1348)

SCSL-03-01-A
(2732 – 6311)

2732

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 31 October 2012

Case No.: SCSL-2003-01-A

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH PUBLIC ANNEX A AND CONFIDENTIAL ANNEX B

AMENDED BOOK OF AUTHORITIES TO THE DEFENCE RULE 111 SUBMISSIONS

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

Counsel for Charles G. Taylor:
Mr. Morris Anyah
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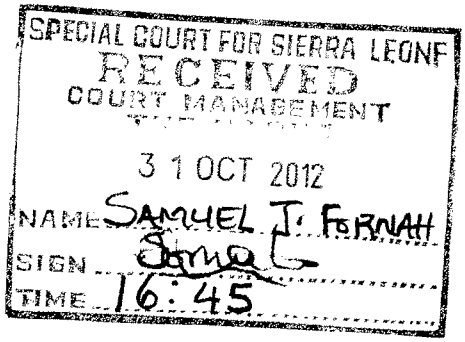

1. Pursuant to the "Decision on Prosecution Motion Seeking Clarification of the Practice Direction on the Structure of Grounds of Appeal before the Special Court," of 16 October 2012,[1] the Defence hereby files its Amended Book of Authorities which is contained in Annex A hereto.
2. Hard copies of all material referenced in the Defence Rule 111 Submissions,[2] and included in the Amended Book of Authorities, have been appended to Annex A hereto, excepting those which are confidential. Confidential Annex B hereto contains hard copies of referenced confidential material.
3. Uniform Resource Locators (URLs) have been provided in the Amended Book of Authorities, where an authority is regularly available on the Internet. However, the authoritative version of referenced authorities are the hard copies (in full or excerpts, as appropriate) appended to Annex A and Confidential Annex B.
4. Consistent with Article 16 of the Practice Direction,[3] Annex A and Confidential Annex B include a table of content, numbered consecutively, describing each document, including the date and reference, and contain legible copies of the pages or excerpts from every referenced material including case law, statutory and regulatory provisions from the Special Court, international tribunals and national sources in the Defence Rule 111 Submissions.[4]

Respectfully submitted,

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

Dated this 31st Day of October 2012, The Hague, The Netherlands

[1] *Prosecutor v. Charles Ghankay Taylor,* SCSL-03-01-A-1338, Decision on Prosecution Motion Seeking Clarification of the Practice Direction on the Structure of Grounds of Appeal before the Special Court, 16 October 2012.
[2] *Prosecutor v. Taylor*, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012 and Confidential Annex A and Public Annexes B and C to *Prosecutor v. Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012 ("Defence Rule 111 Submissions").
[3] Practice Direction of the Structure of Grounds of Appeal of 1 July 2011, amended 23 May 2012.
[4] Defence Rule 111 Submissions.

List of Authorities

Practice Direction of the Structure of Grounds of Appeal of 1 July 2011, amended 23 May 2012.

Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-A-1338, Decision on Prosecution Motion Seeking Clarification of the Practice Direction on the Structure of Grounds of Appeal before the Special Court, 16 October 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012.

Annex A

Amended Book of Authorities of Appellant's Submissions of Charles Ghankay Taylor

AMENDED BOOK OF AUTHORITIES
(WITH APPENDED HARD COPIES)

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A. Special Court for Sierra Leone Jurisprudence

1. AFRC Case – Prosecutor v. Brima et al., SCSL-04-16

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AFRC TJ	*Prosecutor v. Brima et al.*, SCSL-04-16-T-628, Judgement, dated 20 June 2007, filed 20 July 2007, pursuant to *Prosecutor v. Brima, et al.*, SCSL-04-16-T, Corrigendum to Judgement filed on 21 June 2007, dated 19 July 2007, filed 20 July 2007 http://www.sc-sl.org/LinkClick.aspx?fileticket=EqikfVSpLWM=&tabid=106	*14-58*
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[1] Hard copies of confidential documents, including confidential annexes of public filings are to be found in Confidential Annex B.

[2] *Prosecutor v. Taylor*, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012 and Confidential Annex A and Public Annexes B and C to *Prosecutor v. Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012 ("Appellant's Submissions").

AFRC Leave to Appeal Decision	*Prosecutor v Brima et al.*, Case No. SCSL-04-16-T-367, Decision on Brima-Kamara Application for Leave to Appeal from Decision on the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel, Comment of Justice Doherty, 5 August 2005 http://www.sc-sl.org/LinkClick.aspx?fileticket=4bzsjaGoFXU=&tabid=157	*72-76*
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2. *CDF Case – Prosecutor v. Fofana et al.*, SCSL-04-14

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CDF AJ	*Prosecutor v. Fofana et al.*, SCSL-04-14-A-829, Judgement, 28 May 2008 http://www.sc-sl.org/LinkClick.aspx?fileticket=9xsCbIVrMlY%3d&tabid=194 [**NOTE**: The reference "*CDF* AJ, para. 46" in fn. 1596 of the Appellant's Submissions should read "*CDF* AJ, para. 467"]	*126-146*
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CDF TJ	*Prosecutor v. Fofana et al.*, SCSL-04-14-T-785, Judgement, 2 August 2007 http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberJudgement/tabid/175/Default.aspx	*157-159*

3. *RUF Case – Prosecutor v. Sesay et al.*, SCSL-04-15

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Disqualification Decision	*Prosecutor v. Taylor*, SCSL-03-01-A-1-1323, Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Judges, 13 September 2012 http://www.sc-sl.org/LinkClick.aspx?fileticket=E7Gg0ioFXiY%3d&tabid=191 [**NOTE**: The reference "Disqualification Decision, Annex A" in fn. 1465 of the Appellant's Submissions should read "Disqualification Motion, Annex A"]	*230-238*

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Defence Final Brief	*Prosecutor v. Taylor,* SCSL-03-01-T-1229, Confidential, Defence Final Trial Brief, 9 March 2011	*See CONF Annex B (156c-167c)*
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	Prosecutor v. Taylor, SCSL-03-01-T-775, Decision on "Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment", 1 May 2009 http://www.sc-sl.org/LinkClick.aspx?fileticket=1EKHD1m52qM%3D&tabid=159	*662-673*
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	Prosecutor v. Taylor, SCSL-03-01-T-751, Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick, 27 February 2009 http://www.sc-sl.org/LinkClick.aspx?fileticket=H6iG6otdvkE=&tabid=159	*726-736*
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B. Taylor Trial Case Materials

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TF1-227	27 October 2008	19303	*985-986*
		19306	*987-988*
TF1-314	20 October 2008	18785	*989-991*
TF1-263	6 October 2008	17981-17983	*992-996*
TF1-568	17 September 2008 [**NOTE:** Footnotes 415-417 of the Appellant's Submissions refer to "17 September 2007" whereas they should refer to "17 September 2008".]	16411-16412	*997-999*
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		12883-12884	*See CONF Annex B (70c-73c)*
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TF1- 584	20 June 2008	12342-12344	*1087-1090*
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	18 June 2008 [**NOTE:** Footnote 1210 of the Appellant's Submissions refers to p. 12126 as occurring in "17 June 2008", whereas it should read "18 June 2008"]	12126	*1109-1110*
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TF1-532	7 April 2008	6703-6716	*1321-*

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		4895-4897 (CS)	*See CONF Annex B (99c-102c)*
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		4553 [**NOTE:** Footnote 542 in the Appellant's Submissions refers to "p. 4453", whereas it should refer to "p. 4553"]	*1409*
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TF1-101	14 February 2008	3928-3929	*1412-1416*
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TF1-360	6 February 2008	3181-3182	*1429-1431*
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		2384-2385 (CS)	*See CONF Annex B (125c-126c)*
		2401-2416 (CS)	*See CONF Annex B (127c-142c)*
		2427-2428 (CS)	*See CONF Annex B (143c-145c)*
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TF1-276	24 January 2008	2154-2156	*1450-1454*
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D-482	*1614-1618*

C. Non-Special Court for Sierra Leone Jurisprudence

1. ICC Jurisprudence

Short form citation	*Full citation*	*Page*
Lubanga Dyilo Decision on Sentence	*Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2901, Trial Chamber I Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012 http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf	*1619-1622*
Lubanga Dyilo Judgement on Appeal against the Decision on Jurisdiction	*Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006 http://www.icc-cpi.int/iccdocs/doc/doc243774.PDF [**NOTE**: In fn. 1433 of the Appellant's Submissions, the quotation from the *Lubanga Dyilo* Judgement on Appeal against the Decision on Jurisdiction refers to no specific paragraph. The specific paragraph is, in fact, para. 39. Furthermore, the quotation should end after: "...as the potent agent of justice." The remainder ("In both Courts, the concern is whether the proceedings, as a whole, are fair") is not part of the quotation]	*1623-1625*
Mbarushimana Confirmation Decision	*Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-RED, Decision on the Confirmation of Charges, 16 December 2011 http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf	*1626-1627*
Mbarushimana Transcript	*Prosecutor v. Mbarushimana*, ICC-01/04-01/10-T-8-RED2-ENG CT WT, Transcript, 20 September 2011 http://www.icc-cpi.int/iccdocs/doc/doc1246069.pdf	*1628-1629*

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Bagilishema AJ	*The Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgement, 3 July 2000 http://www.unictr.org/Portals/0/Case/English/Bagilishema/	*1630-1631*

	decisions/030702.pdf	
Bagilishema TJ	*Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 http://www.ictrcaselaw.org/docs/doc22004.pdf	*1632-1633*
Bagosora AJ	*Bagosora and Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement, 14 December 2011 http://www.unictr.org/Portals/0/Case/English/Bagosora/Judgement/111214-%20Appeals%20Judgement.pdf	*1634-1638*
Bagosora TJ	*The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008 http://www.unictr.org/Portals/0/Case/English/Bagosora/Judgement/081218.pdf	*1639-1643*
Bikindi AJ	*Simon Bikindi v. The Prosecutor*, Case No. ICTR-01-72-A, Judgement, 18 March 2010 http://www.unictr.org/Portals/0/Case/English/Bikindi/decisions/100318_apl.pdf	*1644-1645*
Bizimungu TJ	*The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Judgement and Sentence, 30 September 2011 http://www.unictr.org/Portals/0/Case/English/Bizimungu/judgement/110930.pdf	*1646-1653*
Gacumbitsi TJ	*The Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-T, Judgement, 17 June 2004 http://www.unictr.org/Portals/0/Case/English/Gacumbitsi/Decision/040617-judgement.pdf	*1654-1658*
Kalimanzira AJ	*Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 http://www.unictr.org/Portals/0/Case/English/Kalimanzira/decisions/101020-appeals.pdf	*1659-1664*
Kambanda TJ or *Kambanda*	*The Prosecutor v. Kambanda,* Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998	*1665-1666*

SJ	http://www.unictr.org/Portals/0/Case/English/Kambanda/decisions/kambanda.pdf	
Kanyarukiga TJ	*The Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Judgement and Sentence, 1 November 2010 http://www.unictr.org/Portals/0/Case/English/Kanyarukiga/judgement/101101.pdf	*1667-1668*
Karemera TJ or *Karemera* Decision	*The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Judgement and Sentence, 2 February 2012 http://www.unictr.org/Portals/0/Case/English/Karemera/Judgement/120202%20-%20JUDGEMENT.pdf [**NOTE**: The reference "*Karemera* Decision in fn. 111 of the Appellant's Submissions should read "*Karemera* Decision, paras. 194-195"]	*1669-1690*
Karemera Decision on Abuse of Process	*The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Dismiss for Abuse of Process: Payments to Prosecution Witnesses and "Requete de Mathieu Ngirumpatse en Retrait de L'Acte D'Accusation", 27 October 2008 http://www.unictr.org/Portals/0/Case/English/Karemera/decisions/081027.pdf	*1691-1692*
Karemera Appeals Chamber Decision on Adjudicated Facts	*Prosecutor v. Karemera et al.*, ICTR-98-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006 http://www.unictr.org/Portals/0/Case/English/Karemera/trail/160606.pdf	*1693-1694*
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Nahimana AJ	*Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgement.pdf	*1709-1720*
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Nchamihigo TJ	*The Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, Judgement and Sentence, 12 November 2008 http://www.unictr.org/Portals/0/Case/English/Nchamihigo/081112_judgement&sentence.pdf	*1726-1729*
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Ntagerura AJ	*The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006 http://www.unictr.org/Portals/0/Case/English/Ntagerura/judgement/060707.pdf	*1735-1737*

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Semanza AJ	*Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005 http://www.unictr.org/Portals/0/Case/English/Semanza/judgement/appealsjudgement/200505-Appeal-Judgement.pdf	*1754-1757*
Semanza TJ	*The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003 http://www1.umn.edu/humanrts/instree/ICTR/SEMANZA	*1758-1759*

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Blagojević AJ	*Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007 http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf	*1780-1789*
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7(v) Italy

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	Cass. Pen. Sez. I 03-03-1987 (09-02-1987), n. 2656- Pres. CARNEVALE C- Rel. DINACCI U- GRAZIANI – P.M. (CONF) GUASCO (massima 2) [no copy]	*N/A*

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	R v Chief Constable of North Wales Police, ex p Evans [1982] 1 WLR 1155 (HL) http://www.bailii.org/uk/cases/UKHL/1982/10.html	*2434-2453*

7(vii) United States of America:

	Estes v Texas, 381 U.S. (1965) 532 at 583	*2454-2493*
	State v. Moreno, 104 P.3d, p. 628, 631 (Or. Ct. App. 2005)	*2494-2498*
	United States v. Peoni, 100 F.2d p. 401, 402 (2nd Cir 1938)	*2499-2502*

D. Legal Instruments and Other Documents

1. Domestic Legal Instruments and Other Documents

Short form citation	***Full citation***	***Page***
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Canadian Criminal Code	Section 21(b), Canadian Criminal Code, R.S.C. 1985	*2512-2513*
Scheffer's Amicus or Scheffer Brief	Amicus Curiae, Brief of David J. Scheffer, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 131 S. Ct. 79 (2010), No. 09-1262, On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, 19 May 2010, p.12	*2514-2523*
Serafino Issues for US Congress	Serafino, Nina M., "Security Assistance Reform: "Section 1206", Background and Issues for Congress, 13 January 2012, [exceeds 30 pages] p. 2 of the PDF- i.e. "Summary" page and p.28 [**NOTE**: The reference "Serafino Issues for US Congress, p. 2" in fn. 879 of the Appellant's Submissions should read "Serafino Issues for US Congress, Summary page". Furthermore, the reference "Serafino Issues for US Congress, p. 31" in fn. 880 of the Appellant's Submissions should read "Serafino Issues for US Congress, p. 28"]	*2524-2526*
	United States Model Penal Code, Paras 2.02, 2.06	*2527-2531*
US Yemen Report	US, Department of State, 2010 Human Rights Report: Yemen, p.15 [exceeds 30 pages]	*2532-2533*

2. Special Court for Sierra Leone

Short form citation	***Full citation***	***Page***
Statute	*Statute of the Special Court for Sierra Leone*, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002	*2534-2542*
Rules	*Rules of Procedure and Evidence of the Special Court for Sierra Leone* , as amended on 31 May 2012	*2543-2562*
Special Court Practice	Practice Direction on the Structure of Grounds of Appeal before the Special Court, entered into force on 1 July 2011,	*2563-2569*

Direction on Structure of Appeal	as amended 23 May 2012	
Special Court Practice Direction on dealing with Documents	Practice Direction on dealing with Documents in The Hague – Sub-Office, as amended on 25 April 2008	*2570-2582*
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ICTR Statute	*Statute of the International Criminal Tribunal for Rwanda*, as amended on 16 December 2009 http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf	*2652-2653*
ICTY Statute	*Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, as amended on 7 July 2009 http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf	*2654-2657*
Rome Statute or ICC Statute	Rome Statute of the International Criminal Court, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544 http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf	*2658-2666*
Statute of the Special Tribunal for Lebanon or STL Statute	*Statute of the Special Tribunal for Lebanon,* adopted 30 May 1997, UNSC Res 1757 (2007)	*2667-2688*
ICTR RPE	*Rules of Procedure and Evidence of the International Criminal Tribunal of Rwanda*, adopted on 29 June 1995, as amended on 1 October 2009 http://www.unictr.org/Portals/0/English/Legal/ROP/100209.pdf	*2689-2690*
ICTY RPE	*Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia,* as amended on 28 August 2012-10-01	*2691-2692*

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Short form citation	***Full citation***	***Page***
ACHR	American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 143 http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm	*2693-2695*
American Declaration on the Rights and Duties of Man	OAS Declaration on the Rights and Duties of Man http://www.hrcr.org/docs/OAS_Declaration/oasrights.html	*2696-2698*
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf	*2699-2702*
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ICCPR	International Covenant on Civil and Political Rights	*2704-*

	(adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 http://www2.ohchr.org/english/law/ccpr.htm	*2706*
UDHR	*Universal Declaration of Human Rights,* General Assembly Resolution 217 A (III) http://www.un.org/en/documents/udhr/index.shtml	*2707-2708*

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CCJE Principles Governing Judges	*Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality*, CCJE (2002) OP No. 3 (19 November 2002) https://wcd.coe.int/ViewDoc.jsp?id=1046405&Site=COE	*2716-2738*
COE Charter for Judges	Council of Europe, (COE) European Charter on the Statute for Judges, 8-10 July 1998 http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf	*2739-2757*
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ICC Code of Judicial Ethics	ICC, *Code of Judicial Ethics*, ICC-BD/02-01-05, 9 March 2005 http://www.iccnow.org/documents/CodeJudicialEthics_English.pdf	*2784-2789*
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	Second Annual Report of the President of the Special Court for Sierra Leone for the period 1 January 2004-17 January 2005, p. 5 [exceeds 30 pages]	*2815-2816*
Chair of the Security Council Committee Letter	"Letter dated 26 June 2012 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council," 27 June 2012, S/2012/348/Add.1 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/393/39/PDF/N1239339.pdf?OpenElement	*2817-2823*
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ILC Draft Articles on State	International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Supplement No. 10 (A/56/10),	*2828-2829*

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SC RES 1315	Security Council Resolution 1315, S/RES/1315 (2000), 14 August 2000 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement	*2855-2857*
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	U.N. Secretary General, Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000 http://www.unhcr.org/refworld/docid/3ae6afbf4.html	*2870-2898*
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	Ashworth, Andrew , *Principles of Criminal Law,* Oxford University Press, (Oxford 2009), p. 417 [the chapter exceeds 30 pages]	*2977-2985*
	Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court,* Vol. II, Transnational Publishers, Inc., (Ardsley, 2005), p.194 [Chapter on Article 25, Individual Criminal Responsibility, appended]	*2986-2994*
	Cassese, Antonio, *International Criminal Law*, Oxford University Press (Oxford, 2nd ed., 2008), p. 192 and 279 [Chapters 9 and 15 appended]	*2995-3043*
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	Crawford, James, *The International Law Commission's Articles on State Responsibility; Introduction, Text and Commentaries,* (2002) [chapter 4 appended]	*3067-3083*
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	Jackson, M. "Criminal Law, in Gaylord, M et al., *Introduction to Crime, Law and Justice in Hong Kong,* Hong Kong University Press (Hong Kong 2009) p. 28 [exceeds 30 pages]	*3122-3124*
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	Yeo Stanley, "India", in Heller, K, and Dubber, M., eds. *The Handbook of Comparative Criminal Law,* Stanford University Press (Stanford 2011), p. 296 [Chapter "India" appended]	*3212-3245*

	Zahar, Alexander, and Sluiter, Göran, *International Criminal Law,* Oxford University Press, (Oxford, 2008), p. 293 [exceeds 30 pages]	*3246-3249*

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Short form citation	***Full citation***	***Page***
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Pakistan Human Rights	Amnesty International, Our Work, Countries, "Pakistan Human Rights" http://www.amnestyusa.org/our-work/countries/asia-and-the-pacific/pakistan	*3367-3368*
Yemen Human Rights	Amnesty International, Our Work, Countries, "Yemen Human Rights" http://www.amnestyusa.org/our-work/countries/middle-east-and-north-africa/yemen	*3369-3370*
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SCSL-04-16-A
(1883-1999)

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SCSL

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding Judge
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Raja Fernando
Justice Jon M. Kamanda

Registrar: Herman von Hebel

Date: 22 February 2008

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
NAME Adrea Ngaima K.
SIGN
TIME 13:10

PROSECUTOR **Against** **ALEX TAMBA BRIMA**
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU
(Case No. SCSL-2004-16-A)

JUDGMENT

Office of the Prosecutor:
Dr. Christopher Staker
Mr. Karim Agha
Mr. Chile Eboe-Osuji
Ms. Anne Althaus

Defence Counsel for Alex Tamba Brima:
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels

Defence Counsel for Santigie Borbor Kanu:
Ajibola E. Manly-Spain
Silas Chekera

VI. BRIMA'S APPEAL

A. Brima's First Ground of Appeal: Equality of Arms

217. In his First Ground of Appeal, Brima alleges that the Trial Chamber erred in law and in fact in failing to ensure the equality of arms between the Prosecution and Defence, which "denied or substantially impaired [his] right . . . to a fair trial" and resulted in "a miscarriage of justice."[336]

1. Submissions of the Parties

218. Brima submits that the principle of equality of arms is a core element of the right to a fair trial;[337] that while equality of arms does not guarantee an equality of resources, there must at least be an approximate equality in terms of resources.[338] Brima complains that the Trial Chamber denied him "adequate time and resources" necessary to present his case.[339]

219. In response, the Prosecution contends that Brima's Ground of Appeal consists almost entirely of a discussion of general legal principles relating to the concept of equality of arms. Brima does not make any statement on the particular circumstances of his own case, except for general complaint contained in paragraph 81 of his Appeal Brief.[340] The Prosecution further states that during the trial, Brima never filed any written request seeking additional time or resources, and that he cannot now place on the Prosecution the burden of establishing that he did, in fact, have adequate time and resources.[341]

2. Discussion

220. The Statute and Rules provide for an accused's right to a fair trial.[342] In particular, Article 17(4) of the Statute requires that an accused has "adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing."[343] Equality of arms is a core element of the right to a fair trial.

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[336] Brima Appeal Brief, para. 71
[337] *Ibid* at para. 72.
[338] *Ibid* at para. 73; Rule 45(B)(iii) of the Rules.
[339] Brima Appeal Brief, para. 81.
[340] Prosecution Response, para. 2.2.
[341] *Ibid* at para. 2.2.
[342] *See* Article 17 of the Statute; Rule 26*bis* of the Rules.
[343] Article 17(4)(b) of the Statute.

235. The Prosecution responds that the "Trial Chamber was duly mindful of the concerns of the Defence in this regard and had correctly instructed itself on the appropriate legal standards."[351]

2. Discussion

236. Kamara's First Ground raised two issues relating to:

(i) Contradiction in the evidence of Prosecution witnesses; and

(ii) Assessment of evidence of accomplice.

237. The Appeals Chamber has earlier in this Judgment pronounced on these two issues and there is no reason to repeat what it said already.[352]

238. The Appeals Chamber will not disturb the Trial Chamber's reliance on the testimony of witness TF1-334. Having heard the testimony of witness TF1-334, the Trial Chamber is in a far better position than the Appeals Chamber to decide whether his alleged participation in the commission of crimes affects his credibility and the reliability of his testimony. The Appeals Chamber finds that Kamara failed to demonstrate that a reasonable tribunal could not have relied on the evidence of the unlawful killings in Karina. This Ground of Appeal therefore fails.

B. Kamara's Second, Third and Fourth Grounds of Appeal: Planning Crimes in Bombali District and Other Parts of the Western Area

239. The Appeals Chamber has considered Kamara's Grounds Two, Three and Four where the substance of complaint is that the Trial Chamber erred in fact in finding that Kamara planned the crimes alleged in Counts 9, 12 and 13. Having scrutinised the Record on Appeal the Appeals Chamber concludes that the Grounds of Appeal were misconceived. The Trial Chamber in its findings had not found that Kamara planned the crimes set out in Counts 9, 12 and 13. However, the Appeals Chamber has noted that the Trial Chamber in its Disposition had mistakenly stated that Kamara was guilty of the crimes in Counts 9, 12 and 13 pursuant to Article 6(1) of the Statute when it should have been Article 6(3).

240. Accordingly, the Appeals Chamber revises the Trial Chamber's Disposition by substituting Article 6(3) for Article 6(1) in respect of Counts 9, 12 and 13.

[351] Prosecution Response Brief, para. 4.41.

C. Kamara's Fifth and Sixth Grounds of Appeal: Aiding and Abetting Crimes in Freetown and the Western Area

241. Kamara contends that the Trial Chamber erred in law and in fact by finding him guilty under Article 6(1) for aiding and abetting the mutilation of civilians in Freetown and other parts of the Western Area as well as the killing of civilians at Fourah Bay.[353] In particular, he argues that the Trial Chamber erroneously "applied a wider standard of liability instead of the stricter standard to find the Appellant guilty as an aider and abettor based on its analysis of the *mens rea* of aiding and abetting."[354] He submits that the Trial Chamber was required to find that he was aware that his acts assisted the specific crime committed by the principal perpetrator and that he was aware of the essential elements of that crime.[355]

1. Errors of Law

242. In discussing the *mens rea* for aiding and abetting, the Trial Chamber stated:

> "The *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed."[356]

243. The Appeals Chamber finds that the Trial Chamber was correct in its analysis. The Appeals Chamber of the ICTY in both *Blaškić* and *Simić* found that it was not necessary to prove that the aider and abettor knew the precise crime that was intended or actually committed by the principal perpetrator.[357] In both cases the ICTY Appeals Chamber held further that liability for aiding and abetting requires proof that the accused knew that one of a number of crimes would probably be committed, that one of those crimes was in fact committed, and that the accused was aware that his conduct assisted the commission of that crime.[358] The Appeals Chamber endorses this principle.

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[352] *See supra* paras 127-128, 153.
[353] Kamara Appeal Brief, para. 156.
[354] *Ibid* at para. 165.
[355] *Ibid* at para. 166.
[356] AFRC Trial Judgment, para. 776.
[357] *Simić* Appeal Judgment, para. 86; *Blaškić* Appeal Judgment, para. 50.
[358] *Ibid* at para. 50.

concerning the burning of five young girls inside a house in Karina and the events in Freetown. In respect of the incident involving the death of five young girls in Karina, the Prosecution concedes that there are "variations in the details of how the crime was committed;" but notes that there is no dispute concerning what it calls the "essential features" of the evidence.[385]

3. Discussion

257. In addition to military commanders, superior responsibility under Article 6(3) of the Statute encompasses political leaders and other civilian superiors in positions of authority.[386] A superior is one who possesses the power or authority to either prevent a subordinate's crimes or punish the subordinate after the crime has been committed.[387] The power or authority may arise from a *de jure* or a *de facto* command relationship.[388] Whether it is *de jure* or *de facto*, the superior-subordinate relationship must be one of effective control, however short or temporary in nature. Effective control refers to the material ability to prevent or punish criminal conduct.[389] The test of effective control is the same for both military and civilian superiors.[390]

258. Kamara submits that a finding of superior responsibility requires proof of both command and control which he claims are inseparable.[391] The Appeals Chamber rejects this assertion. The terms "command" and "control" are two related but distinct concepts. The term "command" refers to powers that attach to a military superior, while the term "control," which has a wider meaning encompasses both military and civilian superiors.[392]

(a) Kamara's Responsibility for Crimes Committed by Savage

259. Kamara contends that the Trial Chamber erred in finding him liable as a superior for crimes committed by Savage in Kono District. According to Kamara, he did not have the material ability to control the acts of Savage because Savage was unruly in character.[393] The Trial Chamber noted that

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[384] *Ibid* at paras 5.34-5.37.
[385] *Ibid* at paras 5.56-5.61.
[386] *Čelebići* Appeal Judgment, para. 195.
[387] *Aleksovski* Appeal Judgment, para. 76, *Bagilishema* Appeal Judgment, para. 50, *citing Čelebići* Appeal Judgment, para. 192.
[388] *Bagilishema* Appeal Judgment, para. 50.
[389] *Čelebići* Appeal Judgment, para. 256.
[390] *Bagilishema* Appeal Judgment, para. 50, *citing Aleksovski* Appeal Judgment, para. 76.
[391] Kamara's Appeal Brief, para. 194.
[392] *Čelebići* Appeal Judgment, para. 196.
[393] Kamara Appeal Brief, para. 208.

enlisting children under the age of 15 years] was legitimate."[451] He contends that at all material times, he lacked the requisite criminal intent required for the crime of "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities" punishable under Article 4.c of the Statute of the Special Court.

294. In the alternative, Kanu argues that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment.

295. The Prosecution observes that the Appeals Chamber has already ruled that conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities was a crime entailing individual criminal responsibility at the time of the acts alleged in the Indictment. The Appeals Chamber refers to its dictum that:

> "The rejection of the use of child soldiers by the international community was widespread by 1994 . . . Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law. Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. As set out above, the principle of legality and the principle of specificity are both upheld."[452]

296. Kanu's submission that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment is without merit. Furthermore it is frivolous and vexatious for Kanu to contend that the absence of criminal knowledge on his part vitiated the requisite *mens rea* in respect of the crimes relating to child soldiers.

297. Kanu's Seventh Ground of Appeal therefore fails.

D. Kanu's Ninth Ground of Appeal: Findings of Responsibility Pursuant to Article 6(1) of the Statute

1. The Parties' Submissions and the Findings of the Trial Chamber

298. In his Ninth Ground of Appeal, Kanu submits that the Trial Chamber erred in convicting him under Article 6(1) for planning the commission of sexual slavery (Count 9), the conscription and use of children for military purposes (Count 12), and abductions and forced labour (Count 13).

[450] Kanu Appeal Brief, para. 7.1.
[451] *Ibid* at para. 7.8.
[452] Norman Child Recruitment Decision, paras 52-53.

The Trial Chamber held that Kanu "planned, organised and implemented the system to abduct and enslave civilians which was committed by AFRC troops in Bombali and Western Area." It further held that Kanu "had the direct intent to establish and implement the system of exploitation involving the three enslavement crimes, namely, sexual slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour."[453] The Trial Chamber was, therefore, satisfied beyond reasonable doubt that Kanu bore individual criminal responsibility under Article 6(1) for planning the commission of the above crimes in the Bombali District and the Western Area.[454]

299. Kanu argues that while the evidence shows that it fell upon him, as Chief of Staff, to manage the system of slavery within the AFRC faction, he could not be convicted on that basis for planning the crimes of sexual slavery, conscription and use of children for military purposes, and abductions and forced labour.[455] He further argues that at best, the evidence implicates him at the execution stage in the military training of children and the exploitation of women for sexual purposes.[456]

300. The Prosecution responds that Kanu's position of influence in the AFRC and his admission that he managed this system of slavery amply justify a reasonable inference that he was involved in planning the above crimes.[457]

2. Discussion

301. The Appeals Chamber concurs with the Trial Chamber's definition of planning under Article 6(1). The Trial Chamber stated that " 'planning' implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases."[458] Circumstantial evidence may provide proof of the existence of a plan, and an individual may incur responsibility for planning when his level of participation is substantial even though the crime may have actually been committed by another person.[459] According to the Trial Chamber, the *actus reus* for planning requires that "the accused, alone or together with others, designated [*sic*] the criminal

[453] AFRC Trial Judgment, para. 2095.
[454] *Ibid* at paras 2096-2098.
[455] Kanu Appeal Brief, para. 9.1-9.6.
[456] *Ibid* at para. 9.6.
[457] Response Brief of Prosecution, paras 6.61, 6.64, 6.66.
[458] AFRC Trial Judgment, para. 765.
[459] *Ibid* at para. 765.

IX. GROUNDS OF APPEAL RELATING TO SENTENCE

A. Introduction

307. The Trial Chamber imposed a sentence of fifty (50) years imprisonment on Brima and Kanu respectively and forty-five (45) years imprisonment on Kamara.[469] The Trial Chamber found that there were a number of aggravating but no mitigating factors. The Appellants have appealed against the sentence, while the Prosecution has not done so except to request that if some of its Grounds succeed, the Appeals Chamber should consider revising the sentence to reflect any additional criminal liability. The Appellants' Grounds of Appeal are closely related, therefore, dealing with them separately would lead to unnecessary repetition. It is convenient to address the Appellants' submissions together except for those which raise a different issue in Kanu's Eighth Ground of Appeal.

B. Standard of Review on Appeals Relating to Sentence

308. Article 19 of the Statute limits the penalty that a Trial Chamber can impose upon a convicted person (other than a juvenile) to "imprisonment for a specified term of years." It further provides that the Trial Chamber shall, in determining the "terms of imprisonment," as appropriate, have recourse to the sentencing practices of the International Criminal Tribunal for Rwanda ("ICTR") and the national courts of Sierra Leone. The Statute requires the Trial Chamber to take into account such factors as the gravity of the offence and the individual circumstances of the convicted person in imposing sentences.[470]

309. The determination of an appropriate sentence being at the discretion of the Trial Chamber, the Appeals Chamber will only revise a sentence where the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. To show that the Trial Chamber committed a discernible error in exercising its discretion:

> "the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals

[469] AFRC Sentencing Judgment, Disposition.
[470] Article 19, Statute of the Special Court.

Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."[471]

C. Excessive Sentences: Ground Twelve of Brima's Appeal and Ground Ten of Kamara's Appeal

310. Brima alleges that the Trial Chamber erred by imposing a global sentence of fifty years, that it is "excessively harsh and disproportionate," and that it is inconsistent with the sentencing guidelines of the ICTY and the ICTR.[472] Kamara's Tenth Ground of Appeal argues that the Trial Chamber was required by Article 19(1) of the Statute to consider the sentencing practices in the ICTR and the national courts of Sierra Leone.[473] Kamara further argues that a sentence of 45 years is inconsistent with the penalties that have been imposed by the ICTR.[474]

311. Article 19(1) of the Statute provides that the "Trial Chamber, as appropriate, shall have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone." The phrase "where appropriate" shows that the Trial Chamber has a discretion in determining when to have recourse to sentencing practices in the two courts.

D. Mitigating Factors: Ground Nine of Kamara's Appeal and Grounds Eleven, Fifteen, Sixteen, Seventeen and Eighteen of Kanu's Appeal

312. The Appellants make two distinct submissions with regard to mitigating factors. First, that the Trial Chamber did not consider mitigating factors and second, that particular mitigating factors were not given adequate weight.[475]

313. Rule 101(B) of the Rules provides that the "Trial Chamber shall take into account the factors mentioned in Article 19(2) of the Statute, as well as such factors as: ...any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person

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[471] *Babić* Judgment on Sentencing Appeal, para. 44. *See also*, *Nikolić* Sentencing Appeal Judgment, para. 95. *Blagojević* Appeal Judgment para. 137; *Brđanin* Appeal Judgment, para. 500; *Bralo* Sentencing Appeal Judgment, para. 9; *Galić* Appeal Judgment, para. 394.
[472] Brima Appeals Brief, paras 180-181.
[473] Kamara Appeals Brief, para. 246.
[474] *Ibid* at para. 249.
[475] Brima Appeal Brief, paras 184,182; Kamara Appeal Brief, para. 237. Kanue Appeal Brief, paras 11.1, 11.9.

before or after conviction." Brima and Kanu argue that the Trial Chamber failed to consider mitigating factors.[476]

314. In the view of the Appeals Chamber an appellant challenging the weight given by a Trial Chamber to a particular mitigating circumstance has the duty of showing that the Trial Chamber abused its discretion.

315. The mere recital of mitigating factors, as the Appellants have done, without concrete arguments, does not suffice to discharge the burden of demonstrating that the Trial Chamber abused its discretion.[477]

E. Double-Counting, Gravity of the Offence and Aggravating Factors: Ground Twelve of Brima's Appeal

316. Brima submits that the Trial Chamber erred by considering the following factors in determining the gravity of the offence as well as aggravating factors:

> "The brutality and heinousness of the crimes such as the drugging of child soldiers, brutal gang rapes, lengthy periods of enslavement, the burning alive of civilians and amputations."

317. Although the issue of double-counting was only raised by Brima, it is in the interest of justice for the Appeals Chamber to consider the issue in relation to Kanu and Kamara as well. As the Trial Chamber notes in the Sentencing Judgment, "where a factor has already been taken into account in determining the gravity of the offence, it cannot be considered additionally as an aggravating factor . . . ."[478] This prohibition is well established in the case law of the international criminal tribunals.[479]

318. In *Nikolić*, the ICTY Appeals Chamber determined that the Trial Chamber had double-counted by repeating facts concerning the accused's general role in the offences.[480] However, the Appeals Chamber determined that there was no double-counting where the Trial Chamber

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[476] Brima asserts that the Trial Chamber did not consider his lack of criminal convictions, good reputation in the Army and contribution to the peace process (Brima Appeal Brief, para. 184); Appellant Kanu asserts that the Trial Chamber did not take into consideration his relatively low position in the AFRC and that the length of time it took to conclude the proceedings caused him unbearable anxiety and mental anguish (Kanu Appeal Brief, para. 11.6, 11.9).
[477] *Simić* Appeal Judgment, para. 249; *Kvočka* Appeal Judgment, para. 675.
[478] Sentencing Judgment, para. 23.
[479] *Deronjić* Trial Judgment, para. 106-107; *Nikolić* Appeal Judgment, para. 61; *Stakić* Appeal Judgment, para. 411; *Krajisnik* Trial Judgment, para. 1140; *Bralo* Trial Judgment, para. 27
[480] *Nikolić* Appeals Judgment, para. 61.

considered the impact of the crimes on the victim in one section and the vulnerability of the victims in the other section.[481]

319. The Appeals Chamber notes that there were instances of double-counting in the Sentencing Judgment.[482]

320. Although the Trial Chamber made an error by double-counting, the Appeals Chamber does not consider that this error had a significant impact upon the Appellants' sentences.

F. Kanu's Eighth Ground of Appeal: Cumulative Convictions and Sentence

1. Submissions of the Parties

321. In his Eighth Ground of Appeal, Kanu submits that the Trial Chamber erred in law in imposing a global sentence of fifty years. He argues that the term of imprisonment shows that the cumulative convictions entered against him were not discounted for sentencing purposes[483] and that the sentence imposed on him reflects the number of convictions rather than the underlying criminal conduct.[484] Kanu further submits that a more appropriate penalty that reflects his criminal conduct and not the number of convictions should replace the sentence imposed on him. In response, the Prosecution contends that the Trial Chamber was under no obligation to discount the cumulative convictions entered against Kanu for sentencing purposes.[485]

2. Discussion

322. The Trial Chamber stated that the Special Court Statute permits it to impose a single sentence. It added that in exercising its discretion whether to impose a single sentence, "[t]he governing criteria is that the final or aggregate sentence should reflect the totality of the culpable conduct, or generally, that it should reflect the gravity of the offences and the overall culpability of the offender, so that it is both just and appropriate."[486] The Trial Chamber then explained that "[i]n

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[481] *Ibid* at para. 66.
[482] AFRC Sentencing Judgment, paras 44, 53, 57, 72, 75, 82, 85, 96, 107, 112.
[483] Kanu Appeal Brief, para. 8.1.
[484] *Ibid* at para. 8.3.
[485] Prosecution Response Brief, para. 3.56.
[486] AFRC Sentencing Judgment, para. 12.

X. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence;

NOTING the written submissions of the Parties and their oral arguments presented at the hearings on 12, 13 and 14 November 2007;

SITTING in open session;

UNANIMOUSLY;

WITH RESPECT TO THE PROSECUTION'S GROUNDS OF APPEAL;

HOLDS in regard to Grounds One and Three, that as the Appellants have been convicted and sentenced to terms of imprisonment of fifty (50) years and forty-five (45) years for crimes committed under Article 6(1) or Article 6(3) of the Statute, in Bombali District and in the Western Area, it becomes an academic exercise and also pointless to adjudicate further on Grounds One and Three of the Prosecution's Appeal;

ALLOWS the Fourth Ground of Appeal relating to joint criminal enterprise but sees no need to make further factual findings or to remit the case to the Trial Chamber for that purpose, having regard to the interest of justice;

ALLOWS Ground Seven relating to forced marriage but declines to enter a further conviction on Count 8 of the Indictment;

ALLOWS Ground Nine relating to cumulative convictions, but declines to enter such convictions for responsibility found under Articles 6(1) and 6(3) of the Statute, having regard to the global sentences imposed which are adequate;

DISMISSES Grounds Two, Five, Six and Eight;

WITH RESPECT TO BRIMA'S GROUNDS OF APPEAL;

NOTES that Grounds Two, Three, Seven and Eight have been abandoned;

DISMISSES the rest of his Grounds, namely Grounds One, Four, Five, Six, Nine, Ten, Eleven and Twelve and **AFFIRMS** the sentence of fifty (50) years imprisonment imposed by the Trial Chamber;

WITH RESPECT TO KAMARA'S GROUNDS OF APPEAL;

DISMISSES all of Kamara's Grounds of Appeal;

REVISES the Trial Chamber's Disposition in respect of Counts 9, 12 and 13 by substituting Article 6(3) for Article 6(1) of the Statute and **AFFIRMS** the sentence of forty-five (45) years imprisonment imposed by the Trial Chamber;

WITH RESPECT TO KANU'S GROUNDS OF APPEAL;

DISMISSES all of Kanu's Grounds of Appeal and **AFFIRMS** the sentence of fifty (50) years imprisonment imposed by the Trial Chamber;

ORDERS that this Judgment be enforced immediately pursuant to Rule 102 of the Rules of Procedure and Evidence.

Delivered on 22 February 2008 at Freetown, Sierra Leone.

Justice George Gelaga King, Presiding

Justice Emmanuel Ayoola

Justice Renate Winter

Justice Raja N. Fernando

Justice Jon M. Kamanda

[Seal of the Special Court for Sierra Leone]

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SCSL-04-16-T
(23025 — 23678)

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SPECIAL COURT FOR SIERRA LEONE

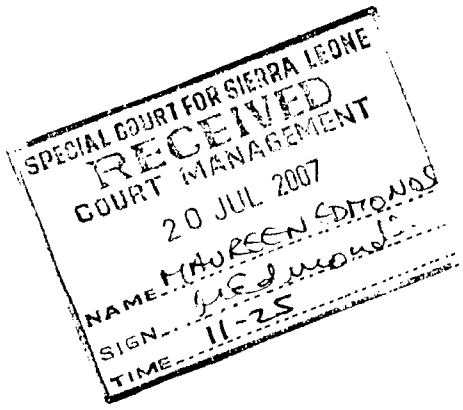
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Date: 20 June 2007

Case No.: SCSL-04-16-T



PROSECUTOR

Against

Alex Tamba BRIMA
Brima Bazzy KAMARA
Santigie Borbor KANU

JUDGEMENT

Office of the Prosecutor:
Karim Agha
Christopher Staker
Charles Hardaway
Lesley Taylor
Melissa Pack
Vincent Wagona
Shyamala Alagendra

Defence Counsel for Alex Tamba Brima:
Kojo Graham
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Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Agibola E. Manly-Spain
Carry Knoops

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Revised pursuant to Corrigendum issued by the Trial Chamber on 19 July 2007.

128. The Practice Direction requires the Special Court's Witnesses and Victims Section ("WVS") to provide records of payments to the Special Court's Finance Section, and vice versa.[192] In the present case, records of disbursements to Prosecution witnesses were disclosed to the Defence pursuant to Rule 68 of the Rules,[193] and disbursement forms concerning witnesses for both Parties have been admitted into evidence.[194] The Trial Chamber is satisfied that these payments have been made in a transparent way and in accordance with the applicable Practice Direction. Allegations to the contrary are therefore without merit.

129. Relocation to another country is a protective measure employed by WVS pursuant to its responsibility to provide appropriate protection for witnesses and victims who are at risk on account of the testimony given by them.[195] The mere fact that a witness has received protection in that form is not in itself reason to doubt his or her evidence.

130. Accordingly, the Trial Chamber has not given undue weight to these alleged 'incentives' when assessing the credibility of the witnesses in question.

(h) Putting the Defence Case to Prosecution Witnesses

131. The Prosecution submits that "the Trial Chamber should refuse to accept, or give less weight to, Defence evidence that presents a line of defence that has not been put to Prosecution witnesses - for example the evidence of the First Accused that he was maltreated in the presence of Lieutenant Colonel Petrie - in the interests of fairness to the witnesses and overall considerations of justice."[196]

132. In contrast to its ICTY and ICTR counterparts,[197] the Rules of the Special Court do not oblige a Party to put its case to a witness. However, before such a Rule was adopted at the ICTR, the ICTR Appeals Chamber held that

> when weighing the [Defence's] allegation going to the credibility of the Prosecution witnesses, the Trial Chamber was entitled to take into account the fact that the [Defence] did not put such allegations to the witnesses for their reactions. Indeed, without the benefit of observing the

[192] Practice Direction on Allowances for Witnesses and Expert Witnesses, Article 2(D).
[193] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL16-04-16-T, Decision on Kanu Motion to Disclose Prosecution Material and/or other Information Pertaining to Rewards to Prosecution Trial Witnesses and Brima's Motion in Support, 16 March 2005.
[194] Exhibit D-6, "All Disbursements for Witness" (confidential); exhibit P-23a, "Interoffice Memorandum – Witness Payment Policy – Payments made to TF1-004"; exhibit D-6, "All Disbursements for Witness".
[195] Statute, Article 16(4) and Rule 34 of the Rules; see also witness George Johnson, Transcript 19 September 2005, pp. 34, 35; the witness complained: "I'm presently under threat", and "My life is at stake, I just have to be protected well."
[196] Prosecution Trial Brief, para. 63.
[197] Rule 90(H)(ii) of the ICTY Rules of Procedure and Evidence and Rule 90(G)(ii) of the ICTR Rules of Procedure and Evidence provide that "[i]n the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness."

Newton before arriving in Benguema in the Western Area in December 1998. Throughout the advance, the troops withstood frequent attacks by ECOMOG. Little evidence was adduced that the troops targeted civilians during this period, rather, they concentrated on purely military targets.

199. While the AFRC troops were advancing on Freetown, RUF troops in the east recaptured Koidu and planned an advance on Makeni in Bombali District. They reached Makeni in the final days of 1998.[341]

200. On one occasion during the advance, SAJ Musa and the AFRC troops heard the British Broadcasting Corporation (BBC) interview Sam Bockarie over the radio. Bockarie revealed the position of the AFRC fighting forces and explained that it was RUF troops who were approaching Freetown. Soon after, ECOMOG bombarded the area.[342] Musa immediately contacted Sam Bockarie, insulted him and told him that he had no right to claim that the troops approaching Freetown were RUF troops.[343]

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

6. Attack on Freetown (January 1999)

202. Following the death of SAJ Musa, the troops reorganised. On 6 January 1999, they invaded Freetown. From Benguema, the troops passed through the villages of Waterloo, Hastings, Wellington and Kissy. During the advance, the civilian population was increasingly targeted. The AFRC troops were able to capture the seat of government at State House on the morning of the 6th of January.[344] That same day, Sam Bockarie announced over Radio France International (RFI) that the troops had taken Freetown and that "they" would continue to defend Freetown.[345]

203. One of the first acts of the invading troops upon reaching Freetown was to attack the city's central prison at Pademba Road and release all the prisoners. The release of the prisoners into the general population contributed to a general breakdown of order amongst the troops.[346] However, during the three days following the capture of State House, the AFRC fighting forces were able to control large areas of Freetown.

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[341] Exhibit P-36, Iron Report, D-5.
[342] TF1-334, 13 June 2005, pp. 46-48.
[343] TF1-334, 13 June 2005, p. 48.
[344] George Johnson, Transcript 15 September 2005, p. 21.
[345] TF1-334, Transcript 14 June 2005, p. 20.
[346] Exhibit P-36, Iron Report, D-11.

204. From State House, senior AFRC officers established radio contact with Sam Bockarie and asked for reinforcement. Bockarie instructed them to burn down Freetown if they could not hold the city.[347] Bockarie then announced over the BBC that if ECOMOG did not stop attacking troop positions the whole of Freetown would be burnt down.[348] In a second communication, Bockarie promised to send manpower, arms and ammunition, and arranged a location at which the AFRC troops should meet the RUF reinforcements. However, the support never arrived.[349]

205. The AFRC troops remained in Freetown for around three weeks, although they were not able to advance into the western part of the city. This period is often referred to as the "Freetown invasion".

7. Retreat from Freetown (January/February 1999)

206. Following heavy assaults from ECOMOG, the troops were forced to retreat from Freetown. This failure marked the end of the AFRC offensive as the troops were running out of ammunition.[350] While the AFRC managed a controlled retreat, engaging ECOMOG and Kamajor troops who were blocking their way, RUF reinforcements arrived in Waterloo. However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops.[351]

207. Most of the damage to Freetown, especially the damage to infrastructure and civilian housing, was inflicted by the retreating AFRC forces. The AFRC were also responsible for massive civilian casualties.[352]

8. Port Loko District (February 1999 – April 1999)

208. The AFRC forces withdrew, reorganised and established bases in the Western Area, including at in Newton and Benguema. They remained there until approximately early April 1999, when the AFRC divided. One group travelled to Makeni in Bombali District to support one of several RUF factions involved in internecine battle. A smaller group moved to Port Loko District and settled in the region of the Okra Hills near Rogberi. This group became known as the "West Side Boys" and frequently targeted and attacked the civilian population. Towns and villages

[347] TF1-334, Transcript 14 June 2005, pp. 48-49. George Johnson, Transcript 16 September, 2005, pp. 40-41. TF1-184, Transcript 27 September 2005, pp. 76-77.
[348] George Johnson, Transcript 16 September, 2005, pp. 40-41.
[349] George Johnson, Transcript 16 September 2005, pp. 49-51.
[350] Exhibit P-36, Iron Report, D-15.
[351] Exhibit P-36, Iron Report, D-15.
[352] *See* General Requirements of Articles 2, 3 and 4 of the Staute, para. 236, *infra*.

395. In addition to the concerns regarding the credibility of Prosecution witnesses discussed above, the Brima Defence submits that Prosecution witness Gibril Massaquoi "painted a false picture" of events "designed to blame others and exonerate himself."[768]

(a) Prosecution Witnesses

396. Prosecution witness TF1-334 testified that despite rumours among the troops that the Accused Brima had killed SAJ Musa, Brima became overall commander following Musa's death and began to organise the movement of the troops around the region.[769] On Christmas Day, Brima called his commanders and told them that a woman had had a dream that SAJ Musa was crying in his grave and urging the troops to continue on towards Freetown. He took the opportunity to remind the AFRC soldiers that he was now overall commander and promoted himself to the rank of Lieutenant General.[770] He then restructured the troops.[771] The witness estimated the troop strength to be about 1500 men.[772]

397. George Johnson testified that following the death of SAJ Musa, there was a short power struggle between the Accused Brima and the Accused Kamara, but this was quickly resolved in favour of the Accused Brima, who became overall commander of the troops.[773] The witness corroborated the evidence of witness TF1-334 that Brima restructured the troops. The witness was promoted from the rank of Major to the rank of Lieutenant Colonel.[774]

398. According to witness TF1-334, on 5 January 1999 the Accused Brima gathered the troops in Allen Town and told them the time had come to attack Freetown.[775] At this meeting he further instructed his troops to capture State House, burn police stations, release the prisoners held at Pademba road prison and execute 'collaborators,' meaning anyone who did not support the troops. He further informed his troops that as he did not have the wherewithal to pay them, they were free

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October 2006, p. 110; DBK-113, Transcript 13 October 2006, pp. 41, 85; DBK-005, Transcript 5 October 2006, pp. 61-63; DBK 113, Transcript 13 October 2006, pp. 42, 52.
[766] George Johnson, Transcript 15 September 2005, p. 4.
[767] DAB-023, Transcript 31 July 2006, pp. 79-81; Transcript 3 August 2006, pp. 103-104.
[768] Brima Final Brief, para. 202.
[769] TF1-334, Transcript 13 June 2005, pp. 57-58.
[770] TF1-334, Transcript 13 June 2005, p. 59.
[771] TF1-334, Transcript 13 June 2005, pp. 60-85; *See* Military Structure of the AFRC Fighting Force, paras 602-608 *infra*.
[772] TF1-334, Transcript 13 June 2005, p. 85.
[773] George Johnson, Transcript 16 September 2005, pp. 11-13.
[774] George Johnson, Transcript 16 September 2005, p. 15.
[775] TF1-334, Transcript 13 June 2005, p. 100.

to loot from the civilian population although he expected his troops to hand any 'government property', meaning diamonds or dollars, to the Brigade.[776]

399. George Johnson corroborated the evidence that the Accused Brima chaired a meeting prior to the attack on Freetown at which he announced the attack and instructed that certain crimes be committed.[777] While George Johnson testified that this meeting took place at Orugu village rather than Allen Town, the Trial Chamber is satisfied that both witnesses were referring to the same meeting as very little distance separates the two locations.

400. According to Witness TF1-334, State House, the seat of the government, was captured by AFRC troops on 6 January 1999 at 6 a.m and the three Accused arrived there approximately half an hour later.[778] The witness alleged that throughout the time that the AFRC headquarters were at State House, the Accused Brima committed and ordered the commission of crimes, and that his orders were implemented.[779]

401. George Johnson corroborated evidence that crimes were committed by the troops at State House and that the Accused Brima ordered the release of prisoners held at Pademba Road prison.[780] Johnson provided a great deal of detail about troop movements around the city during the invasion.[781] He also corroborated the evidence of the witness TF1-334 that the Accused Brima was the overall commander of the troops, and that as Commander he communicated on at least one occasion with Sam Bockarie[782] while he was at State House. The witness also detailed the commission of crimes by troops associated with the Accused.[783] While there were discrepancies between this witness's evidence and that of witness TF1-334 regarding the commission of these crimes, most were minor.

402. Witness TF1-153 also testified that the Accused Brima became overall commander of the troops at Benguema following the death of SAJ Musa.[784] The witness confirmed that Brima met with the troops at Orugu village before the final onslaught on Freetown and that he ordered the

[776] TF1-334, Transcript 13 June 2005, pp. 101-103.
[777] George Johnson, Transcript 16 September 2005, pp. 16-17.
[778] TF1-334, Transcript 13 June 2005, p. 104.
[779] TF1-334, Transcript 14 June 2005, pp. 4-47, 54-73, 82-89, 96-100, 115-121; Transcript 15 June 2005, pp. 3-4, 14.
[780] George Johnson, Transcript 16 September 2005, pp. 22, 27.
[781] George Johnson, Transcript 16 September 2005, pp. 22-26, 29-34.
[782] George Johnson, Transcript 16 September 2005, p. 41; TF1-334, Transcript 14 June 2005, pp. 48-49.
[783] George Johnson, Transcript 16 September 2005, pp. 21-22, 38, 43-44, 52-57.
[784] TF1-153, Transcript 22 September 2005, p. 94.

718. Rape (Count 6) is an offence which is specified in Article 3(e) of the Statute as being an outrage upon personal dignity . As stated by the ICTR Trial Chamber in *Akayesu*, "[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity".[1403]

719. With reference to the elements of sexual slavery set out in the discussion of Count 8 above, the Trial Chamber is similarly satisfied that sexual slavery is an act of humiliation and degradation so serious as to be generally considered an outrage upon personal dignity. The Trial Chamber in *Kvočka* held that "perform[ing] subservient acts," and "endur[ing] the constant fear of being subjected to physical, mental or sexual violence" in camps were outrages upon personal dignity.[1404] Sexual slavery, which may encompasses rape and/or other types of sexual violence as well as enslavement, entails a similar humiliation and degradation of personal dignity.

720. "Any other form of Sexual Violence" in the context of crimes against humanity is a residual category of sexual crimes listed under Article 2(g) of the Statute, and may encompass an unlimited number of acts. The Trial Chamber agrees with the conclusion of the ICTY Trial Chamber in *Kvočka* that "sexual violence is broader than rape".[1405] The prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation.[1406]

721. The Indictment fails to provide any particulars as to the specific form of sexual violence alleged. One of the fundamental rights guaranteed to an accused under Article 17(4)(a) of the Statute is the right to be informed "of the nature and cause of the charge against him". An Indictment is defective if it does not state the material facts underpinning the charges with enough detail to enable an accused to prepare his or her defence.[1407] In the present case, given the broad scope of the offence of 'any other form of sexual violence', it was essential for the Indictment to clearly identify the specific offence or offences which the Accused are required to answer. The Trial Chamber finds that the Indictment is defective in this respect because it fails to plead material facts with sufficient specificity. For this reasons, the charge of 'any other form of sexual violence' is dismissed and thus will not be considered additionally or alternatively under Count 9.

[1403] *Akayesu* Trial Judgement, para. 597.
[1404] *Kvočka* Trial Judgement, para. 173.
[1405] *Kvočka* Trial Judgement, para. 180.
[1406] *Furundžija* Trial Judgement, para. 186; *Akayesu* Trial Judgement, para. 688.
[1407] *See Kamuhanda* Appeal Judgement, para. 17; *Kupreškić* Appeal Judgement, para. 88; *see also* Alleged Defects in the Form of the Indictment.

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

(a) Elements of Superior Responsibility

781. As is evident from its terms, Article 6(3) of the Statute requires a three-pronged test for criminal liability to attach:

1. The existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime;

2. The accused knew or had reason to know that the crime was about to be or had been committed; and

3. The Accused failed to take necessary and reasonable measures to prevent the crime or punish the perpetrators thereof.[1510]

782. The principle that an individual may be held responsible as a superior in the course of an armed conflict is enshrined in customary international law.[1511] The scope of Article 6(3) does not only include military commanders, but also political leaders and other civilian superiors in possession of authority.[1512]

783. Under Article 6(3) of the Statute, a superior is held responsible for an omission, *i.e.*, for the failure to perform an act required by international law.[1513] The culpable omission of a superior consists of his or her failure to prevent or punish crimes under the Statute committed by subordinates. Hence, a superior is responsible not for the principal crimes, but rather for what has been described as a 'dereliction' or 'neglect of duty' to prevent or punish the perpetrators of serious

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[1510] Rule 98 Decision, para. 328, referring to *Čelebići* Trial Judgement, para. 346.
[1511] *Čelebići* Trial Judgement, para. 333, stating "[t]hat military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary international law." See also *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* Appeal Decision on Jurisdiction"), para. 31, holding that "[i]n the opinion of the Appeals Chamber, the Trial Chamber was correct in holding, after a thorough examination of the matter, that command responsibility was at all times material to this case a part of customary international law in its application to war crimes committed in the course of an internal armed conflict."
[1512] *Aleksovski* Appeal Judgement, para. 76; *Stakić* Trial Judgement, para. 459; *Orić* Trial Judgement, para. 308; *Bagilshema* Appeal Judgement, para. 51; *Kajelijeli* Appeal Judgement, para. 85.
[1513] *Halilović* Trial Judgement, para. 54.

crimes.[1514] Responsibility of a superior is not limited to crimes committed by subordinates in person, but encompasses any modes of criminal liability proscribed in Article 6(1) of the Statute. It follows that a superior can be held responsible for failure to prevent or punish a crime which was planned, ordered, instigated or aided and abetted by subordinates.[1515]

(i) Existence of a Superior-Subordinate Relationship

784. The doctrine of command responsibility is "ultimately predicated upon the power of the superior to control the acts of his subordinates."[1516] It is immaterial whether the power of the superior over the subordinates is based on *de jure* or on *de facto* authority,[1517] as long as the superior possessed the material ability to prevent or punish the commission of the offence.[1518] This requirement has been widely referred to as the exercise of 'effective control'.[1519] It may be presumed that the existence of *de jure* authority *prima facie* results in effective control unless proof to the contrary is produced.[1520] Substantial influence over the conduct of others falls short of effective control.[1521]

785. Indications for effective control include the formality of the procedure used for appointment of a superior,[1522] the power of the superior to issue orders[1523] or take disciplinary action,[1524] the fact

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[1514] *Halilović* Trial Judgement, paras 42-54; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Judgement, 15 March 2006 ("*Hadžihasanović* Trial Judgement"), para. 75; see Judge Shahabuddeen's partly dissenting opinion in the *Hadžihasanović* Appeal Decision on Jurisdiction, stating that "[t]he position of the appellants seems to be influenced by their belief that Article 7(3) of the Statute has the effect, as they say, of making the commander 'guilty of an offence committed by others even he neither possessed the applicable mens rea nor had any involvement whatsoever in the actus reus.' No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so"; *Orić* Trial Judgement, para. 293. See also Brima Final Brief, para. 65.

[1515] *Orić* Trial Judgement, paras 301-302; see also *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution's Motion to Amend the Indictment, 26 May 2006, paras 18 et seq.

[1516] *Čelebići* Trial Judgement, para. 377.

[1517] *Orić* Trial Judgement, para. 309, stating that "the broadening of this liability as described above is supported by the fact that the borderline between military and civil authority can be fluid. This is particularly the case with regard to many contemporary conflicts where there may be only de facto self-proclaimed governments and/or de facto armies and paramilitary groups subordinate thereto" (footnotes omitted); see also *Kordić* Trial Judgement, paras 419, 422; Prosecutor v. Juvenal Kajelijeli, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement"), para. 87; *Prosecutor v. Mladen Naletilić aka "Tuta" and Vinko Martinović aka "Štela"*, Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić* Trial Judgement"), para. 67.

[1518] *Čelebići* Appeal Judgement, para. 256; see also *Halilović* Trial Judgement, para. 58.

[1519] *Čelebići* Appeal Judgement, para. 256; *Brđanin* Trial Judgement, para. 276; *Orić* Trial Judgement, para. 311; *Limaj* Trial Judgement, para. 522.

[1520] *Čelebići* Appeal Judgement, para. 197; Prosecution Final Brief, para. 437.

[1521] *Čelebići* Appeal Judgement, para. 266; *Blagojević* Trial Judgement, para. 791; *Ntagerura* Trial Judgement, para. 628; Brima Final Brief, para. 100; Kamara Final Brief, para. 61.

[1522] *Halilović* Trial Judgement, para. 58.

[1523] *Aleksovski* Trial Judgement, paras 101, 104; *Blaškić* Trial Judgement, para. 302; *Kordić* Trial Judgement, para. 421; see also *Kajelijeli* Trial Judgement, paras 403-404.

[1524] *Blaškić* Trial Judgement, para. 302; *Hadžihasanović* Trial Judgement, paras 83 et seq.

the Trial Chamber to reach any conclusion regarding his relationship with alleged subordinates based on that position alone. Membership of the Supreme Council and attendance at meetings *per se,* does not suffice to prove beyond reasonable doubt that Brima was in a superior-subordinate relationship with the perpetrators of the offences committed in Bo, Kenema and Kailahun Districts during the relevant Indictment period. As stated above in the Trial Chamber's discussion of the applicable law, the authority of members of a power-sharing collegiate body like the Supreme Council must be assessed on a case-by-case basis and requires an analysis of the functions of the particular Accused.[2876] The Trial Chamber finds that there is no evidence that within the Supreme Council the Accused Brima possessed any individual decision-making capability.

1658. The only evidence before the Trial Chamber relating to his actual functions as PLO 2 is that he was nominally in charge of several Government ministries.[2877] It is assumed that the Accused Brima would have had the power to give orders in relation to work carried out under his Ministries. However, there is no evidence regarding the type of issues that came within his portfolios or to whom he would have been entitled to issue orders, even apart from the question of whether such orders were issued and obeyed.

1659. The Prosecution submits that the Accused's position as "an Honourable" gave him authority over soldiers and officers of higher rank, on the basis that position precedes rank in the military. The Prosecution consequently submits that the Accused Brima was subordinate only to Johnny Paul Koroma, Foday Sankoh and Abu Sankoh. The Trial Chamber is thus invited to accept that the Accused was capable of exercising control over any other person in the AFRC. The Trial Chamber is not persuaded by this theory. Proof of superior responsibility requires conclusive evidence of the actual exercise of command and control over an identifiable group of subordinates. The Trial Chamber agrees that the Accused Brima enjoyed a privileged position on the Supreme Council as one of the original coup-plotters, as an 'Honourable' and as PLO 2. However, the Prosecution evidence adduced regarding his *de jure* position is insufficient to persuade the Trial Chamber to draw a conclusion, based on that position alone, that Brima had effective control over subordinate perpetrators of the crimes in the said districts, during the AFRC Government period.

1660. The evidentiary burden required to establish 'effective control' is high. For example in *Kordić*, the court failed to find 'control' despite the fact that the defendant, a civilian, wore a military uniform, held the title of 'colonel,' issued orders for military equipment and supplies, managed personnel, represented the Croatian forces in UN negotiations, exercised control over

[2876] Applicable Law, para. 786, *supra.*

roads, roadblocks, and prisoners, participated in planning, was physically present during military operations, and provided "political authorization" for ethnic cleansing campaigns.[2878] The Trial Chamber will now examine the evidence adduced by the Prosecution regarding Brima's alleged superior responsibility in relation to the Districts of Bo, Kenema and Kailahun in which crimes were found to have been committed by AFRC/RUF troops during the Junta period.

i. Bo District (1 – 30 June 1997)

1661. The Prosecution evidence showed that administratively, Bo District fell within the responsibility of AFRC Secretary of State East Eddie Kanneh.[2879] Although superior responsibility is not precluded by the existence of other superiors in relation to the same subordinates, there is no evidence that the Accused Brima's responsibilities as PLO 2 overseeing Eddie Kanneh entailed command of AFRC/RUF forces stationed in Bo District.

ii. Kenema District (25 May 1997 – 19 February 1998)

1662. Evidence before the Trial Chamber shows that AFRC forces in Kenema District were under the command of Secretary of State East Eddie Kanneh, who reported directly to Johnny Paul Koroma.[2880] The Trial Chamber heard evidence that the Accused Brima was involved in mining activities in Kono District but that he did not have any executive powers in relation to these activities.[2881] The Trial Chamber notes that the three Accused have not been charged with enslavement in Kono District during the Junta period. The Accused Brima's involvement in Kono District is insufficient to prove that he possessed the material ability to prevent or punish the persons responsible for the use of civilians as forced labour in Kenema District during the Junta period.

iii. Kailahun District (27 May 1997 – 14 February 1998)

1663. It has not been established beyond reasonable doubt that AFRC troops were present in Kailahun during this period. Indeed, Prosecution witness TF1-334 testified that there were no AFRC troops in Kailahun during the Junta period.[2882] The area was controlled by Sam Bockarie of

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[2877] Role of the Accused, Brima, para. 321, *supra.*
[2878] *Kordić* Trial Judgement, paras 546-631, 838.
[2879] TF1-334, Transcript 17 May 2005, pp. 54, 57.
[2880] TF1-334, Transcript 17 May 2005, pp. 54, 57.
[2881] Although witness TF1-334 testified that 'Gullit' was in overall charge of mining operations in Kono: Transcript 17 May 2005, pp. 52-53.
[2882] TF1-334, Transcript 16 June 2005, p. 77.

mark on Karina and that no one should be spared. It also alleges that the Accused Brima participated in the shooting on the attack on Karina.[2950] However, it does not specify the details of the attack on the mosque; that is the means and purpose of the attack or a description of the victims. In addition, the OTP Opening Statement does not specify the Accused Brima participation in the killing of civilians at a mosque in Karina. Instead, the Prosecution indicated that when the people of Karina village were assembled at the mosque at 5:00 o'clock for morning prayers, AFRC/RUF forces led by the three Accused descended on them with guns, machetes and axes. They lined them up and one after the other hacked them to death.[2951]

1708. The Trial Chamber notes that the Prosecution disclosure materials of a Witness Statement of TF1-334 dated 6 November 2003, does not mention the shooting of the Imam by the Accused Brima. However, it specifically states that Witness TF1-334 saw 'Gullit' going to a mosque in Karina and questioned the people as morning prayers were going on. Thereafter, the witness saw 'Gullit' remove his pistol and shoot the civilians dead.[2952] Therefore, the Trial Chamber finds that the above constitutes sufficient notice of the material particulars relating to Brima's participation in the Karina killings and that the defect in the Indictment with regard to this crime was cured by clear, timely and consistent notice to the Defence.

1709. In light of the foregoing considerations and the Trial Chamber's finding that the Accused Brima participated in a mass killing of at least 12 civilians at a mosque in Karina, the Trial Chamber finds that the Prosecution has established beyond reasonable doubt the Accused's responsibility by committing on a large scale the massacre of civilians at a mosque in Karina. The Trial Chamber is further satisfied that the Accused Brima was aware that his participation in the killings on such a massive scale amounted to the crime of extermination.

b. Ordering

i. Order to terrorise and kill the civilian population at Karina

1710. Around June 1998, at Kamagbengbe and in the presence of Kamara and Kanu, the Accused Brima gave orders to the AFRC troops to attack Karina. Brima referred to Karina as a strategic location because it was the home town of President Ahmed Tejan Kabbah. The witness stated that

[2949] *See* test applied by the Trial Chamber in Alleged Defects in Form of Indictment, para. 55, *supra.*
[2950] Prosecution Supplemental Pre-Trial Brief, p. 24.
[2951] Prosecution Opening Statement, Transcript 7 March 2005, p. 39.
[2952] Statement of Witness TF1-334, 6 November 2003, CMS p. 6557 [confidential].

Brima ordered the troops to burn down Karina, capture strong male civilians, and amputate civilians. Brima concluded that he wanted the attack on Karina to shock "the whole country" and the international community. The Trial Chamber has found that there were no ECOMOG or Kamajor troops in Karina at the time and that all the victims were civilians.[2953] Witness TF1-157 testified that after the attack on Karina, he heard rebels say that the town had been attacked because it was the home town of President Kabbah.[2954] Witness TF1-033 testified that he heard 'Gullit' order that civilian women should be stripped naked and raped during the attack on Karina, and the neighbouring town of Bornoya.[2955] The Trial Chamber found this evidence detailed, consistent and credible.

1711. The Trial Chamber is therefore satisfied that the Accused Brima ordered his subordinates to perpetrate crimes against the civilian population in Karina and its environs with the specific intent of instilling terror in the civilian population.

ii. Order to terrorise the civilian population around Rosos

1712. Witness TF1-334 testified that during the rainy season in 1998, the AFRC/Junta forces established a base at Rosos and remained there for approximately three months. While at Rosos, the witness heard Brima order the troops to occupy the surrounding villages and ensure that no civilians remained within 15 miles of the village.[2956] Brima ordered that any civilians be executed rather than brought back to the camp, and added that he would take disciplinary action against any soldier who brought a civilian to the camp. Brima named this action "Operation Clear the Area". Witness TF1-334 testified that villages surrounding Rosos were burnt down and looted following this order.[2957] Witness TF1-033 corroborated the evidence of Witness TF1-334 testifying that he heard Brima order his soldiers to kill any civilians in the area of Rosos.[2958] Witness TF1-267 also testified that rebels told her that civilians who did not leave a village near Rosos would be killed.[2959]

1713. The Indictment does not charge unlawful killings at Rosos and therefore will not make any findings on the killings perpetrated following Brima's order. However, the evidence shows that the Accused Brima, in issuing such orders to his subordinates specifically intended to terrorise the civilian population in the areas surrounding Rosos. The Trial Chamber concludes that Brima's

[2953] TF1-334, Transcript 23 May 2005, pp. 56-60, 61, 64-65; George Johnson, Transcript 15 September 2005, pp. 53-54.
[2954] TF1-157, Transcript 25 September 2005, pp. 29-30, 58-60; Transcript 26 September 2005, pp. 9, 23-24, 30.
[2955] TF1-033, Transcript 11 July 2005, pp. 18-20.
[2956] TF1-334, Transcript 23 May 2005, p. 104; Transcript 24 May 2005, pp. 2-5.
[2957] TF1-334, Transcript 23 May 2005, pp. 100-106.
[2958] TF1-033, Transcript 11 July 2005, pp. 24-25.

generalised instruction created a climate of criminality which endured in the months following the order.

iii. Order for killings at Mateboi and Gbendembu

1714. Witness TF1-334 testified that after the Accused Brima banned civilians from the area surrounding 'Camp Rosos',[2960] an AFRC commander executed six civilians, four men and two women, with an AK-47 rifle in a village near Mateboi.[2961]

1715. Witness TF1-033 testified that in or around August 1998 at 'Colonel Eddie Town,' the Accused Brima ordered two AFRC commanders named Salifu Mansaray and 'Arthur' to attack Gbendembu because ECOMOG and "loyal" Sierra Leonean Army troops were present there.[2962] When the Operations Commander returned from the operation he reported to Brima that the troops had captured arms and ammunition and that 25 civilians had been killed. Brima commended his men for "a job well done."[2963]

1716. The Trial Chamber finds that as overall commander in Bombali District the Accused Brima had sufficient authority over his troops to order the commission of the crimes in the expectation that his orders would be implemented. The Trial Chamber is therefore satisfied that the Accused Brima was aware of the substantial likelihood that crimes would be committed in the execution of the order given at 'Colonel Eddie Town.' The Trial Chamber therefore finds that the Accused Brima ordered the murder of civilians in the villages of Mateboi and Gbendembu.

iv. Order at Rosos to recruitment children for military purposes

1717. Witness TF1-334 testified that during a three week training program at Rosos [2964] 77 civilian abductees, including children under the age of 15 years, underwent military training. He was able to provide this estimate because he conducted head counts during muster parades.[2965] Witness George Johnson also confirmed this training at Rosos but estimated that 520 civilians were trained at Rosos. The Trial Chamber observes that Witness TF1-334 referred to the number of civilians trained

[2959] TF1-267, Transcript 27 July 2005, pp. 8-9, 10-11, 17, 23-26, 29-30
[2960] TF1-334, Transcript 23 May 2005, p. 105.
[2961] TF1-334, Transcript 24 May 2005, pp. 2-5; exhibit P-16 (under seal).
[2962] TF1-033, Transcript 11 July 2005, pp. 32-33; TF1-334, Transcript 23 May 2005, pp. 81, 84.
[2963] TF1-033, Transcript 11 July 2005, p. 34.
[2964] TF1-334, Transcript 24 May 2005, p. 28.
[2965] TF1-334, Transcript 24 May 2005, p. 23; TF1-334, Transcript 23 May 2005, pp. 74-75.

during one three week period, while George Johnson refers to the number of civilians trained overall at Rosos. Therefore the Trial Chamber does not consider the discrepancy in numbers to be significant. Witness TF1-334 testified that following the completion of the training period, the trainees were addressed by both the Accused Kanu and the Accused Brima. Brima then ordered that the male children be distributed to the various company commanders, while the girls and women were to be turned over to "their husbands" meaning the soldiers and commanders.[2966]

1718. Witness TF1-158, a former child soldier, testified that he was abducted by the AFRC forces and spent one week at Rosos. Upon arrival in Rosos, a commander named 'Staff Alhaji' gave the civilians guns and ordered them to search the town for food.[2967] 'Staff Alhaji' told witness TF1-158 and the other civilians that this order came from the Accused Brima.[2968] During the week at Rosos, the witness was given military training together with approximately 300 other civilians.[2969]

1719. The Trial Chamber has found these witnesses to be credible and is therefore satisfied that the Accused Brima ordered the abduction of children under the age of 15 years for military purposes.

c. Planning, Instigating and otherwise aiding and abetting

1720. The Prosecution has not adduced any evidence that the Accused Brima planned, instigated or otherwise aided and abetted any of the crimes committed under Counts 1-6, 10 and 14 in Bombali District. The Trial Chamber finds that the Prosecution has not proved any of these modes of criminal responsibility against the Accused Brima for the crimes committed under Counts 1-6, 10 and 14 in Bombali District. In view of the continuing nature of the crimes charged under Counts 9, 12 and 13 and the fact that they span across several Districts, the Trial Chamber will discuss the Accused Brima's responsibility for these crimes below.[2970]

(b) Responsibility of the Accused Brima under Article 6(3) of the Statute

(i) Submissions

[2966] TF1-334, Transcript 24 May 2005, pp. 29-31.
[2967] TF1-158, Transcript 26 July 2005, pp. 38-39.
[2968] TF1-158, Transcript 26 July 2005, p. 38.
[2969] TF1-158, Transcript 26 July 2005, pp. 39-40.
[2970] Responsibility of the Accused, Brima, paras 1820-1838, *infra*.

was not stolen.[3002] The Trial Chamber is of the opinion that this prohibition does not demonstrate the Accused's intention to prevent general looting of civilian property by the troops.

1743. The Trial Chamber accordingly finds that the Accused Brima failed to take necessary and reasonable measures to prevent the crimes committed in Bombali District or punish the perpetrators thereof.

(iii) Conclusion

1744. On the basis of the foregoing, the Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that the Accused Brima as a superior, bears individual criminal responsibility under Article 6(3) for the crimes committed by his subordinates in Bombali District between 1 May 1998 and 30 November 1998 in which he did not directly participate.

7. Freetown and Western Area

1745. The Trial Chamber found in relation to Freetown and the Western Area that AFRC troops committed unlawful killings of civilians[3003] and inflicted sexual[3004] and physical[3005] violence on civilians; that AFRC troops also abducted civilians and used them as forced labour;[3006] that AFRC troops illegally recruited and used children under the age of 15 years for military purposes in the attack on Freetown;[3007] and that AFRC troops engaged in looting,[3008] and committed collective punishments and acts of terror against the civilian population,[3009] as charged in the Indictment.

(a) Responsibility of the Accused Brima under Article 6(1) of the Statute

(i) Submissions

1746. In its Final Trial Brief, the Prosecution asserts that the Accused Brima together with the Accused Kamara and Kanu planned and led the invasion of Freetown, and that the attack on Freetown was designed and organised by Brima. The Prosecution further asks the Trial Chamber to infer that the Accused, based on his position and participation in the commission of crimes in Freetown, intended the commission of the crimes pleaded in the Indictment in Freetown 1999, or

[3002] George Johnson, Transcript 15 September 2005, p. 49.
[3003] Factual Findings, Unlawful Killings, paras 902-949, *supra*.
[3004] Factual Findings, Sexual Violence, paras 1048-1049, 1056-1057, *supra*.
[3005] Factual Findings, Physical Violence, paras 1229-1242, *supra*.
[3006] Factual Findings, Enslavement, para. 1389, *supra*.
[3007] Factual Findings, Child Soldiers, para. 1278, *supra*.
[3008] Factual Findings, Pillage, para. 1429, *supra*.
[3009] Factual Findings, Acts of Terror and Collective Punishments, paras 1609-1611, *supra*.

not object to the leading of evidence of this incident. The Trial Chamber therefore finds that the failure to give notice did not materially impair the ability of the Brima Defence to prepare its case.

1755. Accordingly, the Trial Chamber finds the Accused Brima criminally responsible for committing the murder of three civilian Nigerian men at State House as part of a widespread and systematic attack against the civilian population.

ii. Killing of a soldier's wife at the State House Area

1756. The Trial Chamber has found that the Accused Brima personally killed the wife of one of his soldiers outside State House in Freetown in early January 1999.[3022] Witness TF1-184 stated that he heard the husband of the victim assert that "[t]his Papay [the Accused Brima] had been after my woman for quite sometime."[3023]

1757. Yet again this incident is not pleaded in the Indictment, rendering the Indictment defective. The Trial Chamber must therefore determine whether this defect in the Indictment was cured by clear, timely and consistent notice to the Brima Defence. The Prosecution Supplemental Pre-Trial Brief and the Prosecution's Opening Statements do not refer to this incident. The only document that does refer to the incident is a prior statement of Prosecution witness TF1-334, dated 7 November 2003, which described the killing in the following terms:

> [...] I returned to State House. Surprisingly Gullit started firing soldiers who, according to him, were not members of the troop, who were not cooperating. Also, some Nigerian soldiers we have captured, Gullit fired them. Also, in my presence, he killed a certain lady we had brought from the jungle.[3024]

1758. As the date of disclosure was not provided to the Trial Chamber, it is unable to determine the timeliness of the notice to the Defence.

1759. Prosecution witness TF1-334 did not ultimately give evidence of this incident in his oral testimony, but Prosecution witness TF1-184 did. The Trial Chamber is unable to determine the passage of time between the initial disclosure of the Prosecution material and the testimony of witness TF1-184, and is therefore unable to determine the timeliness of the notice. However, the Brima Defence did not object. The Trial Chamber therefore finds that the failure to give notice did not materially impair the ability of the Brima Defence to prepare its case.

[3022] TF1-184, Transcript 27 September 2005, p. 62; TF1-334, Transcript 14 June 2005, pp. 22, 27.
[3023] TF1-184, Transcript 27 September 2005, p. 62.
[3024] Statement of Witness TF1-334 dated 7 November 2003, CMS p. 6585 [confidential].

1760. The Trial Chamber accordingly finds that the Accused Brima is criminally responsible for personally killing a soldier's wife at the State House area.

iii. Unlawful killings at Kissy Mental Home/Portee area

1761. The Trial Chamber heard unchallenged evidence that shortly after the AFRC forces invaded Freetown in early January 1999, on the way from Kissy Mental Home towards the Portee area, the Accused Brima personally shot dead a nun.[3025] Witness TF1-153 stated that he moved together with the AFRC troops to the Portee area by the Cotton Tree where they met nuns and that after 'Gullit' ordered the nuns to walk faster, he later took out his pistol and shot dead "a black nun".[3026]

1762. The Trial Chamber finds that once again, the Indictment does not plead the incident of the killing of a nun by the Accused Brima around the Portee area, which renders the Indictment defective. The Trial Chamber observes that the Prosecution Supplemental Pre-Trial Brief and its Opening Statement do not mention the killing of a nun in the Portee area. However, this defect was cured by the information provided in the pre-trial statement of witness TF1-153 dated 28 February 2003.

1763. Although the pre-trial statement of witness TF1-153 does not provide specific details on the killing of a nun by the Accused Brima, the information contained therein put the Defence on adequate notice.[3027] Further information was contained in the pre-trial statement of witness TF1-153 on the conduct of the Accused Brima upon the AFRC troops' retreat from Freetown, and the witness responded to the question put to him in relation to the killing of the black nun. In addition, the Defence cross examined the witness on this incident.[3028]

1764. Taking these statements together, the Trial Chamber finds that adequate notice was given to the Brima Defence of this incident. Accordingly, the Trial Chamber finds the Accused Brima individually criminally liable for committing the murder of a nun around the Kissy Mental Home/Portee area, as part of a widespread and systematic attack against the civilian population.

iv. Unlawful killings in the Wellington area

[3025] TF1-153, Transcript 23 September 2005, pp. 21-22.
[3026] TF1-153, Transcript 23 September 2005, p. 22.
[3027] TF1-153, Prior Witness Statement, 28 February 2003, CMS pp. 10269-10272 [confidential].
[3028] TF1-153, Transcript 23 September 2005, pp. 50-51.

> there. I saw Gullit cutting hands of one man with [a] cutlass. The boys were doing this too. I saw 6 persons whose hands were cut.[3032]

The Trial Chamber cannot determine whether this information was disclosed to the Defence before the start of trial. Therefore the Trial Chamber considers that the Defence was not given timely and consistent notice of critical material facts.

1769. The Trial Chamber notes however that the Defence cross examined the witness with respect to this incident,[3033] and therefore finds that the failure to provide adequate notice did not materially impair the ability of the Brima Defence to prepare its case. Accordingly, the Trial Chamber finds the Accused Brima individually criminally liable, pursuant to Article 6(1) of the Statute, for committing the amputation of one civilian at Shell Company, Old Road, as part of a widespread and systematic attack against the civilian population in January 1999.

b. Ordering/Instigating

i. Order to kill civilians in Fourah Bay area

1770. The Trial Chamber has found that the Accused Brima ordered his soldiers to kill civilians in the Fourah Bay area in retaliation for the killing of an AFRC soldier.[3034] The Trial Chamber is satisfied that the Accused Brima ordered the commission of these crimes in the awareness that the crimes were likely to be committed.

ii. Orders to terrorise and collectively punish the civilian population

1771. The Trial Chamber heard the following unchallenged evidence of witness TF1-184 who was with the AFRC troops during the Freetown invasion of January 1999. The witness testified that in the presence of the Accused Kanu, 'Gullit' ordered 'Major Mines' to collect cutlasses and to distribute them to the soldiers so that amputations could be carried out. 'Changabulanga' distributed the cutlasses to the soldiers. Describing the manner in which the amputations were carried out, the witness stated that "[c]ivilians were given either "long sleeves" meaning that the hand from the wrist downwards was removed, or "short sleeves" meaning that the entire arm from the bicep or elbow downwards was removed".[3035] The witness further stated that a new battalion under the command of 'Changabulanga' was created by 'Kande'. The aim of the battalion was to create fear

[3032] Statement of witness TF1-184 dated 20 May 2005, CMS p. 9824 [confidential].
[3033] TF1-184, Transcript 27 September 2005, p. 80.
[3034] Factual Findings, Unlawful Killings, para. 925, *supra*.
[3035] TF1-184, Transcript 27 September 2005, p. 74.

order to compensate for those fighters killed by ECOMOG. Following the order, civilians who refused to join the AFRC forces were shot in the presence of the Accused Brima, and their dead bodies thrown out of the back of State House.[3043] In addition, witness TF1-334 also testified that Brima ordered the abduction of civilians from Freetown during the attack "so as to attract the attention of the international community".[3044] During the attack civilians were indeed abducted. Another witness testified that when the ARFC entered Freetown, they ordered the civilians to sing while they were burning their houses.[3045] The Trial Chamber found the above Prosecution evidence, which was unchallenged, credible.

1775. The Trial Chamber also heard evidence that soon after the troops lost State House the Accused Brima was informed by a soldier that one of the troops had been hacked to death by civilians at the Fourah Bay crossroad.[3046] In response, the Accused Brima called 'Major Mines', one of his subordinates, and instructed him to collect cutlasses at the SLRA[3047] compound. 'Major Mines' returned with cutlasses, some of which he kept for himself while the remainder he distributed to 'Changabulanga' who was the "battalion commander for amputations". The Accused Brima then ordered his men to go to Upgun roundabout where he told his fighters that "these people we should teach them a lesson." He ordered his men to amputate and kill civilians and burn the area down. The Trial Chamber has found that the order to commit these crimes was carried out.[3048] On the basis of this evidence the Trial Chamber is satisfied that the Accused Brima ordered the commission of crimes in full awareness that the crimes were likely to be committed. Witnesses TF1-334 and TF1-104 testified that the amputations and killings of civilians continued during the AFRC retreat from Freetown. When it became clear that Guinean troops had taken over, 'Gullit' saw that the civilian population was celebrating. In the presence of the Accused Kamara and Kanu, 'Gullit' stated that the people of Freetown were ungrateful and ordered the troops to go as far as they could burning and killing people. Attacks on civilians were then carried out by the troops around the area of the Kissy Mental Hospital, Blackhall Road and the Kissy Police Station up to PWD Junction near Shankardass.[3049] Witness TF1-334 testified that he personally saw six civilians

[3042] TF1-033, Transcript 11 July 2005, pp. 60-64.
[3043] TF1-024, Transcript 7 March 2005, pp. 46-48, 72-74.
[3044] TF1-334, Transcript 14 June 2005, pp. 62-64.
[3045] TF1-157, Transcript 26 September 2005, pp. 18-19, 23-24, 26, 29-30.
[3046] TF1-184, Transcript 27 September 2005, pp. 71-72.
[3047] "Sierra Leone Roads Authority", clarified upon question from the Bench, Transcript 30 September 2005, p. 5.
[3048] Factual Findings, Unlawful Killings, paras 919-926, *supra*.
[3049] TF1-334, Transcript 14 June 2005, pp. 83-87; TF1-104, Transcript 30 June 2005, pp. 31-33.

whose arms were amputated by 'Changabulanga'. The arms of the civilians were chopped off at the elbow and 'Osman Sesay' told them to "go to Pa Tejan Kabbah to get new hands".[3050]

1776. Prosecution witness TF1-033 testified that after the AFRC lost the battle in Freetown he remained with the AFRC troops during their retreat for three weeks. During this time the eastern part of Freetown was occupied by AFRC fighters under the command of 'Gullit'. The witness saw and heard 'Gullit' ordering his men to commit atrocities against the civilian population as they were retreating. As a result of the order, girls and women were raped by the fighters.[3051] This evidence was not challenged. The Trial Chamber finds that through the above unchallenged evidence, the Prosecution has proved beyond reasonable doubt that the Accused Brima is individually criminally responsible for ordering his subordinates to commit those crimes, as part of a widespread attack on the civilian population during the January 1999 invasion of and retreat from Freetown.

iii. Orders to kill collaborators

1777. The Trial Chamber also heard evidence that during the January 1999 attack on Freetown, the police were specifically targeted and punished by the AFRC troops who saw them as "collaborators" of the Kabbah Government. Witness TF1-334 heard 'Gullit' giving orders to the AFRC troops in Freetown, specifying that "[p]olice stations should be targeted and burnt down" and "collaborators" killed.[3052] Witness TF1-157 confirmed the fact that the invading AFRC troops searched Freetown for police officers and killed them and "their people", meaning their families. The witness also saw the AFRC troops attack the Eastern Police Station.[3053]

iv. Order to loot UN Vehicles and civilian property

1778. The Trial Chamber heard the unchallenged evidence of witness TF1-334 that on 6 January 1999, the Accused Brima ordered the Operations Commander to loot vehicles at United Nations headquarters and to bring them back to State House and that the Operations Commander complied with the order.[3054] Another witness, Gibril Massaquoi, testified that soon after the January 1999 Freetown invasion, he saw the Accused Kanu and other commanders driving UN vehicles in Freetown.[3055] The Trial Chamber is satisfied on the basis of this evidence that the Accused Brima

[3050] TF1-334, Transcript 14 June 2005, pp. 81-82.
[3051] TF1-033, Transcript 11 July 2005, pp. 65-66.
[3052] TF1-334, Transcript 13 June 2005, pp. 100-102.
[3053] TF1-157, Transcript 25 September 2005, pp. 19-20, 22, 29-30, 58-60; Transcript 26 September 2005, pp. 23-24.
[3054] TF1-334, Transcript 14 June 2005, pp. 5, 21-26.
[3055] Gibril Massaquoi, Transcript 7 October 2005, p. 126.

Freetown.[3050] The Trial Chamber is satisfied on the basis of this evidence that the Accused Brima's that he ordered the commission of this crime in full awareness that the crime was likely to be committed and that the order was carried out. The Trial Chamber heard evidence that in Allen Town, on the eve of the invasion of Freetown in January 1999, the Accused Brima gathered his troops and instructed them to execute "collaborators" - a term witness TF1-334 explained was used to refer to any person who did not support the AFRC troops. Brima also informed his troops that as he did not have the means to pay them they were free to loot from the civilian population. Brima also instructed the troops to burn down all police stations.[3051]

v. Order to kill 14 captive Nigerian ECOMOG soldiers at State House

1779. The Trial Chamber has found that at State House on an unknown date during the Freetown attack, Brima ordered the execution of 14 to 16 captive and unarmed Nigerian ECOMOG soldiers.[3052] Although the Prosecution witnesses TFI-334 and TFI-033 gave varying accounts of why the Nigerians were killed, they were all consistent regarding the fact that the Accused Brima gave the order for the Nigerians to be killed.[3053] The Trial Chamber found that these ECOMOG soldiers, *hors de combat*, were subsequently killed.[3054] On the basis of this evidence the Trial Chamber is satisfied that the Accused Brima ordered the commission of crimes in full awareness that the crimes were likely to be committed.

vi. Order to kill eight nuns at Kissy Mental Home

1780. A number of Prosecution witnesses testified that on an unspecified day in early January 1999, AFRC troops captured two clerics and eight nuns at Kissy Mental Home. After ECOMOG began bombarding the troops there, the two abducted clerics escaped. 'Gullit' ordered his fighters to execute the eight nuns "so as to prevent them escaping and leaking information". Pursuant to this order, Foday Bah Marah a.k.a. 'Bulldoze' executed five nuns. [3055] The witness stated that following the execution of the nuns, the Accused explained to his troops that they were trapped and that it was time "for a complete bulldoze." The entire brigade then began to withdraw towards Wellington

[3050] Gibril Massaquoi, Transcript 7 October 2005, p. 126.
[3051] TF1-334, Transcript 13 June pp. 100-103.
[3052] Factual Findings, Unlawful Killings, paras 911-912, *supra*.
[3053] TF1-033, Transcript 11 July 205, pp 63-65; Gibril Massaquoi, Transcript 7 October 2005, pp. 115-116; TF1-334, Transcript 14 June 2005, pp. 22-28.
[3054] Factual Findings, Unlawful Killings, para. 912, *supra*.
[3055] TF1-334, Transcript 14 June 2005, pp. 95-97; George Johnson, Transcript 16 September 2005, p. 55; TF1-184, Transcript 27 September 2005, pp. 82-84.

killing civilians and burning houses as they went.[3056] Witness George Johnson also testified that the troops had eight abducted nuns at Kissy mental home. However, he stated that when ECOMOG attacked the troops, Foday Bah Marah killed three nuns and the others escaped. The witness did not state whether this was pursuant to any order.[3057] Witness TF1-184 corroborated the evidence that three nuns were killed when the Nigerians attacked the mental home. He does not state who killed the nuns, but he testified that it was 'Gullit' who ordered their execution.[3058] The Trial Chamber is satisfied that the Accused Brima gave the order to kill the nuns and that the killing was carried out. On the basis of this evidence the Trial Chamber is satisfied that the Accused Brima ordered the commission of crimes in full awareness that the crimes were likely to be committed.

vii. Order to massacre civilians in Rogbalan Mosque

1781. The Trial Chamber heard unchallenged evidence that at Kissy Mental Home while the AFRC were retreating from Freetown, the Accused Brima called several senior commanders together and informed them that he had received information that civilians were harbouring ECOMOG troops in a nearby mosque. He told his commanders not to assume that mosques were housing civilians and ordered that all those found in the Mosque be killed. On these instructions, the Accused Kanu set off with the soldiers. Once they reached the Mosque the Accused Kanu ordered the troops to begin firing. The witness observed that the mosque was full of civilians and that many people were killed.[3059] The evidence of this massacre was corroborated by the following evidence.

1782. Witnesses TF1-083 and TF1-021 both testified about a massacre at Rogbalan Mosque in Freetown in January 1999. Towards the end of January 1999,[3060] TF1-083 was told that there was an ongoing fire fight between ECOMOG troops and rebels. He therefore decided to seek refuge in Rogbalan Mosque. When he arrived he found approximately 70 dead bodies inside the mosque.[3061] TF1-021 testified that he was present in Rogbalan Mosque at midday on a Friday in January 1999 when men wearing "mixed clothing" (partly combat uniform and partly civilian clothing) and carrying guns and machetes attacked the mosque. The attackers first robbed the worshippers and then told them that they would all be killed for supporting President Kabbah. The attackers then began shooting. The witness estimated that 71 worshippers were killed in this attack. The witness stressed that the victims were civilian worshippers who had gathered for the traditional 14:00

[3056] TF1-334, Transcript 14 June 2005, pp. 97-98.
[3057] George Johnson, Transcript 16 September 2005, p. 55.
[3058] TF1-184, Transcript 27 September 2005, pp. 82-84.
[3059] TF1-334, Transcript 14 June 2005, pp. 87-89.
[3060] TF1-083, Transcript 8 April 2005, p. 58.

prayers.[3062] The Trial Chamber is satisfied that the Accused Brima gave the order to kill the civilians at Rogbalan Mosque and that the killing was carried out by his subordinates. On the basis of this evidence the Trial Chamber is satisfied that the Accused Brima ordered the commission of crimes in full awareness that the crimes were likely to be committed.

viii. Order to abduct and enslave civilians including child soldiers

1783. The Trial Chamber heard evidence that during the retreat of the AFRC fighters from Freetown, the Accused Brima ordered the abduction of civilians "in order to attract the attention of the international community". Civilians were then abducted by the renegade-SLA troops and used to carry loads. On Brima's orders, the young boys under the age of fifteen years were later trained as Small Boy Units.[3063] The Trial Chamber notes the evidence of Prosecution witness TF1-024 that the Accused Brima ordered the abduction of civilians because he lost so many troops and needed reinforcements from among the civilian population.[3064] On the basis of all the Prosecution evidence narrated above, the Trial Chamber is satisfied that the Accused Brima ordered the commission of these crimes in full awareness that they were likely to be committed. The Trial Chamber finds, pursuant to Article 6(1) of the Statute, that the Prosecution has proved beyond reasonable doubt that the Accused Brima ordered his subordinates to commit crimes against the civilian population in Freetown, in January 1999 as part of a widespread attack on the population.

c. Planning

1784. No evidence was adduced that the Accused Brima planned any crimes under Counts 3 through 6, 10 through 11 and 14 in Freetown and the Western Area. The Trial Chamber finds that the Prosecution has not proved this mode of criminal responsibility against the Accused Brima, in relation to Freetown and the western Area.

d. Otherwise aiding and abetting

1785. As stated above with regards to liability for commission of crimes in Fourah Bay, the Trial Chamber has found that there is evidence that the Accused Brima participated in the attack on Fourah Bay in which civilians were killed and houses burnt. The Trial Chamber found that the

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[3061] TF1-083, Transcript 8 April 2005, pp. 69-71.
[3062] TF1-021, Transcript 15 April 2005, pp. 25-32.
[3063] Factual Findings, Child Soldiers, para. 1278, *supra*; TF1-334, Transcript 14 June 2005, pp. 62-64, 118-121; Transcript 15 June 2005, pp. 14-15.
[3064] TF1-024, Transcript 7 March 2005, p. 47.

Accused Brima was present during the commission of the crimes and either himself participated or failed to admonish the troops from committing the crimes.

1786. Given his authority as commander of the troops, the Trial Chamber finds Brima's presence at the scene gave moral support which had a substantial effect on the perpetration of the crime. In addition, given the systematic pattern of crimes committed by the AFRC troops throughout the District, the Trial Chamber is satisfied that the Accused Brima was aware of the substantial likelihood that his presence would assist the commission of the crime by the perpetrators.

(b) Responsibility of the Accused Brima Under Article 6(3) of the Statute

(i) Submissions

1787. The Prosecution submits in its Final Brief that the Accused Brima has superior responsibility for all crimes committed by his subordinates in Freetown between 6 January 1999 until around 28 January 1999.[3065]

1788. The Brima Defence submits that the evidence of mutiny by junior soldiers at Colonel Eddie Town, which led to the arrest and 'long detention' of the three Accused, 'weakens any responsible chain of command and the existence of superior authority'.[3066] The Brima Defence further submits that there was no effective command or control over the fighters that attacked Freetown, citing in support of this argument the Prosecution Military Expert's conclusion that 'the AFRC faction had a strong command capability which failed on 6th January 1999'.[3067]

(ii) Findings

a. Existence of a superior-subordinate relationship

1789. The Trial Chamber has found that the Accused Brima was overall commander of the troops in Freetown.[3068] The Trial Chamber will now consider the evidence pertaining to the Accused Brima's control of the troops from the time he regained command throughout the attack on Freetown until the retreat of the troops to Benguema in February 1999 in order to ascertain whether a superior-subordinate relationship existed.

[3065] Prosecution Final Brief, paras 1637-1640.
[3066] Brima Final Brief, para. 105.
[3067] Brima Final Brief, para. 195; *see also* exhibit P-36, Iron Report, para. E6.1.
[3068] Role of the Accused, Brima, para. 420, *supra*.

decisions, and the command structure was effective enough to be able to conduct a relatively complex manoeuvre".

1805. The foregoing evidence establishes a superior-subordinate relationship existed between the Accused Brima and the AFRC troops in Freetown after the troops lost State House. The Trial Chamber therefore finds that the Accused Brima was in a superior-subordinate relationship with the AFRC troops that committed crimes in Freetown even after the "Headquarters" were dislodged from State House.

b. Actual or Imputed Knowledge

1806. The Prosecution submits that 'based on the fact that in most cases the orders to commit crimes were given to the subordinates directly by the Accused or at least in their presence, the Accused either knew or at the very least had reason to know that the subordinates were about to commit the offences or had done so.'[3107]

1807. The Trial Chamber is satisfied that the Accused Brima ought reasonably to have known of the commission of crimes committed in which he was not directly involved. He directly participated in the commission of a number of crimes.[3108] The crimes were committed on a wide scale in physical proximity to the Accused Brima at State House.

1808. The Trial Chamber therefore finds that there can be no reasonable doubt that the Accused Brima was in possession of information to put him on notice that crimes were being committed by his subordinates, although he may not have been directly involved in such crimes.

c. Failure to prevent or punish

1809. There is no evidence that the Accused Brima took any measures to prevent the troops under his control in Freetown from committing crimes against or punish the perpetrators of such crimes.

(iii) Conclusion

1810. The Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that the Accused Brima is liable as a superior under Article 6(3) for crimes committed in Freetown and the Western Area during the relevant Indictment period.

[3107] Prosecution Final Brief, para. 1639.
[3108] *See* Responsibility of the Accused, Brima, paras 1750-1786 *supra*.

Rosos, abducted young women were forced to provide sexual services and to perform domestic tasks.[3124]

1824. The magnitude of commission of the three enslavement crimes by AFRC troops indicates their systemic nature. The Trial Chamber notes that the Brigade included a position in which an individual was appointed specific responsibility for abducted civilians.[3125] Although the Trial Chamber is unable to make a finding on the total number of civilians abducted and forced to undergo military training, the example provided by Colonel Iron that one battalion at 'Colonel Eddie Town' consisted of approximately 150 trained soldiers supplemented by approximately 200 abducted civilians[3126] corroborates the evidence of fact-based witnesses that these crimes were committed on a large scale.[3127]

1825. Indeed, it would appear that once established the *modus operandi* of enslavement became so deeply entrenched that it was difficult to break. Col. Iron's conclusion about the abduction of civilians during the withdrawal from Freetown is instructive.

> There can be little military justification for what happened" during the retreat from Freetown [...] The abductions seem particularly self-defeating: at a time when there was benefit in reducing the size of the force to make it faster moving during the escape, the abductees swelled the size of the column, slowed it down, and made it a bigger target. One reason given for the abductions was to make the fighting strength seem larger than it was; *but I suspect that the truth is more simply that abductions were now common practice for the AFRC*." [3128] [emphasis added]

1826. Based on the large scale, continuous and organised nature of the enslavement crimes, the Trial Chamber is satisfied that the only reasonable inference is that a substantial degree of planning and preparation were required to commit the crimes.

1827. On the basis of the evidence below, the Trial Chamber is further satisfied that the Accused Brima, alone or with others, designed the commission of the three crimes (enslavement, sexual slavery and recruitment and use of child soldiers) and that although these crimes were largely committed by his subordinates, his contribution was substantial.

1828. The Accused played a substantial role in the system of exploitation and cruelty. The Trial Chamber has found that the Accused Brima was the overall commander of both the AFRC troops that moved from Mansofinia, Koinadugu District to Camp Rosos, Bombali District and of the

[3124] Factual Findings, Outrages upon Personal Dignity, paras 1138-1139, *supra*.
[3125] Exhibit P-36, Iron Report, para. C3.5; TF1-153, Transcript 23 September 2005, p. 102.
[3126] Exhibit P-36, Iron Report, para. C3.5.
[3127] Factual Findings, Enslavement, para. 1359, *supra*.
[3128] Exhibit P-36, Iron Report, para. D5.4.

1832. As was the pattern with all operations overseen by the Accused Brima, AFRC fighters exhibited a depraved indifference towards human life in abducting and enslaving civilians. Children watched their abductors executing family members.[3142] Throughout the conflict women and young girls were treated as war bounty, abducted from their homes and repeatedly raped.[3143] Child soldiers were terrorised, drugged and forced to commit crimes against other civilians.[3144] Given his authority, the Accused was in a position to shut down this system of exploitation entirely, to deter the excesses committed by his troops, and to alleviate the plight of the victims. On the evidence adduced the Trial Chamber finds that he failed to do so.

1833. The Trial Chamber stresses that the above evidence relates entirely to enslavement crimes committed in Bombali and the Western Area. The Trial Chamber has found that the Accused Brima was not involved in the commission of crimes in Bo, Kenema, Kailahun, Kono, Koinadugu and Port Loko Districts.

1834. The Trial Chamber is satisfied that the Accused planned, ordered, organised and implemented the system to abduct and enslave civilians which was in fact committed by AFRC troops in Bombali and Western Area. It is further satisfied that the Accused had the direct intent to set up and implement the system of exploitation involving the three enslavement crimes, namely, sexual slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour.

(a) Responsibility under Article 6(1) for Count 9 (Outrages on Personal Dignity)

1835. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Brima is individually criminally responsible under Article 6(1) of the Statute for planning the commission of the crime of outrages on personal dignity in Bombali District and Freetown and the Western Area.

(b) Responsibility under Article 6(1) for Count 12 (Child Soldiers)

1836. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Brima is individually criminally responsible under Article 6(1) of the Statute for planning the commission of conscription of children under the age of 15 into the armed group or using them to participate actively in hostilities in Bombali District and the Western Area.

[3142] TF1-158, Transcript 26 July 2005, pp. 33-34.
[3143] Factual Findings, Sexual Violence, paras 973-980, 1044-1049, *supra*.
[3144] Factual Findings, Child Soldiers, para. 1254, *supra*.

(c) Responsibility under Article 6(1) for Count 13 (Enslavement)

1837. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Brima is individually criminally responsible under Article 6(1) of the Statute for enslavement in Bombali District and the Western Area.

(d) Responsibility under Article 6(3) for Counts 9, 12 and 13

1838. As the Trial Chamber has already found the Accused Brima criminally responsible for the planning of the enslavement crimes, it is not necessary to examine his responsibility under Article 6(3).

C. The Accused Kamara

1. Allegations in the Indictment

1839. The Indictment alleges:

> At all times relevant to this Indictment, Brima Bazzy Kamara was a senior member of the AFRC/ Junta and RUF forces.
>
> Brima Bazzy Kamara was a member of the group which staged the coup and ousted the government of President Kabbah. Johnny Paul Koroma, Chairman and leader of the AFRC, appointed Brima Bazzy Kamara a Public [sic] Liaison Officer (PLO) within the AFRC. In addition, Brima Bazzy Kamara was a member of the Junta governing body.
>
> Between about mid February 1998 and about 30 April 1998, Brima Bazzy Kamara was a commander of AFRC/RUF forces based in Kono District. In addition, Brima Bazzy Kamara was a commander of AFRC/RUF forces which conducted armed operations throughout the north, eastern and central areas of the Republic of Sierra Leone, including, but not limited to, attacks on civilians in Koinadugu and Bombali Districts between about mid February 1998 and 31 December 1998. Brima Bazzy Kamara was a commander of AFRC/RUF forces which attacked Freetown on 6 January 1999.
>
> [...]
>
> In [his] positions referred to above, [...] Brima Bazzy Kamara [...], individually or in concert with [the Accused Brima and the Accused Kanu], Johnny Paul Koroma aka JPK, Foday Saybana Sankoh, Sam Bockerie aka Mosquito aka Maskita, Issa Hassan Sesay aka Issa Sesay, Morris Kallon aka Belai Karim, Augustine Gbao aka Augustine Bao and/or other superiors in the AFRC, Junta and AFRC/RUF forces, exercised authority, command and control over all subordinate members of the AFRC, Junta and AFRC/RUF forces.
>
> [...]
>
> [...] Brima Bazzy Kamara [...], by [his] acts or omissions, [is] individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Indictment, which crimes [he] planned, instigated, ordered, committed or in whose planning, preparation or execution [he] otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which [he] participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which [he] participated.

indicating that the civilians in Tombodu were celebrating. Witness George Johnson testified that the Accused Kamara passed through Tombodu after the commission of the crimes and himself observed the bodies of the civilians killed.

c. Failure to prevent or punish

1890. The Prosecution submits that 'as the key commander in the field, the Second Accused clearly had the material ability to prevent offences or to punish those subordinates responsible for committing crimes.'[3224]

1891. The Trial Chamber finds on the basis of the evidence examined above that the Accused Kamara had the ability to issue orders which were followed; that he took over authority for promoting SLA soldiers after Johnny Paul Koroma left Kono District; and that generally, that the SLAs maintained an effective day-to-day chain of command and regularly mustered, that therefore, as examined above, it was within the Accused's material ability to prevent crimes committed by his subordinates or to punish subordinates for committing crimes.

1892. The Trial Chamber finds further on the evidence the Accused Kamara did not attempt to prevent or punish the crimes committed by 'Savage' and his battalion in Tombodu.

d. Conclusion

1893. The Trial Chamber finds that the Accused Kamara was in a position of superior responsibility and criminally responsible under article 6(3) of the Statute, for crimes committed by his subordinates in Kono District; namely, unlawful killings and physical violence, committed with the primary purpose to spread terror and to collectively punish civilians for allegedly failing to provide sufficient support to the AFRC/RUF.

4. Kailahun District

1894. The Trial Chamber has found that an unknown number of civilians were unlawfully killed by RUF forces in or around February 1998, as charged under Counts 3 through 5[3225] and that RUF troops or troops not established beyond a reasonable doubt to be members of the AFRC abducted

[3224] Prosecution Final Brief, para. 1287.
[3225] Factual Findings, Unlawful Killings, para. 864, *supra*.

persons to do so. Finally, it argues that those witnesses who did allege such participation - in particular TF1-334 and George Johnson - failed to corroborate each others' testimonies.[3245]

(ii) Findings

a. Committing

1914. The Trial Chamber finds that the Prosecution has not proved this mode of individual criminal responsibility against the Accused Kamara for the crimes committed in the Bombali District.

b. Ordering

1915. The Trial Chamber finds that the Accused Kamara ordered the unlawful killing of five young girls in Karina. Kamara ordered that the girls be locked in a house and that the house then be set on fire. This order was obeyed by AFRC troops.[3246]

1916. The Trial Chamber finds that as the deputy commander in Bombali District the Accused Kamara had sufficient authority over the troops to instruct the commission of the crimes. On all the evidence adduced, the Trial Chamber finds that the Accused Kamara was aware of the substantial likelihood that the burning to death of the five young girls in Karina would be carried out.

c. Planning

1917. The Trial Chamber recalls its finding that the Accused Brima ordered the attack on Karina in an address to the troops at Kamagbengbe.[3247] In the course of this address, the Accused Brima stated that he wanted to divide the troop and make attacks on both Karina and Kamabai, but that the other commanders suggested to him that keeping the troop together would result in less casualties. The Accused Brima agreed to this.[3248] The Trial Chamber notes that this incident was a strategic discussion between commanders which could constitute planning of the attack on Karina and the crimes committed therein. However, witness TF1-334 does not name the commanders involved in this discussion. The Trial Chamber is not prepared to infer merely by virtue of the Accused Kamara's position as deputy commander that he was one of them.

[3245] Kamara Final Brief, para. 204.
[3246] TF1-334, Transcript 23 May 2005, pp. 66-67.
[3247] Factual Findings, Unlawful Killings, para. 886, *supra*.
[3248] TF1-334, Transcript 23 May 2005, p. 57.

therefore look at the available evidence to determine whether the Accused Kamara, as deputy commander, was able to exercise effective control over the AFRC troops in Bombali District.

1924. There is evidence that the Accused Kamara played a role at a senior level in military operations in Bombali District. Witness TF1-334 testified that the Accused Kamara was Deputy Brigade Commander[3254] and, at Karina, "[...] the commanders have been monitoring each and every soldier"[3255] The Accused Kamara was one of the senior AFRC commanders who was present at the meeting with SAJ Musa at Kurubonla at which the restructuring of the troops was discussed; however, no evidence was adduced as to his contribution.[3256] Within the structure which was subsequently established by the Accused Brima, the Operations Commander and the Provost-Marshal were required to report to the Accused Kamara. At Rosos, the Accused Kamara was based at 'headquarters', from where operations were planned and orders issued. Whilst there is no direct evidence on the Accused Kamara's precise involvement[3257] Witness TF1-334 testified that the Accused Kamara was one of the commanders who made decisions regarding the brigade;

> Q. Witness, I'm going to ask you to clarify. My question to you was what did you subsequently see the deputy chief in command do as second in command? Just focus on him specifically, please.
> A. He, the chief in command, the chief of staff and the senior military supervisors were responsible for taking decisions in the brigade.
> Q. How do you know that?
> A. I myself was present whenever they want to take a decision in my presence. I was there whenever they were deciding on anything before they can send it out.[3258]

1925. The Trial Chamber has found that the Accused Kamara issued an order to the troops in Karina which was obeyed.[3259] The Trial Chamber is satisfied on the evidence that the Accused Kamara participated in decision making. On the evidence the Trial Chamber is satisfied that the Accused Kamara exercised effective control over the AFRC troops and was aware that the troops under his control committed crimes in Bombali District.

1926. The Trial Chamber finds on the foregoing evidence that there was a formal command structure in the AFRC faction in Bombali District, that the Accused Kamara, in his capacity as Deputy Brigade Commander had and exercised effective control over the troops under his command.

[3254] TF1-334 Transcript 23 May 2005, p. 95.
[3255] TF1-334 Transcript 23 May 2005, p. 67.
[3256] George Johnson, Transcript 15 September 2005, p. 47.
[3257] George Johnson, Transcript 15 September 2005, p. 60.
[3258] TF1-334, Transcript 20 May 2005, p. 95.
[3259] Factual Findings, Unlawful Killings, para. 887, *supra*.

1927. Accordingly the Trial Chamber finds on the evidence adduced that a superior-subordinate relationship existed between the Accused Kamara and the AFRC troops in Bombali District and that the Accused Kamara had actual or imputed knowledge of the crimes committed and failed to prevent or punish the perpetrators.

1928. The Trial Chamber accordingly finds that the Prosecution established beyond reasonable doubt that the Accused Kamara is liable as a superior under Article 6(3) for crimes committed in Bombali District.

7. Freetown and the Western Area

1929. The Trial Chamber had found that AFRC troops engaged in unlawful killings of civilians as charged under Counts 3 through 5[3260] and inflicted sexual and physical violence on civilians as charged under Counts 6 through 9 and 10 respectively.[3261] AFRC troops also abducted civilians and used them as forced labour and used children illegally recruited for military purposes in the attack on Freetown, as charged under Counts 13 and 12 respectively.[3262] Finally, AFRC troops engaged in widespread looting, as charged under Count 14, terrorised the civilian population, as charged under Count 1, and committed collective punishments, as charged under Count 2.[3263]

(a) Responsibility of the Accused Kamara Under Article 6(1) of the Statute

(i) Submissions

1930. In its Final Brief, the Prosecution submits that the Accused Kamara was present when the attack on Freetown was planned and that it can be inferred from his position as second in command that he was therefore actively involved in the planning phase. It further contends that Kamara was often present when the Accused Brima issued unlawful orders.[3264]

1931. The Prosecution further asserts that 'Captain Blood' carried out Kamara's order to execute civilians, ordered the burning of houses during the retreat towards Waterloo and was present when the Accused Brima ordered other burnings in Freetown and the Western Area.[3265]

[3260] Factual Findings, Unlawful Killings, para. 951, *supra*.
[3261] Factual Findings, Rape, para. 1068, *supra*; Outrages on Personal Dignity, para. 1170, *supra*; Physical Violence, para. 1203, *supra*.
[3262] Factual Findings, Enslavement, para. 1389, *supra*; Child Soldiers, para. 1278, *supra*.
[3263] Factual Findings, Acts of Terror and Collective Punishment, para. 1612, *supra*.
[3264] Indictment, para.1624
[3265] Prosecution Final Brief, para. 1626, citing TF1-334, Transcript 14 June 2005, pp. 72-73.

that the Prosecution has not proved these modes of individual criminal responsibility against the Accused Kamara for the crimes committed in the Western Area.

1938. In view of the continuing nature of these crimes charged under Counts 9, 12 and 13 and the fact that they span across various districts the Trial Chamber will discuss the Accused Kamara's criminal responsibility for Counts 9, 12 and 13 below.[3271]

c. Otherwise aiding and abetting

1939. As stated above with regards to liability for commission of crimes in Fourah Bay, the Trial Chamber has found that there is evidence that the Accused Kamara "partook" in the attack on Fourah Bay in which civilians were killed and houses. While the precise meaning of "partook" is unclear, the Trial Chamber has found that Kamara was present during the commission of the crimes and either himself participated or failed to admonish the troops from committing the crimes.

1940. Given his authority as deputy commander of the troops, the Trial Chamber finds Kamara's presence at the scene gave moral support which had a substantial effect on the perpetration of the crime. In addition, given the systematic pattern of crimes committed by the AFRC troops throughout the District, the Trial Chamber is satisfied that the Accused Kamara was aware of the substantial likelihood that his presence would assist the commission of the crime by the perpetrators.

i. "Operation Cut Hand" in Freetown

1941. The Accused Kamara led an mission to loot machetes from the World Food Program warehouse. He later explained to Tina Musa, the late SAJ Musa's wife, that they had been used that day in "Operation Cut Hand," meaning that his troops had used the machetes to amputate civilians.[3272] The Trial Chamber is satisfied that the Accused, in providing weapons to the troops, with knowledge of how these weapons were to be used, the Accused Kamara gave practical assistance which had a substantial effect on the perpetration of unlawful killings and physical violence in Freetown. It further finds that the Accused Kamara was aware of the substantial likelihood that the use of the machetes would assist in the commission of these crimes. The Trial Chamber therefore finds the Accused Kamara liable for aiding and abetting physical violence.

[3271] Responsibility of the Accused, Kamara, paras 1970-1976, *infra*.
[3272] TF1-153, Transcript 23 September 2005, p. 18.

1946. Given the limited resources of the AFRC, the Trial Chamber is satisfied that this evidence proves that the Accused Kamara exercised a degree of authority over the AFRC faction.

1947. The Accused Kamara was present at the State House when the Accused Brima announced to the battalion commanders and others, that they were likely to lose "the ground totally" and that the burning of Freetown should start.[3280] After the loss of State House, the Accused Kamara gave an order to AFRC troops to burn houses.[3281]

1948. The Trial Chamber finds the evidence adduced indicates the continual presence of the Accused Kamara during the invasion of Freetown up until State House was lost. He was often in the company of other senior commanders, including the Accused Brima and the Accused Kanu, and gave a number of orders himself, he participated in decision making and did not distance himself from decisions made. The Trial Chamber is satisfied that the Accused's had both a *de jure* position of authority during this period, and the *de facto* ability to effectively control the AFRC troops under his command in Freetown.

b. Knowledge and failure to prevent or punish

1949. The Accused Kamara had actual or imputed knowledge of the crimes committed and failed to prevent or punish the perpetrators.

c. Conclusion

1950. The Trial Chamber finds that the Prosecution has established beyond reasonable doubt that the Accused Kamara is liable as a superior under Article 6(3) for crimes committed in Freetown.

8. Port Loko District

1951. The Trial Chamber has found that AFRC/RUF troops unlawfully killed a number of civilians in Port Loko District as charged under Counts 3 through 5.[3282] In addition, AFRC troops held persons in sexual slavery as charged under Count 9.[3283] AFRC/RUF troops used abducted civilians for forced labour, as charged under Count 13.

[3280] TF1-334, Transcript 14 June 2005, p. 47.
[3281] TF1-184 Transcript 30 September 2005, p. 9.
[3282] Factual Findings, Unlawful Killings, para. 965, *supra*.
[3283] Factual Findings, Outrages upon Personal Dignity, para. 1187, *supra*.

Trial Chamber notes that witness Gibril Massaquoi testified that Bazzy sent a message to Gullit regarding the attack on Port Loko.[3301] Neither witnesses George Johnson nor TF1-334 mention this.

b. Actual or Imputed Knowledge

1966. Prosecution Witness George Johnson testified that en route to Port Loko, he sent an advance troop to secure a village ahead. Upon arrival there, he observed a number of dead civilians and 'Sheriff' complained to him that 'Cyborg' had amputated and killed civilians in the villages.[3302] The Trial Chamber has found that this village was Manaarma.

1967. George Johnson further testified that on his return to camp after the successful operation to Port Loko, he reported to the Accused Kamara, informing him of the conduct of 'Cyborg'. The Trial Chamber is accordingly satisfied that the Accused Kamara had actual knowledge of the commission of crimes in Manaarma by his subordinates.

c. Failure to prevent or punish

1968. George Johnson stated that the Accused Kamara did not take any disciplinary action in response to his report regarding the killings in Manaarma. Rather, the Accused Kamara radioed Sam Bockarie in Kailahun and recommended that the witness be promoted to Colonel, and Bockarie subsequently endorsed this promotion. George Johnson testified that the Accused Kamara did not take any action.[3303] Trial Chamber is satisfied that the Accused Kamara failed to punish his subordinates for committing unlawful killings in Port Loko District.

d. Conclusion

1969. The Trial Chamber finds that it has been established beyond reasonable doubt that the Accused Kamara is liable as a superior under Article 6(3) for crimes committed in Manaarma in Port Loko District.

[3301] Gibril Massaquoi, Transcript 9 October 2005, pp. 87-102.
[3302] George Johnson, Transcript 16 September 2005, pp. 75-76.
[3303] George Johnson, Transcript 16 September 2005, pp. 78-79.

captured who were conscripted into the AFRC force.[3306] While the Trial Chamber is satisfied that the Operations Commander was under the effective control of the Accused Kamara after the departure of Johnny Paul Koroma from Kono District. The evidence adduced does not establish beyond reasonable doubt whether these crimes were committed prior to the departure of Johnny Paul Koroma or subsequently when the Accused Kamara had effective command over the AFRC commanders who were among the perpetrators.

1975. The Trial Chamber has found that Witnesses DAB-098, TF1-072 and TF1-216, along with an unknown number of other civilians, were captured in approximately March 1998 in Kono District and enslaved in Tombodu. The Trial Chamber is satisfied, from the testimony of these witnesses, that the perpetrators of these crimes were led by AFRC commanders 'Savage' and 'Staff Alhaji', who were under the effective control of the Accused Kamara.

1976. The Trial Chamber accordingly finds the Accused Kamara liable as a superior under Article 6(3) for the crime of enslavement in Kono District.

(ii) Port Loko District

1977. The Trial Chamber has made no findings on Counts 12 and 13. The Trial Chamber notes the evidence of witnesses TF1-282 and TF1-085 who were subjected to sexual slavery in Port Loko District.[3307] However, the evidence adduced does not establish beyond reasonable doubt that the perpetrators of these crimes were troops under the command of the Accused Kamara.

[3305] Role of the Accused, para. 461. *supra.*
[3306] Name admitted under seal: exhibit P-12. *See* Factual Findings. Child Soldiers, para. 1278, *supra.*
[3307] Factual Findings. Outrages on Personal Dignity, paras 1087-1099. 1174-1184, *supra.*

2041. The Trial Chamber is also satisfied on the evidence beyond reasonable doubt that in his role as leader of the attacks, the Accused Kanu knew or should have known of the crimes committed by his troops and that it was within his ability to have prevented such crimes or to have punished his subordinates for committing them, but that he failed to take the necessary and reasonable measures to do so.

2042. The Kanu Defence submits that the Accused Kanu's responsibilities with respect to civilians was 'protective'.[3388] The Trial Chamber rejects this submission. The factual findings demonstrate that the Accused Kanu presided over a system that institutionalised serious abuse of civilians. The characterisation of the Accused Kanu's function as 'protective' is incorrect and unacceptable.

2043. The Trial Chamber thus finds that the Prosecution has established beyond reasonable doubt that the Accused Kanu knew or ought to have known of the commission of crimes by his subordinates in Bombali District and failed to prevent or punish the perpetrators thereof.

c. Conclusion

2044. The Trial Chamber finds that the Prosecution has established beyond reasonable doubt that the Accused Kanu is liable as a superior under Article 6(3) for crimes committed in Bombali District.

7. Freetown and the Western Area

2045. The Trial Chamber had found that AFRC troops engaged in unlawful killings of civilians as charged under Counts 3 through 5[3389] and inflicted sexual and physical violence on civilians as charged under Counts 6 through 9 and 10 respectively.[3390] AFRC troops also abducted civilians and used them as forced labour and used children illegally recruited for military purposes in the attack on Freetown, as charged under Counts 13 and 12 respectively.[3391] Finally, AFRC troops engaged in widespread looting, as charged under Count 14, terrorised the civilian population, as charged under Count 1, and committed collective punishments, as charged under Count 2.[3392]

[3386] TF1-334, Transcript 23 May 2005, p. 58.
[3387] TF1-158, Transcript 26 July, 2005, p. 32.
[3388] Kanu Final Brief, paras 267-279.
[3389] Factual Findings, Unlawful Killings, para. 951, *supra*.
[3390] Factual Findings, Sexual Violence, para. 1243, *supra*, Physical Violence, para. 1170, *supra*.
[3391] Factual Findings, Enslavement, para. 1389, *supra*, Child Soldiers, para. 1278, *supra*.
[3392] Factual Findings, Pillage, para. 1429, *supra*, Acts of Terror and Collective Punishments, para. 1609, *supra*.

2048. The Trial Chamber has found that AFRC troops killed an unknown number of civilians at Fourah Bay in retaliation for the alleged murder of a soldier during the 1999 attack on Freetown.[3401] While witness TF1-334 testified that the Accused Kanu "partook" in the attack, the witness does not further clarify the manner of his participation.[3402]

2049. The Trial Chamber has found that this evidence does not establish that the Accused Kanu personally killed any civilians.[3403]

ii. Kissy Road: "Demonstration" of an amputation to the troops

2050. The Trial Chamber has found that the Accused Kanu amputated a civilian near Kissy Old Road during the 6 January 1999 invasion in order to "demonstrate" to his troops how best to carry out amputations.[3404] He explained that there were two types of amputation possible, one called a long sleeve, meaning an amputation of the arms, and the other a short sleeve, meaning an amputation of the arm up to the bicep.[3405] The Indictment does not provide any of the particulars of the incident and is therefore defective in this regard.

2051. The Trial Chamber must determine whether this defect in the Indictment was cured by clear, timely and consistent notice to the Kanu Defence. The Prosecution Supplemental Pre-Trial Brief and the Prosecution's Opening Statements do not refer to this incident. Nevertheless, the Kanu Defence did not object to the evidence when led and in fact cross-examined the witness on this specific incident during trial. The Trial Chamber therefore finds that the failure to give notice did not materially impair the ability of the Kanu Defence to prepare its case.

2052. The Trial Chamber accordingly finds the Accused Kanu individually criminally responsible for committing an act of physical violence.

iii. Upgun: "Demonstration" of an amputation on a civilian

2053. The Trial Chamber has found that subsequently the Accused Kanu demonstrated how to perform amputations on two other civilians at Upgun during the retreat from Freetown in January

[3399] Kanu Final Brief, paras 420-421.
[3400] Kanu Final Brief, paras 422-424.
[3401] TF1-334, Transcript 14 June 2005, pp. 66-67.
[3402] Factual Findings, Unlawful Killings, para 919, *supra*.
[3403] Factual Findings, Unlawful Killings, para 926, *supra*.
[3404] Factual Findings, Physical Violence, para 1230, *supra*; TF1-184, Transcript 27 September 2005, pp. 72-74.
[3405] TF1-184, Transcript 27 September 2005, p. 74.

1999.[3406] The Trial Chamber is satisfied that this is a separate incident to the act of physical violence described above. The Indictment does not provide any of the particulars of the incident and is therefore defective in this regard.

2054. The Trial Chamber must determine whether this defect in the Indictment was cured by clear, timely and consistent notice to the Brima Defence. The Prosecution Supplemental Pre-Trial Brief and the Prosecution's Opening Statements do not refer to this incident. The Trial Chamber observes that the relevant information did not come into the Prosecution's possession until March or April 2005, and that on 22 April 2005 it disclosed a statement to the defence in which the witness said that

> Whilst we were at Upgun, 55 came with a commander, Major Mines and Captain Kabila and some people were amputated. 55 demonstrated by amputating two people. From then on the amputations started.[3407]

2055. Thus, the Defence was not put on notice of this allegation until over one month after the trial commenced. The Trial Chamber does not consider that this constitutes timely notice. Nevertheless, the Kanu Defence did not object to the evidence when led and in fact cross-examined the witness on this specific incident during trial. The Trial Chamber therefore finds that the failure to give timely notice did not materially impair the ability of the Kanu Defence to prepare its case.

2056. The Trial Chamber accordingly finds the Accused Kanu individually criminally responsible for committing an act of physical violence.

iv. State House: Looting of vehicles

2057. Witness Gibril Massaquoi testified that vehicles were looted by AFRC troops in Freetown and that the Accused Kanu arrived at State House with a stolen vehicle during the 6 January 1999 Freetown invasion.[3408] The Trial Chamber is satisfied beyond a reasonable doubt on this evidence that the Accused Kanu personally looted at least one vehicle in Freetown. The Trial Chamber accordingly finds the Accused Kanu individually criminally responsible for committing an act of pillage.

b. Ordering

[3406] TF1-334, Transcript 14 June 2005, pp. 68-70.
[3407] Statement of witness TF1-334 dated 16 March 2005-20 April 2005, CMS p. 7880 [confidential].
[3408] Gibril Massaquoi, Transcript 7 October 2005, p. 126.

i. Order at State House to kill captive Nigerian ECOMOG soldiers

2058. The Trial Chamber found that the Accused Brima ordered the execution of fourteen to sixteen captive ECOMOG soldiers at State House, and that the Accused Kanu then took the soldiers outside, killed one ECOMOG soldier himself, and ordered his soldiers to execute the remaining captives. The Trial Chamber is satisfied that the executions were carried out[3409] and that the Accused Kanu ordered the commission of this crime in full awareness that the crime was likely to be committed.

ii. Order to kill civilians at a mosque in Kissy

2059. The Trial Chamber found that the Accused Kanu reissued an order given by the Accused Brima on the day after the troops withdrew from Kissy Mental Home that an unknown number of civilians at a mosque were to be killed. The Accused Kanu is not relieved of criminal responsibility for ordering this massacre simply because he was reissuing an order originally made by his commander, the Accused Brima. The Trial Chamber has found that the executions were carried out.[3410] The Trial Chamber is further satisfied that the Accused Kanu ordered the commission of this crime in full awareness that the crime was likely to be committed.

iii. Order to commit amputations in Eastern Freetown

2060. The Trial Chamber has found that when AFRC troops arrived at Kissy Mental Home, during the retreat from Freetown, the Accused Kanu ordered his fighters to go to Eastern Freetown and amputate 200 civilians and then send them to Ferry Junction. The witness George Johnson was present when the order was given, and saw the troops leave towards Eastern Freetown and return with severed arms and blood covered machetes.[3411] The Trial Chamber is satisfied that the amputations were carried out and that the Accused Kanu ordered the commission of this crime in full awareness that the crime was likely to be committed.

2061. The Trial Chamber has found that when the troops reached Upgun during the retreat from Freetown, the Accused Kanu told his commanders, including Col. Mines and Kabila, that it was time for amputations to begin, and that he would begin by demonstrating. Later two civilians were captured and the Accused amputated their arms. The Accused explained that he had begun the

[3409] Gibril Massaquoi, Transcript 7 October 2005, pp. 115-116.
[3410] Factual Findings, Unlawful Killings, para 936, *supra*; Gibril Massaquoi, Transcript 7 October 2005, pp. 115-116.
[3411] George Johnson, Transcript 16 September 2005, p. 53-54.

amputations as an example to his troops of how to proceed. He then told the victims that they should go to President Kabbah to ask for new hands. Later that day, ten other civilians were captured and amputated by Kabila and Mines in Kanu's presence. Mines repeated Kanu's instruction to the victims to seek new hands from President Kabbah.[3412] The Trial Chamber recalls its finding that the Accused is liable for committing two amputations at Upgun. It additionally finds that he ordered the commission of further amputations which were then carried out. The Trial Chamber is satisfied that the Accused Kanu ordered the commission of this crime in full awareness that the amputations were likely to be committed. The Trial Chamber therefore finds that the Prosecution has proved this particular mode of individual criminal responsibility beyond reasonable doubt.

c. Planning

2062. The Prosecution has not adduced any evidence that the Accused Kanu planned any crimes under Counts 3 through 6, 10 through 11 and 14 in Freetown and the Western Area. The Trial Chamber finds that the Prosecution has not proved this mode of individual criminal responsibility against the Accused Kanu for any crimes committed under those Counts. The Accused Kanu's criminal responsibility for Counts 9, 12 and 13, which involve crimes of a continuing nature spanning various districts, will be discussed below.[3413]

d. Instigating

2063. The Trial Chamber recalls that on the eve of the 6 January 1999 invasion of Freetown, the Accused Brima chaired a meeting at which the Accused Kanu reminded the AFRC troops present about orders to burn down police stations and kill "targeted persons"/collaborators.[3414] The Trial Chamber has found that a number of civilians were subsequently killed in Freetown. The Trial Chamber is satisfied that the Accused Kanu prompted the perpetrators to kill civilians in Freetown. The Trial Chamber therefore finds that the Prosecution has proved this mode of liability against the Accused Kanu.

e. Otherwise aiding and abetting

2064. The Prosecution has not adduced any evidence that the Accused Kanu aided and abetted any crimes in Freetown and the Western Area. The Trial Chamber finds that the Prosecution has not

[3412] TF1-334, Transcript 14 June 2005, 68-71.
[3413] Responsibility of the Accused, Kanu, para. 2095, *infra*.

2079. There is no evidence that the Accused Kanu took any measures to prevent the troops under his control in Freetown from committing crimes against or punish the perpetrators of such crimes.

d. Conclusion

2080. The Trial Chamber finds that the Prosecution has established beyond reasonable doubt that the Accused Kanu is liable as a superior under Article 6(3) for crimes committed in the Western Area.

8. Port Loko District

2081. The Trial Chamber has found that AFRC/RUF troops unlawfully killed a number of civilians in Port Loko District as charged under Counts 4 through 5.[3430] In addition, AFRC troops held persons in sexual slavery as charged under Count 9.[3431] AFRC/RUF troops used abducted civilians for forced labour, as charged under Count 13.

(a) Responsibility of the Accused Kanu Under Article 6(1) of the Statute

(i) Submissions

2082. In its Final Trial Brief, the Prosecution argues only that the Accused in Kanu is liable for the crimes committed in Port Loko District as a principal in a joint criminal enterprise.[3432]

2083. The Kanu Defence makes no specific submissions regarding the alleged liability of the Accused for crimes committed in Port Loko District in its Final Brief.

(ii) Findings

2084. The Prosecution has not adduced any that the Accused Kanu individually committed, ordered, planned, instigated, or otherwise aided and abetted any of the crimes that occurred in Port Loko District. The Trial Chamber finds that the Prosecution has not proved any of these modes of individual criminal responsibility against the Accused Kanu for the crimes committed in Port Loko District.

[3430] Factual Findings, Unlawful Killings, para. 965, *supra*.
[3431] Factual Findings, Outrages upon Personal Dignity, para. 1187, *supra*.
[3432] Prosecution Final Brief, para. 1755.

Chamber will consider the evidence in order to determine whether the Accused Kanu substantially contributed to the planning of these crimes.

2091. The Trial Chamber has found that the Accused Kanu was Chief of Staff and commander in charge of abducted civilians in Bombali District and the Western Area.[3435] As the AFRC troops depended heavily on these civilians for a multitude of tasks, the Accused Kanu's position was a critical one.

2092. In Bombali District the Accused Kanu designed and implemented a system to control abducted girls and women. All abducted women and girls were placed in the custody of the Accused. Any soldier who wanted an abducted girl or woman to be his "wife" had to "sign for her". The Accused informed his fighters that any problems with the women were to be immediately reported back to him, and that he would then monitor the situation.[3436] The Accused issued a disciplinary instruction ordering that any woman caught with another woman's husband should be beaten and locked in a box.[3437] In one instance, Witness TF1-334 observed a Staff Sergeant reporting to Kanu that he suspected his "wife" of misbehaving and the Accused Kanu called the woman before him and found her guilty. He ordered that she be sent to the Mammy Queen, be given a dozen lashes and be locked in the box.[3438]

2093. The Trial Chamber has also found that the Accused Kanu was in charge of the forced military training of civilians at Camp Rosos. Among those forced to undergo training were children below the age of 15 years old.[3439]

2094. The Trial Chamber has found that the Accused Kanu continued in his positions as Chief of Staff and commander in charge of civilians in Freetown and the Western Area. The Trial Chamber has found that the Accused Kanu had approximately ten child combatants in his charge in Benguema following the retreat from Freetown.[3440]

2095. The Trial Chamber is satisfied that the Accused Kanu planned, organised and implemented the system to abduct and enslave civilians which was committed by AFRC troops in Bombali and Western Area. It is further satisfied that the Accused Kanu had the direct intent to establish and implement the system of exploitation involving the three enslavement crimes, namely, sexual

[3435] Role of the Accused, para 535, *supra*.
[3436] TF1-334, Transcript 23 May 2005, pp. 75-77.
[3437] TF1-334, Transcript 24 May 2005, pp. 63-65.
[3438] TF1-334, Transcript 24 May 2005, pp. 67-69.
[3439] TF1-334, Transcript 24 May 2005, pp. 24-25.

slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour.

(a) Responsibility under Article 6(1) for Count 9 (Sexual Slavery)

2096. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Kanu is individually criminally responsible under Article 6(1) of the Statute for planning the commission of the crime of sexual slavery in Bombali District and the Western Area.

(b) Responsibility under Article 6(1) for Count 12 (Child Soldiers)

2097. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Kanu is individually criminally responsible under Article 6(1) of the Statute for planning the commission of conscription of children under the age of 15 into the armed group or using them to participate actively in hostilities in Bombali District and the Western Area.

(c) Responsibility under Article 6(1) for Count 13 (Enslavement)

2098. On the basis of the foregoing, the Trial Chamber is satisfied beyond reasonable doubt that the Accused Kanu is individually criminally responsible under Article 6(1) of the Statute for enslavement in Bombali District and the Western Area.

[3440] Factual Findings, Child Soldiers, para 1263; TF1-227, Transcript 8 April 2005, pp. 95-96; 11 April 2005, pp. 2-3, 16, 21.

2854

(624) SCSL-04-16-T (22984 — 28019)

22984

SPECIAL COURT FOR SIERRA LEONE

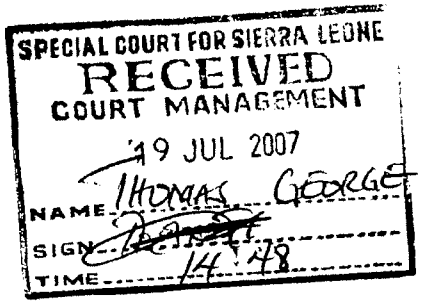
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Date: 19 July 2007

Case No.: SCSL-04-16-T



PROSECUTOR

Against

Alex Tamba BRIMA
Brima Bazzy KAMARA
Santigie Borbor KANU

SENTENCING JUDGEMENT

Office of the Prosecutor:
Christopher Staker
Karim Agha
Chile Eboe-Osuji
Anne Althaus

Defence Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Agibola E. Manly-Spain
Carry Knoops

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Leonean practice can only be considered as a guide but is not binding on the Trial Chamber.[57] It further refers to the *Serushago* Trial Chamber's assessment of mitigating circumstances in that case,[58] and cites a number of cases before the ICTY and ICTR in which high ranking officials convicted on numerous counts were given lighter sentences than those proposed by the Prosecutor in the instant case.[59]

30. The Kamara Defence notes that the Kamara was convicted of having ordered the killing of five girls in Karina, Bombali District, and submits that the average sentencing period at the ICTR for the offences of murder and extermination has been between ten and fifteen years.[60] It further argues that Sierra Leonean practice on sentencing for murder is not binding on the Trial Chamber.[61]

31. The Kanu Defence proposes that the Trial Chamber should take into consideration the sentencing practice of the ICTY, as it is a basis for ICTR practice, and may provide the Trial Chamber with additional guidance.[62] The Prosecution would appear to agree as it provided a chart on ICTY sentencing practice in Annex B of its Sentencing Brief. The Kanu Defence contends that in Sierra Leone, a sentence of life imprisonment can be imposed for a range of crimes including "rape, burglary and gilding coinage"[63] while the ICTR has only imposed life sentences on individuals convicted of the crime of genocide.[64] In oral arguments, the Kanu Defence further submitted that Sierra Leonean sentencing practice is only relevant for convictions under Article 5 of the Statute which deals with crimes under Sierra Leonean law, which crimes were not charged in the indictment.[65]

B. Deliberations

(a) Sentencing Practice in Sierra Leone

32. Article 19(1) states that as appropriate, the Trial Chamber shall have recourse to the practice regarding prison sentences in the national courts of Sierra Leone as and when appropriate. This does not oblige the Trial Chamber to conform to that practice, but rather to take into account

[57] Brima Sentencing Brief, paras 10 and 11.
[58] Brima Sentencing Brief, para. 42.
[59] Brima Sentencing Brief, paras 50-56 citing the cases: *Blaskić* Trial Judgement, para. 808; *Prosecutor v. Mladen Naletilić (aka "Tuta") and Vinko Martinović (aka "Štela")*, Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić* Trial Judgement"), para. 74 before the ICTY and *Akayesu* before the ICTR.
[60] Kamara Sentencing Brief, paras 22-28. citing *Imanishimwe, Akayesu, Ntakirutimana, Muvunyi, Serushago* at the ICTR and *Kordić* at the ICTY.
[61] Kamara Sentencing Brief, para. 29.
[62] Kanu Sentencing Brief, para. 57.
[63] Kanu Sentencing Brief para. 72.
[64] Kanu Sentencing Brief, para. 72.
[65] Transcipt, 16 July 2007, p. 76.

that practice as and when appropriate.[66] The Trial Chamber finds that it is not appropriate to adopt the practice in the present case since none of the Accused was indicted for, nor convicted of, offences under Article 5 of the Statute.

(b) Sentencing Practice at other International Tribunals

33. Article 19(1) of the Statute provides that the Trial Chamber shall, where appropriate, have recourse to the practice regarding prison sentences in the ICTR in determining the terms of imprisonment. The Trial Chamber will also consider the sentencing practice of the ICTY as its statutory provisions are analogous to those of the Special Court and the ICTR. The Trial Chamber is therefore guided by the sentencing practices at both the ICTR and the ICTY. The Chamber further notes that the pronouncement of global sentences is a well established practice at those tribunals.[67] The mitigating and aggravating factors that the Trial Chamber has considered in the instant case have also been widely considered by the ICTR and ICTY.[68]

V. DETERMINATION OF SENTENCES

34. Brima, Kamara and Kanu have been found responsible for some of the most heinous, brutal and atrocious crimes ever recorded in human history. Innocent civilians – babies, children, men and women of all ages – were murdered by being shot, hacked to death, burned alive, beaten to death. Women and young girls were gang raped to death. Some had their genitals mutilated by the insertion of foreign objects. Sons were forced to rape mothers, brothers were forced to rape sisters. Pregnant women were killed by having their stomachs slit open and the foetus removed merely to settle a bet amongst the troops as to the gender of the foetus. Men were disembowelled and their intestines stretched across a road to form a barrier. Human heads were placed on sticks on either side of the road to mark such barriers. Hacking off the limbs of innocent civilians was commonplace. The victims were babies, young children and men and women of all ages. Some had

[66] See also *Serushago* Appeal Judgement, para. 30; Semanza Appeal Judgement, para. 377.
[67] *Kambanda* Appeal Judgement, para. 113. *Gacumbitsi* Trial Chamber Judgement, para. 356. *Nahimana* Trial Judgement, paras 1105, 1106, 1108. *Muvunyi*, Trial Chamber Judgement, para. 545; Simba Trial Judgement, para. 445.
[68] *Blaskić* Judgement, *supra* note 22, at para. 686 (citing *Čelebići* Appeal Judgement, para. 763); *Jokić* Sentencing Judgement, paras 61-62; *Tadić* Appeal Judgement, paras 55-56; *Vasiljević* Appeal Judgement, paras 172-173; *Vasiljević* Trial Judgement, para. 277; *Kunarac* Appeal Judgement, para. 357; *Todorović* Trial Judgement, para. 57; *Kunarac* Appeal Judgement, para. 356; *Todorović* Sentencing Judgement, para. 65; *Krstić* Trial Judgement, para. 708; *Furundžija* Trial Judgement, para. 281; *Čelebići* Appeal Judgement, paras 736-737; *Jelisic* Appeal Judgement, para. 86; *Kayishema* Appeal Judgement, para. 351; *Krstić* Trial Judgement, paras 711-712; *Krstić* Appeal Judgement, para. 258; *Kunarac* Trial Judgement, para. 867, and *Kunarac* Appeal Judgement, para. 353; *Kunarac et al.* Trial Judgement, para.

one arm amputated, others lost both arms. For those victims who survived an amputation, life was instantly and forever changed into one of dependence. Most were turned into beggars unable to earn any other living and even today cannot perform even the simplest of tasks without the help of others. Children were forcibly taken away from their families, often drugged and used as child soldiers who were trained to kill and commit other brutal crimes against the civilian population. Those child soldiers who survived the war were robbed of a childhood and most of them lost the chance of an education.

35. The Trial Chamber cannot recall any other conflict in the history of warfare in which innocent civilians were subjected to such savage and inhumane treatment.

36. It is against this background that Brima, Kamara and Kanu are sentenced for the crimes of which each of them have been convicted.

A. Alex Tamba Brima

1. Gravity of the Offences

(a) Submissions of the Parties

37. The Prosecution submits that Brima was convicted of crimes which involved a very large number of victims.[69]

38. In relation to the role and participation of Brima in the crimes of which he was convicted, the Prosecution submits that he was "not an unwilling participant" but rather "a primary initiator and aggravator of the violence".[70] Most of the crimes were deliberate, unprovoked, brutal and committed against unarmed civilians including men, women and children, the intention of which was to kill, mutilate, abduct or enslave or otherwise terrorise or collectively punish the civilian population and to shock the international community.[71]

39. The Brima Defence concurs that the crimes for which he was convicted were serious, yet submits that the Trial Chamber must consider the context of guerrilla warfare in determining the

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864, 866; *Kunarac et al.* Appeal Judgement, para. 355; *Furundžija* Trial Judgement, para. 283; *Čelebići* Appeal Judgement, para. 788; *Tadić* Sentencing Judgement, para. 19)

[69] Prosecution Sentencing Brief, paras 78-79; see also Oral Submissions, Transcript 16 July 2007, pp. 19-20.

[70] Prosecution Sentencing Brief, para. 86.

[71] Oral Submissions, Transcript 16 July 2007, p. 19.

extent and gravity of the offences, as well as the difficulty in ascertaining the precise number of victims.[72]

(b) Deliberations

40. The Trial Chamber considers that the crimes for which Brima was convicted were heinous, deliberate, brutal and targeted very large numbers of unarmed civilians and had a catastrophic an irreversible impact on the lives of the victims and their families.

41. Brima was convicted under Article 6(1) and under Article 6(3). Specifically, the Trial Chamber found Brima responsible under Article 6(1) for:

1. committing extermination in Karina, Bombali District;
2. committing the murder of five civilians at State House, Freetown, Western Area;
3. committing the mutilation of one civilian in Freetown, Western Area;
4. ordering the terrorisation of the civilian population in:
    a. Karina, Bombali District;
    b. Rosos, Bombali District; and
    c. Freetown, Western Area;
5. ordering the collective punishment of the civilian population in Freetown, Western Area;
6. ordering and planning the recruitment and use of child soldiers in:
    a. Freetown, Western Area; and
    b. Rosos, Bombali District;
7. ordering the murders of civilians at:
    a. Mateboi, Bombali District;
    b. Gbendembu, Bombali District;
    c. State House, Freetown, Western Area;
    d. Kissy Mental Home, Freetown, Western Area; and
    e. Rogbalan Mosque, Freetown, Western Area;
8. ordering and aiding and abetting the murders of civilians in Fourah Bay, Freetown, Western Area;
9. ordering and planning the enslavement of civilians in Freetown, Western Area;
10. ordering the looting of civilian property; Freetown, Western Area;

[72] Brima Defence Sentencing Brief, para. 12.

11. planning the commission of outrages upon personal dignity in the form of sexual slavery in Bombali District and the Western Area;
12. planning the enslavement of civilians in Bombali District.

42. Brima was further found liable under Article 6(3) for crimes committed by his subordinates throughout Bombali District and Freetown and the Western Area.

43. With regards to the crimes for which Brima is responsible under Article 6(1), the Trial Chamber recalls its factual findings that Brima was the primary perpetrator of the murders of at least 12 civilians in a mosque during the attack on Karina,[73] a fact indicative of the particular gravity of this offence.

44. With regards to the recruitment and use of child soldiers, the Trial Chamber recalls that the young victims were abducted from their families, often in situations of extreme violence, often drugged and forcibly trained to kill and to commit crimes against innocent civilians. These children were robbed of their childhood and many lost the chance of an education.

45. With regards to the crimes for which Brima is responsible under Article 6(3) the Trial Chamber has examined the gravity of the crimes committed by subordinates under his effective control. Many of these crimes, detailed in the Trial Chamber's Factual Findings are of a particularly heinous nature. The Trial Chamber recalls in particular that in Karina, Brima's subordinates unlawfully killed children by throwing them into the flames of burning houses.[74] In Rosos, five of Brima's subordinates beat and orally and vaginally gang-raped a civilian[75] and another four raped a civilian so brutally that she was in great pain, could not stand up and testified that "it seem[ed] as though all my guts were coming out".[76] With regards to the sexual crimes in general, the Trial Chamber notes that many of the victims were particularly young and vulnerable, were held in captivity for protracted periods, often coupled with unwanted pregnancy/miscarriages and endured social stigma.

46. The Trial Chamber considers the crime of mutilation was particularly grotesque and malicious. Victims who had their limbs hacked off not only endured extreme pain and suffering, if they survived, but lost their mobility and capacity to earn a living or even to undertake simple daily tasks. They have been rendered dependent on others for the rest of their lives.

[73] Judgement, para. 1709.
[74] Judgement, para. 888.
[75] Judgement, paras 1031-1032.
[76] Judgement, para. 1035.

B. Ibrahim Bazzy Kamara

1. Gravity of the Offences

(a) Submissions of Parties

68. The Prosecution submits that on account of the Trial Chamber's broad findings of Kamara's liability under Article 6(3), the crimes for which he was convicted involved a very large number of victims, particularly in crimes sites such as Tombodu in Kono District.[98]

69. The Kamara Defence submits that Kamara's convictions under Article 6(1) of the Statute were based on one incident of ordering the killings of five girls in Bombali District and two incidents of aiding and abetting the commission of various crimes in Freetown and the Western Area and, while not denying the seriousness of the crimes for which Kamara has been convicted, submits this should be a relevant factor in determining the gravity of the offences.[99]

(b) Deliberations

70. The Trial Chamber found Kamara responsible under Article 6(1) for:

1. ordering the murder of five civilians in Karina, Bombali District;
2. planning the abduction and use of child soldiers in Bombali District and the Western Area;
3. planning the commission of outrages upon personal dignity in the form of sexual slavery in Bombali District and the Western Area;
4. planning the enslavement of civilians in Bombali and Western Area;
5. aiding and abetting the murder/extermination of civilians at Fourah Bay, Freetown, Western Area;
6. aiding and abetting the mutilation of civilians in Freetown, Western Area.

71. Kamara was further found liable under Article 6(3) for crimes committed by his subordinates at Tombodu, Kono District and throughout Bombali District, the Western Area and Port Loko District.

72. The crimes for which Kamara was convicted were heinous, deliberate, brutal and targeted very large number of unarmed civilians and had a catastrophic and irreversible impact on the lives of the victims and their families.

[98] Prosecution Sentencing Brief, paras 110-113.
[99] Kamara Sentencing Brief, paras 16-19, 22.

1. the vulnerability of many of the civilian victims, especially young children and pregnant women;[108]

2. the heinous nature of the crimes, including the burning alive of civilians in Karina and Tombodu;[109] and

3. the fact that Kamara was a senior government official prior to the commission of the crimes, and a senior commander at the time of the commission of the crimes.[110] In the Prosecution's view, the failure of Kamara to fulfil his duty to prevent or punish "shows a total disregard for the sanctity for human life and dignity".[111]

83. The Kamara Defence contends that Kamara was a "quiet, calm, non-violent and often passive and unrecognised "participant" in the crimes rather than an active and direct participant like Brima.[112] The Kamara Defence accordingly submits that Brima and Kamara should not be viewed as equally liable for the purposes of sentencing.[113]

84. The Kamara Defence submits that Kamara's position as a senior government official prior to the commission of the crimes cannot be used as an aggravating circumstance.[114] The Kamara Defence further argues that, although the offences for which Kamara has been convicted are serious, "they occurred in situations in which [he] lacked clear sufficient command and control".[115]

(b) Deliberations

85. The Trial Chamber agrees that all of the factors submitted by the Prosecution are aggravating factors. Moreover, the Trial Chamber has given consideration to the vulnerability of some of the victims of the crimes for which Kamara was convicted with regards to the gravity of the offence and will not consider this factor additionally as an aggravating circumstance.

86. The Trial Chamber also finds that the killing of civilians deliberately locked in their homes and set ablaze, as was ordered by Kamara and carried out by his subordinates, is a violent and cruel circumstance of the offence amounting to an aggravating factor. Further, this particular incident

[108] Prosecution Sentencing Brief, para. 122.
[109] Prosecution Sentencing Brief, para. 124.
[110] Prosecution Sentencing Brief, paras 126-127.
[111] Prosecution Sentencing Brief, para. 125.
[112] Kamara Sentencing Brief, para. 40; see also Oral Submissions, Transcript 16 July 2007, p. 54.
[113] Kamara Sentencing Brief, paras 39-41; see also Oral Submissions, Transcript 16 July 2007, p. 54.
[114] Kamara Sentencing Brief, para. 47.
[115] Kamara Sentencing Brief, para. 44.

shows that Kamara was a violent and active participant in the crimes, contrary to the Defence assertions.

87. The Trial Chamber further finds that the prolonged period of time over which the enslavement crimes were committed, the vulnerability of the victims and the targeting of places of worship or sanctuary are all aggravating factors.

88. The Trial Chamber does not consider Kamara's position in the AFRC government prior to the commission of the offences to be an aggravating factor. However, the Trial Chamber considers his position of command authority in relation to the crimes for which he has been found liable under Article 6(1) of the Statute to be an aggravating factor.

4. Mitigating Circumstances

(a) Submissions of Parties

89. The Prosecution submits that no mitigating circumstances exist in respect of Kamara, as he did not at any time cooperate with the Prosecution or express any remorse and there is no evidence that he acted under duress.[116]

90. The Kamara Defence submits that mitigating factors in the case of Kamara include the absence of a prior criminal record; the stressful environment prevailing at the time of the offences; and his responsibilities as an income earner for his large family.[117]

(b) Deliberations

91. The Trial Chamber finds that there are no mitigating circumstances in Kamara's case. In particular, although Kamara chose to address the Trial Chamber at the sentencing hearing, he failed to express any genuine remorse whatsoever for his crimes.[118]

[116] Prosecution Sentencing Brief, paras 128-129.
[117] Kamara Sentencing Brief, paras 32, 53-55.
[118] Oral Submissions, Transcript 16 July 2007, p. 59.

C. Santigie Borbor Kanu

1. Gravity of the Offences

(a) Submissions of Parties

92. The Prosecution submits that the Accused Kanu was criminally responsible under Article 6(1) for crimes involving a number of victims and that the extent of his liability under Article 6(3) is particularly significant as he was found to be responsible for all crimes committed in Bombali and the Western Area.[119]

93. The Kanu Defence submits that the RUF was responsible for the bulk of human rights violations in Sierra Leone and this "historical broader picture [...] should be reflected in the sentencing".[120]

(b) Deliberations

94. The Trial Chamber found Kanu responsible under Article 6(1) for:

i. committing the mutilation of civilians in:
   a. Kissy, Freetown; and
   b. Upgun, Freetown;
ii. committing the looting of civilian property in Freetown;
iii. ordering the murder of persons *hors de combat* at State House in Freetown;
iv. ordering the murder of civilians at Rogbalan Mosque in Freetown;
v. ordering the mutilations of civilians at:
   a. Ferry Junction, Freetown; and
   b. Upgun, Freetown;
vi. planning the abduction and use of child soldiers in Bombali District and the Western Area;
vii. planning the commission of outrages upon personal dignity in the form of sexual slavery in Bombali District and the Western Area;
viii. planning the enslavement of civilians on numerous occasions in Bombali District and the Western Area;
ix. instigating the murder of civilians in Freetown; and

[119] Prosecution Sentencing Brief, paras 133-135.
[120] Kanu Sentencing Brief, paras 85-86.

x. aiding and abetting the murder/extermination of civilians at Fourah Bay in Freetown, and the Western Area.

95. Kanu was further found liable under Article 6(3) for crimes committed by his subordinates throughout Bombali District and Freetown and the Western Area.

96. With regards to the crimes for which Kanu is responsible under Article 6(3) the Trial Chamber has examined the gravity of the crimes committed by subordinates under his effective control. Many of these crimes, detailed in the Trial Chamber's Factual Findings are of a particularly heinous nature. The Trial Chamber recalls in particular that in Karina, Kanu's subordinates unlawfully killed children by throwing them into the flames of burning houses.[121] In Rosos, five of Kanu's subordinates beat and orally and vaginally gang-raped a civilian[122] and another four raped a civilian so brutally that she was in great pain, could not stand up and testified that "it seem[ed] as though all my guts were coming out"[123] With regards to the sexual crimes in general, the Trial Chamber notes that many of the victims were particularly young and vulnerable, were held in captivity for protracted periods often coupled with unwanted pregnancy/miscarriages and endured social stigma.

97. The Trial Chamber considers the crime of mutilation was particularly grotesque and malicious. Victims who had their limbs hacked off not only endured extreme pain and suffering if they survived, but lost their mobility and capacity to earn a living or even to undertake simple daily tasks.

98. The Trial Chamber dismisses the Defence arguments that the RUF was responsible for the bulk of human rights violations in Sierra Leone and finds that this allegation cannot be a mitigating factor.

99. The Trial Chamber found that Kanu was a direct participant in unlawful killings, mutilations, the recruitment and use of the child soldiers, outrages on personal dignity, and enslavement.

[121] Judgement, para. 888.
[122] Judgement,paras 1031-1032.
[123] Judgement, para. 1035.

x. aiding and abetting the murder/extermination of civilians at Fourah Bay in Freetown, and the Western Area.

95. Kanu was further found liable under Article 6(3) for crimes committed by his subordinates throughout Bombali District and Freetown and the Western Area.

96. With regards to the crimes for which Kanu is responsible under Article 6(3) the Trial Chamber has examined the gravity of the crimes committed by subordinates under his effective control. Many of these crimes, detailed in the Trial Chamber's Factual Findings are of a particularly heinous nature. The Trial Chamber recalls in particular that in Karina, Kanu's subordinates unlawfully killed children by throwing them into the flames of burning houses.[121] In Rosos, five of Kanu's subordinates beat and orally and vaginally gang-raped a civilian[122] and another four raped a civilian so brutally that she was in great pain, could not stand up and testified that "it seem[ed] as though all my guts were coming out"[123] With regards to the sexual crimes in general, the Trial Chamber notes that many of the victims were particularly young and vulnerable, were held in captivity for protracted periods often coupled with unwanted pregnancy/miscarriages and endured social stigma.

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98. The Trial Chamber dismisses the Defence arguments that the RUF was responsible for the bulk of human rights violations in Sierra Leone and finds that this allegation cannot be a mitigating factor.

99. The Trial Chamber found that Kanu was a direct participant in unlawful killings, mutilations, the recruitment and use of the child soldiers, outrages on personal dignity, and enslavement.

[121] Judgement, para. 888.
[122] Judgement,paras 1031-1032.
[123] Judgement, para. 1035.

VI. DISPOSITION

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER UNANIMOUSLY

SENTENCES Alex Tamba Brima to a **SINGLE TERM OF IMPRISONMENT OF FIFTY YEARS** for all the Counts on which he has been found **GUILTY**. Credit shall be given to him for any period during which he was detained in custody pending this trial;

SENTENCES Ibrahim Bazzy Kamara to **SINGLE TERM OF IMPRISONMENT OF FORTY FIVE YEARS** for all the Counts on which he has been found **GUILTY**. Credit shall be given to him for any period during which he was detained in custody pending this trial;

SENTENCES Santigie Borbor Kanu to **SINGLE TERM OF IMPRISONMENT OF FIFTY YEARS** for all the Counts on which he has been found **GUILTY**. Credit shall be given to him for any period during which he was detained in custody pending this trial.

Done in Freetown, Sierra Leone, this 19th day of July 2007.

Justice Richard Lussick

Justice Julia Sebutinde
Presiding Judge

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER II

Before: Judge Teresa Doherty, Presiding Judge
Judge Richard Brunt Lussick
Judge Julia Sebutinde

Registrar: Robin Vincent

Date: 5 August 2005

PROSECUTOR Against **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-PT)

DECISION ON BRIMA – KAMARA APPLICATION FOR LEAVE TO APPEAL FROM DECISION ON THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS AS LEAD COUNSEL

First Respondent:
Registrar

Second Respondent:
Principal Defender

Defence Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
Pa Momo Fofanah

SPECIAL COURT FOR SIERRA LEONE
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NAME Neil Gibson
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TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Judge Teresa Doherty, presiding, Judge Richard Lussick and Judge Julia Sebutinde;

SEISED of the Brima-Kamara Application For Leave to Appeal from Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by the Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005, filed 14 July 2005 ("the Motion");

CONSIDERING the Response, filed on 22 July 2005 by the Principal Defender ("the Second Respondent's Response");

CONSIDERING the Response, filed by the Registrar on 22 July 2005 ("the First Respondent's Response");

CONSIDERING the Defence's consolidated Reply to both Responses's ("the Reply");

BEING MINDFUL of the "Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005", dated 9 June 2005 ("the impugned Decision");

BEING MINDFUL FURTHER of the "Dissenting Opinion of the Hon. Justice Julia Sebutinde from the Majority Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, and Decision on Cross Motion by the Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005", dated 11 July 2005 ("the dissenting Opinion");

NOTING that Rule 73(B) of the Rules provides that

> *Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as stay of proceedings unless the Trial Chamber so orders.*

NOTING therefore the general rule that decisions are without interlocutory appeal, and that only if the conjunctive conditions of exceptional circumstances and irreparable prejudice to the accused in Rule 73(B) are satisfied, a Trial Chamber may grant leave to interlocutory appeal;

CONSIDERING FURTHER that the Appeals Chamber has recently ruled that

> *"In this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgment will be corrected in due course by this Chamber on appeal".*[1]

NOTING therefore that the rationale behind the restrictive nature of Rule 73(B) is that the proceedings before the Special Court should not be heavily encumbered and consequently unduly delayed by interlocutory appeals;[2]

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[1] *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

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NOTING AND APPLYING therefore the restrictive application of Rule 73(B) as established by Trial Chamber I stating that

> *[Rule 73(B)] involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs of the test are clearly conjunctive, not disjunctive: in other words, they must both be satisfied;*[3]

CONSIDERING HOWEVER that in the present case the very nature of the application satisfies the conjunctive test of "exceptional circumstances" and "irreparable prejudice" by Rule 73 (B) since it concerns a fundamental right enshrined in Article 17(4) of the Statute;

FOR THE FORGOING REASONS

TRIAL CHAMBER ALLOWS THE APPLICATION and grants the Defence leave to file an interlocutory appeal against the impugned Decision.

Justice Lussick will give a Separate and Concurring Opinion and Justice Doherty appends a personal comment to this Decision.

Done at Freetown, Sierra Leone, this 5th day of August 2005.

Justice Richard Lussick | Justice Teresa Doherty, Presiding Judge | Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

[3] *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004.
[3] *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004; *Prosecutor v. Brima et al.*, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004.

COMMENT OF JUSTICE DOHERTY

Having read the Dissenting Opinion of the Hon. Justice Sebutinde from the Majority Decision on the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, and Decision on Cross-Motion by the Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005 [hereinafter "Dissenting Opinion"] I consider some facts stated are incorrect or misleading. I was not given a copy of the Dissenting Decision prior to publication. I consider Rule 29 of the Rules of Procedure and Evidence does not permit any Judge to publish or discuss matters that have been discussed in Chambers however since several matters have been brought into the public arena by the publication of both the Dissenting Opinion and the interoffice memorandum I consider I am entitled to put the following before the Appeal Chamber:

1. At paragraph 29 of the Dissenting Opinion Her Honour states that "Before Ms. Carlton-Hanciles had an opportunity to disclose the contents of a document the Presiding Judge interjected..." thereby implying that this was a sole decision of the Presiding Judge. This implication is erroneous. The document, a copy letter from the accused persons, was given to each of the judges immediately before court was to open on 16 May 2005. We discussed that document, its implications on the ruling of 12 May and the attitude we should adopt. Hon. Justice Sebutinde took a very active part in that discussion and was one of the majority who decided the document should not be read. My notes show three issues were identified by the judges and those three issues are incorporated into the extempore ruling.

2. At paragraph 29 there is a reference to a copy of Ms. Elizabeth Nahamya minute of 17 May 2005 being copied to the Judges. That memorandum was not received by the Judges of Trial Chamber II until the Registrar's annotated copy was given on 18 May 2005 and we had no opportunity to discuss same prior to meeting the Registrar.

3. On 18 May 2005 the Registrar came to Trial Chamber II Chambers at the invitation of the Judges to discuss a matter entirely unrelated to the issues therein. At the end of our discussions he raised the issue of Ms. Nahamya's minute. There was an active discussion and Hon. Justice Sebutinde was there throughout that discussion. The matters recorded in my minute are an ad verbatim record of statements made. Justice Sebutinde did not speak on the matter, neither did she dispute nor resile from the discussions. The Registrar asked for written confirmation the same day as he was leaving for New York.

4. It is correct that I telephoned each of the Judges and read out the draft to each of my judicial colleagues. It was only then that Justice Sebutinde stated she had reservations. I asked her to let me have her views as the Registrar needed a response that day. I waited, sent, then retrieved the minute pending Justice Sebutinde's input. When none was received I again sent the minute prior to Registrar's departure. I dispute the detail Justice Sebutinde gives in paragraph 2 of interoffice memorandum. The detailed memorandum referred to paragraph 30 of the Dissenting Opinion was not received until 19 May 2005 and it was not sent solely to me as Presiding Judge but also disseminated to others. It is correct that, as stated at paragraph 31 that I did not distinguish Justice Sebutinde's views. I did not have those views.

5. I stress that the decision of 16 May 2005 and discussion of 18 May 2005 involved all three judges of the Trial Chamber. We had no knowledge of the pending motion filed on 24 May 2005 and cannot be said to have contributed to controversy as implied in paragraph 41.

6. It is correct I gave Justice Sebutinde a copy of the minute to the Registrar when she asked me for it. I did so stating twice it was a chambers matter subject to Rule 29 and could not be published.

Done at Freetown, Sierra Leone, this 5th day of August 2005.

Justice Teresa Doherty
Presiding Judge

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PROSECUTOR v ALEX TAMBA BRIMA & ORS - DISSENTING OPINION OF THE HON. JUSTICE JULIA SEBUTINDE FROM THE MAJORITY DECISION ON THE EXTREMELY URGENT CONFIDENTIAL JOINT MOTION FOR THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS AS LEAD COUNSEL FOR ALEX TAMBA BRIMA AND BRIMA BAZZY KAMARA, AND - Case No.SCSL-04-16-T [2005] SCSL 115 (11 July 2005)

O

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TRIAL CHAMBER II

Before:	Justice Teresa Doherty, Presiding Judge Justice Richard Lussick Justice Julia Sebutinde	
Registrar:	Robin Vincent	
Date:	11 July 2005	
PROSECUTOR	**Against**	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No.SCSL-04-16-T)

DISSENTING OPINION OF THE HON. JUSTICE JULIA SEBUTINDE FROM THE MAJORITY DECISION ON THE EXTREMELY URGENT CONFIDENTIAL JOINT MOTION FOR THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT

HARRIS AS LEAD COUNSEL FOR ALEX TAMBA BRIMA AND BRIMA BAZZY KAMARA, AND DECISION ON CROSS-MOTION BY THE DEPUTY PRINCIPAL DEFENDER TO TRIAL CHAMBER II FOR CLARIFICATION OF ITS ORAL ORDER OF 12 MAY 2005

First Respondent:
The Registrar

Second Respondent:
The Acting Principal Defender

Defence Counsel for Alex Tamba Brima:
Glenna Thompson
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Carry Knoops
Abibola E. Manly-Spain

I- Introduction:

I respectfully dissent from the Majority Ruling of my learned colleagues, Hon. Justice Teresa Doherty and Hon. Justice Richard Lussick on the Extremely Urgent Confidential Joint Motion for the Reappointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara pursuant to Articles 17(4)(c) and 17(4)(d) of the Statute of the Special Court for Sierra Leone and Rule 54 of the Rules of Procedure and Evidence and the Inherent Jurisdiction of the Court (herein referred to as "the present Motion") and the Principal Defender's Cross-Motion Filed Pursuant to Articles 17(4)(c) and 17(4)(d) of the Statute of the Special Court and Rules 45 and 54 of the Rules of Procedure and Evidence and Inherent Jurisdiction of the Court for Clarification on the Decision on the Confidential Joint Defence Application For Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu (herein referred to as "the Cross-Motion").

Firstly, I am not persuaded that the present Motion by the Accused persons Alex Tamba Brima and Brima Bazzy Kamara is either frivolous or vexatious or some kind of a sinister conspiracy between the Accused persons, their former Counsel Kevin Metzger and Wilbert Harris and the Deputy Principal Defender "to go behind" the Trial Chamber's earlier Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu (herein referred to as "the earlier Decision"). I find absolutely no grounds or justification for drawing such an inference or conclusion. Nor do I understand the present Motion to be asking the Trial Chamber indirectly or underhandedly, "to review its said earlier Decision". In my opinion the present Motion filed solely by the Accused persons Alex Tamba Brima and Brima Bazzy Kamara pursuant to Article 17 (4) (c) and (d) of the Statute of the Special Court is fundamentally concerned with the statutory rights of Accused persons to be tried without delay and to choose their Counsel and is clearly distinct and different from an earlier application filed solely by their former Defence Counsel seeking leave to withdraw from the AFRC trial pursuant to Rule 45 (E) of the Rules of Procedure and Evidence (herein referred to as "the Rules"). In my opinion, the interests of justice and a fair trial would best be served if the Trial Chamber perceived, treated and determined the two applications as separate and distinct from each other and if the Trial Chamber examined and determined

the present Motion upon its merits rather than treating it with suspicion and summarily dismissing it as frivolous and vexatious or as a backdoor attempt by the Applicants to undermine a court Order.

In my opinion the pursuit of the statutory rights of Accused persons should never be described or treated as "frivolous" or "vexatious". The reasons for my dissent are articulated in the ensuing paragraphs. Before examining the merits of the present Motion and Cross-Motion I wish to highlight a number of statements in the Majority Decision with which I fundamentally disagree. I propose to indicate the statements as they appear in the various paragraphs of the Majority Decision and to briefly indicate alongside each statement the reasons for disagreement. These comments form an integral part of the ensuing dissenting opinion and are without prejudice to the detailed reasoning contained therein. The preliminary comments will be followed by an in-depth consideration of the merits of the Motion and Cross-Motion.

II-Preliminary comments on Majority Decision:

1. I disagree with the statements in paragraph 25 of the Majority Decision in relation to the Defence prayer that the Motion and all subsequent responses and replies thereto be made public and heard in open court, that "*Counsel have made an application for further relief in a Reply*" and that "*there has been no submission to support or explain this application for a public hearing*". In my opinion the Defence request for "an open and public hearing" is not a request for "further relief" against the First or Second Respondents as such. The Accused persons are merely asserting their statutory right to a public hearing as guaranteed by Article 17 (2) of the Statute and asking the Trial Chamber not to apply the exception to the rule provided in Rule 73 (A) of the rules. As I understand it, the right to a public trial is the norm under the Statute, while Rule 73 (A) of the Rules which empowers the Trial Chamber to adjudicate on motions "*based solely on written submissions*" is the exception to the norm. In my view Rule 73 (A) is not intended to override the right to a public trial as such but is merely intended generally to expedite the proceedings of the Trial Chamber. In any event, there is nothing in the Statute of the Special Court or the Rules or the Practice Direction on Filing of Documents before the Special Court[1] that expressly or impliedly prohibits a party from applying for "additional relief" in a reply, if the interests of justice so require. After all, Rules of procedure are merely handmaidens of justice and are not meant to fetter the court's discretion where the interests of justice otherwise require. The proper remedy for a party prejudiced by a belated prayer for such "additional relief" is for that party to apply to the Trial Chamber for leave to respond appropriately to such prayer. Since neither of the Respondents herein has applied for leave to respond to the application for a public trial and neither of them has indicated that a public hearing is likely to be prejudicial to or in conflict with any measures ordered by the Court for the protection of witnesses or victims, the Trial Chamber ought not in my opinion, to assume or infer the existence of such prejudice or to penalise the Accused persons for containing the application in their Reply rather than their Motion. The Trial Chamber ought instead, to consider the merits of that application, as I will endeavour to do later on in this opinion. In this regard I am persuaded by the approach taken by the Honourable Justices of Trial Chamber I in the ***Prosecutor v. Brima, et al,*** SCSL-2004-16-PT-16[2]. In that Decision Trial Chamber I decided that in order to ensure the protection of the rights of the accused persons under Article 17 (4) (b) and (d) of the Statute, their Lordships would hear Counsel orally "*on any new matters which had not already been raised in their submissions or on clarifications relating to the*

filed submissions". Their Lordships did not consider it to be in the interests of justice to prevent Counsel from raising additional matters not originally included in their written submissions.

2. More significantly, the Accused persons in the present Motion have clearly indicated in their Response to the Registrar's Reply that their application for a public and open hearing "*was above all necessitated by the disclosure by the Registrar that both Counsel (Kevin Metzger and Wilbert Harris) have been removed from the list of eligible Counsel*"[3] and by "*the Registrar's decision to strike off Counsel from the list of eligible Counsel in the face of a motion and cross motion for their reappointment while claiming to be acting in the best interests of the accused when they have clearly said that they want their Counsel back*"[4]. In my opinion, since the Registrar's removal of Counsel from the eligible list and the disclosure of that removal occurred after the filing of the Defence's initial Motion and while that Motion was *sub judice*, the Trial Chamber cannot reasonably expect the Accused persons to have applied for an open and public hearing any earlier than in their Response to the Registrar's Reply, nor can the Trial Chamber in these circumstances penalise the Accused persons for invoking their Statutory rights in their reply. Their Lordships in paragraph 25 of the Majority Decision also seem to suggest that the Accused persons are estopped from asserting their right to a public hearing in the present Motion simply because their former Counsel in an earlier application to withdraw raised certain personal security concerns that Counsel requested the Trial Chamber to handle as "*confidential and under seal*". In my opinion the argument is fallacious as it uses the security concerns of former Counsel raised in an application to which neither accused person was party, to deny the Accused persons their rights under the present Motion. Not only must a distinction be drawn between the Accused persons and their Defence Counsel, but a clear distinction ought to be drawn between the earlier withdrawal motion by Counsel and the present Motion by the Accused persons. I will address the merits of the application for a public hearing later on in this opinion.
3. I disagree with the statements in paragraph 26 (in respect of the Defence's failure to include a statement in their Motion that the Court made a ruling on 12 May 2005 granting in full the relief sought by Counsel to withdraw from the case) that "*the Motion implies that the Trial Chamber gave orders to withdraw after and despite a letter from the Accused asking for Counsel to be maintained. Such an implication that the Court acted without giving any consideration to the wishes and statements of the Accused is improper*". It is a fact that the Court's Oral Order of 12 May 2005 together with the reasoned Ruling of 23 May 2005 are both matters of public record that speak for themselves and that need not be recited by either party in their pleadings. Accordingly I see no need for the Trial Chamber or any of the parties to read into the Motion any views or implications that are contrary to the public court record. In any event, even the Registrar who was not a party to the proceedings that led to the Court Order and Reasoned Ruling of 12th and 16th May 2005 is well aware of the Court's "Decision on the Confidential Defence Application for withdrawal by Counsel for Brima and Kamara and on the Request For Further Representation by Counsel for Kanu" and quotes extensively from it in the Registrar's Reply to Extremely Urgent Motion[5] and in the Registrar's Reply to the Principal Defender's Cross-Motion[6], thereby proving that he has suffered no prejudice by the failure of the Accused persons to recite the Decision in their Motion.
4. I disagree with their Lordship's view and statement in paragraph 28 to the effect that "*the Deputy Principal Defender's submissions omitted to cite the Trial Chamber's Ruling of 16 May 2005 and a Memorandum from the Deputy Principal Defender to the Registrar on 17 May 2005 which sought to have Counsel re-assigned. That Memorandum very improperly fails to inform the Registrar of the Court's Ruling of 16 May 2005*". I reiterate my earlier comments above with regard to the Court's Ruling of 16 May 2005 being a matter of public record that speaks for itself. Furthermore, the Deputy Principal Defender's Memorandum to the Registrar of

17 May 2005 although copied to the Honourable Justices of Trial Chamber II on an earlier occasion, is not annexed to the Defence Office's Response to the Motion and therefore does not form part of the Principal Defender's case in these proceedings. I disagree with the view taken by their Lordships that the Deputy Principal Defender was under some kind of legal obligation to include certain facts in her pleadings. In my opinion it is improper for the Trial Chamber to dictate to the parties what they ought or ought not to include in their pleadings. To do so would be tantamount to the Trial Chamber "descending into the arena". In my view, where the Trial Chamber considers certain facts to be relevant in the determination of this Motion, the Trial Chamber has the option to narrate those facts in its decision, even if the parties have not recited them in their pleadings. This in my view is the proper course to take.

5. I disagree with their Lordship's view and statements expressed in paragraph 29. The views expressed in that paragraph are premised upon the presumption that the Trial Chamber has power to dictate to the parties the content of their pleadings, which presumption I have described above as being tantamount to the Trial Chamber "descending into the arena". By imputing or implying "*mala fides*", "untruthfulness" and "vexatious ness" on the part of the Deputy Principal Defender simply because she chose to omit certain facts from her pleadings (which facts are in any event public) or because she omitted to included certain facts that the Trial Chamber would have wanted or expected her to include in her pleadings, their Lordships are once again, "descending into the arena" that is the province of the disputants. Furthermore I cannot see how the Deputy Principal Defender who herself is one of the Respondents obligated to respond to the Motion, can be said to be "vexatious" in her Response, much less "vexatious to the Trial Chamber".
6. I disagree with their Lordship's view and statements expressed in paragraph 30. I shall comment on this in greater detail later.
7. I disagree with their Lordship's view and statements expressed in paragraph 31. There is no indication that in the Accused in their Motion question or challenge the Registrar's powers to consult the Trial Chamber pursuant to Rule 33B of the Rules. Instead the Accused persons indicate in paragraphs 31 to 33 of the Motion that they object to and challenge the manner in which the Trial Chamber responded to the Registrar's consultation pursuant to Rule 33B.
8. I disagree with their Lordship's view and statements expressed in paragraphs 32 and 33. I shall comment on this in greater detail later.
9. I disagree with their Lordship's view and statements expressed in paragraphs 34, 35 and 36 on the grounds that those statements and view are premised upon the perception that the earlier application[7] by Mr. Kevin Metzger and Mr. Wilbert Harris to withdraw from the conduct of the Defence case for Brima and Kamara respectively, and the subsequent withdrawal of Counsel pursuant to the Trial Chamber's Ruling thereon, act as an estoppel or bar to the current application by the Accused persons Brima and Kamara to subsequently apply to have the same Counsel "re-appointed" as their chosen Counsel pursuant to Article 17 (4) (d) of the Statute. With the greatest respect to their Lordships I think that such a perception is mistaken and legally unjustified. In particular I disagree with the statements that "*the accused have decided to frustrate the hearing by withdrawing instructions and then, when it suits them, giving instructions. There is no undertaking or clear indication that this pattern of behaviour will not be repeated to avoid interfering with a fair and expeditious hearing. In our earlier decision permitting Lead Counsel to withdraw, we found that the accused were merely boycotting the trial and obstructing the course of justice. In our view, that is exactly what they are seeking to do in bringing the present Motion. We do not believe that they genuinely wish to be represented by those particular Counsels. We believe that their real motive is to cause as much disruption to the trial as possible*". Apart from prematurely speculating about the future conduct or behaviour of the Accused persons, the statements are premised upon the presumption that the

Trial Chamber has power to dictate the relationship between an Accused person and his Counsel and to demand certain "undertakings" of "good behaviour or conduct" from the Accused persons with regard to that relationship. In my opinion the Trial Chamber has no such power under the law. In the same vein, I am of the opinion that the Trial Chamber has no power to question the "genuineness" or otherwise of the Accused persons' choice of Counsel, whether that choice is in favour of Mr. Kevin Metzger and Mr. Wilbert Harris or any other Counsel. Under the Statute and Rules the choice of Defence Counsel is entirely the prerogative of the concerned Accused persons. Lastly I am of the opinion that without having examined the merits of the present application, it is unjust for the Trial Chamber to disparage the motives of the Accused persons purely on the basis of an earlier application by their Counsel, to which application the Accused persons were not party. This is precisely the crux of my departure in opinion from their Lordships in the Majority Decision. In my opinion the two applications are separate and distinct from each other and should be handled as such.

10. I disagree with their Lordship's view and statements expressed in paragraphs 36 to the effect that, "*Rule 45 (E) provides that the appointment must be of "another" Counsel. There is no provision for reassignment of former Counsel in the event that they or their clients or both, have changed their mind.*" Again this statement is based upon the presumption or perception that the Accused persons are in their present application asking the Trial Chamber to reverse or review its earlier decision permitting their Counsel to withdraw. The present application is clearly not a Rule 45 (E) application by any stretch of imagination, nor do the Accused persons claim it to be so. Furthermore although there is nothing in the Rules providing expressly for "*re-assignment of former Counsel*" there is nothing in the Rules, the Statute or the Directive on assignment of Counsel that prohibits such re-assignment either, if the interests of justice so require and the Accused persons and concerned Counsel are agreeable to it.
11. I disagree with their Lordship's view and statements expressed in paragraph 37 to the effect that, "*we do not have the power to interfere with the law relating to privity of contract.*" The Trial Chamber's duty is not limited to ensuring that the trial is "*fair and expeditious*". There is ample authority to the effect that the Special Court's inherent jurisdiction does extend to the control and supervision of officers of the Court and to subject questionable administrative acts to Judicial scrutiny and review in order to protect the rights of the Accused persons and to promote a fair and just trial[8].
12. I disagree with their Lordship's view and statements expressed in paragraph 38 to the effect that, "*In the absence of the Principal defender, certain obligations to carry out duties fall upon the Registrar.*" There is ample authority to the effect that "*in view of the very nature and functioning of public or private services, it is and should always be envisaged that the substantive holder of the position is not always expected to be there at all times. In order to ensure a proper functioning and a continuity of services with a view to avoiding a disruption in the administrative machinery, the Administration envisages and recognises the concept of "Acting Officials" in the absence of their substantive holders. Where an official is properly appointed or designated to act in a position during the absence of the substantive holder of that position, the Acting Official enjoys the same privileges and prerogatives as those of the substantive official and in that capacity, can take the decisions inherent in that position.*"[9]
13. I disagree with their Lordship's view and statements expressed in paragraphs 39 to 52. The Accused persons Brima and Kamara have in the present Motion not requested the Trial Chamber to review or reverse its earlier decision in the withdrawal motion by Defence Counsel. It appears to me that their Lordship's view and statements expressed in paragraphs 39 to 52 are in tantamount to a review of that earlier motion and decision. The present Motion filed by the

Accused persons pursuant to Rule 54 and Article 17 (4) (d) of the Statute is clearly separate and distinct from that earlier motion for withdrawal filed by Defence Counsel pursuant to Rule 45 (E). In my opinion the present Motion is so fundamental to the rights of the Accused persons as envisaged under Article 17 (4) (d) of the Statute that it would not be in the interests of justice or a fair trial for the Trial Chamber to simply and summarily dismiss the Motion as a veiled attempt by the Accused persons "*to reverse an earlier decision of the Trial Chamber*". Furthermore I find no grounds or justification whatsoever for imputing insincerity, ill motive or alacrity on the part of the Accused persons who are simply pursuing their statutory right to choose Counsel. Equally, I find no grounds or justification whatsoever for accusing Mr. Kevin Metzger and Wilbert Harris who are not party to the present Motion, of conniving with the Accused persons to "*go behind an earlier order of the Trial Chamber*" or to "*delay or obstruct*" the conduct of a trial from which they have already withdrawn. Equally, I find no ground or justification whatsoever for imputing insincerity, ill motive, alacrity on the part of the Deputy Principal Defender who herself a Respondent in these proceedings, nor do I find any grounds or justification for accusing her of connivance with the Accused persons or with Mr. Kevin Metzger and Wilbert Harris to "*go behind an earlier order of the Trial Chamber*" or to "*delay or obstruct*" the conduct of the trial. The fact of the matter is that the AFRC trial has never been adjourned or delayed even for a single day on account of the Accused persons or their former Counsel or the Deputy Principal Defender. Therefore I cannot subscribe to the view or statement in paragraph 50 that "*the accused have seriously delayed and obstructed this trial*" nor do I subscribe to the view that there is some kind of backdoor conspiracy between the Accused persons, their former Counsel and the Deputy Principal Defender to delay and obstruct the AFRC trial.

14. I disagree with their Lordship's view and statements expressed in paragraph 51 to the effect that "*Counsel are not eligible to be reappointed since they are no longer on the list of qualified counsel required to be kept under Rule 45 (C).*" With the greatest respect, the view and statement fails to take into account the fact that the removal of Counsel from the said list was done by the Registrar who is the first Respondent to the present Motion while the Motion was under judicial consideration (i.e. *sub judice).* In my opinion it would not be in the interests of justice or a fair trial if the Trial Chamber merely turned a blind eye to this pertinent fact and failed to properly evaluate and adjudicate upon the effect of such removal on the rights of the Accused persons, as my colleagues appear to have done. It does not appeal to my sense of justice and fairness to question the motives of the Applicants or of the Second Respondent while being completely oblivious to those of the First Respondent.
15. I disagree with their Lordship's view and statements expressed with regard to the Deputy Principal Defender's Cross Motion. Having concluded in paragraph 62 that "*the Cross Motion sought clarification only and that having made those clarifications no orders are required*" it is contradictory to describe the Cross Motion in paragraph 53 as "*a vehicle that seeks further relief*".
16. Lastly, I disagree with their Lordship's view and statements expressed in paragraph 61. I find no ground or justification whatsoever in accusing the Deputy Principal Defender of "*having gone out of her way to undermine an order of the Trial Chamber*" or of "*being unwilling to do her job or to follow the directions of the Registrar*". In my opinion, the views expressed in paragraph 61 of the Majority decision presuppose that there are certain fixed time frames within which the Trial Chamber expects the Principal Defender to have assigned new Counsel to the Accused persons. In fact this is not the case. In its earlier Decision the Trial Chamber did not stipulate any time frames within which they expected the Principal Defender to assign new Counsel for the Accused Brima and Kamara, even though the Trial Chamber had the option to do so. In the premises it is inconceivable that the same Trial Chamber that did not order time frames now accuses an officer of the court of having "*undermined its order*". It is a fact that under the Statute

and Rules it is the Defence Office (headed at the material time by the Deputy Principal Defender in the absence of the Principal), that is vested with the power and responsibility of assigning Counsel to the Accused persons. There is nothing in the Rules or the Directive on Assignment of Counsel to suggest that the Principal Defender when carrying out that duty is obligated to do so "under the direction of the Registrar". On the contrary, the office of the Principal Defender was designed to act autonomously and independently when handling issues related to assignment of Counsel, as I shall endeavour to show later on in this opinion. It is also a fact that many of the lawyers who serve as assigned Counsel at the Special Court are also practitioners in foreign jurisdictions and are not readily available at the drop of a hat to take up their duties when the need arises or when called upon. It may well be that the consultative process between the foreign lawyers and the office of the Principal Defender takes considerable time. It is also a fact that the Defence Office in assigning Counsel or new Counsel to the Accused persons is under statutory obligation to liaise with the Accused persons and to ensure as much as possible that their choice of Counsel is respected. In my assessment, the assignment of new Counsel to the Accused persons is a process that necessarily takes time, careful consideration and consultation of all parties involved. As matters stand, the Trial Chamber is simply not in possession of any or sufficient information as to how the Deputy Principal Defender has been going about the issue of replacing Mr. Kevin Metzger and Mr. Wilbert Harris. As such I do not think that the Trial Chamber is in a position to make a fair assessment of her "*willingness or otherwise to do her job*" or to draw conclusions that the Defence Office "*has made no attempts to appoint new lead Counsel*" or that the Deputy Principal Defender has "*gone out of her way to undermine an order of the Trial Chamber.*" It is also note worthy that the Registrar in his written submissions himself makes no such claims or accusations against the Deputy Principal Defender, even though it is he that is in disagreement with the Deputy Principal Defender over this issue! In the circumstances, I find absolutely no justification for the statements made about the Deputy Principal Defender in paragraph 61 of the Majority Decision.

After my preliminary comments on the majority Decision I will now go on to discuss the merits of the present Motion in the ensuing paragraphs.

III- The Merits of the Present Motion and Cross-Motion:

17. The present Motion principally challenges the extent of the powers of the Registrar (the First Respondent) and of the Deputy Principal Defender (the Second Respondent) acting as Head of the Defence Office, to assign Counsel on the one hand, and on the other hand, the rights of the Accused persons (Alex Tamba Brima and Brima Bazzy Kamara) to choose their assigned Counsel as guaranteed and enshrined in the provisions of Article 17 (4) (c) and (d) of the Statute.
18. The present Motion also raises issues related to the extent to which the rights of the Accused persons, in particular those pertaining to the right to choose assigned Counsel, should be protected, upheld and ensured by the Deputy Principal Defender (the Second Respondent) as acting Head of the Defence Office established under Rule 45 of the Rules, under the authority and supervision of the Registrar (the First Respondent), in their application of the provisions of the Directive on Assignment of Counsel promulgated by the Second Respondent on 3 October, 2003 pursuant to Article 17 of the Statute.
19. The Motion also raises related questions of conflict of interest in particular whether the Honourable Justices of the Trial Chamber, having advised the Registrar on 19 May 2005 pursuant to Rule 33

(B) not to re-appoint Mr. Kevin Metzger or Mr. Wilbert Harris as assigned Counsel for the Accused persons after their withdrawal, are now in a position to fairly and objectively adjudicate upon the present Motion or should recuse themselves. The present Motion also raises the more fundamental question of whether this Trial Chamber is competent to entertain and adjudicate upon a dispute arising from an administrative decision of the Registrar and Deputy Principal Defender emanating from the application of the legal instruments referred to above. In particular the Motion raises the question whether the Trial Chamber has power to review the decision of the Registrar not to re-appoint Mr. Kevin Metzger or Mr. Wilbert Harris as assigned Counsel for the Accused persons and further his decision of 25 May 2005 to remove them from the list of qualified Counsel.

20. The Principal Defender's Cross-Motion raises questions relating to the rights of the Accused persons (Alex Tamba Brima and Brima Bazzy Kamara) to choose Mr. Kevin Metzger and Mr. Wilbert Harris as their assigned Counsel respectively, even after those Counsel have been permitted by the Trial Chamber to withdraw and have withdrawn from defending the Accused persons pursuant to Rule 45 (E) of the Rules.
21. In my opinion, the present Motion and Cross-Motion raise the following issues for consideration and determination.

    (i) Whether or not there are substantial grounds for casting doubt on the impartiality of the Honourable Justices of the Trial Chamber when adjudicating upon the present Motion and Cross-Motion.

    (ii) Whether or not the present Motion and Cross-Motion should be heard in open court.

    (iii) Whether or not the Trial Chamber has jurisdiction to entertain the present Motion and Cross-Motion.

    (iv) Whether or not the Accused persons Alex Tamba Brima and Brima Bazzy Kamara are entitled under Article 17 (4) (c) and (d) of the Statute of the Special Court to choose Mr. Kevin Metzger and Mr. Wilbert Harris respectively, as assigned Counsel, after each of those Counsel withdrew from representing the respective accused persons in the AFRC Trial pursuant to Rule 45 (E) of the Rules. Alternatively, whether or not Mr. Kevin Metzger and Mr. Wilbert Harris are ineligible for reassignment as Defence Counsel for the respective Accused persons, by reason of Counsel having withdrawn from representing the respective accused persons in the AFRC Trial pursuant to Rule 45 (E) of the Rules.

    (v) Whether the Registrar acted within his powers in directing the Deputy Principal Defender not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the respective Accused persons and in subsequently removing their names from the Principal Defender's list of eligible Counsel.

    (vi) Whether the Deputy Principal Defender was bound to comply with the directives of the Registrar relating to the non-assignment of Counsel and their removal from the list of qualified Counsel.

    (vii) Whether the Trial Chamber has power to review the Registrar's decision not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as assigned Counsel, and his decision to remove their names from the list of qualified Counsel.

22. Before examining the merits of the Motion and Cross-Motion, I consider it necessary therefore, to reproduce here the relevant provisions of these legal instruments: The provisions pertaining to the right of the accused to choose Counsel are contained in Article 17 (4) of the Statute and Article 2(A) of the Directive on Assignment of Counsel.

Article 17 (4) of the Statute provides as follows:-

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

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her own choosing;
(c) To be tried without undue delay;
(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her in any such case where the interests of justice so require and without payment by him or her in any such case if he or she does not have sufficient means to pay for it..."

Article 2 (A) of the Directive on Assignment of Counsel provides as follows:-

"2 (A) Any person detained on the authority of the Special Court has the right to Counsel, in terms conclusively defined in Article 17 (4) (d) of the Statute."

23. The provisions pertaining to the assignment and withdrawal of Counsel by the Principal Defender are contained in Rule 45 (A), (C) and (D) as well as Articles13 (A), (B), (E) and (F) and Articles 24 (B), (C) and (F) of the Directive on Assignment of Counsel.

Rule 45 (A), (C) and (D) provide as follows:-

"The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and accused. The Defence Office shall be headed by the Special Court Principal Defender.

(A) The Defence Office shall, in accordance with the Statute and Rules, provide advice, assistance and representation to

i. ***Suspects being questioned by the Special Court or its agents under Rule 42 including non-custodial questioning;***
ii. ***Accused persons before the Special Court.***

(B)....

(C) The Principal Defender shall, in providing an effective defence, maintain a list of highly qualified criminal defence counsel whom he believes are appropriate to act as duty counsel or to lead the Defence or appeal of an accused. Such counsel, who may include members of the

Defence Office, shall:

i. *Speak fluent English;*
ii. *Be admitted to practice law in any State;*
iii. *Have at least seven years' experience; and*
iv. *Have indicated their willingness and full-time availability to be assigned by the Special Court to suspects or accused.*

(D) Any request for replacement of an assigned counsel shall be made to the Principal defender. Under exceptional circumstances, the request may be made to a Chamber upon good cause being shown and after being satisfied that the request is not designed to delay the proceedings.

(E)....."

Article 13 (A), (B), (E) and (F) of the Directive on Assignment of Counsel provide as follows:-

"(A) Any person may be assigned as Counsel if his name appears on the list maintained by the Principal Defender in accordance with Rule 45 (C) and the Principal Defender has determined that he is and remains available to deal with the case of a particular Accused or Suspect.

(B) To be eligible to be included by the Principal Defender in the list of Qualified Counsel an individual must have the following qualifications:

i. *Speak fluent English;*
ii. *Be admitted to the practice of law in any State;*
iii. *Have at least seven years of experience as Counsel;*
iv. *Possess reasonable experience in criminal law, international law, international humanitarian law or international human rights law;*
v. *Having indicated their willingness and availability to be assigned by the Special Court to an Accused or Suspect; and*
vi. *Have no record of professional or other misconduct, which may include criminal convictions.*

(C) .....
(D) .....
(E) Where the Principal Defender refuses to place the name of an applicant Counsel on the List of Qualified Counsel or removes the name of Counsel from the List of Qualified Counsel, the Principal Defender shall notify the applicant Counsel of his decision in writing and briefly set out his reasons for refusing to include the name of the applicant Counsel on the List, or for removing the name of Counsel from the List.
(F) Where the Principal Defender refuses to place the name of an applicant Counsel on the List of Qualified Counsel or removes the name of Counsel from the List of Qualified Counsel, the concerned Counsel may seek review, by the President, of the Principal Defender's refusal. An application for review shall be

in writing and the Principal Defender shall be given the opportunity to respond to it in writing."

Article 24 (B), (C) and (F) of the Directive on Assignment of Counsel provide as follows:-

"(B) The Principal Defender shall withdraw the assignment of Counsel or nomination of other Counsel in the Defence Team:

i. ***In the case of a serious violation of the Code of Conduct;***
ii. ***Upon the decision by a Chamber to refuse audience to Counsel for misconduct under Rule 46 of the Rules;***
iii. ***Where the name of the Assigned Counsel has been removed from the list kept by the Principal Defender under Rule 45(C) and Article 13 of this Directive.***

(C) The Accused, the Counsel concerned and his respective professional or governing body shall be notified of the withdrawal.

(D).....

(E).....

(F) Where the assignment of Counsel or nomination of other Counsel in the Defence Team is withdrawn by the Principal Defender, pursuant to paragraph (B) (i) and (iii), Counsel affected by withdrawal may seek review of the decision of the Principal Defender by the presiding Judge of the appropriate Chamber."

IV-Deliberation and Determination of the issues:

(i) Whether or not there are substantial grounds for casting reasonable doubt on the impartiality of the Honourable Justices of the Trial Chamber when adjudicating upon the present Motion and Cross-Motion:

24. The Accused Alex Tamba Brima and Brima Bazzy Kamara applied that "*the Justices of Trial Chamber II who reconfirmed the order not to re-appoint Counsel as indicated in the letter from the Registrar's Legal Adviser[10] should recuse (disqualify) themselves from adjudicating upon the present Motion and Cross-Motion*". The Accused seem to glean the grounds in support of their application for recusal from the Memorandum written by myself on 19 May 2005 in response to the Registrar's consultations, and copied to the Deputy Principal Defender's Office[11]. The Accused persons argue that "*the substantive legal issues of ultra vires, perceived judicial impropriety, potential bias and conflict of interest, and the potential compromise of the fair and impartial conduct of the trial are so palpable in the circumstances as to compel the Defence to respectfully request that the Justices referred to in the letter from the Registrar's Legal Adviser recuse themselves from hearing this present Motion.*" The Accused persons maintain that the Honourable Justices having previously ordered that Mr. Kevin Metzger and Wilbert Harris are not to be re-appointed as Defence Counsel, would

not be in a position to fairly or impartially adjudicate upon the present Motion and Cross-Motion. The Accused persons further argue that in the absence of duly proven misconduct or incompetence on the part of Mr. Kevin Metzger or Mr. Wilbert Harris, the Trial Chamber has no power or authority to stipulate who should or should not represent an Accused person or to express a preference of one assigned Counsel over the other. The applicants further argue that for the Trial Chamber to do so would amount to or give the impression of bias and interference with the statutory rights of the Accused persons to choose assigned Counsel under Article 17 (4) (d) of the Statute.

25. The Registrar (First Respondent) submitted that the Defence application for voluntary withdrawal (recusal) is unfounded and should be denied. He argued that under Rule 33 (B) of the Rules he was entitled to consult or liaise with the Trial Chamber on the implementation of its earlier Decision. He argued further that the Trial Chamber was entitled to and acted within its powers when it expressed the view that Counsel who had withdrawn from the case should not be reappointed or re-assigned, and that to re-assign them would not be in the interests of a fair trial. The Registrar further argued that in expressing their opinion the Trial Chamber was merely giving the Registrar advice pursuant to Rule 33 (B) and was not "directing him" as to what he should do. Their Lordships in their Majority Decision appear to agree with the Registrar's arguments and reasoning. I however, beg to disagree for the following reasons.

26. There is no doubt that the Accused persons on trial before the Special Court are entitled to be heard by an impartial tribunal. The charges that they face as well as the consequences of conviction are of an extremely serious nature that they warrant the highest standards of fairness, transparency and impartiality on the part of the Tribunal at every step of the trial. Although the Statute of the Special Court does not define the term "impartiality" the principle of impartiality lies at the heart of the concept of a fair trial and demands that each of the judges of the Trial Chamber before whom the Accused persons appear be unbiased, has no interest or stake in the matter under consideration and does not have pre-formed opinions about it. Actual impartiality as well as the appearance of impartiality are both fundamental for maintaining the integrity and fairness of the trial and respect for the administration of justice by the Court. (Justice must not only be done but must be seen to be done.) Impartiality implies that judges must not harbour pre-conceived views about the merits of the matter before them, and that they must not act in ways that promote the interests of one of the parties[12]. While the appearance of partiality is considered as important as actual partiality, there is a general presumption that a judge is personally impartial unless one of the parties raises proof to the contrary. Under Rule 15 of the Rules of Procedure and Evidence of the Special Court, it is sufficient for a party to show that *"substantial grounds exist for reasonably doubting the impartiality of a judge*". Once that has been established the impugned judge is disqualified from sitting on the panel considering the matter and is obligated to withdraw.

27. While the Statute of the Special Court is silent as to the issue of recusal or disqualification of a judge from sitting at a trial on grounds of bias, under Article 13 thereof "impartiality" is one of the hallmarks or qualifications for appointment as a Judge of the Special Court. It is the Rules of Procedure and Evidence that deal with the issue or judicial disqualification. Under Rule 14 every Judge of the Special Court is required before taking up his or her judicial duties to undertake a solemn declaration to serve "*with out fear or favour, affection or ill-will, honestly, faithfully, impartially and conscientiously.*" It follows logically from that solemn undertaking that where a matter arises in which a judge's impartiality might reasonably be doubted upon any substantial ground, that Judge is expected under Rule 15 (A) and (C) of the Rules to voluntarily withdraw from adjudicating upon such matter in the interests of justice and a fair trial. In my view, the voluntary withdrawal of a judge from a proceeding in the circumstances envisaged under Rule 15 (A), is often a matter of judicial conscience and should not in any way reflect negatively on the integrity of the judge concerned. However, as earlier indicated Rule 15 also envisages situations

where a judge will not voluntarily withdraw from a proceeding on grounds of impartiality. In such a case, Rule 15 (B) empowers an aggrieved party to apply to the Chamber of which the judge is a member, to have the said judge disqualified on grounds that *"substantial grounds exist for reasonably doubting the impartiality of a judge"*. Clearly this Rule does not envisage that the impugned judge will sit on the panel that will hear and determine the disqualification motion against him or herself, for that would have absurd consequences! Rule 15 (B) envisages that the disqualification motion should be heard by the remaining judges of the Trial Chamber, excluding the impugned judge. Furthermore Rule 15 (F) requires that *"at each stage, the challenged judge shall be entitled to present his comments on the matter* ***but shall not take part in the deliberations and in the decision thereof***" (emphasis added). The Rule also envisages that the issue of disqualification should be resolved apart from and prior to the issues in the main Motion, otherwise the whole purpose of recusal may be defeated! I note however, that in the present Motion, the applicants not only shied away from naming the Justices that they wanted to see disqualified but also filed the application for disqualification as an integral part of the present Motion. This has put their Lordships of the Trial Chamber in the awkward position firstly, of having to deduce from the facts who is impugned and secondly, of having to go against the well-known principle embodied in the maxim "*Nemo Judex in sua Causa*" (You cannot be a judge in your own cause!) in determining the issue of bias, thereby clearly violating the provisions of Rule 15 (F). Be that as it may I will endeavour at this stage, to examine this issue as best as I can.

28. I must admit that upon the initial reading of Rule 15, it would appear by implication that disqualification or recusal of a judge is envisaged only with respect to either the main trial or the main appeal and does not apply with respect to interlocutory applications or motions such as the present one. However, such a narrow interpretation of Rule 15 would in my view, lead to undesirable and unjust results consequences especially where issues affecting the rights of Accused persons or the conduct of a fair trial arise in the course of an interlocutory application or motion such as the present one. Accordingly I would adopt a more liberal interpretation of Rule 15 which permits the recusal or disqualification of a judge at any stage of the trial (including Motions), whenever it appears that "*his or her impartiality might upon any substantial ground, be reasonably doubted.*" That interpretation is in my view, compatible with the solemn undertaking of a judge to serve honestly, faithfully, impartially and conscientiously, not only during the main trial, but at all times. It is also compatible with the practice pertaining in other international Tribunals such as the ICTR and ICTY. If I understand the applicants correctly, they assert that the Honourable Justices of the Trial Chamber having openly declared to the Defence Office and Registrar on 16th and 18th May 2005 that the Trial Chamber would not countenance the reassignment of Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel respectively for the Accused persons Alex Tamba Brima and Brima Bazzy Kamara, the same judges cannot bring a fair and impartial mind be seen to adjudicate upon the present Motion and Cross-Motion fairly or impartially because they would have already set their minds against such reassignment. A proper determination of this issue requires a full disclosure and examination of the facts surrounding the allegation that there are substantial grounds for doubting the impartiality of the Honourable Justices of the Trial Chamber.

29. The following facts are in my view, relevant. The Trial Chamber orally delivered its earlier Decision granting Mr. Metzger and Mr. Harris leave to withdraw as Defence Counsel on 12 May 2005 and published its reasoned Ruling in respect thereof on 23 May 2005. On 16 May 2005 Ms. Carlton-Hanciles of the Defence Office orally submitted in open court that "*she had received a communication from two of the detainees with regards to a decision which was rendered by this honourable court with instructions that a copy be served on Chambers*". Before Ms. Carlton-Hanciles had an opportunity to disclose the contents of the document[13] or the identity of its authors, the Presiding Judge interjected and pronounced that "*before she (Ms. Carlton-*

Hanciles) goes any further, this Court read an Order on application. The application was an application to withdraw. That Order was made and any letters, correspondence or documents that seek to go behind that decision cannot be countenanced in this court. The decision has been made."[14] On 17 May 2005 Ms. Elizabeth Nahamya the Deputy Principal Defender wrote a Memorandum to the Registrar which she copied to the Honourable Justices of Trial Chamber II to the effect that although the Trial Chamber had granted Mr. Kevin Metzger and Mr. Wilbert Harris leave to withdraw from the AFRC Case as assigned Counsel and had ordered that new Lead Counsel be assigned to represent the Accused persons Alex Tamba Brima and Brima Bazzy Kamara, the two accused persons wished to retain the two gentlemen as their chosen Counsel in the interests of continuity and a speedy and fair trial. The Deputy Principal Defender indicated in her Memo that she agreed with the views and concerns of the accused persons and that since both Mr. Kevin Metzger and Mr. Wilbert Harris had expressed willingness to be reassigned, she was inclined to re-appoint them as Lead Counsel for the accused persons instead of assigning the accused persons new Counsel. Given the provisions of Rule 45 giving the Principal Defender power to assign Counsel, it is not clear from the wording of this Memorandum whether the Deputy Principal Defender was merely notifying the Registrar and the Trial Chamber of her decision to reassign Counsel or whether in fact she was seeking the approval of the Registrar before doing so. It is also not clear why she copied her Memorandum to the Trial Chamber, given the argument that the Trial Chamber should not at this early stage be involved in issues of assignment of counsel. On 18 May 2005 the Registrar sent a copy of the Deputy Principal Defender's Memorandum to the Presiding Judge of Trial Chamber II with a note that read,

"*Justice Doherty, as promised, this is the formal update by the Defence Office as to the present position on Metzger and Harris. As I have mentioned to you, as a matter of expediency, there are reasons which would support their return. But from the long term conduct of the trial, and considering both Counsels' performance and demeanour, my view is that it would be counter-productive to reassign them. One point I would like to put to you for your advice is the issue of who, ultimately, has the final word on this. Whilst it is clear from the Directive on Assignment of Counsel that the Principal Defender and I have a major role, I cannot believe that a Trial Chamber does not have at least a say if not the final say.*"

The Registrar maintains that in addressing the above comments to Justice Doherty he was acting in exercise of his powers under Rule 33 (B) of the Rules seeking the views of the Trial Chamber pursuant to that Rule.

30. On the same day the Presiding Judge circulated the Registrar's Memo and note referred to above to the Justices of Trial Chamber II and orally sought their comments there on. I immediately indicated to the Presiding Judge that I had a number of reservations on the idea of the Trial Chamber expressing an "administrative" or extra-judicial opinion (*i.e.* outside of court) on an application by the Accused persons to the Principal Defender which application was not officially before us as a court and wrote a detailed Memorandum to the Presiding Judge articulating my reservations. That Memorandum appears as Annex D to the present Motion but is for ease of reference, also appended to this opinion. I further indicated to the Presiding Judge that due to those reservations I would not participate in giving any opinion or advice to the Registrar in that regard, and further requested her to ensure that any communication or opinion emanating from Trial Chamber II in that regard should clearly indicate that it was not an opinion of the Bench but

rather that of the individual Justices giving it.

31. On 18 May 2005 and in response to the Registrar's request or query referred to above, the Presiding Judge wrote an inter-office Memo to the Registrar that read as follows:

"Re- Appointment of Mr. Kevin Metzger and Wilbert Harris as Lead Counsel:

This matter was already brought orally to the Court and the following order made on 16th May 2005:

"This Court read an order on an application. The application was an application to withdraw. That order was made and any letters, correspondence or documents that seek to go behind that decision cannot be countenanced in this Court. The Decision has been made."

That ruling stands and the order stands. The Court will not give audience to Counsel who make an application to withdraw on one day on various grounds, particularly security and then come back the day after and basically say they retract. They cannot make fools of the Court like this, nor can they do it in a "back door" way through the Principal Defenders and the Registrar's power to appoint Counsel."

The Presiding Judge did not make the distinction that Justice Sebutinde requested to the effect that this was not the view of the full Bench or Trial Chamber. Justice Sebutinde was not privy to this letter nor was she given a copy of this letter until much later when she asked for it. The Registrar argued in paragraph 19 of his submissions that following his representations pursuant to Rule 33 (B) the Trial Chamber was not only acting in the interests of a fair trial but was well within its rights and indeed exercised its responsibilities when it expressed its view quoted above on the reassignment of Counsel. From these submissions it is clear that the Registrar was under the mistaken impression that what he received was the unanimous view of "the Trial Chamber" pursuant to Rule 33 (B) of the Rules rather than a view of individual judges. Their Lordships agree in paragraph 60 of the Majority Decision with the Registrar's submissions. I on the other hand, respectfully disagree with such a view. This is on the grounds that not only are the above-quoted comments *ultra vires* the powers of the Trial Chamber but they did not constitute the opinion of the Trial Chamber as such but rather the opinion of the individual judges who wrote or subscribed to the Presiding Judge's Memorandum to the Registrar. It is one thing for the Trial Chamber to permit Counsel to withdraw from a case pursuant to an application properly brought before the Trial Chamber under Rule 45 (E) of the Rules. It is quite another for individual judges who are not seized with a formal application for reassignment of counsel, to subsequently make an out of court declaration that "*they will not give audience to such counsel or countenance any letters, documents or correspondences, (and applications)*" that seek to have them reassigned and more so to pass off that declaration as a view of the Trial Chamber, with a view to influencing the final decision of the Registrar and Deputy Principal Defender on the issue. Secondly, whilst I recognise the Registrar's powers to consult the Trial Chamber on the implementation of its decisions under Rule 33 (B), I do not agree that that is what transpired between the 17th and 18th May 2005 for the following reasons. That Rule empowers him to make representations to the Trial Chamber as a Bench of three Judges rather than seek the individual opinions of some of the judges. Clearly, this is not what happened. I also note that whilst the Registrar in his submissions refers to the fact that "*the Trial Chamber was entitled to express its views regarding the re-assignment of counsel pursuant to Rule 33 (B)*", he also does not make the distinction that the views he received were not from the Trial Chamber but rather from individual judges even though he too had received a copy of Justice Sebutinde's Memorandum of 19 May 2005. Furthermore he seems to suggest that the Trial Chamber acted properly and legally pursuant to Rule 33

(B) which empowers the Trial Chamber to consult with the Registrar "*in the implementation of judicial decisions*." Here I can only point out that the Trial Chamber's Decision permitting Mr. Metzger and Mr. Harris to withdraw did not expressly or impliedly deal with issues of reassignment of counsel pursuant to an application by an accused person, nor did the Trial Chamber order that counsel be removed from the list of qualified counsel. Any additional views, directives or pronouncements by individual judges that tend to modify or go beyond what the Trial Chamber ordered on 12 May 2005 are, in my view *ultra vires*. If I am correct then the Registrar's argument that the Trial Chamber acted within its judicial mandate pursuant to Rule 33 (B) cannot hold water. By the same token it can be argued that while Rule 33 (B) empowers the Registrar to consult the Trial Chamber on "*the implementation of judicial decisions*", in the present case the Trial Chamber had not yet rendered any judicial decision in respect of the Accused persons' application for reassignment of Counsel (*i.e.* the present Motion). It was therefore premature for the Registrar to pre-empt an opinion in that regard from the Trial Chamber. In my humble opinion it was equally fallacious for the Trial Chamber to purport to advise the Registrar on an application that was not yet officially before the Trial Chamber. In that regard, I maintain the views expressed in my Memorandum annexed to this opinion.

32. Furthermore, it is evidently clear from the Transcript of 16 May 2005 that contrary to the Presiding Judge's Memorandum to the Registrar, the matter of the reassignment of Mr. Kevin Metzger and Wilbert Harris as Lead Counsel was never "*orally brought before the court*" on that day nor was there a "*Decision or order made in respect thereof*" that day. There was no oral application before Court made by or on behalf of the accused persons Brima and Kamara on 16 May 2005 to have their former Counsel reappointed. Perhaps that was what Ms. Carlton Hanciles of the Defence Office wanted to do but was not given a chance to finish what she had come to tell the court. The record shows that she wanted to address the Trial Chamber on a letter written by two of the accused persons but was not permitted to either explain the contents of that letter nor its authors and was interrupted by the Presiding Judge before she could do so. Furthermore, as the Transcript clearly shows, the comments of the Presiding Judge addressed to Ms. Carlton Hanciles on 16 May 2005 referred to an earlier application by Counsel seeking leave to withdraw from the AFRC case and to the Trial Chamber's earlier Decision in respect thereof. I do not see any connection or relationship between that application and Ms. Carlton Hanciles' undisclosed letter or the present Motion filed by the accused persons on 24 May 2005. I maintain in this dissenting opinion, that the earlier withdrawal motion should be treated as separate and distinct from the present Motion. It does not appeal to my sense of justice to take the orders in the earlier motion to automatically apply them to the present Motion, and to do so without having heard the merits of the present Motion. Such a stance would in my view, not only be fallacious but would be prejudicial to the statutory rights of the accused persons.
33. Although their Lordships state in paragraphs 32 and 33 of the Majority Decision that "*there was no determination of the issue of reappointment of Counsel*" and further that "*there was no order made in this Trial Chamber refusing reappointment of Counsel per se*" and further that "*the (Registrar's) orders for appointment of other Lead Counsel were based on the mandatory provisions of Rule 45 (E)*", the fact of the matter is that the text of the Transcript quoted above[15] and the Presiding Judge's Memorandum of 18 May 2005 to the Registrar give the impression (however unintended) that the Trial Chamber had as early as 16th and 18th May 2005 made its mind up "*not to give audience to Mr. Kevin Metzger and Mr. Wilbert Harris if reappointed as Lead Counsel*" and that based on the Trial Chamber's earlier Decision and orders made pursuant thereto, "*the Trial Chamber would not countenance any letters, correspondence or documents contrary to those earlier orders*". It is also clear from the

Registrar's note addressed to Judge Doherty that he believed that the Trial Chamber had "the final say" on the issue of reassignment of counsel. Accordingly, his submissions that he was merely "advised" and not "directed" by the Trial Chamber also don't hold water. In the circumstances the Accused persons would appear justified under Rule 15 (A) in reasonably casting doubting the impartiality of the Justices of the Trial Chamber in adjudicating upon the present Motion and Cross-Motion. Be that as it may, the issue remains whether in the circumstances the Honourable Justices of the Trial Chamber could each be trusted to bring an impartial and unprejudiced mind to the issues in the present Motion and Cross-Motion, and not to decide the issues in the same way as they previously exhibited. This is the test to be applied to the judges who are ordinarily presumed to be objective and fair-minded professionals capable of making a reasonable judgement[16]. Perhaps at this stage the question is merely academic as the Majority Decision is already made and published! However, suffice it to say in conclusion that the manner in which the application for recusal or disqualification was made an integral part of the present Motion, coupled with the failure of the applicants to name the impugned Justices, render impossible the resolution of this issue in a fair and impartial manner, and my conclusions on the matter perhaps merely of academic interest.

(ii) Whether or not the present Motion and Cross-Motion should be heard in open court:

34. The accused persons submitted in their Joint Defence Response to the First Respondent's Reply filed on 3 June 2005 that "*In reliance upon the above arguments, the Registrar's indication of security concerns as a ground for non-reappointment of Counsel and, above all, recent disclosure by the Registrar that both Counsel, Mr. Kevin Metzger and Mr. Wilbert Harris, have been removed from the list of eligible Counsel for the Special Court for Sierra Leone, the Defence further prays that its Motion of 24th May 2005 together with all subsequent responses and replies thereto be made public and heard in open court.*" The First and Second Respondents did not respond to this submission.
35. The right to a public trial is one of the statutory rights guaranteed to an accused person on trial before the Special Court[17]. Although the Statute does not define the right to a public hearing there is a wealth of jurisprudence on the subject, which has its roots in the English Common Law. The principle of "publicity" presupposes that a trial is "a public event" and that what transpires in the courtroom is "public property". The principle also embodies the common law notion that "justice must not only be done but must be seen to be done." A public trial is recognised as a safeguard against any attempt to employ the court as an instrument of persecution. The knowledge that the trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power[18]. The public trial guarantee ensures that not only judges, but all participants in the criminal justice system are subjected to public scrutiny. In the case of international tribunals like the Special Court, that public includes not only the people and press of Sierra Leone where the court is situated but also the international community. The right of the Accused persons to a fair and public trial is guaranteed by Article 17(2) and the only statutory limitation upon that right is "*subject to measures ordered by the Special Court for the protection of victims and witnesses*". In my opinion the right of an Accused to a public hearing is not limited to the conduct of the main trial but also to the interlocutory applications and motions filed under the Rules by the parties, such as the present one. Rule 73 (A) of the Rules of Procedure and Evidence which empowers the Trial Chamber to rule upon motions based solely on written submissions (in order to expedite proceedings) also gives the Trial Chamber the power and discretion to hear motions in open court "*where they otherwise decide*". The Trial Chamber's

discretion in deciding to hear a motion in open court under that Rule is unfettered in as far as the Rule does not stipulate any particular circumstances under which the Trial Chamber may or may not hear a motion in open court. I am averse to attaching an interpretation to Rule 73 (A) whose effect is to curtail or deny the Accused persons their rights as guaranteed under Article 17 of the Statute, one of which is "*the right to a public hearing*". Such an interpretation would render Rule 73 *ultra vires* Article 17 (2) of the Statute.

36. The Accused persons submitted that their application for a public and open hearing "*was above all necessitated by the disclosure by the Registrar that both Counsel (Kevin Metzger and Wilbert Harris) have been removed from the list of eligible Counsel*"[19] and by "*the Registrar's decision to strike off Counsel from the list of eligible Counsel in the face of a motion and cross motion for their reappointment while claiming to be acting in the best interests of the accused when they have clearly said that they want their Counsel back*"[20]. It is a fact that Mr. Kevin Metzger and Mr. Wilbert Harris were removed from the list of qualified Counsel by the Acting Registrar on the 25 May 2005[21], after the filing of the present Motion seeking their reassignment and while that Motion was under consideration by the Trial Chamber. According to paragraph 1 of the First Respondent's Response to the present Motion, the Acting Registrar directed that they be removed from the List of Qualified Counsel "*when it became apparent that they were still on the List, despite the fact that they had withdrawn from the trial and that their security concerns, which were a major reason which caused them to seek to withdraw, had not been addressed by Counsel in any manner with the court Registry.*" Since the reassignment of Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the Accused persons is one of the key issues to be resolved in the present Motion, their removal from the list of Counsel qualified to serve as Defence Counsel while the matter is still under judicial consideration, has the effect not only of pre-empting the Trial Chamber's decision on that issue but is also capable of rendering any relief that the Trial Chamber might grant to the Accused persons in that regard, nugatory. While the Rules provide for the withdrawal of Counsel from representing an accused person[22], they do not contemplate or provide for the removal of Counsel from the Principal Defender's list of eligible Counsel maintained pursuant to Rule 45 (C) of the Rules, once Counsel has qualified for placement and been included on the said list. The provisions pertaining to the removal of Counsel from the Principal Defender's list are only found in Article 13 (E) and (F) of the Directive on Assignment of Counsel. According to Article 13 the power to remove Counsel from the Principal Defender's list is vested in the Principal Defender, subject to review of the President of the Special Court. However, the Directive does not stipulate the grounds or reasons for removal of Counsel from the Principal Defender's list. There is no provision either in the Rules or in the Directive on Assignment of Counsel that expressly or impliedly empowers the Registrar to remove Counsel from the Principal Defender's list of eligible Counsel maintained pursuant to Rule 45 (C) of the Rules. Considering that in the present case it is the Registrar's office and not the Principal Defender that issued the order for removal of Mr. Kevin Metzger and Mr. Wilbert Harris from the Principal Defender's list of eligible Counsel and considering further that this was done while the present Motion and Cross-Motion for their reassignment were under judicial consideration, the Accused persons are in my view, entitled to question the legality as well as *bona fides* of the Registrar's administrative decision in that regard, including the grounds for Counsel's removal, and to subject that decision to public scrutiny, through an open hearing. In my opinion the application for an open and public hearing of the present Motion and Cross-Motion should in the interests of justice be granted. I will comment later on the Registrar's decision to remove Counsel from the Principal Defender's list in greater detail under the appropriate issue.

(iii) Whether or not the Trial Chamber has jurisdiction to entertain the present Motion and Cross-Motion:

37. The Accused persons have on the one hand, called upon the Trial Chamber to entertain the present Motion pursuant to Article 17 (4) (c) and (d) of the Statute, Rule 54 of the Rules and to review the administrative decision of the Registrar pursuant to the inherent powers of the court[23]. The Registrar and First Respondent on the other hand questioned the jurisdiction and competence of the Trial Chamber to entertain the present Motion and ultimately to review his administrative decisions. He argued that while "*the Trial Chamber was entitled pursuant to the provisions of Rule 33 (B) to express the view that Counsel who have withdrawn from the case are not to be reassigned,*"[24] and "*entitled pursuant to its inherent powers to ensure that the accused receive a fair trial,*"[25] the Trial Chamber "*has no power to order anyone to enter into a contract. The process of contract negotiations is a matter for individual parties to reach agreement on the terms of a contract. That is a matter for the parties and should not be constrained by any order to enter into a contract from the Trial Chamber.*"[26] On her part, the Acting Principal Defender and Second Respondent does not question the Trial Chamber's jurisdiction to entertain the Motion and Cross-Motion and in fact "*implores the Trial Chamber to grant the Accused persons' request for reassignment of their former Lead Counsel*".[27]
38. Essentially the issue for determination is whether the Trial Chamber is competent and can draw upon its inherent jurisdiction to review the administrative Decisions of the Registrar, firstly in denying the reassignment of Mr. Kevin Metzger and Mr. Wilbert Harris as Lead Defence Counsel, and secondly in removing their names from the Principal Defender's List of eligible Counsel, and whether the Trial Chamber is competent ultimately to grant the orders sought by the Accused persons Alex Tamba Brima and Brima Bazzy Kamara. I have stated earlier on in this opinion that I do not agree with the views expressed by their Lordships in paragraph 37 to the effect that "*the Trial Chamber does not have the power to interfere with the law relating to privity of contract*" or in paragraph 49 and 50 to the effect that "*it is unclear on what legal grounds this application is made. The application does not say it is founded on Rule 45 (D) and makes no submission that there are exceptional circumstances that would allow the Trial Chamber to exercise its jurisdiction under Rule 45 (D).*" In my opinion Rule 45 (D) of the Rules applies to a situation where an accused person is dissatisfied with the services of his current assigned Counsel and wishes for good cause to have him or her replaced. In such a case, Rule 45 (D) permits the accused person to make his request for the replacement of such Counsel either before the Principal Defender or under exceptional circumstances, before the Trial Chamber. Clearly Rule 45 (D) does not cover the present situation where assigned Counsel (Mr. Metzger and Mr. Wilbert Harris) have already withdrawn from representing an accused person pursuant to a court order under Rule 45 (E) of the Rules and where the accused persons wish to have their former Counsel reassigned to represent them but the Registrar has removed the names of Counsel from the Principal Defender's List of qualified Counsel. For that matter, I am not aware of any other Rule that provides for the present situation. In such situations where the Rules are silent, the Trial Chamber must if called upon, draw upon its inherent powers if it is in the interests of justice to do so.
39. There is a wealth of authorities supporting the principle that an international tribunal such as the ICTY, ICTR and the Special Court can invoke their inherent jurisdiction to entertain a motion alleging a violation or denial of the statutory rights of accused persons, in the overall interests of justice and in order to prevent a violation of those rights. For instance in the ***Prosecutor v. Tadic***[28] the Appeals Chamber held that the Tribunal did have jurisdiction to examine the plea against its own jurisdiction reasoning that such authority "*is inherent in every judicial organ*". In the ***Prosecutor v. Blaskic***[29] where the validity of a subpoena that Judge Macdonald of Trial Chamber II had issued both to the Republic of Croatia and to its Defence Minister personally, was called into question. On the issue of inherent jurisdiction the Appeals Chamber observed,

"The power to make this judicial finding is an inherent power. The International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded."

40. In the ***Barayagwiza (Abuse of Process) Decision*** of the ICTR[30] the central issue was one of alleged abuse of process by the Prosecutor, for which the Appeals Chamber found it necessary to its inherent power to dismiss the Indictment. The Trial Chamber had dismissed the Applicant's motion for orders to review or nullify his arrest and provisional detention. The Applicant appealed against the decision. Allowing the appeal, the Appeals Chamber held that "*an International Tribunal had inherent jurisdiction or supervisory powers to curb an abuse of process or travesty of justice.*" In the ***Prosecutor v. Momcilo Krajisnik***[31] the Registrar who in the ICTY performs the functions of the Principal Defender, arbitrarily and unreasonably assessed the means of Krajisnik an indigent accused, and declared him only partially indigent for legal aid purposes. The Trial Chamber drawing upon its inherent jurisdiction quashed the Registrar's decision. On the Registrar's appeal against the Trial Chamber's decision, the Appeals Chamber observed that "*It should be clear from the analysis in the previous section that the incidence of error and unreasonableness in the Registrar's decision is such as to justify an order quashing that decision. The Registrar should reconsider his position in the light of the Chamber decision.*" I note that our sister Tribunals have not hesitated to invoke their inherent jurisdiction to oversee and supervise Officials of these International Tribunals on the grounds that such oversight and supervision is fundamental to the Court's ability to regulate its own process and to ensure a fair trial. Closer to home, our own Special Court has pronounced itself on the issue. Ironically, less than one year ago, issues similar to the ones now before us arose between the same parties, namely the Accused Alex Tamba Brima versus the Registrar and Acting Principal Defender in the case of the ***Prosecutor v. Alex Tamba Brima et al***, Case No. SCSL-04-16-PT[32]. In that case the Registrar purportedly acting as the Principal Defender refused to enter into a Legal Services Contract with Mr. Terence Michael Terry, then assigned Counsel for the Accused Alex Tamba Brima on two grounds. Firstly the Registrar insisted that before he enters into such contract, Counsel should undergo a medical examination and should be certified medically fit to permanently and at all times be at the disposal of the accused. Secondly the Registrar argued that having represented Ex President Charles Ghankay Taylor Mr. Terry could not under Article 14 (C) of the Directive on assignment of Counsel be permitted to represent the Accused Alex Tamba Brima in the same Trial Chamber. In an application by the Accused Alex Tamba Brima asking the court to review the administrative decision of the Registrar and Acting Principal Defender to deny him assigned Counsel of his choosing, Trial Chamber I said the following:

"We would like to say here that dismissing this Motion either on the merits or on the jurisdictional grounds as the respondents urge us to do, would amount to conceding to the merits of the objections of both the 1st and 2nd Respondents to our jurisdiction and competence to entertain it and in particular, would be approving a judicial endorsement of the 2nd Respondent's submissions, claiming immunity from a judicial review of the 1st Respondent's acts which are palpably arbitrary, ultra vires and offensive to the law. This, in our opinion, would further amount to a total abdication on our part, of our sovereign obligation and judicial responsibility as a court and as Judges, to subject questionable administrative acts to Judicial scrutiny and review in order to check and curb arbitrary acts, conduct, or decisions taken by our Administrative Officials in

particular, and by the Executive organs in general. The Applicant and his Counsel in the situation in which they find themselves, certainly deserve the protection of the court, notwithstanding the jurisdictional objections raised by both the 1st and 2nd Respondents which we dismiss as frivolous, unfounded and bereft of any merits. The stand we have taken in this regard is consonant with the justification the Learned Editors of Halsbury's Laws of England advance to justify the utility of the inherent jurisdiction of the court in terms of a residual source of power to enable the court ..."in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression" such as the Applicant and his Counsel were indeed subjected to by the 1st Respondent in the instant case."

41. In a way it is surprising that less than a year after Trial Chamber I issued the above decision, the Registrar would once again question the competence and jurisdiction of the Special Court to review his administrative decisions over the rights of accused persons and in particular the right of an indigent accused person to choose assigned Counsel. Be that as it may, suffice it to say that I disagree with the views of my colleagues in the Majority Decision which views seem to ignore the established jurisprudential trends in this area. I find that the Trial Chamber is indeed competent to entertain the present Motion and Cross-Motion in the interests of justice and may for the protection of the rights of the Accused persons, draw upon its inherent power to scrutinise, review and nullify the administrative decisions of the Court's Officials whose effect impacts negatively upon those rights.

(iv) Whether or not the Accused persons Alex Tamba Brima and Brima Bazzy Kamara are entitled under Article 17 (4) (c) and (d) of the Statute of the Special Court to choose Mr. Kevin Metzger and Mr. Wilbert Harris respectively, as assigned Counsel, after each of those Counsel withdrew from representing the respective accused persons in the AFRC Trial pursuant to Rule 45 (E) of the Rules. Alternatively, whether or not Mr. Kevin Metzger and Mr. Wilbert Harris are ineligible for reassignment as Defence Counsel for the respective Accused persons, by reason of Counsel having withdrawn from representing the respective accused persons in the AFRC Trial pursuant to Rule 45 (E) of the Rules.

The dispute that has given rise to the present Motion and Cross-Motion essentially centres around the question whether the Applicants can in pursuit of their statutory rights under Article 17 (4) (c) and (d) of the Statute on choose Mr. Kevin Metzger and Wilbert Harris as their assigned Lead Counsel, after the Trial Chamber permitted Counsel on the 12 May 2005 to withdraw from the AFRC trial pursuant to Rule 45 (E) of the Rules. The controversy is heightened by the fact that before the present Motion was officially filed before Trial Chamber II on the 24 May 2005, certain views were expressed from the Trial Chamber on 16 May 2005 to the effect that "*this Court read an Order on application. The application was an application to withdraw. That Order was made and any letters, correspondence or documents that seek to go behind that decision cannot be countenanced in this court. The decision has been made*"[33] and on 18 May 2005 to the effect that "*This matter was already brought orally to the Court and the following order made on 16th May 2005: This Court read an order on an application. The application was an application to withdraw. That order was made and any letters, correspondence or documents that seek to go behind that decision cannot be countenanced in this Court. The Decision has been made. That ruling stands and the order stands. The Court will not give audience to Counsel who make an application to withdraw on one day on various grounds, particularly security and then come back the day after and basically say they*

retract. They cannot make fools of the Court like this, nor can they do it in a "back door" way through the Principal Defenders and the Registrar's power to appoint Counsel[34]." The controversy was further heightened by the fact that while this issue was under judicial consideration the Registrar on 25 May 2005 removed the said Counsel from the list of Counsel qualified to serve as assigned Counsel, thereby effectively rendering them ineligible under the Rules to serve as assigned Counsel.

42. The Applicants Alex Tamba Brima and Brima Bazzy Kamara submitted that notwithstanding the withdrawal of their former assigned Counsel pursuant to Rule 45 (E) of the Rules the Accused persons are entitled under Article 17 (4) (c) and (d) of the Statute to request the Principal Defender to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as their respective Lead Counsel on the following grounds:

    (i) That the Accused persons have a right to be consulted regarding their preferred choice and that their choice of Counsel may only be denied upon "reasonable and valid" grounds including proven incompetence, misconduct or serious violations of Counsel's respective Codes of Conduct or instances where Counsel's name has been removed from the Principal Defender's list of qualified Counsel pursuant to Article 13 of the directive on Assignment of Counsel;
    (ii) That the Accused persons have indicated their preference of Mr. Kevin Metzger and Mr. Wilbert Harris to other qualified Counsel and have full confidence and trust in their abilities and competence as their respective Lead Counsel;
    (iii) That Mr. Kevin Metzger and Mr. Wilbert Harris have each indicated their willingness and full-time availability to be reassigned as Counsel for the Accused;
    (iv) That there are no reasonable and valid grounds for not reassigning Mr. Kevin Metzger and Wilbert Harris as Lead Counsel;
    (v) That the reassignment of Mr. Metzger and Mr. Harris as Lead Counsel will promote a fair and expeditious trial as Counsel are already familiar with the case and any new appointments would necessarily result in undue delay on the part the newly appointed Counsel who would require adequate time to effectively represent the Accused persons;
    (vi) That the Trial Chamber has no power or authority to interfere in the statutory right of an Accused person to choose assigned Counsel, by giving directives that are contrary to that choice.

43. The Deputy Principal Defender in her Response fully agrees with the submissions of Accused persons and "implores the Trial Chamber to grant the present Motion". The Deputy Principal Defender submitted further in her Cross-Motion that the wording of Rule 45 (E) relating to assignment of "*another Counsel*" does not preclude Counsel who has been permitted to withdraw from subsequently being reassigned to defend the same accused person provided that the original reasons for withdrawal no longer exist and both Counsel and the Accused are in agreement about the reassignment. The Deputy Principal Defender argued that since both Mr. Metzger and Mr. Harris had indicated to her their willingness and availability for reassignment they should in the interests of justice be reassigned.

44. The Registrar opposes the Accused persons' application for reassignment of Mr. Kevin Metzger and Wilbert Harris as Lead Counsel and defends his decision not to reassign them, on the following grounds:

    (i) That Mr. Kevin Metzger and Wilbert Harris are no longer eligible for reassignment as the Acting Registrar removed their names from the Principal Defender's List of qualified Counsel on 25 May 2005;

(ii) That Mr. Kevin Metzger and Wilbert Harris have not unequivocally indicated their willingness and availability to serve as Lead Counsel if reassigned;
(iii) That the Registrar is obligated to give effect to the Trial Chamber's earlier Decision that permitted Mr. Kevin Metzger and Wilbert Harris to withdraw from the AFRC trial and ordered that "other Counsel" be assigned to replace them, as well as their subsequent advice pursuant to Rule 33 (B) of the Rules;
(iv) That the Registrar's decision not to reassign Mr. Kevin Metzger and Wilbert Harris as Lead Counsel is in the interests of the Accused persons because the Trial Chamber in its earlier decision adjudged Counsel no longer fit to represent the Accused persons by reason of their security concerns;
(v) That the appointment of new Counsel would not unduly delay the trial as the Trial Chamber has in its earlier Decision put measures in place to curb delay including the appointment of co-Counsel to represent the Accused persons in the interim.

45. I have throughout this opinion belaboured the point that the previous withdrawal application by Mr. Kevin Metzger and Mr. Wilbert Harris pursuant to Rule 45 (E) of the Rules is separate and distinct from the present Motion by the Accused persons Brima and Kamara seeking their reassignment as Lead Counsel. In the absence of hard evidence that the two motions are related in any way, there is no justification for treating the present Motion with suspicion and perceiving it as some kind of vexatious or underhanded scheme by the Accused persons in connivance with their former Counsel (and perhaps the Deputy Principal Defender) to "go behind the Trial Chamber's earlier Decision" or to abuse court process or to avert the course of justice. To do so would in my humble opinion, be a serious error of judgment and would amount to an abdication of our judicial duty to protect and uphold the statutory rights of the Accused persons as guaranteed by Article 17 (4) (d) of the Statute. In this regard I reiterate the judicial stand that I took in my Memorandum to their Lordships on 19 May 2005 when the Registrar approached the Trial Chamber pursuant to Rule 33 (B) of the Rules for advice on the issue. Article 17 (4) (d) of the Statute guarantees to the Applicants as indigent accused persons, the right to be represented by Counsel of their choosing. I fully agree with the following observations of Trial Chamber I aptly expressed one year ago that, "*It should be noted that this provision is mandatory and even though jurisprudential and interpretational evolutions have significantly whittled down this right which is now more qualified than it is absolute. The Chamber will not, given the allegations of serious breaches of the rule of law and the due process, lose sight of the pre-eminently mandatory and defence protective character of the provisions of this Article.*"[35] The practice pertaining in the ICTR from which the Special Court borrows much of its own, is that the Registry vested with the statutory authority to assign Counsel, permits the accused to select any available counsel from the list of compiled for that purpose and is prepared to add counsel to the list if selected by an accused, provided that such counsel meets the necessary criteria[36]. The ICTR provisions relating to assignment of counsel are similar to those of the Special Court. I agree therefore that although generally the right of an indigent accused to counsel of his choosing may not be unlimited, each case should be considered upon its own merits and the choice of the Accused ought to and should be respected unless there are well founded reasons[37] or reasonable and valid grounds[38] not to assign Counsel of their choice. Can it be said in the instant case that there are well founded reasons or reasonable and valid grounds justifying the Registrar's decision to deny the Accused their choice of Counsel?

46. The placement of counsel on the Principal Defender's list presupposes that counsel has fulfilled the eligibility criteria prescribed under Rule 45 (C) of the Rules. I note that Article 13 (B) of the Directive on Assignment of Counsel purports to modify the eligibility criteria by introducing additional criteria[39]. Once counsel has been placed on the Principal Defender's list, the Rules do not contemplate the removal of counsel from that list. At the most, the Rules simply provide for

withdrawal or replacement of counsel from a particular case[40] or denial of audience by the Trial Chamber for misconduct[41] but certainly not removal from the Principal Defender's list. Again the provisions for removal of counsel from the Principal Defender's list are introduced by the Directive on Assignment of Counsel[42], which Directive also purport to modify the provisions for withdrawal of assigned counsel[43]. It is of course debatable whether the provisions of an administrative Directive promulgated by the Registrar can operate to amend, modify or replace a Rule or Rules promulgated by the Plenary of Judges pursuant to Article 14 of the Statute[44]. Be that as it may, it has been suggested by the Accused persons and the Deputy Principal Defender that once Counsel have been included on the Principal Defender's list pursuant to Rule 45 (C) of the Rules the only "reasonable and valid" grounds for rejecting an indigent accused person's choice of a particular counsel from that list is where that counsel has been found guilty of misconduct or a serious breach of the Code of Conduct or where the Principal Defender has removed his name from the list of qualified Counsel pursuant to Article 13 of the Directive on Assignment of Counsel. The Accused and the Deputy Principal Defender further argued that the voluntary withdrawal of counsel pursuant to Rule 46 (E) of the Rules does not lead to automatic removal of that counsel from the Principal Defender's list, nor does it act as an estoppel against his reassignment if the Accused person chooses to have Counsel back. They maintain in other words, that the withdrawal of counsel pursuant to Rule 45 (E) of the Rules does not constitute "reasonable and valid grounds" for denying an accused person's choice of counsel. Their Lordships in the Majority Decision disagree with those arguments and perceive the Accused persons' choice of counsel as simply "*an attempt by the accused persons acting in concert with Mr. Metzger, Mr. Harris and the Deputy Principal Defender, to go behind the earlier order of the Trial Chamber, which their Lordships will not countenance*". Their Lordships further perceive the voluntary withdrawal of Mr. Metzger and Mr. Harris as an estoppel to their reassignment and perhaps a justification for their removal by the Registrar from the Principal Defender's list, since they do not challenge that removal in their Decision. As such they perceive the right of each of the Accused persons Brima and Kamara as being limited to choice of "another counsel" (other than Mr. Metzger or Mr. Harris). For this conclusion their Lordships rely on the wording of Rule 45 (E) of the Rules.

47. As earlier stated in this opinion, I respectfully do not share the views of their Lordships on this issue on the grounds that the present Motion is not an application by Mr. Metzger and Mr. Harris for review of the Trial Chamber's earlier Decision. I also do not share the beliefs of my colleagues expressed in paragraph 35 of the Majority Decision to the effect that "*the Accused persons do not genuinely wish to be represented by those particular Counsel and that their real motive is to cause as much disruption to the trial as possible*". I believe that the Trial Chamber simply does not possess sufficient information or grounds suggesting *mala fides* or bad motives on the part of the Accused persons. For me to draw such conclusions would be nothing short of judicial recklessness on my part. While it is true that the Accused persons have on past occasions "*given Counsel limited instructions to represent them during the trial*" it is also true that this was not on account of any alleged misconduct or incompetence on the part of assigned Counsel nor on any alleged loss of confidence by the Accused in their assigned counsel. On the contrary the Accused persons have on every such occasion reiterated the fact that have confidence in and high regard for their Counsel. The reasons for the Accused limiting their instructions to counsel have in the past related to the manner in which the Trial Chamber has dealt with certain issues in the trial such as the contempt proceedings[45], but not to the conduct or competence of assigned counsel. It is therefore not true or fair to accuse the applicants of inconsistent behaviour in this regard. Secondly, although one of the grounds put forward by Mr. Metzger and Mr. Harris in their withdrawal motion was that the withdrawal of instructions by their clients had made Counsel's work impossible, the Trial Chamber quite rightly observed and ruled that "*the inability of Counsel to obtain instructions from his client does not constitute "the most exceptional circumstances"*

within the meaning of Rule 45 (E).[46]" In other words the Trial Chamber did not recognise the inability of Counsel to obtain instructions from his client as constituting a valid impediment to Counsel continuing to represent that client. Since that precedent has been set, it should not matter to the Trial Chamber if a similar situation should arise in future between the Accused and their assigned Counsel and it is not necessary n my opinion, to require the Accused persons to make an undertaking or commitment that the situation would not arise again in the future, as suggested in paragraph 35 of the Majority Decision. For now, it is sufficient that the Accused persons have indicated that they would prefer their former counsel to any others that might be chosen for them.

48. Then there is the issue of whether or not the "security concerns" that initially caused Mr. Metzger and Mr. Harris to withdraw from this case, still exist and whether those security concerns now operate either as a bar to their reassignment or a justification for removal of their names from the Principal Defender's list. It will be remembered that in their withdrawal motion Counsel stated then that "*there was a significant threat of danger to their persons or family in the conduct of the Defence case, and that undisclosed sources had informed Counsel that all Court Appointed Lawyers who work for the Special Court are deemed to be party to a conspiracy to subvert the sovereignty of the Laws of Sierra Leone. In consequence whereof they and their families would be called upon to answer for their decision to accept Special Court appointment*"[47]. Counsel also alluded to incidents where a potential Defence witness and clerk to one of the other Defence Counsel were detained and intimidated in separate incidents. Counsel also alluded to a telephone call that one of them received from abroad containing threats. It is also a fact that at the time of the withdrawal motion, Counsel had not taken any formal steps to have their alleged threats investigated by the relevant departments of the Special Court. None the less, the Trial Chamber ruled that these "security concerns" constituted "most exceptional circumstances" under Rule 45 (E) of the Rules warranting the withdrawal of Counsel. The Accused persons have in paragraph 34 of the present Motion indicated that "*their respective Defence teams have met with the Principal Defender's Office and share a common view that these threats could be investigated by the Registry and reasonable steps taken to ensure the safety of Counsel, if and when necessary, and that both Mr. Metzger and Mr. Harris have indicated that they are agreeable to this arrangement and are willing to continue representing the accused persons once reassigned.*" In support of their submissions the Accused persons attached a copy of a letter from Mr. Metzger E-mailed to the Defence Office in which he indicated that both he and Mr. Harris were willing and available to be reassigned as Defence Counsel for the Accused persons, provided that their initial security concerns were duly investigated. Furthermore, the Accused persons submitted that in the interests of continuity of their case and a speedy trial, they would prefer to be represented by their former counsel who are already acquainted with the trial rather than be represented by new counsel who would require time to get acquainted with the case. The Deputy Principal Defender agreed with the submissions of the Accused persons and submitted in addition that in her opinion since both Mr. Metzger and Mr. Harris have indicated their willingness and availability to serve as reassigned Counsel and none of them has hitherto been found guilty of proven misconduct, there is no legal impediment to their reassignment as Lead Counsel, as requested by the Accused persons. For the same reason she maintained that there are no legally justifiable reasons for the Registrar to remove their names from the Principal Defender's list.

49. Although the Registrar did not contradict the above submissions he submitted that in his opinion it is not enough for Mr. Metzger and Mr. Harris to indicate their willingness to be reassigned. They must, in his opinion, directly apply to be reassigned[48]. Clearly the Registrar makes no distinction between the present Motion made solely by the Accused persons in pursuit of their statutory rights, and an application by Counsel for inclusion on the Principal Defender's list, nor does he indicate under what Rule Counsel may apply for "reassignment". It is clear that the Statute and Rules of Procedure and Evidence primarily guarantee the rights of Accused persons, in particular the right

to choose counsel, and further ensure that assigned counsel fulfil the minimum requirements for defending accused persons. The matter of assignment or reassignment of counsel to defend a particular accused person is not one over which counsel is expected "to apply" but rather is the sole prerogative of the Principal Defender in consultation with the accused persons. Accordingly the issue of Counsel "applying for reassignment" does not arise. The Registrar further expresses concerns that "*to date there has been no approach to court to discuss the security concerns of Counsel nor any determination made that the court is even able to meet those security concerns, and if it could, how long it would take to investigate and implement any recommended security measures. There is no evidence that Counsel have reassessed their security concerns so it can be presumed that the conditions upon which they sought to withdraw from the trial still exist.* " Clearly the Registrar's concerns are all purely speculative and are only capable of ascertainment once Counsel are reassigned and are back on board. As regards the Registrar's submissions that Mr. Metzger and Mr. Harris are no longer eligible for reassignment, I am strongly of the view that the Registrar only removed their names from the Principal defender's list precisely in order to render them ineligible for reassignment. I will deal with this issue in greater detail below. Suffice to say here that the removal of Counsel's names from the Principal Defender's list was, in my view, not done in good faith and therefore cannot be used as a ground to thwart the Accused persons' choice of counsel. I would conclude this issue by stating that I agree with the submissions of the Accused persons and the Deputy Principal Defender on this issue. I acknowledge the fact that both Mr. Metzger and Mr. Harris if reassigned would in future have to be more diligent in expeditiously addressing their security concerns to the relevant departments of the Special Court. For now it is sufficient that they have indicated their readiness and willingness to defend the accused persons, notwithstanding their earlier security concerns. I should perhaps add that in my opinion, the feelings of "fear" and "insecurity" are a personal and subjective affair and that the Trial Chamber should not only listen when Counsel express their feelings of fear and insecurity but should also listen when Counsel say that those feelings have subsided or no longer prevent them from efficiently performing their duties. I resolve this issue in the affirmative.

(v) Whether the Registrar acted within his powers in directing the Deputy Principal Defender not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the respective Accused persons and in subsequently removing their names from the Principal Defender's list of eligible Counsel.

50. The Registrar submitted that "*Mr. Metzger and Mr. Harris were directed to be removed by the Acting Registrar from the List of Qualified Counsel suitable for assignment on 25 May when it became apparent that they were still on the List. This was despite the fact that they had withdrawn from the trial and that the security concerns, which were a major reason which caused them to seek to withdraw, had not been addressed by Counsel in any manner with the court Registry. In the circumstances the Accused persons have no basis upon which to make their application because the Counsel they request are not on the list from which they can choose.*"[49] The Registrar further maintained that in refusing to reappoint Mr. Metzger and Mr. Harris as Lead Counsel for the Accused persons Brima and Kamara respectively, he was "*upholding the statutory rights of the Accused persons under Article 17 (4) (d) of the Statute and in the interests of justice*".[50] He further submitted that the Trial Chamber in permitting Counsel to withdraw found them unfit to continue representing the Accused persons and ordered that other counsel be assigned to replace them. The Registrar submitted that when he rejected the Accused persons' choice of former Counsel for reassignment he was simply implementing the Trial Chamber's earlier Decision that ordered the assignment of new Counsel, as well as the view expressed by the Hon. Justices pursuant to Rule 33 (B) that they would not accept reassignment of Mr. Metzger and Mr. Harris as Lead Counsel for the Accused persons.[51] The Registrar further

argued that "*the Deputy Principal Defender as Acting head of the Defence Office acted contrary to the order of the Trial Chamber in being willing to reappoint Mr. Metzger and Mr. Harris as Lead Counsel for the Accused persons*"[52] and that consequently the Registrar acted legally and within his powers under Article 16 of the Statute in directing the Deputy Principal Defender to assign new counsel for the Accused persons. The Registrar argued that "*the position of Principal Defender is not recognised under the Statute therefore the office of the Principal Defender has no statutory authority and that title comes under the authority of the Registrar and staff are subject to his administrative direction including ensuring that court orders are implemented. It therefore cannot be said that the Registrar is therefore illegally interfering with the role of the Acting head of the Defence Office when he directs her to assign other Counsel to represent the Accused persons. These directions and action to appoint Counsel are administrative matters within the authority of the Registrar.*"[53] Lastly the Registrar argues that "*the Trial Chamber has no power to order anyone to enter into a contract. The process of contract negotiations is a matter for individual parties to reach agreement on the terms of a contract. That is a matter for the parties and should not be constrained by any order to enter a contract from the Trial Chamber.*"[54] Their Lordships in the Majority Decision agree with the Registrar's submissions in their entirety.

51. In reply to the Registrar's submissions the Applicants maintained that the Registrar's direction for the removal of Mr. Metzger and Mr. Harris from the List of Qualified Counsel was arbitrary, *ultra vires* and had no legal justification. They argued further that under Article 13 (E) of the Directive on Assignment of Counsel the power to remove Counsel from that list is vested solely in the Principal Defender and that in any event, at the time the accused filed the present Motion on 24 May 2005 the names of Counsel were still on that list. The Accused argue that the Registrar had a duty to investigate the security concerns of Counsel and in the absence of proven misconduct or breach of the Code of Conduct, Mr. Metzger and Mr. Harris should never have been removed from the List. The Accused further argued that the circumstances that caused them to withdraw instructions from Counsel including the issue of the contempt proceedings, no longer exist. On her part the Deputy Principal Defender argued that under the Rules and Directive on Assignment of Counsel, the power to assign and replace counsel and to include and remove from the list of qualified counsel is solely vested in the Principal Defender's Office. She argued further that although the Defence Office is administratively and financially accountable to the Registrar, his role with respect to matters concerning the rights of accused persons is limited to giving support to that office and does not extend to review or usurpation of the Principal Defender's decisions with regard to the rights of accused persons. The Deputy Principal Defender further argued that in the absence of the substantive office holder, she served in an acting capacity as head of the Defence Office and by virtue of that capacity exercised the full powers of the Principal at the material time. She also argues that since both Mr. Metzger and Mr. Harris have no record of misconduct and have indicated their willingness and availability for reassignment, the Accused persons should be permitted to choose them as their reassigned counsel.

52. The resolution of this issue requires a prior understanding of the genesis of the Defence Office of the Special Court as well the inter-relationship between Defence Office and the Principal Defender on the one hand and the office of the Registrar of the Special Court on the other. The traditional practice appertaining in international tribunals like the ICTY, ICTR (and until January 2003 the Special Court for Sierra Leone), has been that there was no independent professional section or department of the international tribunal charged with looking after the rights of accused persons appearing before the Tribunal. For example, while the ICTY and ICTR have administrative offices that handle the affairs of the Defence, neither of the ad hoc international tribunals a permanent institution entrusted with "ensuring the rights of suspects and accused persons" appearing before them. Prior to April 2002 the office of the Registrar handled all aspects of the Defence. This

practice has however, been the subject of much international criticism as it does not provide for effective representation of the Defence and has led to significant inequalities between the Defence and Prosecution. In her "***Report on the Establishment of a Defence for the Special Court for Sierra Leone***"[55] Sylvia de Bertodano observes:

"*One of the principal guarantees of the right to a fair trial is the provision of adequate facilities for an accused person's defence. Trials can only achieve this legitimacy if there is equality of arms between the defence and prosecution. The prosecution of crimes under international law requires not only an effective prosecution office, but also an effective defence. If this is not provided, trials will not be regarded as having been fair, and their verdicts will not be regarded as legitimate. The forthcoming trials before the SCSL will be subjected to a high degree of national and international scrutiny. The court cannot afford to give the impression that the process is overloaded in favour of the prosecution. Defence is often overlooked in the early stages of planning for international trials. The ICTY in its early stages made no proper provision for the defence, and in the preliminary months of its first case was employing only one defence lawyer. The Special Panels for Serious Crimes in East Timor were planned without any regard to the need for defence, and began their operation with only one junior overseas lawyer acting as a public defender, along with newly qualified national public defenders. The spectacle of nervous newly qualified lawyers facing up to experienced international prosecutors before the Special Panels in East Timor was not an edifying one. Although attempts have been made to improve the situation, there has never been any real recovery from this position. On the other hand, other institutions have given rise to grave concerns at the unmanageable costs of providing defence representation. These have surfaced in relation to both ad hoc tribunals, in particular the ICTR, where over-billing, dishonest practices and lack of proper caps and controls has resulted in a grossly inflated defence budget. The Registry of the SCSL expresses concern that both these extremes should be avoided, and that a system should be instituted which succeeds in improving a high standard of representation for defendants at a proportionate and manageable cost.*"

53. In January 2003 the Management Committee reached the conclusion that a Defence Office should be created and headed by a Principal Defender, with a Defence Advisor and three Duty Counsel together with administrative support. Prior to the establishment of the Defence Office the role of the Defence had been essentially ignored through all the early stages of the creation of the court. The "bare bones" of Article 17 of the Statute, which provides for rights and minimum guarantees of an accused person does not stipulate how those rights and guarantees were to be secured. Thus although not originally provided for in the Statute of the Special Court, the Defence Office became an innovation incorporated into Rule 45 of the Rules of Procedure and Evidence, and entrusted with "*ensuring the rights of suspects and accused persons*". Commenting on the newly established Defence Office of the Special Court, Rupert Skilbeck[56] writes:

"*If the Special Court is judged a success, the Defence Office is likely to be a structure that is repeated in other countries. If that is the case, then the unique model of the Defence Office is clearly one that should be adopted. It has to be acknowledged that it is absolutely essential for the defence to be considered on an equal basis to the prosecution from the very start, in terms of legal capacity, administrative support, investigations, public relations, media coverage and outreach. Without this there cannot be a fair trial.*"

54. It is clear from its genesis that the Defence Office was established to "*ensure the statutory rights of suspects and accused persons*", which role the Management Committee and Plenary of Judges reckoned could no longer be adequately performed by the Registrar's Office. With the promulgation of Rule 45 of the Rules, that role was solely vested in the Defence Office and no longer lies with the Registry. The fact that the Defence Office was provided for in the Rules rather than the Statute does not, in my opinion, detract from the important role and mandate of that office. What is of paramount importance is that the establishment of the Defence Office was commissioned by both the Management Committee and the Plenary of Judges, the two legislative arms of the Special Court. Against that background the Registrar's submission that "*the position of Principal Defender is not recognised under the Statute therefore the office of the Principal Defender has no statutory authority*" is inconceivable. Under Rule 45 of the Rules the Registrar is charged with the responsibility of establishing, maintaining and developing the Defence Office. The Registrar is not charged with the running or operations of the Defence Office. That responsibility lies solely with the head of the Defence Office, namely the Principal Defender. In carrying out its mandate under Rule 45 of "*ensuring the rights of suspects and accused persons*" the Defence Office headed by the Principal Defender is expected to carry out the functions stipulated in Rule 45 (A), (B), (C) and (D), including compilation and maintenance of a list of qualified criminal defence counsel, as well as assignment and / or replacement of counsel to indigent suspects and accused persons. Again these important functions are vested solely in the Defence Office and performed by or under the supervision of the Principal Defender. The Directive on Assignment of Counsel sets out further guidelines for the Principal Defender's role of assignment of counsel as well as maintenance of the list of qualified counsel. There is nothing in the Directive remotely suggesting that the Principal Defender should perform those functions in consultation with or subject to the direction of the Registrar. It would appear to me on the reading and interpretation of Rule 45 and the Directive on Assignment of Counsel, that the Defence Office in the performance of its functions, was deliberately envisaged to act with a high degree of autonomy and independence from any other body. It is precisely the autonomous and independent nature of the defence Office that calls for the highest calibre and professionalism of its officials, subject only to judicial review. Thus while the Registrar is expected to exercise administrative and financial oversight over the Defence Office and to give it logistical and other administrative support, he is not expected to take over the functions of the Defence Office or to veto the decisions of its officials made in pursuance of their mandate. That in my opinion, would appear to be an accurate statement of the law on this issue.

55. If I am right, it logically follows that where the Defence Office generally or the Principal Defender in particular has taken a certain stand or decision on matters falling within their mandate (*i.e.* ensuring the rights of suspects and accused persons), any purported interference or veto of that stand or decision (other than by way of judicial review) is clearly *ultra vires* and null and void. Given that in this case the Acting Principal Defender had in exercise of her mandate taken a stand to reappoint Mr. Metzger and Mr. Harris as Lead Counsel for Brima and Kamara respectively, the Registrar's decision directing her not to reappoint them and instead to appoint other counsel, is clearly *ultra vires* and null and void. By the same token the Registrar's unilateral decision to remove the names of Mr. Metzger and Mr. Harris from the Principal Defender's list, against the advice of the Acting Principal Defender was also clearly *ultra vires* and null and void.

56. Regarding the argument that the Deputy Principal Defender acted without proper authority since she had not substantively been appointed "Acting Principal Defender", the law is already settled on this matter. In the ***Brima Decision*** referred to earlier, Trial Chamber I dealt with the issue of court officials serving in an acting capacity and said the following:

"*In view of the very nature and functioning of public or private services, it is, and should always*

be envisaged, that the substantive holder of the position is not expected to there at all times. In order to ensure a proper functioning and a continuity of services with a view to avoiding a disruption in the administrative machinery, the Administration envisages and recognises the concept of "Acting Officials" in the absence of their substantive holders."

The Trial Chamber went on to observe that,

"*Where an official is properly appointed or designated to act in a position during the absence of the substantive holder of that position, the Acting Official enjoys the same privileges and prerogatives as those of the substantive official and in that capacity can take the decisions inherent in that position. The trial Chamber would like to observe that to perform such functions which would give rise to far reaching and contentious confrontations as has happened in the instant case, the concerned official should have been regularly, clearly and expressly be appointed or designated as Acting Principal Defender whilst waiting for the recruitment of the substantive holder of the position. We say this because the exercise of administrative duties, functions or discretions, is founded on the notion of empowerment to exercise the duties that go with that office or the discretions that relate to it. This empowerment is conferred on the official purporting to so act, by a legislative, statutory, regulatory or administrative instrument which clearly defines his competence, and on which the substantive holder of the position functions and takes decisions.*"

57. In the instant case it is a fact that at the time of filing of the present Motion there was no substantive holder of the Office of Principal Defender as Ms. Simone Monasebian the former Principal defender had left the Special Court and Mr. Vincent Mnehielle the new Principal Defender had not yet reported for duty. It was during this administrative "vacuum" that the present Motion was filed as "extremely urgent". Consequently Ms. Elizabeth Nahamya the Deputy Principal Defender found herself in the unenviable position of having to choose between waiting for the new Principal Defender to arrive or simply assuming his powers in order to handle an emergency. This was because the Registrar had not officially designated anyone to serve in an "acting capacity" pending the arrival of the new Principal Defender. Ideally, such a vacuum should never be allowed to occur as it may compromise the rights of the accused persons. Rather than jeopardise the rights of the Applicants it was expedient that the next most senior official of the Defence Office, namely the Deputy Principal Defender should step into the shoes of an "Acting Principal Defender", as Ms. Nahamya did. I find therefore that she acted diligently and lawfully. In concluding this issue I find that the Registrar's decision directing the Deputy Principal Defender not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the respective Accused persons and in subsequently removing their names from the Principal Defender's list of eligible Counsel were *ultra vires* his powers and are null and void. This brings me to the pen ultimate issue.

(vi) Whether the Deputy Principal Defender was bound to comply with the directives of the Registrar relating to the non-assignment of Counsel and their removal from the list of qualified Counsel.

58. Having found as I did above that the Registrar's decision directing the Deputy Principal Defender not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the respective Accused persons and in subsequently removing their names from the Principal Defender's list of

eligible Counsel were *ultra vires* his powers and are null and void, I find also that the Deputy Principal Defender was not bound to comply with those directives. I would add here that I find the issues raised in the Deputy Principal defender's Cross-Motion superfluous as they have already largely been addressed in the present Motion.

(vii) Whether the Trial Chamber has power to review the Registrar's decision not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as assigned Counsel, and his decision to remove their names from the list of qualified Counsel.

59. I have earlier on in this opinion examined the inherent jurisdiction of the Trial Chamber in reviewing the actions of administrative Officials of the court in order to check and curb their arbitrary acts, conduct or decisions. It logically follows from those earlier findings that the Trial Chamber has not only the inherent jurisdiction but also the power to review the Registrar's decision not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as assigned Counsel, and his decision to remove their names from the list of qualified Counsel. I sum up the role of the First Respondent in this matter as that of an official who acted in excess of his statutory and administrative powers. It is therefore my considered opinion that the Trial Chamber should have allowed the present Motion and that the arguments advanced to support it are founded as against those of the First respondent which are both factually and legally unconvincing.

Conclusion:

60. Finally, recognising that the Majority Decision unquestionably prevails , I would allow the present Motion and declare the Registrar's decision directing the Deputy Principal Defender not to reassign Mr. Kevin Metzger and Mr. Wilbert Harris as Defence Counsel for the respective Accused persons and in subsequently removing their names from the Principal Defender's list of eligible Counsel, *ultra vires* and are null and void. I would further order that the Principal defender immediately reinstates the names of M. Kevin Metzger and Wilbert Harris on the list of qualified Counsel. I would further order that the Principal Defender complies with the choice of counsel that the Accused persons Alex Tamba Brima and Brima Bazzy Kamara have made.

Done at Freetown, Sierra Leone, this 11th day of July 2005.

Judge Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

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[1] Document No. SCSL-2004-16-PT-114

[2] *Brima-Decision on Applicant's Motion against Denial by the Acting Principal Defender to enter into a Legal Service Contract for Assignment of Counsel,* 6 May 2004, paragraph 28

[3] Document No. SCSL-2004-16-PT-296, paragraph 6 of the Conclusion, page 9337.

[4] Document No. SCSL-2004-16-PT-296, paragraph 18.

[5] Document No. SCSL-2004-16-PT-290, paragraphs 11, 12,16,17,22 and 25.

[6] Document No. SCSL-2004-16-PT-298, paragraph 3.

[7] *The Prosecutor v. Alex Tamba Brima et al,* Case No. SCSL-2004-16-T: Decision on the

Confidential Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, 23 May 2005.

[8] *The Prosecutor v. Alex Tamba Brima et al,* Case No.SCSL-2004-16-T, Brima Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004; see also *Prosecutor v. Tadic,* Case No. IT-94-1Decision on the Defence Motion for Interlocutory Appeal for Jurisdiction, 2 October 1995; The Prosecutor v. Blaskic, Case No. IT-95-14: Appeals Chamber Judgment on the Request of the Republic of Croatia for Review of the decision of Trial Chamber II, 18 July 1997; The Prosecutor v. Barayagwuriza, Case No. ICTR-97-13, Appeals Chamber Decision on Abuse of Process, 3 November 1999.

[9] *The Prosecutor v. Alex Tamba Brima et al,* Case No.SCSL-2004-16-T, Brima Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, paragraphs 78 and 79.

[10] Annex C to the Extremely Urgent Confidential Joint Motion for the Reappointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara pursuant to Articles 17(4)(C) and 17(4)(D) of the Statute of the Special Court for Sierra Leone and Rule 54 of the Rules of Procedure and Evidence and the Inherent Jurisdiction of the Court.

[11] Annex D to the present Motion.

[12] Report of the Human Rights Committee, HRC, vol. II (A/48/40), 1993, at 120, para.7.2

[13] This letter is now annexed to Clare Carlton-Hancile's Submissions in Support of the present Motion, which forms part of the defence Office's Reply to the present Motion.

[14] AFRC Trial, Transcript of 16 May 2005, p.48, lines 14-24.

[15] Ibid.

[16] This was the test applied in the "*Decision on Application by Momir Talic for the Disqualification and Withdrawal of Judge Mumba, 18 May 2000* " cited in the International Criminal Practice by Jones and Powles, 3rd Edition, page 63 at paragraph 2.1.69

[17] Article 17 (2)

[18] In re Oliver, 333 U.S. 257 at 268 (1948).

[19] Document No. SCSL-2004-16-PT-296, paragraph 6 of the Conclusion, page 9337.

[20] Document No. SCSL-2004-16-PT-296, paragraph 18.

[21] See Acting Registrar's letter to Acting Head of Defence Office dated 25/05/05, Attachment 1 to the Registrar's Reply.

[22] Rule 45 (D) and (E)

[23] Paragraph 36 of the present Motion and paragraph 20 (4) and (5) of the Joint Defence response to 1st Respondent's Reply to the present Motion.

[24] Paragraphs 19, 20 and 21 of the First Respondent's Response to the present Motion.

[25] Paragraph 19 and 28, ibid.

[26] Paragraph 27, ibid.

[27] See last paragraph of the Second Respondent's Response to the present Motion, the Cross-Motion and Defence Office's reply to Registrar's Response to Cross-Motion.

[28] Decision on the Defence Motion for Interlocutory Appeal for Jurisdiction, Case No. IT-94-1, 2 October 1995, Appeals Chamber (Tadic (Jurisdiction)), referred to in an instructive article on the subject by Louise Symons entitled "The Inherent Power of the ICTY and ICTR" in the *International Criminal Law Review* 3: 369-404, 2003.

[29] Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-914, 29 October 1997, Appeals Chamber.

[30] Case ICTR-97-13, 3 November 1999, Appeals Chamber.

[31] ICTY Case No. IT-00-39-PT, 20 January 2004

[32] Brima-Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal services Contract for the Assignment of Counsel, 6 May 2004.

[33] ibid.
[34] Ibid.
[35] Brima Decision, ibid. paragraph 41.
[36] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeals Chamber, Judgment, 1 June 2001, paras.50-64
[37] This was the test applied in *The Prosecutor v. Martic*, Case No. IT-95-11-PT, Decision on Appeal against Decision of the Registry, 2 August 2002 and in Gerald Ntakirutimana
[38] This was the test applied in *The Prosecutor v. Knezevic*, Case No. IT-95-4-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002.
[39] Article 13 (B) (iv) and (vi) of the Directive introduces new criteria not prescribed by Rule 45 (C) of the Rules.
[40] Rule 45 (D) and (E)
[41] Rule 46 (A) and (B)
[42] Article 13 (E)
[43] Article 24 of the Directive on Assignment of Counsel substantially modifies the provisions of Rule 45 (D) and (E) by introducing a parallel avenue for withdrawal of assigned counsel.
[44] Trial Chamber I held in its Brima Decision, ibid, para. 35 that The Directive on Assignment of Counsel cannot operate to either replace or to amend the Rules of Procedure, as to do so would be ultra vires the Registrar's delegated powers.
[45] See the three letters of the Accused persons quoted in the Trial Chamber's Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, 23 May 2005.
[46] Ibid. paragraph 39.
[47] Ibid. paragraph 6.
[48] Paragraph 3 of the Registrar's Response.
[49] Paragraphs 1 and 2, ibid.
[50] Paragraph 14, ibid.
[51] Paragraphs 19 and 24, ibid.
[52] Paragraph 25, ibid.
[53] Paragraphs 5 and 23, ibid.
[54] Paragraph 27, ibid.
[55] The Report was compiled at the request of the Registry of the Special Court and No Peace Without Justice (NPWJ), 28 February 2003.
[56] Defence Advisor, SCSL, February- August 2004. Paper entitled "***Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone***"

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TRIAL CHAMBER II

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

Registrar: Robin Vincent

Date: 9 June 2005

SPECIAL COURT FOR SIERRA LEONE
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9 JUN 2005
NAME: GEOFF WALKER
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TIME: 17:15

PROSECUTOR Against Alex Tamba Brima
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-T)

DECISION ON THE EXTREMELY URGENT CONFIDENTIAL JOINT MOTION FOR THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS AS LEAD COUNSEL FOR ALEX TAMBA BRIMA AND BRIMA BAZZY KAMARA AND DECISION ON CROSS MOTION BY DEPUTY PRINCIPAL DEFENDER TO TRIAL CHAMBER II FOR CLARIFICATION OF ITS ORAL ORDER OF 12 MAY 2005

1st Respondent
The Registrar

2nd Respondent
The Acting Principal Defender

Defence Counsel for Alex Tamba Brima:
Glenna Thompson
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Carry Knoops
Abibola E. Manly-Spain

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TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

SEISED of the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, Pursuant to Articles 17(4)(C) and 17(4)(D) of the Statute of the Special Court for Sierra Leone and Rule 54 of the Rules of Procedure and Evidence and the Inherent Jurisdiction of the Court, filed on 24 May 2005 ("Motion") on behalf of the Accused Brima and Kamara;

NOTING that the Motion names the Registrar as First Respondent and the Acting Principal Defender as Second Respondent;

NOTING the Defence Office's Response to the Motion, filed on 30 May 2005 ("Defence Office Response"), which was entitled as "Reply" and which included a Cross Motion by the Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005 and its subsequent Decision dated 20 May 2005 ("Cross Motion");

NOTING FURTHER that this Defence Office Response incorporated statements of the Deputy Principle Defender and a Legal Officer of the Defence Office;

NOTING the Response of the Registrar to the Motion, filed on 31 May 2005 ("Registrar's Response");

NOTING the Joint Defence Reply to the Registrar's Response, filed on 3 June 2005 ("Defence Reply");

NOTING the Registrar's Response to the Cross Motion, filed on 6 June 2005;

NOTING the Defence Office's Reply to the Registrar's Response to the Cross Motion, filed on 7 June 2005;

NOTING the various corrigenda to the submissions that were filed by the parties;

DECIDES AS FOLLOWS.

I. THE SUBMISSIONS OF THE PARTIES

MOTION

1. Counsel for Alex Tamba Brima and Brima Bazzy Kamara seek the following orders:

   i. "**In the first place**, based on the foregoing arguments, the Defence herewith respectfully prays the Trial Chamber to order the Registrar to ensure that Mr. Metzger and Mr. Harris are re-assigned as Counsel for Accused persons Brima and Kamara.

   ii. **In the second place**, an order to the Acting Principal Defender to immediately enter into a legal services contract with Mr. Metzger and Mr. Harris.

   iii. **In the third place**, that the Justices that re-confirmed the order not to re-appoint as indicated in the letter from the Registrar's Legal Advisor recluse (sic) themselves from hearing this present Motion.

iv. In the fourth place, an order to declare as null and void the decision of the Registrar not to re-assign Counsel as the decision was made without legal or just cause and therefore ought to be quashed accordingly and set aside.

v. In the fifth place, any other relief the Trial Chamber may deem fit and appropriate in the circumstance".

2. The Motion purports to set out a chronology of events leading up to this application. Reference is made to the application filed on May 5, 2005, by Lead Counsel for Brima and Kamara wherein the Trial Chamber was requested to: (a) approve the withdrawal of Counsel as Counsel for the accused, (b) not order that Counsel hitherto on record be made Court Appointed Counsel and (c) make any order that the Trial Chamber deems appropriate. Although the responses are recited, no mention is made of the order of the Trial Chamber of 12 May 2005 when the Trial Chamber by a majority decision granted leave to both Counsel to withdraw.

3. The Motion refers to a letter dated May 12, 2005 written by the Accused to the Principal Defender and to subsequent meetings held between the Defence Office and the Accused, but fails to mention that the said letter was not revealed to the Trial Chamber until 16 May 2005, on which day the Trial Chamber ruled:

> *"This Court read an order on an application. The application was an application to withdraw. That order was made and any letters, correspondence or documents that seek to go behind that decision cannot be countenanced in this Court. The decision has been made".*

4. The Defence submits that the decision of the Registrar refusing the re-appointment of the two Lead Counsel is in breach of the rights of the Accused persons to have counsel of their "own choosing" as provided for in Article 17(4)d of the Statute of the Special Court.

5. The Defence further submits that in matters relating to the assignment of defence counsel, an accused has a right to be consulted regarding his wishes and that the Registrar may only refuse those wishes "on reasonable and valid grounds". It submits that reasonable and valid grounds are those which may occasion withdrawal, non-appointment or reinstatement of Counsel, including proven incompetence or misconduct, serious violation of the Code of Conduct, or where the name of the Assigned Counsel has been removed from the list kept by the Principal Defender under Rule 45(C) and Article 13 of the Directive on the Assignment of Counsel. The reasons stated in the Registrar's letter, it is submitted, do not constitute reasonable and valid grounds for not reinstating Lead Counsel.

6. The Defence goes on to argue that, in the absence of duly proven misconduct or incompetence, it is not for the Trial Chamber to stipulate who should represent an accused person. It submits that the former Lead Counsel are familiar with the case and appointment of other Counsel will result in delay.

7. The Defence further submits that an expression of preference or otherwise for Counsel by the Trial Chamber, gives the impression however unintended, of bias and interference with the statutory rights of the Accused persons.

8. The Defence subscribes to the observations and opinions stated by the Hon. Justice Sebutinde in her Memorandum dated 19 May 2005 and claims that the substantive legal issues of ultra vires, perceived judicial impropriety, potential bias and conflict of interest, and the potential compromise of fair and impartial conduct of the trial are so palpable that the other two judges of this Trial Chamber ought to recuse themselves from hearing the present Motion.

9. Finally, the Defence seeks judicial review of the Registrar's decision not to re-assign the two Counsel who withdrew from the case to ensure the observance of due process of law, and prevent improper vexation and oppression in the administration of justice.

DEFENCE OFFICE'S RESPONSE

10. In reply the 2nd Respondent – the Deputy Principal Defender – argues that the Directive on the Assignment of Counsel and Rule 45 imply the Principal Defender's lead role in assigning and replacing counsel and his independent and autonomous decision-making authority. She points out that the Registry is not mentioned in the provisions governing assignment and replacement of counsel, but rather in provisions dealing with administration and servicing. She submits that the Registrar's delegation of the defence duties to the OPD limits the Registrar's role in assigning counsel and he does not have explicit power to review determinations of the Principal Defender. Alternatively, if the Registrar does have implicit power to review the Principal Defender's appointment decisions, then such power is subject to a "reasonable and valid grounds" test.

PRINCIPAL DEFENDER'S CROSS-MOTION

11. The Cross-Motion seeks clarification of the meaning of the word "permit" used in the majority order of the Trial Chamber of 12 May 2005, and whether counsel must actually withdraw if he has only been "permitted to withdraw". The Deputy Principal Defender also seeks guidance on the meaning of "another" as in the phrase "appoint another counsel". She also makes a submission that there is no Rule or Directive disqualifying counsel who has previously withdrawn from the case, and so any disqualification may be perceived as a penalty for complying with the clients' wishes and their local code of ethics.

REGISTRAR'S RESPONSE TO THE MOTION

12. The 1st Respondent, the Registrar, notes that the Counsel in question were, on the 25th. May 2005, removed from the List of Qualified Counsel suitable for assignment as Lead Counsel when it was noticed that they were still on the list despite the fact that they had withdrawn from the trial and that the security concerns, which were a major reason which caused them to seek to withdraw, had not been addressed by Counsel in any manner with the Registry.

13. Accordingly, the Registrar submits that there is no basis for the Motion since the Counsel requested by the Accused are not on the List of Qualified Counsel from which they can choose.

14. The Registrar further submits that while the position of Registrar is recognised under Article 16 of the Statute, the position of Principal Defender has no statutory authority and therefore that title and the Defence Office come under the statutory authority of the Registrar and they are subject to his administrative direction, and that includes ensuring that court orders are implemented.

15. Hence the Registrar states that he has sought to ensure that the decision of the Trial Chamber on 12 May wherein it directed another Counsel be appointed by the Principal Defender to represent the accused is complied with. He submits that his action in refusing to allow the acting head of the Defence Office to re-appoint Counsel, is within the responsibility and powers the Registrar has to direct staff under his authority and to ensure that court orders are complied with.

16. The Registrar further submits that the Motion, by seeking to allow the acting head of the Defence Office to re-appoint Counsel in contravention of the Trial Chamber's decision of 12 May, is in reality seeking to ignore and "go behind" the order of the Trial Chamber which allowed Counsel to withdraw from the case, and therefore constitutes an abuse of process.

17. He also submits that statements from the accused that they are now prepared to provide full instructions should be disregarded as they have withdrawn instructions before and may do so again.

18. The Registrar states that the right of the Accused to be assigned Counsel of their choice is not absolute and that he must take into account all surrounding circumstances before deciding whether to accept a request by an accused for counsel. He sees the decision of the Trial Chamber in allowing the two Lead Counsel to withdraw as being based on the fact that Counsel were no longer in a position to properly defend the Accused, and regards the decision as an important matter to take into account to ensure that the Accused are properly represented. In support, he cites para. 60 of the decision:

> *"We are of the view that Lead Counsel, with their present difficulties, would not be capable of acting in the best interest of their clients. We doubt that they would be able to represent their clients to the best of their ability when, apart from everything else, they are concerned for their own safety and that of their families. Although we are loath to come to a decision which possibly may adversely affect an expeditious trial, we are of the view that the rights of the Accused to be represented by counsel would best be served by appointing counsel able to carry out their duties free of the constraints inhibiting present Lead Counsel".*

19. The Registrar argues that the Motion seeks to impose upon him a test of refusal on "reasonable and valid grounds" but that no such test is provided in the Rules or the Directive. However, he submits that if there is such a test, then he relies on the decision of the Trial Chamber allowing Lead Counsel to withdraw because they could not properly represent the Accused.

20. With reference to the Defence submission that there was extra judicial interference in the question of the re-appointment of Counsel, the Registrar states that he has the right under Rule 33(B) to make oral or written representations to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions. Pursuant to this right, his representations to the Trial Chamber were to seek clarification of its order; he was not seeking to be directed by the Trial Chamber.

21. He refers to the overall authority of the Registrar over the administration and servicing of the Special Court and argues that he is entitled to direct the Principal Defender on the assignment of counsel, which is an administrative matter.

JOINT DEFENCE REPLY TO REGISTRAR'S RESPONSE

22. The Defence reply, which is very strongly worded and, in our view, amounts to a personal attack on the Registrar, restates the Defence argument that the Registrar's direction not to reassign counsel is arbitrary and without legal foundation. The Reply also contains a further prayer for relief that the:

> "Motion of 24 May 2005 together with all subsequent responses and replies thereto be made public and heard in open court".

REGISTRAR'S RESPONSE TO CROSS-MOTION

23. The Registrar submits that the cross-motion is being used to extend the arguments of the Deputy Principal Defender and attempts to redefine the clear order of the Trial Chamber of 12 May 2005.

DEFENCE OFFICE'S REPLY TO REGISTRAR'S RESPONSE TO CROSS-MOTION

24. The Defence Office reiterates its mandate under Rule 45 to ensure the rights of the Accused. The new Principal Defender states that he is in a dilemma as to what to do in order to secure the best interests of the accused persons and in the interests of fair trial and justice, and that ultimately, the Defence Office will await the directive of the Trial Chamber in view of the multifarious motions, responses and replies already filed.

II. DELIBERATIONS

Further relief sought in Joint Defence Reply to Registrar's Response that the motions be heard in open Court.

25. We again note that Counsel have made an application for further relief in a Reply. We repeat what was stated by this Trial Chamber in the Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68 (4 May 2005): "This is a practice that must be discouraged. A Reply is meant to answer matters raised by the other party in its Response, not to claim additional relief to that sought in the Motion. Obviously the other party, having already filed a Response to the Motion, has no way under the Rules to answer the new prayer, except to apply to the Trial Chamber for leave to do so. In future, the Trial Chamber will not hear claims for additional relief contained in a Reply".

Furthermore, we observe that there has been no submission to support or explain this application for a public hearing. Counsel refers to "security concerns" but ignores the fact that the Lead Counsel, in their original application to withdraw from the case sought to have the facts under seal and ex-parte as well as confidential. In the circumstances, we consider this application vexatious.

Relief sought in the substantive Motion

26. As recited above, the applicants seek four substantive orders. We again note that the chronology recited by the applicants omits fundamental facts, e.g. the order of the Trial Chamber of 12 May 2005, the ruling of 16 May 2005 and a letter of the 17 May 2005 from the Deputy Principal Defender to the Registrar. Without a clear statement that the Court made a ruling on 12 May 2005 granting in full the relief sought by Counsel to withdraw from the case, the Motion implies that the Trial Chamber gave orders to withdraw after and despite a letter from the accused asking for Counsel to be "maintained". Such implication that the Court acted without giving any consideration to the wishes and statements of the accused is improper.

27. Further, the submission fails to recite that the Court on 16 May 2005 recorded that its order had been made and letters, correspondence and documents that sought to go behind the order would not be countenanced.

28. Instead, the submission refers to consequential orders made on 13 May 2005, then to a letter from the Registrar on 19 May 2005 omitting both the ruling of 16 May 2005 and a memorandum from the Deputy Principal Defender to the Registrar on 17 May 2005, (which sought to have the Counsel re-assigned). That memorandum, very improperly in our view, fails to inform the Registrar of the Court's ruling of 16 May 2005.

29. The impression that the Registrar wrote on 19 May 2005 on his own volition or in a vacuum is misleading. We remind Counsel of their duty to the Court to be truthful. We cannot accept that failure to recite these 3 important matters was an oversight. Failure to be truthful is misleading and vexatious.

30. Further, Counsel submits that there was an expression of preference or otherwise for Counsel by Justices of the Trial Chamber. There is no evidence that the Justices made any statement of preference or otherwise and to imply impropriety by the Justices in this way is itself improper.

31. If Counsel seek to base their submission on the reference to the Registrar consulting with the Trial Chamber, then the submission fails to take account of the powers to the Registrar, pursuant to Rule 33B, to make oral or written representations to the Chamber on any issue arising in the context of a specific case which may affect the discharge of his functions. These functions, as the Deputy Principal Defender and the Registrar submit, include the duty to maintain a Defence office pursuant to Rule 45.

Specific Relief

32. (1) We consider it appropriate to first deal with the prayer for relief seeking the following: "That the Justices that reconfirmed the order not to re-appoint as indicated in the letter from the registrar's legal adviser recluse (sic) themselves from hearing this present Motion".

This prayer appears based on a premise that there was:

a. an order that Counsel not be re-appointed and;

b. that order was reconfirmed.

There was no order made in this Trial Chamber refusing re-appointment of Counsel per se. The orders sought in the original application were for leave for Counsel to withdraw from the case. The orders were granted in full as sought and additional orders for, *inter alia*, appointment of Lead Counsel were made.

The orders for appointment of other Lead Counsel were based on the mandatory provisions of Rule 45(E) obliging the Principal Defender to "assign another Counsel".

33. Since there was no determination of the issue of re-appointment of counsel, there are no grounds for submitting that any Judge recuse him/herself.

34. (2) That the Trial Chamber order the Registrar to ensure that Mr.Metzger and Mr. Harris are re-assigned as Counsel for Accused persons Brima and Kamara. The Lead Counsel Metzger and Harris applied to withdraw for various reasons of which their personal safety and that of their families was emphasized in oral submission. The Court is, in our view, entitled to assume that in keeping with professional ethics, they informed their respective clients of this decision to apply to withdraw.

35. The statement by the accused Kamara that he "did not know it would force my lead counsel to withdraw" (see Motion, Annex F, para.4) casts doubt upon that basic assumption. This and the statement from the accused Kamara that "I have deemed it fit to give him full instructions to come

back and work on my case with my full support and continued cooperation" (see Motion, Annex F, para. 4) shows the Court that the accused have decided to frustrate the hearing by withdrawing instructions and then, when it suits them, giving instructions. There is no undertaking or clear indication that this pattern of behaviour will not be repeated to avoid interfering with a fair and expeditious hearing. In our earlier decision permitting Lead Counsel to withdraw, we found that the Accused were merely boycotting the trial and obstructing the course of justice. In our view, that is exactly what they are seeking to do in bringing the present Motion. We do not believe that they genuinely wish to be represented by those particular counsel. We believe that their real motive is to cause as much disruption to the Trial as possible.

36. As the Deputy Principal Defender has correctly stated, the duty to assign Counsel in the event of a withdrawal rests in the Principal Defender. However, we do not consider this entirely relevant as Rule 45(E) provides the appointment must be of "another" Counsel. There is no provision for re-assignment of former Counsel in the event that they or their clients, or both, have changed their mind.

37. (3) An Order to the Acting Principal Defender to immediately enter into a legal contract with Messrs Metzger and Harris:

We repeat the foregoing points and stress that there is no provision for re-appointment under Rule 45(E). Whilst the Trial Chamber has a duty to ensure that a trial is fair and expeditious, we do not have the power to interfere with the law relating to privity of contract.

38. (4) An Order to declare the decision of the Registrar not to re-assign Counsel null and void as it was made without legal or just cause.

As the Deputy Principal Defender has conceded in the absence of the Principal Defender, certain obligations to carry out duties fall upon the Registrar. He has a further overall duty to act as principal administrator of the Court.

39. In exercising his duty, the Registrar sought to uphold an order of the Trial Chamber allowing Counsel's application to withdraw and ordering that another Counsel be assigned in accordance with Rule 45(E).

40. To argue that upholding and implementing a Court Order, made on the application of the parties concerned, is "without legal or just cause" is fallacious.

41. The applicants have stressed the right of the accused to Counsel of their "own choosing" as provided by Article 17(4)(d) and have argued this allows them to have the Counsel they previously refused to instruct and co-operate with re-assigned to them. They submit the Trial Chamber must "ensure that the right [...] is not arbitrarily interfered with [...]"

42. This provision has been considered by various courts, both the International Tribunals and, as stated in the brief by Mr. Knoops, by the European Courts when interpreting Article 6 of the European Convention on Human Rights.

43. The accused in this case have declared themselves indigent and have, in accordance with Article 17(E)(d), a right to have legal assistance assigned.

44. However, the right to have legal assistance does not carry with it an absolute right to any Counsel.

45. As was held in the *Prosecutor v. Martic* by ICTY:

> *"the jurisprudence of the International Tribunal and of the International Criminal Tribunal for Rwanda indicates that the right of the indigent accused to counsel of his own choosing may not be unlimited but that, in general, the choice of any accused regarding this Defence Counsel in proceedings before the Tribunals shall be respected; that, in the view of the Chamber, the choice of all accused should be respected unless there exist well-founded reasons not to assign Counsel of choice".*[1]

And in ICTY *Prosecutor v. Knežević*:

> *"Contrary to the submission of the Accused and Mr. Drasko Zec, the right of indigent accused to counsel of his own choosing is not without limits; that the decision for the assignment of counsel rests with the Registrar, having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request."*[2]

46. And as stated by Ms. Knoops in paragraph 2 of his brief, the right of an accused to counsel "can be subject to certain restrictions, such restrictions should of course be interpreted in the perspective of the overall right of the accused to have a fair trial."

47. Mr. Knoops in his brief, does not resile from this restricted right of an accused but instead stresses the concept of equality of arms. However, we repeat our view in the decision on the Confidential Defence Application, quoted above, "that Lead Counsel with their present difficulties would not be capable of acting in the best interests of their clients".

48. We note the Defence reply that the "circumstances where Counsel previously withdrew his services for stated reasons and circumstances, some of which have changed" (paragraph 8). We have no direct evidence from Counsel that their circumstances have changed, and given that this application emanates from a letter from the accused purportedly written on the same day as the Trial Chamber's order, we question the bona fides of that statement.

The only change since our decision is that the accused are apparently now willing to give instructions to counsel, but all the other factors we considered in arriving at our decision are still in existence. We cannot escape the conclusion that the two lead counsel were not sincere in their reasons for bringing their motion to withdraw from the case and that they never expected it to succeed.

49. Further, it is unclear on what legal grounds this application is made. The application does not say it is founded on Rule 45(D) and makes no submission that there are exceptional circumstances that would allow the Trial Chamber to exercise its jurisdiction under Rule 45(D).

50. It appears that this application in reality is simply an application to reverse a majority decision given by the Trial Chamber on 12 May 2005 because in that decision all relief prayed for was granted to Counsel. A decision upholding the submissions made and granting the relief prayed for could hardly be appealed. Given the alacrity with which the accused and their Counsel and the Deputy Principal Defender sought to go behind that order and seek to reverse it, causes us to doubt the sincerity of the application to withdraw. By not giving instruction to their Counsel leading to withdrawal of counsel from the case, coupled with an immediate application to re-instate the same Counsel, the accused have seriously delayed and obstructed this trial.

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[1] *The Prosecutor v. Martic*, Case No. IT-95-11-PT, Decision on Appeal against Decision of the Registry, 2 August 2002.

[2] *The Prosecutor v. Knežević*, Case No. IT-95-4-PT, IT-95-8/1-PT, Decision on Accused's request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002.

51. Moreover, since the Accused had not been coming to court and were not giving instructions to their counsel (although those were not the only reasons why counsel sought to withdraw from the case), we directed under Rule 60(B) that the Accused be represented by Court-appointed counsel (who were already part of the Defence team) and that the Principal Defender assign another lead counsel to each of the Accused. We were satisfied that these were the proper measures to protect the rights of the Accused, in particular their right to be tried without undue delay as enshrined in Article 17(4)(c). We do not have the jurisdiction to revisit that decision, nor do we see any good reason to re-appoint the counsel concerned. In any event, it appears that the said Counsel are not eligible to be reappointed since they are no longer on the list of qualified counsel required to be kept under Rule 45(C).

52. Having held that this Motion is not founded on bona fide motives and seeks to reverse an order granting relief which the Defence itself sought, we consider this Motion to be frivolous and vexatious and for this and the foregoing reasons, we dismiss the motion and refuse the relief prayed for therein.

Cross Motion

53. The Deputy Principal Defender has filed a Cross-Motion in response to the Defence Motion. We again repeat, a response or reply should not be used as a vehicle to seek further relief. The Acting Principal Defender seeks clarification of the majority order of 12 May 2005 and asks if "permit to withdraw" means Counsel are required to withdraw and if "another" Counsel means Counsel other than those who withdrew.

54. The application then argues that there is no provisions disqualifying counsel who have previously withdrawn and suggests the "disqualification may be perceived as a penalty". In our opinion, this is a speculative statement implying an unspecified party has been subjected to some form of penalty and is made without foundation.

55. The then Principal Defender, Ms. Monasebian, sought clarification of the order and appointment of other Counsel in open Court on 12 May 2005 and accepted the replies of Hon. Justice Lussick and the Presiding Judge. For the benefit of the Deputy Principal Defender, when the Trial Chamber permits counsel to withdraw from the case, it is the duty of the Principal Defender under Rule 45(E) to assign another counsel to the indigent accused. The word "another" is defined in the Paperback Oxford English dictionary as meaning: "1. one more. 2. different from the one already mentioned".

56. If the Deputy Principal Defender is still in doubt as to the meaning of the orders we made in court on the 12 May 2005, we would draw her attention to the transcript of that date, page, 4 lines 11 to 21, where the following exchange took place:

> "JUDGE LUSSICK: We'll be relying on you, Ms. Monasebian, to appoint two new lead counsel in accordance with the order. But we are very confident that the co-counsel can carry the case in the meantime, as they have been doing for long sessions in any event.
>
> Ms. MONASEBIAN: And they are permitted to, that's right.
>
> JUDGE LUSSICK: Certainly, yes. We are well aware they are permitted to do that.
>
> Ms. MONASEBIAN: Yes, yes. Thank you for that clarification and that just leads me to know that we have to assign other people in due course. Thank you for that, Your Honours."

57. We have added emphasis in places in the hope that it will aid the Deputy Principal Defender's understanding. Certainly, the Principal Defender at the time had no difficulty in knowing what her duty was and accepted that new lead counsel would need to be appointed.

58. The other matter raised in the Deputy Principal Defender's Cross-Motion is as follows:

> "The Defence Office seeks an order offering guidance as to the application of the word "permit" to withdraw used in the majority Order of the Court of 12 May 2005 and its subsequent Decision dated 20 May 2005. Must Counsel necessarily be required to withdraw if he is only "permitted to withdraw"?

59. If the Deputy Principal Defender is putting this to the Trial Chamber as a hypothetical question then we would inform her that the Trial Chamber does not make findings on hypotheses. If, on other hand, she is suggesting that the two lead counsel brought a Motion to withdraw from the case when they had no intention of doing so if the motion were granted, then we would view that as a serious impropriety.

60. We refer to the Registrar's Reply to the Motion and agree with his submissions on the law. We find that in implementing the orders of this Trial Chamber, the Registrar has acted within his authority and power.

61. Looking at the history of this case since we made our order on the 12 May 2005, it seems to us as though the Deputy Principal Defender has gone out of her way to undermine our decision. Almost a month has gone by and she has not made any attempt to appoint new lead counsel. It appears she is unwilling to do her job, and unwilling to follow the directions of the Registrar, who has overall authority over the administration of the Special Court and, in particular, over the assignment of counsel, which is an administrative matter.

62. We noted the Cross Motion sought clarification only and having made those clarifications no orders are required.

FOR ALL THE ABOVE REASONS

the Trial Chamber dismisses the Motion.

Hon. Justice Julia Sebutinde will deliver a separate dissenting opinion.

Done at Freetown this 9th day of June 2005.

Justice Richard Lussick

Justice Teresa Doherty
Presiding Judge

[Seal of the Special Court for Sierra Leone]

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THE TRIAL CHAMBER

Before:	Judge Bankole Thompson, Presiding Judge Judge Benjamin Mutanga Itoe Judge Pierre Boutet
Registrar:	Robin Vincent
Date:	1 April 2004

PROSECUTOR Against **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No. SCSL-04-16-PT)

DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION ON DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Luc Côté
Robert Petit

Defence Counsel for Alex Tamba Brima:
Terence Terry

Defence Counsel for Brima Bazzy Kamara:
Ken Fleming

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops

SPECIAL COURT FOR SIERRA LEONE
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- 1 APR 2004
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SIGN
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light of the several challenges to the indictment raised by the Defence, this Trial Chamber deems it necessary to recall, with emphasis, its major judicial focus as regards defects in the form of indictments in the context of international criminality. The Trial Chamber's focus is that:

> where the allegations relate to ordinary or conventional crimes within the setting of domestic or national criminality, the degree of specificity required for pleading the indictment may be much greater than it would be where the allegations relate to unconventional or extraordinary crimes for example, mass killings, mass rapes and wanton and widespread destruction of property (in the context of crimes against humanity and grave violations of international humanitarian law) within the setting of international criminality.[19]

20. The Trial Chamber wishes to observe that the same general judicial focus is shared by our sister tribunals ICTY and ICTR. Admittedly, how each tribunal applies this judicial approach to individual cases of alleged defects in the form of the indictment must, and will, necessarily vary with the particular context, specific parameters of the criminal activities forming the substrata of the allegations charged in the indictment, and the totality of the circumstances as alleged.

21. Given the frequent citation before the Trial Chamber of ICTY and ICTR case-law authorities for the Chamber's guidance as the interpretation of general principles of law in the context of international criminal adjudication, largely due to the nascent character of the Special Court's evolving jurisprudence, this Trial Chamber deems it necessary to comment on this forensic trend.

22. In this connection, the Trial Chamber emphasises that its application of the ICTY and ICTR jurisprudence is not due to a statutory imperative predicated upon a binding relationship of these UN Security Council-established International Criminal Tribunals on the Special Court; indeed, the Statute of the Special Court specifies that the Appeals Chamber of the Special Court shall be "guided" by, and not bound by, decisions of the Appeals Chamber of the two International Tribunals.[20] There is, however, a special relationship envisioned between the Special Court and the

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magnitude on which the acts or events allegedly took place, (iv) the circumstances under which the crimes were allegedly committed, (v) the duration of time over which the said acts or events constituting the crimes occurred, (vi) the time span between the occurrence of the evenrs and the filing of the indictment, (vii) the totality of the circumstances surrounding the commission of the alleged crimes."

[19] *Sesay* Decision, para. 9.

[20] Article 20(3) of the Statute of the Special Court. See also, Report of the Secretary-general on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000 ("Report of the Secretary-General on Special Court"), paras 40-46 (on the proposal of sharing one Appeals Chamber between the International Tribunals and the Special Court). Paragraph 41 is particularly instructive: "While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of formal institutional link."

International Tribunals, as each institution is established to permit prosecutions for *inter alia* "serious violations of international humanitarian law". As such, the International Tribunals, the Special Court and the International Criminal Court belong to a unique, and still emerging, system of international criminal justice.

23. This special relationship is reflected not only in Article 20 of the Statute but also through the fact that, under the Statute of the Special Court, the Rules of Procedure and Evidence of the ICTR applied mutatis mutandis to the conduct of legal proceedings before this Court.[21] It can therefore be concluded that the drafters of the Statute of the Special Court not only envisioned that this Court would follow the procedures established by the ICTR – with necessary modifications – but furthermore, that the Rules of Procedure and Evidence of the ICTR can be construed as reflective of the general principles of law applicable to criminal proceedings in which the principles of international criminal law and international humanitarian law are applied.

24. Like the Special Court,[22] the ICTY and the ICTR are bound to apply customary international law,[23] and their decisions do, as a matter of principle, apply customary international law. It is for this reason that this Court applies persuasively decisions taken at the ICTY and ICTR. While noting that the obligations upon the ICTY and ICTR, as well as the Special Court, in relation to the application of customary international law and respect for the principle of *nullum crimen sine lege* are specifically related to the subject-matter of these institutions, the Trial Chamber finds that the two Tribunals also apply general principles of law on matters related to evidence and procedure.[24] The Trial Chamber

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[21] See, Article 14 of the Statute of the Special Court.

[22] See Report of the Secretary-General on Special Court, para. 12: "In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have the character of customary international law at the time of the alleged commission of the crime."

[23] See, Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808(1993), S/25704, 3 May 1993 (on the Statute of the ICTY), para. 34 (on subject-matter jurisdiction): In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law; and Report of the Secretary-General pursuant to paragtaph 5 of Security Council Resolution 955(1994), S/1995/134, 13 February 1995 (on the Statute of the ICTR), para. 12 (on subject-matter jurisdiction): "...the Security Council has elected to take a more expansive approach to the choice of the applicable law that than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they are consideted part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. [...]"

[24] The Trial Chamber notes that Rule 89 of the Rules of Procedure and Evidence of both the ICTR and the ICTY provides, in relevant part: "(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence. (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules

observes that decisions of both Tribunals are based on recognised sources of law consistent with Article 38 of the Statute of the International Court of Justice.[25]

25. Accordingly, as stated in some of its major decisions so far,[26] the Special Court will apply the decisions of the ICTY and ICTR for their persuasive value, with necessary modifications and adaptations, taking into account the particular circumstances of the Special Court.[27] The Trial Chamber will, however, where it finds it necessary or particularly instructive, conduct its own independent analysis of the state of customary international law or a general principle of law on matters related to *inter alia* evidence or procedure. Additionally, in cases where the Trial Chamber finds that its analysis of a certain point or principles of law may differ from that of either the ICTY or ICTR, it shall base its decisions on its own reasoned analysis.

26. It is against the background of this preliminary analysis as to the applicable jurisprudence that the several challenges advanced by the Defence would be examined on their merits. Before embarking on that exercise, however, it is necessary to dispose at this stage of the preliminary issue raised by the Prosecution, which is that the Motion, in accordance with Rule 72(A), is time-barred.

B. On the Time Limits for Filing the Motion

27. The records show that the Prosecution made disclosures of witness statements or summaries to the Defence in November 2003 and February 2004, on various dates. Based on the facts and circumstances, the Trial Chamber finds that disclosure was done pursuant to Rule 66(A)(i).

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of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

[25] Article 38(1) of the Statute of the International Court of Justice states: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[26] See, e.g., *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, paras 11-12. See also, Joinder Decision, paras 26-28.

[27] The Trial Chamber is cognisant of the fact that the temporal jurisdiction of each of the International Criminal Tribunals may impact upon the applicability of certain of their findings of the state of customary international law at the time relevant to those Tribunals, as opposed to the temporal jurisdiction of the Special Court.

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SCSL-04-14-A
(968 — 1250)

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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding Judge
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Raja Fernando
Justice Jon M. Kamanda

Registrar: Herman von Hebel

Date: 28 May 2008

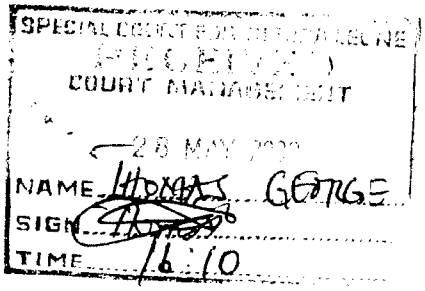
PROSECUTOR Against MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-A)

JUDGMENT

Office of the Prosecutor:
Stephen Rapp
Christopher Staker
Karim Agha
Joseph Kamara
Régine Gachoud
Elisabeth Baumgartner
Bridget Osho
Francis Banks-Kamara

Defence Counsel for Moinina Fofana:
Wilfred Davidson Bola-Carrol
Mohamed Pa-Momo Fofana

Defence Counsel for Allieu Kondewa:
Yada Williams
Osman Jalloh



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28 The Prosecution further alleged a number of errors of law and of fact: (i) in relation to the Trial Chamber's acquittal of Fofana and Kondewa (on Count 6) of terrorism as a war crime (Ground 6) and (ii) in refusing to consider acts of burning for the purposes of the war crime of pillage as charged under Count 5 of the Indictment (Ground 7).

29 In Grounds 8 and 9 the Prosecution alleged mixed errors of law and fact and of procedure, respectively, in that the Trial Chamber denied leave for the Prosecution to amend the Indictment in order to add four new counts of sexual violence (Ground 8) and in preventing the Prosecution from "leading, eliciting or adducing" evidence of sexual violence (Ground 9).

30 Finally, in its Ground 10, the Prosecution, in respect of its appeal against sentence, complained that the Trial Chamber erred in law and in fact and committed a procedural error, "in that there has been a discernible error in the exercise of the Trial Chamber's sentencing discretion" in the sentencing of Fofana and Kondewa.

D. Some Guiding Principles on Appellate Review

31 Before the Appeals Chamber embarks on a detailed consideration of the Parties' Grounds of Appeal, it is expedient to state at the threshold, albeit in general terms, some of the principles of appellate review that will guide it.

32 **In regard to errors of law**: On appeal, pursuant to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence ("Rules"),[60] only arguments relating to errors in law that invalidate the decision of the Trial Chamber would merit consideration. Some International Criminal Tribunals hold the view that in exceptional circumstances, the Appeals Chamber may consider legal issues raised by a party or *proprio motu* although such may not lead to the invalidation of the judgment if it is nevertheless of general significance to the Tribunal's jurisprudence.[61]

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[60] Rules of Procedure and Evidence, Special Court for Sierra Leone, 12 April 2002 (as amended 19 November 2007), Rule 106 [Rules].

[61] *See e.g.*, *Prosecutor v. Galić*, IT-98-29-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 30 November 2006, para. 6 [*Galić* Appeal Judgement]; *Prosecutor v. Stakić*, IT-97-24-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 22 March 2006, para. 7 [*Stakić* Appeal Judgement]; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 23 October 2001, para. 22 [*Kupreškić* Appeal Judgement]; *Prosecutor v.*

33. **In regard to errors of fact**: On appeal where errors of fact are alleged also pursuant to Article 20 of the Statute and Rule 106 of the Rules, the Appeals Chamber will not lightly overturn findings of fact reached by a Trial Chamber. Where it is alleged that the Trial Chamber committed an error of fact, the Appeals Chamber will give a margin of deference to the Trial Chamber that received the evidence at trial. This is because it is the Trial Chamber that is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[62] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[63]

34. The Appeals Chamber adopts the statement of general principle contained in the ICTY Appeals Chamber decision in *Kupreškić*, as follows:

> ". . . the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is wholly erroneous may the Appeals Chamber substitute its own finding for that of the Trial Chamber."[64]

35. **In regard to procedural errors**: Although not expressly so stated in Article 20 of the Statute, not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the same token, procedural errors that could be corrected or waived or ignored (as immaterial or inconsequential) without injustice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice.

Tadić, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 15 July 1999, para. 247 [*Tadić* Appeal Judgement].

[62] *Kupreškić* Appeal Judgement, para. 30. *Prosecutor v. Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 13 December 2004, para. 12 [*Ntakirutimana* Appeal Judgement].

[63] *See Galić* Appeal Judgement, para. 9, fn. 21; *Stakić* Appeal Judgement, para. 219; *Prosecutor v. Delalić et al.*, IT-96-21-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 20 February 2001, para. 458 [*Ćelebići* Appeal Judgement]. Similarly, the standard of proof at trial is the same regardless of the type of evidence, direct or circumstantial.

[64] *Kupreškić* Appeal Judgement, para. 30.

36. **In regard to appellate review of the exercise of discretionary powers by the Trial Chamber**: The guiding principles can be succinctly stated. The Trial Chamber's exercise of discretion will be overturned if the challenged decision was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The scope of appellate review of discretion is, thus, much limited: even if the Appeals Chamber does not agree with the impugned decision, it will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously [65] Where the issue on appeal is whether the Trial Chamber correctly exercised its discretion in reaching its decision the Appeals Chamber will only disturb the decision if an appellant has demonstrated that the Trial Chamber made a discernible error in the exercise of discretion.[66] A Trial Chamber would have made a discernible error if it misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion.[67]

II. ISSUES ARISING IN BOTH APPEALS

A. Prosecution's Third and Fourth Grounds of Appeal and Kondewa's Fourth Ground of Appeal: Individual Criminal Responsibility Pursuant to Article 6(1) of the Statute

1. Introduction

37 The Prosecution's Third and Fourth Grounds of Appeal and Kondewa's Fourth Ground of Appeal concern the individual criminal responsibility of Fofana and Kondewa pursuant to Article 6(1) of the Statute for crimes in Tongo Town, Koribondo, Bo District and Kenema District in

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[65] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Special Court for Sierra Leone, Appeals Chamber, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, para. 5 [Norman Subpoena Decision], *referring* to *Prosecutor v. Milošević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4 [*Milošević* Decision on Appeal from Refusal to Order Joinder], and *citing Prosecutor v. Karemera*, ICTR-98-44-AR73, International Criminal Tribunal for Rwanda, Appeals Chamber, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 9.

[66] Norman Subpoena Decision, para. 5, *referring* to *Milošević* Decision on Appeal from Refusal to Order Joinder, para. 4.

[67] Norman Subpoena Decision, para. 6, *referring* to *Milošević* Decision on Appeal from Refusal to Order Joinder, para. 5.

"encouragement" and "moral support" are two forms of conduct which may lead to criminal responsibility for aiding and abetting a crime.[156]

72. The Appeals Chamber agrees that "encouragement" and "moral support" may constitute the *actus reus* and that acts of aiding and abetting can be made at a time and place removed from the actual crime.

73. In regard to the *actus reus* for aiding and abetting, the Trial Chamber found that Kondewa's speech at the First Passing Out Parade had a substantial effect on the perpetration of the crimes in Tongo.[157] The Appeals Chamber recalls that the Trial Chamber found that at the First Passing Out Parade Norman instructed the Kamajors "to kill captured enemy combatants and 'collaborators' to inflict physical suffering or injury upon them and to destroy their houses."[158] After Norman and Fofana spoke "all the fighters looked at Kondewa, admiring him as a man with mystic powers, and he made the last comment saying that the time for surrender of the rebels had long been exhausted and that they did not need any surrendered rebels."[159] The Trial Chamber then found that in uttering these words Kondewa effectively supported Norman's instructions and encouraged the Kamajors to execute Norman's unlawful orders.[160] The Trial Chamber also noted that no fighter would go to war without Kondewa's blessing because they believed that Kondewa transferred his mystical powers to commit such acts.[161]

74. In addition to his spiritual responsibilities, Kondewa was, together with Norman and Fofana, the three people regarded as what was referred to as the "Holy Trinity" at Base Zero; the three of them were the key and essential components of the leadership structure[162] and were the three people

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[156] *Tadić* Appeal Judgement, para. 229; *Prosecutor v. Aleksovski*, IT-95-14/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 24 March 2000, para. 162 [*Aleksovski* Appeal Judgement]; *Prosecutor v. Vasiljević*, IT-98-32-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 25 February 2004, para. 102 [*Vasiljević* Appeal Judgement]; *Blaškić* Appeal Judgement, para. 48; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 28 February 2005, para. 89 [*Kvočka* Appeal Judgement]; *Prosecutor v. Simić*, IT-95-9-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 28 November 2006, para. 85 [*Simić* Appeal Judgement]; *Prosecutor v. Brđanin*, IT-99-36-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 3 April 2007, para. 277 [*Brđanin* Appeal Judgement]; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 1 June 2001, paras 201-202.

[157] CDF Trial Judgment, para. 736.

[158] *Ibid* at para. 737.

[159] *Ibid* at para. 735.

[160] *Ibid.*

[161] *Ibid.*

[162] *Ibid* at para. 337.

commission of unlawful acts during the "all-out offensive."[231] The fact that Kondewa held a position of responsibility as High Priest and that he spoke at the Second Passing Out Parade and attended Commanders' meetings is not sufficient to conclude that this evidence alone does prove beyond reasonable doubt that Kondewa encouraged or supported the criminal conduct which took place in Koribondo, Bo District and Kenema District.

110. The Appeals Chamber agrees with the findings of the Trial Chamber that giving "words of moral support and encouragement to the Kamajor fighters who were about to conduct military operations on the junta-held territories"[232] or blessings, as well as providing medicine which the Kamajors believed would protect them against the bullets does not constitute aiding and abetting in the planning, preparation or execution of the criminal acts in Bo District.[233]

111. The Appeals Chamber finds that the Trial Chamber was correct in finding Kondewa not liable for aiding and abetting the commission of crimes in Koribondo, Bo District and Kenema District. Consequently, the Prosecution's Third and Fourth Grounds of Appeal fail in this respect.

5. Summary of Findings

112. In relation to the attacks on Tongo, the Appeals Chamber, Justice King dissenting, upholds the Trial Chamber's convictions of Kondewa and Fofana, pursuant to Article 6(1), of aiding and abetting violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment punishable under Article 3.a. of the Statute (Counts 2 and 4 respectively).

113. In relation to the attacks on Koribondo, Bo District and Kenema District, the Appeals Chamber upholds the Trial Chamber's acquittals of Kondewa and Fofana, pursuant to Article 6(1), of violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment, punishable under Article 3.a. of the Statute (Counts 2 and 4, respectively) as well as pillage, a violation of Article 3.a. common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute (Count 5).

114. The Appeals Chamber dismisses the Prosecution's Third and Fourth Grounds of Appeal and dismisses, Justice King dissenting, Kondewa's Fourth Ground of Appeal.

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[231] *Ibid* at paras 765, 809, 904.
[232] *Ibid* at para. 799.
[233] *Ibid* at paras 799-800.

199. Kondewa's reliance on ICTY and ICTR case law for the proposition that the *ad hoc* Tribunals "have disregarded uncorroborated hearsay evidence related to an accused's participation in murder because such evidence is seen as unreliable"[394] is noted. However, although the jurisprudence from other Courts is of great assistance in determining a question of law, whether a particular Trial Chamber erred in its application of the law to the facts, should be determined on the facts of each case. Further, the Appeals Chamber notes that, as a matter of law, a Trial Chamber may convict an accused on the basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness.[395] Corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to the evidence.[396] Any appeal based on the absence of corroboration must be against the weight which a Trial Chamber attaches to the evidence in question.[397]

200. It is common place that a criminal tribunal may convict on circumstantial evidence provided that the only reasonable inference to be drawn from such evidence leads only to the guilt of the accused. When such evidence is capable of any other reasonable inference it is not reliable for the purposes of convicting an accused.

201. Witness TF2-096 testified that she saw Kondewa shoot one of the town commanders and that he fell. Immediately after witnessing this incident, the witness ran away. The Appeals Chamber finds that the fact that she did not herself witness that the town commander was dead, leaves the possibility open that someone else may have killed the town commander. The Trial Record does not contain any evidence corroborating the veracity of Witness TF2-096's testimony that the Kamajors identified the graves of the two people dancing. Furthermore, no evidence indicates the identity of the Kamajors or whether they were present during the incident during which Witness TF2-096 saw Kondewa shoot the town commander. In addition, no further evidence concerned whether the town commander died. No nexus exists between Kondewa's act and the death of the town commander. The evidence that the town commander died is insufficient and, therefore, the offence of murder has not been proved.

95-14/1, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

[394] Kondewa Appeal Brief, para. 116.

[395] *Kordić* Appeal Judgement, para. 274.

circumstances be cured by timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[723]

364. The Appeals Chamber finds that paragraph 28 of the Indictment is clear in establishing that the material facts supporting criminal responsibility under Count 6 are the material facts pleaded in relation to Counts 1 to 5 of the Indictment. These include "threats to kill, destroy and loot." The Trial Chamber, therefore, erred in stating it would only consider crimes "charged and found to have been committed under Counts 1-5 in the Indictment."[724] The Trial Chamber should have considered all conduct that was adequately pleaded in the Indictment irrespective of whether such conduct satisfied the elements of any other crimes under Counts 1-5.

365. Whether the Trial Chamber's error invalidates the decision is discussed below as it is dependent on whether the Trial Chamber erred in its determination of the *mens rea* requirement for acts of terrorism. In particular, Fofana's and Kondewa's liability for acts of terrorism under Article 6(1) and Article 6(3) of the Statute depends on whether they had the requisite *mens rea* for liability as aiders and abetters or superiors. Accordingly, the Appeals Chamber will examine whether a reasonable tribunal of fact could have found, as the Trial Chamber did, that neither Fofana nor Kondewa had the requisite *mens rea*.

(b) Fofana's and Kondewa's Responsibility for Aiding and Abetting Acts of Terrorism in Tongo

366. The Appeals Chamber has previously endorsed the following statement of the *mens rea* for aiding and abetting:

> "The *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed."[725]

[723] *Ibid* at para. 114.
[724] CDF Trial Judgment, para. 49.
[725] AFRC Appeal Judgment, paras 242-243.

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367. The person aiding and abetting a specific intent crime need not possess the principal's intent to commit the crime, but must at least have knowledge of the principal's specific intent.[726]

368. In regard to the acts of terrorism committed in Tongo, the Appeals Chamber is not persuaded by the Prosecution's submission that no reasonable tribunal of fact could have found that Fofana and Kondewa may not have been aware of the specific intent to commit acts of terrorism in Tongo. The Prosecution argues that the Trial Chamber's error resulted from its "exclusive reliance on the instruction given by Norman at the December 1997 Passing Out Parade to determine whether the *perpetrators* of the proven acts of violence had the specific intent to terrorise the civilian population."[727] Contrary to the Prosecution's assertion, the Trial Chamber used evidence of Norman's statements at the December 1997 Passing Out Parade to determine whether Fofana and Kondewa were aware of his specific intent to spread terror. While the instructions given by Norman are inherently illegal, they are ambiguous with respect to his intent to spread terror, and therefore a reasonable tribunal of fact could have determined that Fofana and Kondewa were not aware of the specific intent with respect to any acts of terrorism in Tongo.

369. The Prosecution further argued that Fofana must have known of the specific intent to commit acts of terrorism because he was aware "that the Kamajors who operated in the towns of Tongo Field had previously engaged in criminal conduct."[728] A similar argument was advanced in relation to Kondewa.[729] However, the Prosecution makes no submission as to how knowledge of past general intent crimes would provide Fofana or Kondewa with knowledge of the principal's specific intent to spread terror.

370. The Prosecution's argument with respect to Fofana's and Kondewa's liability for aiding and abetting acts of terrorism in Tongo must be rejected.

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[726] *See Ntakirutimana* Appeal Judgement, para. 501 (regarding genocide); *Ndindabahizi* Trial Judgement and Sentence, para. 457 (and references therein).
[727] Prosecution Appeal Brief, para. 5.17 (emphasis in original).
[728] *Ibid* at para. 5.28 (emphasis omitted).
[729] *Ibid* at para. 5.34.

also provides that in determining the term of imprisonment the Trial Chamber shall have recourse to the practice regarding prison sentences in the ICTR and the national courts of Sierra Leone, as appropriate. According to Rule 101 of the Rules, aggravating and mitigating circumstances shall, *inter alia,* be taken into account.[899] Rule 101(c) of the Rules provides that the Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

466. Appeals against sentence, as appeals from a judgement of a Trial Chamber, are appeals *stricto sensu.* They are not trials *de novo.*[900] Trial Chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[901] The Appeals Chamber will not lightly overturn findings relevant to sentencing by the Trial Chamber.[902] As a general rule, the Appeals Chamber will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[903]

467. In the AFRC Appeal Judgment, the Appeals Chamber explained that to demonstrate that the Trial Chamber committed a discernible error in exercising its discretion:

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position of leadership, his level in the command structure, or his role in the broader context of the conflict of the former Yugoslavia; (ii) the discriminatory intent or the discriminatory state of mind for crimes for which such a state of mind is not an element or ingredient of the crime; (iii) the length of time during which the crime continued; (iv) active and direct criminal participation, if linked to a high-rank position of command, the accused's role as fellow perpetrator, and the active participation of a superior in the criminal acts of subordinates; (v) the informed, willing or enthusiastic participation in crime; (vi) premeditation and motive; (vii) the sexual, violent, and humiliating nature of the acts and the vulnerability of the victims; (viii) the status of the victims, their youthful age and number, and the effect of the crimes on them; (ix) civilian detainees; (x) the character of the accused; and (xi) the circumstances of the offences generally. *See Blaškić* Appeal Judgement, paras 685-686, 696

[899] In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute and in Rule 101(B)(iii).

[900] *Kupreškić* Appeal Judgement, para. 408; *Prosecutor v. Mucić et al.*, IT-96-21-A*bis*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement on Sentence Appeal, 8 April 2003, para. 11; *Čelebići* Appeal Judgement, para. 203.

[901] *See e.g., Čelebići* Appeal Judgement, para. 717. *See also* Article 19(2) of the Statute, Rule 101(B) of the Rules.

[902] AFRC Appeal Judgment, para. 309; *see also Krnojelac* Appeal Judgement, para. 11.

[903] *See Tadić* Judgement in Sentencing Appeals, para. 22; *Aleksovski* Appeal Judgement, para. 187; Prosecutor v. *Furundžija*, IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 21 July 2000, para. 239 [*Furundžija* Appeal Judgement]; *Čelebići* Appeal Judgement, para. 725; *Kupreškić* Appeal Judgement, para. 408; *Prosecutor v. Jelisić*, IT-95-10-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 5 July 2001, para. 99; *Prosecutor v Krstić*, IT-98-33-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 19 April 2004, para. 242; *Blaškić* Appeal Judgement, para. 680.

> "the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."[904]

3. Alleged Refusal to Consider Sentencing Practices of the National Courts of Sierra Leone

(a) Trial Chamber Findings

468. Article 19(1) of the Statute states: "the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone."[905]

469. The Trial Chamber held that it would not give consideration to the sentencing practice in Sierra Leone because Fofana and Kondewa had not been convicted of any crime under Sierra Leone law and because the sentencing practice of Sierra Leone for the convictions in this case would indicate either sentence of death or life imprisonment.[906]

(b) Submissions of the Parties

470. The Prosecution submits that the Trial Chamber erred in law in holding as above.[907] The Prosecution argues that it is immaterial that Fofana and Kondewa were not convicted pursuant to Article 5 of the Statute (regarding certain crimes under Sierra Leone law) in light of the practice at the ICTY and ICTR to take into account the sentencing law and practices in the former Yugoslavia and Rwanda, respectively, despite not having jurisdiction over any violations of domestic law.[908]

471. The Prosecution also submits that the purpose of referring to national sentencing practice is that the punishment must reflect the victim's sense of justice and the needs of the affected communities.[909] The Prosecution further argues that the Statutory language instructing that the Trial Chamber "*shall*, as appropriate, have recourse to the practice regarding prison sentences in . . .

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[904] AFRC Appeal Judgment, para. 309.
[905] Article 19(1) of the Statute.
[906] CDF Sentencing Judgment, paras 42-43.
[907] Prosecution Appeal Brief, para. 9.9.
[908] *Ibid* at para. 9.10.
[909] *See* Prosecution Appeal Brief, para. 9.11.

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(c) Discussion

475. The Appeals Chamber notes that at the time the ICTY Statute took effect, the former Yugoslavia had domestic legislation criminalizing "acts against humanity and international law."[919] Similarly, at the time the ICTR Statute took effect, Rwanda had domestic legislation criminalizing war crimes, crimes against humanity and genocide.[920] In contrast, Sierra Leone has not criminalized war crimes and crimes against humanity as such, and consequently there is no specifically relevant sentencing practice for a Trial Chamber to refer to.

476. The Special Court has jurisdiction over crimes defined in Sierra Leone law in addition to certain international crimes. Bearing this in mind, the Appeals Chamber is of the view that the best interpretation of the word "appropriate" is that a Trial Chamber is to have recourse to the practice of the ICTR for convictions for war crimes and crimes against humanity and is to have recourse to the national courts in Sierra Leone for convictions under Sierra Leone law contained in Article 5 of the Statute.

477. In the result, the Appeals Chamber concludes that the Trial Chamber did not err in holding that it will not consider the sentencing practice of Sierra Leone.

4. Alleged Error in Considering Mitigating Factors

(a) Fofana's and Kondewa's Statements at the Sentencing Hearing

(i) Trial Chamber Findings

478. Under the heading "Remorse," the Trial Chamber stated the following:

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[919] *See The Criminal Code of the Socialist Federal Republic of Yugoslavia,* adopted by the SFRJ Assembly at the session of the Federal Council held on September 28, 1976, published in the Official Gazette SFRJ No. 44 of October 8, 1976, a correction was made in the Official Gazette SFRJ No. 36 of July 15, 1977, *available at* http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm#chap_16, Articles 141-156 (pertaining to genocide and war crimes).

[920] Rwandan Organic Law No. 8/96, on the Organization of Prosecutions for Offences constituting Genocide or Crimes Against Humanity committed since 1 October 1990, published in the Gazette of the Republic of Rwanda, 35th year. No. 17, 1 September 1996. *See Semanza* Appeal Judgement, para. 378; *Prosecutor v. Akayesu*, ICTR-96-4-T, International Criminal Tribunal for Rwanda, Trial Chamber, Sentencing Judgement, 2 October 1998, para. 16 [*Akayesu* Sentencing Judgement]. Under Rwandan law, genocide and crimes against humanity carry the possible penalties of death or life imprisonment, depending on the nature of the accused's participation. *See Prosecutor v. Simba*, ICTR-01-76-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 13 December 2005, para. 434 [*Simba* Judgement and Sentence].

because it considered the sentence inadequate and remitted it for revision.[1043] The ICTY Appeals Chamber held that the Trial Chamber's sentencing discretion "must be exercised by reference to the fundamental . . . consideration . . . that the sentence to be served by an accused must reflect the totality of the [convicted person's] criminal conduct" and that "a person who is convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes."[1044]

544. Fofana responds that the Statute and Rules are "sufficiently liberally worded" to allow the Trial Chamber to "impose a concurrent sentences or global sentence."[1045] Fofana argues that the Trial Chamber has the discretion to choose between concurrent and consecutive sentences, and that the "overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender."[1046] Fofana submits the Prosecution has not shown how the Trial Chamber violated the totality principle.[1047]

545. Kondewa submits that the Trial Chamber acted within its discretion in imposing separate sentences to run concurrently.[1048] Kondewa argues that contrary to the Prosecution's submission, the Trial Chamber only imposed multiple sentences to be served concurrently *after* analyzing all the aggravating and mitigating circumstances and after considering the gravity of the offences for which Kondewa was found guilty.[1049]

(c) Discussion

546. Rule 101(c) of the Rules states "[t]he Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently." The discretion conferred upon the Trial Chamber to choose between consecutive and concurrent sentences is not unchecked, because the Trial Chamber ultimately must impose a sentence that reflects the totality of the convicted person's culpable conduct. The totality principle is, in fact, recognized by all Parties and firmly supported in the case law of the international criminal tribunals. The totality principle requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due

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[1043] *Ibid* at para. 9.60.
[1044] *Ibid*, *quoting Čelebići* Appeal Judgement, para. 771.
[1045] Fofana Response Brief, para. 210.
[1046] *Ibid* at para. 211.
[1047] *Ibid* at para. 212.
[1048] Kondewa Response Brief, paras 9.51-9.52.

consideration to the particular circumstances of the case and to the form and degree of the participation of the accused.[1050]

547. The following examination of several legal traditions demonstrates that Trial Chambers typically enjoy broad discretion to choose between concurrent and consecutive sentences. However, as at the other tribunals, this discretion is restricted by the requirement that the sentence reflect the gravity of the crime and the culpability of the convicted person.

548. In Australia, courts have generally held that it is "impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether sentences should be ordered to be served concurrently or consecutively."[1051] Australian courts have recognized that "[t]he practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty."[1052] Generally, courts consider that consecutive sentences are appropriate when there are "truly two or more incursions into criminal conduct."[1053] However, where, "whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient."[1054]

549. In the United Kingdom (England and Wales), courts consider the "sentencer [is] entitled in his discretion to follow the course of imposing concurrent sentences, provided that the gravity of the criminal conduct . . . [is] properly reflected in the principal sentence."[1055]

550. Likewise, in Canada, courts give the sentencing judge discretion to set the duration and type of sentence due to his or her first-hand knowledge of the case.[1056] The decision to impose

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[1049] *Ibid* at para. 9.54.
[1050] *Furundzija* Appeal Judgement, para. 249; *Blaškić* Appeal Judgement, para. 683; *Aleksovski* Appeal Judgement, para. 182; *Čelebići* Appeal Judgement, para. 731.
[1051] *Attorney-General v Tichy* [1982] 30 SASR 84 at 92-93.
[1052] *See ibid*; *R v Van Der Horst* [2006] SASC 243 at para. 91.
[1053] *Attorney-General v Tichy* at 92-93; *see also Pearce v The Queen* [1998] 194 CLR 610 at 623.
[1054] *Ibid*; *R v Shaw* [1989] 39 A Crim R 343, 347, *referring* to Thomas "Principles of Sentencing" (1st Ed 1970).
[1055] *Court in Bottomley* [1985] 7 Cr. App. R. (S.) 355; *see also R. v. Allen John Wheeler* [2002] 2 Cr. App. R. (S.) 61, paras 27-28; *R. v. Dennis John Leckey* [1999] 1 Cr. App. R. (S.) 57; *R. v. Michael Dawkins* [1995] 16 Cr. App. R. (S.) 456; *R. v. David Ian Bottomley* [1985] 7 Cr. App. R. (S.) 355.
[1056] *R. v. M. (T. E.)* [1997] Carswell Alta 213, Supreme Court of Canada.

> 58. Furthermore, with respect to his liability under Article 6(3), the Chamber finds, as it did with Fofana, that given his leadership role as a superior who failed to prevent his subordinates from committing crimes, the gravity of the offence committed by Kondewa is greater than that of the actual perpetrators of the crimes. The Chamber finds that in this case, the fact that Kondewa's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to believe that they could commit further crimes with impunity, and therefore increases the seriousness of the crimes for which he has been convicted.
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> 60. The Chamber considers that, given his role as a former Chiefdom Speaker, a community elder and the CDF National Director of War, Fofana breached a position of trust in committing the offences for which he has been convicted."
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> 62. The Chamber finds that given the cultural context, Kondewa, in his role as High Priest who blessed the CDF/Kamajors before they went to battle, and as someone widely respected for his mystical powers and abilities to immunize people against harm, held a unique and prominent position in the community. The Chamber therefore finds that he also breached a position of trust in committing the crimes for which he was convicted.
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> 85. In executing this legitimate mission however, at a later stage that appears in the Indictment, and instead of limiting themselves and directing these attacks on legitimate military targets and objectives where collateral damage, if any ensued at all, could be perceived as justifiable, the Accused Persons and their Kamajors, as has been elucidated in the factual and legal findings of the Judgement, went beyond these acceptable military and legal limits and carried out killings and other atrocities against unarmed civilians who they characterised and designated as 'rebel collaborators'. We find that these atrocities were perpetrated, even though the evidence clearly established, and we so found, that the victims in fact, were disarrayed Sierra Leoneans including children fleeing for their lives and for safety from the bloody exchange of enemy fire, and further, that these civilian captives or fugitives, were unarmed and were not in the least, participating in hostilities. In fact, we note here that the crimes for which they have been found guilty were perpetrated by the Accused Persons and CDF/Kamajor fighters when combat activities and operations against the enemy AFRC forces were already over."

559. Notwithstanding these findings and the significant finding that the accused persons and their subordinates went beyond "acceptable military and legal limits" the Trial Chamber, importing a consideration of "just cause" and "civic duty" into the exercise of its discretion concluded that their sentences deserved to be reduced.

560. The Appeals Chamber has already decided that these were inappropriate considerations and will now review the sentences, taking into consideration the gravity of the offences as found and described by the Trial Chamber and taking note of legitimate mitigating circumstances which the

Trial Chamber has taken note of and the fact that in the case of Kondewa, the Appeals Chamber, Justice Winter dissenting, had not found any allegation of "committing" established against him.

561. In exercising its sentencing discretion, the Appeals Chamber re-emphasizes that it is an international court with responsibility to protect and promote the norms and values of the international community, expressed not only as part of customary international law but also, in several international instruments.

562. Shortly after the Special Court was established, the Appeals Chamber had occasion to pronounce on its character and decided, without hesitation, that it is an international court. In the *Decision of Constitutionality and Lack of Jurisdiction*,[1066] the Appeals Chamber stated that the Special Court "is an international tribunal exercising its jurisdiction in an entirely international sphere and not within the system of the national courts of Sierra Leone . . ."[1067] The Appeals Chamber came to the same conclusion in the *Decision on Immunity from Jurisdiction*.[1068]

563. The Appeals Chamber here emphasizes that the crimes of which the accused have been convicted are international crimes and not political crimes, in which consideration of national interest may be a relevant issue. What has to be paramount are international interests in protecting humanity. Such offences as Fofana and Kondewa have been convicted of are of the nature of such "offences that do not affect the interests of one State alone, but shock the conscience of mankind."[1069] They are not political offences. The Appeals Chamber gratefully adopts the opinion of the Supreme Military Tribunal of Italy quoted in *Tadic* (Jurisdiction) as follows:

> Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lese-humanite* (*reatu di lesa umanita*) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way

[1066] *Prosecution v. Kallon et al.*, SCSL-2004-15-AR72(E), Special Court for Sierra Leone, Appeals Chamber, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004.
[1067] *Ibid.* para. 80.
[1068] *Prosecutor v. Taylor*, SCSL-2003-01-I, Special Court for Sierra Leone, Decision on Immunity from Jurisdiction, 31 May 2004.
[1069] *Ibid* at para. 57.

as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed . . ."[1070]

564. What should be one of the paramount considerations in the sentencing of an accused person convicted of crimes against humanity and war crimes is the revulsion of mankind, represented by the international community, to the crime and not the tolerance by a local community of the crime; or lack of public revulsion in relation to the crimes of such community; or local sentiments about the persons who have been found guilty of the crimes. In describing what it described as the *"Justice Phase"* of the armed conflict that took place in Sierra Leone, the Appeals Chamber stated this in *"Decision on Immunity from Jurisdiction"*: The *Justice Phase* is that phase in which participants in the armed conflict have to answer for crimes committed in the course of the armed conflict. The *Justice Phase* itself involves separating what is in the exclusive domain of the municipal authority to be resolved under municipal law from what is in the concurrent jurisdiction of that authority and of the international community to be resolved by application purely of international law."[1071] The Appeals Chamber had earlier stated in that Decision that: "The parties, whether from the Government side or the insurgents, were . . . subjected to the obligations imposed by international law in a situation of internal armed conflicts."[1072]

565 In assessing the appropriate sentence, the obligation of the Appeals Chamber is, therefore, to impose sentences that reflect the revulsion of the international community to such crimes as those for which the accused persons have been convicted, after taking into consideration all factors that may be considered, legitimately, in mitigation as well as in aggravation.

566 In revising the sentences, the Appeals Chamber, Justice King and Justice Kamanda dissenting, takes into consideration those factors that the Majority of the Trial Chamber have, legitimately, taken into consideration. It also takes note of the opinion of the Majority of the Trial Chamber that Fofana and Kondewa have been found responsible mainly as aiders and abettors and the gravity of their respective responsibility as superiors in respect of some of the crimes.

565. Having taken all the circumstances of the case into consideration, the Appeals Chamber, Justice King and Justice Kamanda dissenting, revises the sentences on Fofana and Kondewa in

[1070] *Ibid.*
[1071] *Ibid* at para. 19.
[1072] *Ibid* at para. 17.

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NOTES that Ground Two has been abandoned;

DISMISSES Ground Three and does not enter convictions for Fofana and Kondewa for the crimes committed in Kenema District;

DISMISSES Ground Four and does not enter additional convictions for Kondewa for instigating crimes committed in Tongo Fields or for aiding and abetting crimes committed in Koribondo, Bo District and Kenema District; and does not enter additional convictions for Fofana for instigating and planning the crimes in Tongo Fields or for planning or aiding and abetting the crimes committed in Koribondo, Bo District and Kenema District;

DISMISSES, Justice Winter dissenting, Ground Five and does not enter additional convictions for Kondewa and convictions for Fofana for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities;

DISMISSES Ground Six and does not enter convictions of Fofana and Kondewa for acts of terrorism;

DISMISSES Ground Seven and **HOLDS** that destruction of property not amounting to appropriation does not constitute the crime of pillage;

DISMISSES, Justice Winter dissenting, Ground Eight and **HOLDS** that the Prosecution has not showed that the alleged error relating to the amendment of the Indictment constitutes an error of law invalidating the decision;

ALLOWS, Justice King dissenting, Ground Nine and **HOLDS** that the Trial Chamber erred in denying the hearing of evidence of acts of sexual violence;

ALLOWS Ground Ten and **HOLDS**, Justice King dissenting, that the Trial Chamber erred in finding that "just cause" can be a mitigating factor, although rejecting all other arguments raised by the Prosecution, Justice Winter dissenting with respect to accepting the expression of remorse and the purpose of reconciliation in mitigation;

CONSEQUENTLY REVISES, Justice King and Justice Kamanda dissenting, the sentences in respect of Counts 2, 4, and 5 as follows:

In respect of Moinina Fofana the sentences of six (6) years imposed by the Trial Chamber on each of Counts 2 and 4 are increased to fifteen (15) years imprisonment on each of those Counts, and the sentence of three (3) years imposed on Count 5 is increased to five (5) years imprisonment;

In respect of Allieu Kondewa, the sentences of eight (8) years imposed by the Trial Chamber on each of Counts 2 and 4 are increased to twenty (20) years imprisonment on each of those Counts, and the sentence of five (5) years imposed on Count 5 is increased to seven (7) years imprisonment;

CONSEQUENTLY;

FINDS in respect of Moinina Fofana;

COUNT 1: Murder, a crime against humanity, punishable under Article 2.a. of the Statute, **GUILTY,** by majority, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 2: Violence to life, health and physical or mental well-being of persons, in particular murder, punishable under Article 3.a. of the Statute, **GUILTY**, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 3: Other inhumane acts, a crime against humanity, punishable under Article 2.i. of the Statute, **GUILTY,** by majority, of aiding and abetting under Article 6(1) of the Statute the other inhumane acts committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the other inhumane acts committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, punishable under Article 3.a. of the Statute, **GUILTY**, of aiding and abetting under Article 6(1) of the Statute the cruel treatment committed in Tongo Fields and of superior

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responsibility under Article 6(3) of the Statute for the cruel treatment committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 5: Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute, **GUILTY**, of superior responsibility under Article 6(3) of the Statute, for the crimes committed in Bo District; and **SENTENCES** Fofana to five (5) years of imprisonment;

COUNT 6: Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute, **NOT GUILTY**;

COUNT 7: Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute, **NOT GUILTY,** by majority;

COUNT 8: Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, an other serious violation of international humanitarian law, punishable under Article 4.c. of the Statute, **NOT GUILTY,** by majority;

FINDS in respect of Allieu Kondewa;

COUNT 1: Murder, a crime against humanity, punishable under Article 2.a. of the Statute, **GUILTY,** by majority, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 2: Violence to life, health and physical or mental well-being of persons, in particular murder, punishable under Article 3.a. of the Statute, **GUILTY,** by majority, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 3: Other inhumane acts, a crime against humanity, punishable under Article 2.i. of the Statute, **GUILTY,** by majority, of aiding and abetting under Article 6(1) of the Statute the other inhumane acts committed in Tongo Fields and of superior responsibility under Article 6(3) of the

Statute for the other inhumane acts committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, punishable under Article 3.a. of the Statute, **GUILTY**, by majority, of aiding and abetting under Article 6(1) of the Statute the cruel treatment committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the cruel treatment committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 5: Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute, **NOT GUILTY**, of superior responsibility under Article 6(3) of the Statute, for the crimes committed in Moyamba District; and **GUILTY**, by majority, of superior responsibility under Article 6(3) of the Statute, for the crimes committed in Bonthe District; and **SENTENCES** Kondewa to seven (7) years of imprisonment;

COUNT 6: Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute, **NOT GUILTY**;

COUNT 7: Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute, **NOT GUILTY,** by majority;

COUNT 8: Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, an other serious violation of international humanitarian law, punishable under Article 4.c. of the Statute, **NOT GUILTY**, by majority;

ORDERS that the sentences shall run concurrently;

ORDERS that Moinina Fofana shall serve a TOTAL TERM OF IMPRISONMENT OF FIFTEEN (15) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

ORDERS that Allieu Kondewa shall serve a TOTAL TERM OF IMPRISONMENT OF TWENTY (20) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

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TRIAL CHAMBER I

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	Hon. Justice Bankole Thompson	
	Hon. Justice Pierre Boutet	
Registrar:	Herman von Hebel	
Date:	9th of October 2007	

PROSECUTOR **Against** MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

Public Document

JUDGEMENT ON THE SENTENCING OF MOININA FOFANA AND ALLIEU KONDEWA

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impact of the crime on the immediate victim, as well as its effect on relatives of the victim,[50] and the vulnerability and number of victims.[51]

34. In assessing the role of the Accused in the crime, the Chamber has taken into account the mode of liability under which the Accused was convicted, as well the nature and degree of his participation in the offence. In particular, the Chamber has considered whether the Accused was held liable as an indirect or a secondary perpetrator.[52] In assessing the gravity of offences for which the Accused was convicted as a superior, the Chamber has considered the gravity of the underlying offence and the gravity of the conduct of the Accused in failing to prevent or punish the crimes committed by the subordinate.[53]

35. The Chamber is of the opinion however, that the factors it has taken into account in assessing the gravity of the offence, cannot, in addition, be taken into account as aggravating circumstances.[54] Similarly, the Chamber takes the view that factors which it considers and accepts to lessen the gravity of the offence, cannot be taken into account as mitigating circumstances.

3.2. Aggravating Factors

36. Aggravating factors must be shown to have been established by the Prosecution beyond a reasonable doubt.[55] Only circumstances directly related to the commission of the offence charged, and for which the Accused has been convicted, can be considered to be aggravating.[56] If a

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[50] *Prosecutor v. Blaskic*, IT-95-14-A, Judgement (AC), 29 July 2004 [*Blaskic* Appeal Judgement], para 683, *Stakic* Appeal Judgement, para 380, *Oric* Trial Judgement, para 729.

[51] *Blaskic* Appeal Judgement, para 683, *Prosecutor v. Babic*, IT-03-72-S, Sentencing Judgement (TC), 29 June 2004 [*Babic* Sentencing Judgement], para 47. The Chamber notes that the Prosecution has discussed some of these factors, including the vulnerability and age of victims and the humiliating and degrading nature of the acts, as aggravating factors (Prosecution Sentencing Brief, para 56). The Chamber is of the view that these are more appropriately considered in relation to its determination of the gravity of the offence.

[52] *Prosecutor v. Ntagerura, Bagambiki and Iminishimwe*, ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004, para 813, *Prosecutor v. Vasiljevic*, IT-98-32-A, Judgement (AC), 25 February 2004 [*Vasiljevic* Appeal Judgement], para 182.

[53] *Celibici* Appeal Judgement, para 732.

[54] *Deronjic* Sentencing Appeal, para 106.

[55] *Celibici* Appeal Judgement, para 763, *Blaskic* Appeal Judgement, para 688.

[56] *Prosecutor v. Kunarac, Kovac and Vokovic*, IT-96-23-T and IT-96-23/1-T, Judgement (TC), 22 February 2001, para 850, *Prosecutor v. Hadsahasanovic*, IT-01-47-T, Judgement (TC), 15 March 2006, para 2069.

tribunals is instructive, and has considered these practices where appropriate. However, it is also aware of the limitations of the use that can be made of the sentencing practices of these tribunals. In particular, it notes that the practice of imposing global sentences at both tribunals makes it difficult to ascertain the sentence imposed for each individual crime. Moreover, the Chamber notes that many of the sentences at the ICTR were imposed in relation to the crime of genocide, which is not an offence within the jurisdiction of the Special Court.

5. Sentencing Practice of Sierra Leonean Courts

42. Article 19(1) authorizes the Trial Chamber to consider, where appropriate, the sentencing practices of Sierra Leonean domestic courts. The Prosecution contends that in determining the gravity of the offence, the Chamber should consider that the offences for which the Accused have been found guilty, would attract the death penalty or life imprisonment under Sierra Leonean law.[74] Both Fofana and Kondewa submit that given that the Accused were not convicted of any offences under Article 5 of the Statute which incorporates offences under Sierra Leonean legislation, the court should not consider Sierra Leonean sentencing practice.[75]

43. In this regard, the Chamber notes that the Accused were neither indicted nor convicted for any of the offences enumerated under Article 5 of the Statute. Furthermore, the Statute of the Special Court does not provide for either capital punishment or imposition of a "life sentence", which are the punishments that the most serious crimes under Sierra Leonean law attract. For these reasons, the Chamber finds that it would be inappropriate to rely on the sentencing practices of Sierra Leonean Courts in determining the punishment to be imposed on either Fofana or on Kondewa.

V. DELIBERATIONS

44. The Chamber has considered both the Parties' written briefs and their oral submissions, made in court during the Sentencing Hearing, as they relate to the gravity of the offence, as well as

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16). See also AFRC Sentencing Judgement, where the Chamber held that the sentencing practice of the ICTY should also be considered, as "its statutory provisions are analogous to those at the Special Court and the ICTR" (para 33).

[74] Prosecution Sentencing Brief, paras 78, 139-140.

[75] Fofana Sentencing Brief, para 7 and Kondewa Sentencing Brief, para 14. See also AFRC Sentencing Judgement, where the Chamber held that "it is not appropriate to adopt the practice in the present case since none of the Accused was indicted for, nor convicted of, offences under Article 5 of the Statute" (para 32).

any aggravating or mitigating circumstances. Only those factors that the Chamber has found to be relevant in the determination of sentence, however, have here been explicitly discussed by the Chamber.

1. Gravity of the Offence

1.1. Fofana

45. Fofana was convicted on the basis of Article 6(1) and Article 6(3). Specifically, the Chamber found him guilty of the following:

1. Aiding and abetting pursuant to Article 6(1) of the Statute for Counts 2, 4 and 7 for the Tongo Crime Base;
2. Failure to prevent pursuant to Article 6(3) of the Statute for Counts 2, 4 and 7 for the Koribondo Crime Base; and
3. Failure to prevent pursuant to Article 6(3) of the Statute for Counts 2, 4, 5 and 7 for the Bo District Crime Base.[76]

46. With respect to the crimes for which Fofana was found liable under Article 6(3), the Chamber has examined the gravity of the crimes committed by subordinates under his effective control. Many of these crimes, as described in the Judgement, were of a very serious nature, and were committed against innocent civilians. The Chamber considers actions such as the mutilation and the targeted killing of Limba civilians[77] and the killing and mutilation of Chief Kafala (whom the CDF/Kamajors considered a collaborator) in Koribondo,[78] to be indicative of the brutality of the offences committed by Fofana's subordinates. The Chamber also notes the gruesome murder of two women in Koribondo who had sticks inserted and forced into their genitals until they came out of their mouths. The women were then disembowelled, and while their guts were used as checkpoints, parts of their entrails were eaten.[79]

47. The Chamber also finds that many of the offences for which Fofana was convicted under Article 6(1) were committed on a large scale and with a significant degree of brutality. In particular, the Chamber notes the murder of 150 Loko, Limba and Temne tribe members in

[76] Fofana Sentencing Brief, para 3.
[77] Judgement, para 786(i) and (ii).
[78] *Ibid.*, para 786(iv).
[79] *Ibid.*, paras 423-424.

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to death by machetes or shot, and who was himself hacked with a machete and rolled into a swamp on top of the dead bodies in the belief that he was dead.[88]

50. With respect to the form and degree of Fofana's participation, the Chamber notes that he was found liable for the crimes in Tongo Field as an aider and abettor under Article 6(1) of the Statute. The jurisprudence of the ICTY and ICTR indicates that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation.[89] The Chamber also notes that while Fofana was found liable for aiding and abetting, he was not present at the scenes of the crimes and that the degree of his participation amounted only to encouragement.[90]

51. With respect to the crimes for which Fofana was convicted under Article 6(3), the Chamber has considered the gravity of Fofana's conduct in failing to prevent the crimes. It finds that the gravity of the offence committed by Fofana given his leadership role as a superior who failed to prevent his subordinates from committing crimes, is greater than that of the actual perpetrators of the crimes.[91] In this case, the fact that Fofana's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to

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[88] Judgement, para 406.

[89] *Vasiljevic* Appeal Judgement, para 182. See also *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgement and Sentence (TC), 28 April 2005, para 593 and *Prosecutor v. Krstic*, IT-98-33-T, Judgement and Sentence (TC), 2 August 2001 [*Krstic* Trial Judgement], para 714. The Prosecution has submitted that "the fact that an accused is found liable as an indirect co-perpetrator does not entitle him to a lower sentence (Prosecution Sentencing Brief, para 40), citing the *Stakic* Appeal Judgement. In *Stakic*, while the ICTY Appeals Chamber did claim that "the fact that an accused is found guilty as an 'indirect co-perpetrator' does not necessarily lead to a lower sentence" (para 380), it discussed this specifically in relation to Stakic's case, where he was a crucial member of a joint criminal enterprise, and had a "uniquely pivotal role in co-ordinating the persecutory campaign carried out by the military, police and civilian government in Prijedor" (para 380). The Chamber stressed the need to consider the form and degree of participation of the Accused in the crime. Stakic's role was thus very different than the type of "indirect co-perpetration" (i.e. aiding and abetting) that Fofana was held liable for.

[90] Fofana Sentencing Brief, para 40, Transcript of 19 September 2007, pp. 67-68.

[91] *Prosecutor v. Blaskic*, IT-95-14-T, Judgement (TC), 3 March 2000 [*Blaskic* Trial Judgement], where the Court held that if a commander "fails in his duty to prevent the crime or punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes" (para 789). In the *Blaskic* Appeal Judgement, the Appeals Chamber reduced Blaskic's sentence on the basis of factual errors made by the Trial Chamber, but did not comment on this aspect of the law.

believe that they could commit further crimes with impunity. This factor therefore, in our opinion, increases the seriousness of the crimes for which he has been convicted.[92]

1.2. Kondewa

52. Kondewa was convicted under Article 6(1) and under Article 6(3). Specifically, the Chamber found him guilty of the following:

4. Aiding and abetting pursuant to Article 6(1) of the Statute for Counts 2, 4 and 7 for the Tongo Crime Base;
5. Failure to prevent pursuant to Article 6(3) of the Statute for Counts 2, 4, 5 and 7 for the Bonthe and Moyamba Crime Bases;
3. Commission (murder) pursuant to Article 6(1) of the Statute for Count 2 for the Talia/Base Zero Crime Base;
4. Commission (enlisting child soldiers) pursuant to Article 6(1) of the Statute for Count 8.

53. With respect to the crimes for which Kondewa was found liable under Article 6(3), the Chamber has examined the gravity of the crimes committed by the subordinates under his effective control. Many of these crimes, as described in the Judgement, were of a serious nature. The Chamber notes, in particular, that the CDF/Kamajors in Bonthe stripped Lahia Ndokoi Koroma naked and tied him,[93] a particularly humiliating and degrading act. With respect to Kondewa's liability under Article 6(1), he was convicted for the same crimes as Fofana in the Tongo area; the scale and the barbaric nature of such crimes has been described above.[94]

54. As is the case with Fofana, the Chamber notes that many of the victims of these crimes were young children and women, and were therefore particularly vulnerable. It notes, in particular, the two incidents involving children in the Tongo area described above with respect to Fofana,[95] and the killing of a boy called Bendeh Battiama by Rambo Conteh in Bonthe.[96]

55. With respect to the offence of the enlistment of child soldiers for which Kondewa was convicted, the Chamber notes the particular vulnerability of TF2-021, who was eleven years old when he was captured by the CDF/Kamajors and forcibly trained to kill and to commit crimes

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[92] See Prosecution Sentencing Brief, para 49. See also *Celibici* Appeal Judgement, para 739.
[93] Judgement, para 890(i).
[94] See *supra*, para 47.
[95] See *supra*, para 48.
[96] Judgement, para 883(ii).

against innocent civilians.[97] At the age of eleven, Witness TF2-021 was initiated into the Kamajor society and, at the age of thirteen, he was initiated by Kondewa into the "Avondo Society", a notorious group of Kamajors.[98] The Chamber notes the commentary of the ICRC that "child soldiers are deprived of a family, deprived of an education and all the advantages that would otherwise help them be children and prepare them for adulthood [...] In the end, child soldiers will suffer deep trauma, which persists long after the fighting has stopped".[99]

56. Further, as noted by the Chamber with respect to Fofana, it considers these crimes to have had a significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community.[100]

57. With respect to the form and degree of Kondewa's participation in the crimes committed, the Chamber finds that while he was held liable on the basis of aiding and abetting under Article 6(1) and as a superior under Article 6(3), he was also held liable for the direct perpetration of some acts, including the shooting of a town commander in Talia/Base Zero, and for committing the offence of the enlistment of child soldiers.

58. Furthermore, with respect to his liability under Article 6(3), the Chamber finds, as it did with Fofana, that given his leadership role as a superior who failed to prevent his subordinates from committing crimes, the gravity of the offence committed by Kondewa is greater than that of the actual perpetrators of the crimes. The Chamber finds that in this case, the fact that Kondewa's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to believe that they could commit further crimes with impunity, and therefore increases the seriousness of the crimes for which he has been convicted.

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[97] *Ibid.*, paras 968-970.
[98] Transcript of 2 November 2004, TF2-021, pp. 87-89 & 91-94, Transcript of 14 February 2005, TF2-001, pp. 77-78.
[99] *Child Soldiers* (Geneva: ICRC, 2003), available at http://www.icrc.org.
[100] See *supra*, para 49.

97. The Chamber notes that both the Prosecution and the Fofana Defence recommended that a global sentence be imposed, rather than a separate sentence for each crime.[136] It further notes that while the Kondewa Defence submitted that separate sentences should be imposed, it recommended a single sentence.[137] While the Chamber recognizes that it has the discretion to impose a global sentence,[138] it has chosen to impose separate sentences for each of the crimes for which Fofana and Kondewa have been convicted because it is our view that this better reflects the culpability of the Accused for each offence for which they were convicted, given that distinct crimes were committed by each Accused in discrete geographical areas.[139]

VII. DISPOSITION

FOR THE FOREGOING REASONS, THE CHAMBER:

SENTENCES Moinina Fofana to the following:

For Count 2 - Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF SIX YEARS**;

For Count 4 - Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF SIX YEARS**;

For Count 5 - Pillage, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF THREE YEARS**;

For Count 7 - Collective Punishments, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF FOUR YEARS**;

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[136] Prosecution Sentencing Brief, paras 176-177, Fofana Sentencing Brief, para 48.
[137] Kondewa Sentencing Brief, paras 39-43,166.
[138] See AFRC Sentencing Judgement, para 12. See also *Prosecutor v. Kambanda*, ICTR-97-23-A, Judgement (AC), 19 October 2000, para 113.
[139] Unlike, for example, in several ICTY cases in which global sentences were held to be appropriate where the crimes occurred in one geographical location or where the crimes all formed part of one transaction (*Krstic* Trial Judgement, para 725. See also *Blaskic* Trial Judgement, para 807 and *Kunarac* Appeal Judgement, paras 342-344).

ORDERS that these sentences shall run and be served concurrently.

SENTENCES Allieu Kondewa to the following:

For Count 2 - Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF EIGHT YEARS;**

For Count 4 - Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF EIGHT YEARS;**

For Count 5 - Pillage, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF FIVE YEARS;**

For Count 7 - Collective Punishments, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF SIX YEARS;**

For Count 8 - Enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities, an other serious violation of international humanitarian law, a **TERM OF IMPRISONMENT OF SEVEN YEARS;**

ORDERS that these sentences shall run and be served concurrently;

ORDERS that for both Fofana and Kondewa, the sentences shall run from the date each was taken into custody; and, in this regard,

ORDERS that Moinina Fofana shall serve a **TOTAL TERM OF IMPRISONMENT of SIX YEARS**, and that this takes effect from the 29th of May 2003, when he was arrested and taken into the custody of the Special Court; and further,

ORDERS that Allieu Kondewa (also known as Allieu Musa) shall serve a total **TOTAL TERM OF IMPRISONMENT of EIGHT YEARS** and and that this takes effect from the 29th of May, 2003, when he was arrested and taken into the custody of the Special Court.

Hon. Justice Bankole Thompson appends a Dissenting Opinion to this Judgement, in which he has indicated that he makes no pronouncement as to the sentence and reaffirms that the defence of Necessity is valid in the peculiar circumstances of this case. The said Opinion is attached to this Judgement as Annex A.

INSTRUCTS the Court Management Section to accept the filing of the present Judgement and to serve it after 5:00 p.m. today.

Done at Freetown, Sierra Leone, this 9th day of October 2007

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I

Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

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SCSL-04-14-T
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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Herman von Hebel
Date:	2 August 2007
PROSECUTOR	**Against** MOININA FOFANA ALLIEU KONDEWA (Case No.SCSL-04-14-T)

Public Document

JUDGEMENT

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Susan Wright

SPECIAL COURT FOR SIERRA LEONE
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TIME 15-10

229. The Chamber is of the opinion that the *actus reus* of aiding and abetting requires that the Accused carries out an act specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime and that this act of the aider and abettor must have a substantial effect upon the perpetration of the crime.[292] "Proof of a cause-effect relationship between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required."[293] Further, taking into account the specific wording of Article 6(1) of the Statute that "[a] person who [...] aided and abetted *in the planning, preparation or execution* of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime", this Chamber is of the opinion that the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated and at a location geographically removed from the location of the principal crime.[294] The Chamber reiterates, however, that the act of the aider and abettor must have a substantial effect upon the perpetration of the crime.

230. Mere presence at the scene of a crime will not usually constitute aiding and abetting. Where, however, such presence provides encouragement or support to the principal offender, that may be sufficient. For example, the presence of a person with superior authority at the scene of a principal crime may be probative to determining whether such person encouraged or supported the principal perpetrator.[295] The Chamber also notes that a superior's failure to punish for past crimes might result in acts that would constitute instigation or aiding and abetting for *further* crimes.[296]

231. The Chamber recognises that the *mens rea* of aiding and abetting is the knowledge that the acts performed by the Accused assist the commission of the crime by the principal offender.[297]

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[292] *Vasiljevic* Appeal Judgement, para. 102; *see also Blaskic* Appeal Judgement, para. 46 referring to *Furundzija* Trial Judgement, para. 249.
[293] *Blaskic* Appeal Judgement, para. 48; see also *Gacumbitsi* Appeal Judgement, para. 140.
[294] *Blaskic* Appeal Judgement, para. 48; *see also Vasiljevic* Trial Judgement, para. 70, *Aleksovski* Trial Judgement, para. 62.
[295] *Blaskic* Appeal Judgement, para. 47; *see also Limaj et al.* Trial Judgement, para. 517; *Brdjanin* Trial Judgement, para. 271 and footnoted references; *Aleksovski* Trial Judgement, para. 65.
[296] *Blaskic* Trial Judgement, para. 337;
[297] *Vasiljevic* Appeal Judgement, para. 102; *see also Blaskic* Appeal Judgement, para. 49; *Tadic* Appeal Judgement, para. 229.

internal armed conflict.[305] The Chamber further concurs with the finding of the Appeals Chamber of the *Ad Hoc* Tribunals that the principle of individual criminal responsibility of superiors is applicable, albeit not exactly in the same way, to both civilian and military superiors.[306]

234. The Chamber is of the opinion that the nature of responsibility pursuant to Article 6(3) is based upon the duty of a superior to act, which consists of a duty to prevent and a duty to punish criminal acts of his subordinates.[307] It is thus the failure to act when under a duty to do so which is the essence of this form of responsibility.[308] It is responsibility for an omission[309] where a superior may be held criminally responsible when he fails to take the necessary and reasonable measures to prevent the criminal act or punish the offender.[310]

235. The Chamber takes the view that the following three elements must be satisfied in order to invoke individual criminal responsibility under Article 6(3) of the Statute:

> (i) the existence of a superior-subordinate relationship between the superior and the offender of the criminal act;
>
> (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
>
> (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the offender thereof.[311]

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[305] *See* for the application of the principle of command responsibility to internal armed conflicts, *Hadzihasanovic et al.* Appeal Decision on Command Responsibility, paras 27, 31; *see* also *Brdjanin* Trial Judgement, para. 275; *Strugar* Trial Judgement, para. 357; *Limaj et al.* Trial Judgement, para. 519; *Oric* Trial Judgement, para. 291.

[306] *Bagilishema* Appeal Judgement, paras 35, 51-52; *Celebici* Appeal Judgement, paras 195-197; for the distinction in the application of the principle to civilian and military superiors, *see* para. 163 *infra*.

[307] *Halilovic* Trial Judgement, para. 38; *Celebici* Trial Judgment, para. 334.

[308] *Halilovic* Trial Judgement, para. 38 and footnoted references.

[309] *Halilovic* Trial Judgement, para. 54: "The Trial Chamber finds that under Article 7(3) command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus "for the acts of his subordinates" as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed. The Trial Chamber considers that this is still in keeping with the logic of the weight which international humanitarian law places on protection values."

[310] *Bagilishema* Appeal Judgement, para. 35.

[311] *See Blaskic* Appeal Judgement, para. 484; *Kordic and Cerkez* Appeal Judgement, para. 827; *Aleksovski* Appeal Judgement, para. 72; *Gacumbitsi* Appeal Judgement, para. 143.

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Acting Registrar: Binta Mansaray

Date: 26 October 2009

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-A)

JUDGMENT

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Defence Counsel for Morris Kallon:
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Kennedy Ogeto

Defence Counsel for Augustine Gbao:
John Cammegh
Scott Martin

II. APPELLATE REVIEW

A. Standard of Review on Appeal

30. Before the Appeals Chamber embarks on a detailed consideration of the Parties' Grounds of Appeal, it is expedient to recall at the threshold, albeit in general terms, some of the principles of appellate review that will guide it.[58]

31. **In regard to errors of law**: Where the appellant alleges an error of law pursuant to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence ("Rules"), only arguments relating to errors in law that invalidate the decision of the Trial Chamber would merit consideration. The appellant must provide details of the alleged error and state with precision how the legal error invalidates the decision.[59] In exceptional circumstances, the Appeals Chamber may consider legal issues raised by a party or *proprio motu* although they may not lead to the invalidation of the judgment, if they are nevertheless of general significance to the Special Court's jurisprudence.[60]

32. **In regard to errors of fact**: On appeal where errors of fact are alleged also pursuant to Article 20 of the Statute and Rule 106 of the Rules, the Appeals Chamber will not lightly overturn findings of fact reached by a Trial Chamber; the error of fact must have resulted in a miscarriage of justice.[61] The appellant must provide details of the alleged error and state with precision how the error of fact occasioned a miscarriage of justice. A miscarriage of justice is defined as "[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[62] For an error to be one that occasioned a miscarriage of justice it must have been "critical to the verdict reached."[63] Where it is alleged that the Trial Chamber committed an error of fact, the Appeals Chamber will give a margin of deference to the Trial Chamber that received the evidence at trial.[64] This is because it is the Trial Chamber that is best placed to assess the evidence, including the demeanour of witnesses.[65] The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same

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[58] *See Fofana and Kondewa* Appeal Judgment, paras 32-36.
[59] *Norman et al.* Subpoena Decision, para. 7.
[60] *Fofana and Kondewa* Appeal Judgment, para. 32. *See* also *Galić* Appeal Judgment, para. 6; *Stakić* Appeal Judgment, para. 7; *Kupreškić et al.* Appeal Judgment, para. 22; *Tadić* Appeal Judgment, para. 247.
[61] *Fofana and Kondewa* Appeal Judgment, para. 33, *Kupreškić et al.* Appeal Judgment, para. 29.
[62] *Kupreškić et al.* Appeal Judgment, para. 29, *citing Furundzija* Appeal Judgment, para. 37.
[63] *Kupreškić et al.* Appeal Judgment, para. 29.
[64] *Fofana and Kondewa* Appeal Judgment, para. 33.
[65] *Fofana and Kondewa* Appeal Judgment, para. 33.

finding or where the finding is wholly erroneous.[66] The Appeals Chamber has adopted the statement of general principle contained in the ICTY Appeals Chamber decision in *Kupreškić et al.*, as follows:

> [T]he task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[67]

The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[68]

33. The same standard of reasonableness and deference to factual findings applies when the Prosecution appeals against an acquittal,[69] however, the Appeals Chamber endorses the view that:

> Considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. A convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated.[70]

34. **In regard to procedural errors**: Although not expressly so stated in Article 20 of the Statute, not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the same token, procedural errors that could be waived or ignored (as immaterial or inconsequential) without injustice or prejudice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice.

35. **In regard to appellate review of the exercise of discretionary powers by the Trial Chamber**: The guiding principles can be stated succinctly. The Trial Chamber's exercise of

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[66] *Fofana and Kondewa* Appeal Judgment, para. 33; *Ntakirutimana* Appeal Judgment, para. 12; *Kupreškić et al.* Appeal Judgment, para. 30.
[67] *Fofana and Kondewa* Appeal Judgment, para. 34, *quoting Kupreškić et al.* Appeal Judgment, para. 30.
[68] *See Galić* Appeal Judgment, para. 9, fn. 21; *Stakić* Appeal Judgment, para. 219; *Čelebići* Appeal Judgment, para. 458. Similarly, the standard of proof at trial is the same regardless of the type of evidence, direct or circumstantial.
[69] *Muvunyi* Appeal Judgment, para. 10; *Mrkšić and Sljivančanin* Appeal Judgment, para. 15; *Martić* Appeal Judgment, para. 12.
[70] *Muvunyi* Appeal Judgment, para. 10; *Mrkšić and Sljivančanin* Appeal Judgment, para. 15; *Martić* Appeal Judgment, para. 12.

discretion will be overturned if the challenged decision was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The scope of appellate review of discretion is, thus, very limited: even if the Appeals Chamber does not agree with the impugned decision, it will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously.[71] Where the issue on appeal is whether the Trial Chamber correctly exercised its discretion in reaching its decision the Appeals Chamber will only disturb the decision if an appellant has demonstrated that the Trial Chamber made a discernible error in the exercise of discretion.[72] A Trial Chamber would have made a discernible error if it misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion.[73] Provided therefore that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal even though the Appeals Chamber itself may have exercised the discretion differently.

B. Defective submissions

36. The Appeals Chamber has the inherent discretion to find that any of the Parties' submissions do not merit a reasoned opinion in writing and summarily dismiss arguments that are evidently unfounded. In particular, the Appeals Chamber cannot effectively and efficiently carry out its mandate without focused submissions by the Parties. In order for the Appeals Chamber to assess a Party's arguments, the Party is expected to set out its Grounds of Appeal clearly, logically and exhaustively.[74] Accordingly, submissions that are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies may be, on that basis, summarily dismissed without detailed reasoning.[75]

37. In the instant proceeding, the Appeals Chamber has identified the following seven types of deficiencies in the Parties' submissions.

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[71] *Norman* Subpoena Decision, para. 5, *citing Milošević* Decision on Appeal from Refusal to Order Joinder, para. 4; *Karemera* Decision on Leave to File Amended Indictment, para. 9.
[72] *Norman* Subpoena Decision, para. 5, *citing Milošević* Decision on Appeal from Refusal to Order Joinder, para. 4.
[73] *Norman* Subpoena Decision, para. 6, *citing Milošević* Decision on Appeal from Refusal to Order Joinder, para. 5.
[74] *Brima et al.* Appeal Judgment, para. 34.
[75] *See Krajišnik* Appeal Judgment, para. 16; *Martić* Appeal Judgment, para. 14; *Strugar* Appeal Judgment, para. 16; *Orić* Appeal Judgment, para. 14.

544. The Appeals Chamber notes that all that remains is Gbao's argument that the actions on which the Trial Chamber based its findings as to his *actus reus* and *mens rea* took place after the crimes were committed. It is helpful to reproduce, at the outset, the key findings of the Trial Chamber:

> 2263. ... the Chamber finds that Gbao deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation at the Makump DDR camp and that Gbao's actions in arming himself with an AK-47 amounted to tacit approval of Kallon's conduct. We therefore find that Gbao's conduct before and during the attacks on Salahuedin and Jaganathan had a substantial effect on their perpetration.
>
> 2264. The Chamber further finds that the only reasonable inference to be drawn from the evidence is that Gbao possessed the requisite *mens rea* as he took up arms and stood by while the attacks were carried out and in so doing he intended to assist Kallon in their commission.[1392]

545. In relation to both the *actus reus* and the *mens rea*, the actions of Gbao considered crucial by the Trial Chamber are his taking up of arms and his standing passively by. The taking up of arms took place at some point during the period in which Kallon was inside the camp, as did the start of Gbao's passive behaviour; the exact moment has not been determined. Given that Kallon proceeded to enter the camp after an exchange with Gbao, Kallon would have been aware of Gbao's presence outside the camp. However, there is no indication that Kallon was aware of Gbao having taken up arms until after he left the camp. The question is, then, whether Gbao's presence outside the camp can be said to have had a substantial effect on the perpetration of the crime. The Appeals Chamber takes the view that it is within the discretion of a reasonable trier of fact to hold that such presence did have a substantial effect on the perpetration of the offence.

546. The Appeals Chamber recalls that the *mens rea* for aiding and abetting is that:

> the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed.[1393]

547. The Appeals Chamber notes that there is no indication in the Trial Judgment that, prior to Kallon's entry into the camp, Gbao knew that any attacks might take place or any crimes might be committed by Kallon or Kallon's forces. It does not follow from Gbao's knowledge of Kallon's

[1392] Trial Judgment, paras 2263, 2264.

collective punishment and terrorism; therefore, the Prosecution argues "it is not possible to hold that any of the other war crimes are 'lesser included offences' of collective punishment and terrorism."[3299]

1189. Kallon and Gbao made no additional submissions in reply.

3. Discussion

(a) Applicable law

1190. The jurisprudence on cumulative convictions has been thoroughly addressed at the international tribunals. The test to determine the permissibility of cumulative convictions was set out in the *Čelebići* Appeal Judgment, which stated:

> Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[3300]

1191. The test applied is therefore two-part: first, it is permissible to enter cumulative convictions under different statutory provisions for the same criminal act if each statutory provision has a "materially distinct element" that is not contained in the other statutory provision.[3301] Second, if this is not the case then the conviction for the criminal act should be upheld under the "more specific provision."[3302] It is the legal elements of each statutory provision, and not the acts themselves that

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[3298] Prosecution Response, para. 8.15 [emphasis omitted].
[3299] Prosecution Response, paras 8.17-8.18.
[3300] *Čelebići* Appeal Judgment, paras 412-413.
[3301] *Čelebići* Appeal Judgment, para. 412. *See Ntakirutimana* Appeal Judgment, para. 542; *Musema* Appeal Judgment, paras 358-370.
[3302] *Čelebići* Appeal Judgment, para. 413.

101(c) of the Rules provides that the Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.[3330]

1202. Appeals against sentence, as appeals from a judgment of a Trial Chamber, are appeals *stricto sensu*. They are not trials *de novo*.[3331] Trial Chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[3332] The Appeals Chamber will not lightly overturn findings relevant to sentencing by the Trial Chamber.[3333] As a general rule, the Appeals Chamber will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[3334]

1203. In the *Brima et al.* and *Fofana and Kondewa* Appeal Judgments, the Appeals Chamber explained that to demonstrate that the Trial Chamber committed a discernible error in exercising its discretion:

> the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[3335]

C. Sesay's appeal against sentence (Sesay Ground 46)

1. Trial Chamber's findings

1204. The Trial Chamber convicted Sesay for:

(i) Committing by participating in a joint criminal enterprise pursuant to Article 6(1) of the Statute crimes under:

i. Count 1 in relation to events in Bo, Kenema, Kono and Kailahun Districts;

ii. Count 2 in relation to events in Kenema, Kono and Kailahun Districts;

[3330] *Fofana and Kondewa* Appeal Judgment, paras 465, 546-552.
[3331] *Fofana and Kondewa* Appeal Judgment, para. 466.
[3332] *Fofana and Kondewa* Appeal Judgment, para. 466.
[3333] *Brima et al.* Appeal Judgment, para. 309; *Fofana and Kondewa* Appeal Judgment, para. 466.

3. Discussion

(a) The form and degree of Sesay's participation in the crimes

1229. A Trial Chamber must ultimately impose a sentence that reflects the totality of the convicted person's culpable conduct.[3420] This principle, the totality principle, requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused in the crimes.[3421]

1230. Sesay contests the Trial Chamber's evaluation of his role in the crimes. To do so, he draws comparisons with the criminal conduct of others, but he does not directly challenge or address the Trial Chamber's numerous findings of the specific roles that he played. For example, Sesay contends that the Trial Chamber should have considered that his role was "remote" and "minimal," but he fails to address the extensive findings of his direct participation in crimes, such as his liability for planning enslavement and the use of children under the age of 15 to participate actively in hostilities, his superior responsibility for enslavement, attacks against peacekeepers and murder of peacekeepers. He also ignores the Trial Chamber's findings that at all relevant times he was an influential senior RUF commander and that during the JCE he was a member of the Supreme Council who furthered the Common Criminal Purpose by securing revenues, territory and manpower for the Junta government and by using criminal means to reduce or eliminate the civilian opposition to the Junta regime.

1231. The Appeals Chamber endorses the view of the ICTY Appeals Chamber that a Trial Chamber is not required to assess the participation of an accused in a JCE relative to the participation of other perpetrators when determining the overall level of the accused's participation.[3422] Sesay's reliance on the *Krstić* Appeals Judgment for this proposition is inapposite. The ICTY Appeals Chamber in *Krstić* held that:

> Radislav Krstić's guilt should have been assessed on an individual basis. The Appeals Chamber further agrees that the comparative guilt of other alleged co-conspirators, not adjudicated in this case, is not a relevant consideration.[3423]

[3420] *Fofana and Kondewa* Appeal Judgment, para. 546.
[3421] *Fofana and Kondewa* Appeal Judgment, para. 546.
[3422] *Babić* Appeal Judgment, para. 40.
[3423] *Krstić* Appeal Judgment, para. 254.

1232. The ICTY Appeals Chamber in *Krstić* merely allowed that the Trial Chamber there "was entitled" to consider the accused's guilt "in context of the conduct of any alleged co-perpetrators."[3424] In the present case, the Trial Chamber specifically addressed Sesay's role with respect to Bockarie and Sesay's role in relation to others within the JCE and to his subordinates who committed the crimes for which he was convicted under Article 6(3) of the Statute. It noted Sesay's "very high position of authority within the RUF" and considered that he was "effectively the second highest senior RUF officer after Sam Bockarie."[3425] It further recalled its findings that:

> Sesay was a member of the AFRC Supreme Council, and participated in the meeting[s] of this body throughout the Junta regime. Within the RUF, Sesay, together with Bockarie, approved the appointment of senior RUF commanders to deputy ministerial positions within the Junta government, in order to integrate the RUF into the AFRC regime. The Chamber concluded that given his power, authority, and influence, including his role, rank, and relationship with Bockarie, Sesay contributed significantly to the JCE."[3426]

1233. The Appeals Chamber, therefore, finds no error in the Trial Chamber's assessment that Sesay's "level of participation was key to the furtherance of the objectives of the JCE" and that "his culpability reaches the highest level."[3427]

(b) Double-counting the *mens rea* of acts of terrorism and collective punishments

1234. We endorse the ICTY Appeals Chamber's holding that with respect to alleged errors concerning the gravity of the offence or aggravating factors, an appellant must demonstrate that the Trial Chamber impermissibly double counted the factor in question.[3428]

1235. A Trial Chamber must ensure that they do not allow the same factor to detrimentally influence the Appellant's sentence twice. In the present case the Trial Chamber stated:

> The Chamber, Justice Itoe dissenting, is of the view that, where a particular act amounting to criminal conduct within the jurisdiction of the Court, such as murder or rape as a crime against humanity has also, because of the additional element of intent necessary for a conviction for acts of terrorism or collective punishments as a war crime, amounted to a crime as alleged in Counts 1 and 2 of the Indictment, for purposes of sentencing we will consider such acts of terrorism or collective punishment as factors which increase the gravity of the underlying offence.[3429]

[3424] *Krstić* Appeal Judgment, para. 254.
[3425] Sentencing Judgment, para. 214.
[3426] Sentencing Judgment, para. 214 (internal citations omitted).
[3427] *See* Sentencing Judgment, para. 215.
[3428] *Deronjić* Appeal Judgment, para. 107.
[3429] Sentencing Judgment, para. 106.

1236. The Trial Chamber thus considered that the additional *mens rea* of specific intent which transformed an underlying offence into an act of terrorism or collective punishments increased the gravity of the underlying offence and it took this additional gravity of the offence into account for the purposes of determining the appropriate sentences under Counts 3-11, 13 and 14. In addition, the Trial Chamber entered a sentence for the convictions under Counts 1 and 2. By so doing, the Trial Chamber double-counted the specific intent of the offences of acts of terrorism and collective punishments: first, as increasing the gravity of the underlying offences, and second, as part of the offence of acts of terrorism and collective punishments. Both are reflected in the sentences imposed. Where a factor is not an element of a crime, that factor may be considered in aggravation of sentence. However, where a factor is an element of an offence for which a sentence is imposed, it cannot also constitute an aggravating factor for the purposes of sentencing.[3430]

1237. Having found that the Trial Chamber impermissibly double-counted the specific intent of acts of terrorism and collective punishments as increasing the gravity of the underlying offences, the Appeals Chamber will revise the sentences as appropriate.

(c) Sesay's contribution to the peace process

1238. Sesay argues that the Trial Chamber erred in law in failing to attach any noticeable weight to Sesay's post-conflict conduct. Sesay contends that the test of whether his post-conflict conduct warranted mitigation is whether his contribution to the peace process amounted to a considerable contribution. If this considerable contribution standard was met, then, Sesay asserts, the Trial Chamber was required to attach weight to this factor in mitigation of his sentence. According to Sesay, the fact that he was convicted under Counts 15 and 17 for a failure to prevent and punish the perpetrators of attacks against UNAMSIL peacekeepers is irrelevant to the Trial Chamber's consideration of how much weight to attach to Sesay's post-conflict conduct as a mitigating factor. Sesay contends the *Plavšić* case indicates he is entitled to mitigation, notwithstanding his role in the UNAMSIL attacks.

1239. The Trial Chamber found that Sesay "proved mitigating circumstances on the balance of the probabilities in relation to Sesay's real and meaningful contribution to the peace process in Sierra Leone following his appointment as interim leader of the RUF."[3431] The Trial Chamber's

[3430] *See e.g., Blaškić* Appeal Judgment, para. 693, *citing Vasiljević* Appeal Judgment, paras 172-173.
[3431] Sentencing Judgment, para. 228.

circumstances found to exist then, [and therefore] it should not be given undue weight in mitigation."[3443] Sesay fails to show error in this regard.

(e) Alleged coercive treatment by the Prosecution

1244. The Appeals Chamber is of the view that, contrary to Sesay's argument, the Trial Chamber took into account Sesay's argument that the Prosecution's "coercive conduct" during his arrest and "interview process" denied him of the real possibility of cooperation with the Prosecution. These circumstances were the subject of the "lengthy voir dire process," and Sesay's submissions were noted in paragraph 72 of the Sentencing Judgment.[3444] In the context of considering "Substantial cooperation" with the Prosecution, the Trial Chamber found that Sesay's treatment by the Prosecution during the six day period after his arrest did not preclude him from cooperating with the Prosecution at any point since that episode, and thus it did not warrant additional relief beyond that already afforded to Sesay, namely, that the Trial Chamber expunged from the record the statements obtained by the Prosecution during this six day period.[3445] On appeal, Sesay has not shown any error and, therefore, his submission is untenable.

(f) Likelihood of serving sentence abroad

1245. The Trial Chamber found that:

> [W]hilst it seems more likely than not at this stage that the convicted persons in this trial will serve sentences outside Sierra Leone, this is a decision that ultimately lies within the discretion of the President of the Court, based upon agreements concluded by the Registrar. The Chamber is unable to speculate on the result of these negotiations and decision-making processes, upon which it has no conclusive information, which lie outside of its control. It therefore notes for purposes of record that it has not given any weight to this factor in the consideration of the sentences of any of the convicted persons in this case.
>
> The Chamber, however, wishes to recognize that, in general terms, sentences served abroad, where family visits are likely to be few, may be harder to bear. Such circumstances would normally amount to a factor in mitigation.[3446]

1246. The Appeals Chamber finds no error in the Trial Chamber's decision not to mitigate the Appellants sentences as a consequence of the fact that they will likely be served outside of Sierra

[3442] Sesay Appeal, paras 390, 391, 392.
[3443] Sentencing Judgment, para. 224.
[3444] Sentencing Judgment, para. 72.
[3445] Sentencing Judgment, para. 222.
[3446] Sentencing Judgment, paras 205, 206.

Leone. As discussed in the *Mrđa* case, which is relied upon by Sesay, it is common practice that convicted persons from international criminal tribunals serve their sentences in foreign countries.[3447] Sesay does not refer to any case in which serving the sentence in a foreign country has been considered as a mitigating factor for sentencing purposes.[3448]

(g) Statement of remorse

1247. Although the Trial Chamber found Sesay's statements of remorse were generally "not sincere," it accepted that his expression of empathy toward the victims of the conflict were in fact sincere.[3449]

1248. With regard to any further mitigating weight, Trial Chamber exercised its discretion to find that Sesay's statements, apart from his empathy toward victims of the conflict, did not show any real remorse.[3450] Sesay, however, relies on the ICTY Trial Chamber case of *Brđanin* to assert that in order to constitute a mitigating circumstance "it is sufficient for the accused to extend his sympathy for victims of the conflict."[3451] The Appeals Chamber finds that this is a mischaracterisation of the law. In *Fofana and Kondewa*, the Appeals Chamber observed that only in a minority of cases have Trial Chambers found that an accused's expressions of regret or empathy for victims, without acknowledgement of responsibility for the crimes, constituted a mitigating factor. The Appeals Chamber acknowledged that it is:

> aware of only two cases at the *ad hoc* Tribunals in which the Chamber considered whether an accused's expressions of regret or empathy for victims without acknowledgement of responsibility for the crimes could constitute a mitigating factor. In *Vasiljević*, the ICTY Appeals Chamber opined that an accused can express sincere regrets without admitting his participation in a crime, and that this could be a factor taken into account by the Trial Chamber.[3452] However, in *Vasiljević*, the Appeals Chamber declined to consider Vasiljević's expressions of regret to be a mitigating circumstance.[3453]
>
> The ICTY Trial Judgment in *Orić* is the only case in which a convicted person received credit for expressions of empathy for the victims without acknowledging responsibility.[3454] In *Blaškić*, the accused attempted to express remorse while denying

[3447] *Mrđa* Trial Judgment, para. 109.
[3448] The Trial Chamber in *Mrđa* considered only that service of sentence in a foreign country could be taken into consideration for purposes of parole or early release. *See Mrđa* Trial Judgment, para. 109.
[3449] *M.Nikolić* Sentencing Appeal Judgment, para. 117.
[3450] Trial Judgment, para. 231.
[3451] Sesay Appeal, para. 401.
[3452] *Fofana and Kondewa* Appeal Judgment para. 487, *citing Vasiljević* Appeal Judgment, para. 177.
[3453] *Fofana and Kondewa* Appeal Judgment para. 487, *citing Vasiljević* Appeal Judgment, para. 177.
[3454] *Fofana and Kondewa* Appeal Judgment para. 488, *citing Orić* Trial Judgment, para. 752.

the Trial Chamber did not, and need not have, relied upon findings that he was "the senior RUF commander" (*i.e.*, as Gbao states, the *most* senior RUF commander[3596]) with "the largest number of fighters" at the Makump DDR camp in order to find that his conduct amounted to aiding and abetting.

1314. Gbao's contention that the Trial Chamber erred by taking into account his leadership role rather than any abuse of that role as an aggravating factor is similarly unavailing. The relevant passage of the Sentencing Judgment must be read in conjunction with the Trial Chamber's findings on Gbao's role in the attack on Jaganathan in paragraphs 2261 through 2265 of the Trial Judgment.

1315. In the Sentencing Judgment, the Trial Chamber noted that Gbao was convicted of aiding and abetting the attacks directed against Jaganathan at the Makump DDR camp "where he was the senior RUF Commander present at the time of Kallon's arrival and he remained the RUF Commander with the largest number of fighters present." As the senior RUF Commander until Kallon's arrival representing the RUF, a signatory to the Lomé Accord, he had a duty to support UNAMSIL personnel who were tasked with bringing peace to the population of Sierra Leone. Thus, it was reasonable for the Trial Chamber to find that Gbao had abused his position of authority, including by (i) demanding, with the support of thirty to forty armed RUF subordinates, that UNAMSIL give him back his five fighters, (ii) fomenting an atmosphere of hostility and (iii) orchestrating an armed confrontation at the Makump DDR camp.[3597]

(f) Serving sentence in a foreign country

1316. The Appeals Chamber recalls its holding that the Trial Chamber did not error in declining to mitigate the sentences of the Accused in light of its finding that they will likely serve their sentences in a foreign country.[3598] Gbao does not extend the argument made previously by Sesay, and therefore the Appeals Chamber dismisses his argument for the same reasons.

(g) Disproportionate sentence for aiding and abetting an attack against a UNAMSIL peacekeeper

1317. We endorse the view of the ICTY Appeals Chamber that sentences of like individuals in like cases should be comparable.[3599] The relevance of previous sentences is however often limited as a

[3596] Gbao Appeal, para. 387.
[3597] Trial Judgment, paras 1786, 2263.
[3598] *See supra*, para. 1246.
[3599] *Kvočka et al.* Appeal Judgment, para. 681.

The Appeals Chamber affirms the sentence of forty (40) years imprisonment under Count 15 and thirty-five (35) years imprisonment under Count 17;

In respect of Gbao, taking into account the Grounds of Appeal which have been allowed, the particular circumstances of this case as well as the form and degree of the participation of Gbao in the crimes, and the seriousness of the crimes, the Appeals Chamber finds that the effective sentence imposed by the Trial Chamber reflects the totality of Gbao's culpable conduct for the crimes under Counts 1, 3 through 11 and 13. The Appeals Chamber, Justices Winter and Fisher dissenting, therefore imposes a global sentence for Counts 1, 3 through 11 and 13 of twenty-five (25) years imprisonment. Taking into account that Gbao's Ground 16 has been allowed, in part, the sentence of twenty-five (25) years imprisonment under Count 15 is decreased to twenty (20) years imprisonment;

ORDERS that the sentences shall run concurrently;

ORDERS that Issa Hassan Sesay shall serve a TOTAL TERM OF IMPRISONMENT OF FIFTY-TWO (52) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

ORDERS that Morris Kallon shall serve a TOTAL TERM OF IMPRISONMENT OF FORTY (40) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

ORDERS that Augustine Gbao shall serve a TOTAL TERM OF IMPRISONMENT OF TWENTY-FIVE (25) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

ORDERS that this Judgment shall be enforced immediately pursuant to Rule 119 of the Rules of Procedure and Evidence;

ORDERS, in accordance with Rule 109 of the Rules of Procedure and Evidence that Issa Hassan Sesay, Morris Kallon and Augustine Gbao remain in the custody of the Special Court for Sierra Leone pending the finalization of arrangements to serve their sentences.

1251)

SCSL-04-15-T
(33460-33583)

33460

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER I

Before: Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Benjamin Mutanga Itoe
Hon. Justice Bankole Thompson

Registrar: Herman von Hebel

Date: 8th of April 2009

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

SENTENCING JUDGEMENT

Office of the Prosecutor:
Stephen Rapp
Joseph Kamara
James C. Johnson
Peter Harrison
Vincent Wagona
Reginald Fynn
Elisabeth Baumgartner
Nina Jørgensen
Régine Gachoud
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Subhi Barakat

Defence for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph
Jared Kneitel

Defence for Morris Kallon:
Charles Taku
Kennedy Ogeto
Momoh Fofanah
Kingsley Belle

Defence for Augustine Gbao:
John Cammegh
Scott Martin
Lea Kulinowski

SPECIAL COURT FOR SIERRA LEONE
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I. INTRODUCTION

1. On 25 February 2009 the Trial Chamber I of the Special Court for Sierra Leone ("Chamber") handed down its verdict in this case, delivered in summary form in open court.[1] On 2 March 2009, the Chamber filed its Judgement.[2]

2. The Chamber hereby renders its Sentencing Judgement.

II. CONVICTIONS AND FORM OF LIABILITY

1. Issa Hassan Sesay

3. Issa Hassan Sesay was found guilty of the crimes, set out below, by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute:

(i) **Acts of Terrorism**, punishable under Article 3(d) of the Statute (Count 1), for crimes set forth in Counts 3 to 11 and Count 13 in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

(ii) **Collective Punishments**, punishable under Article 3(b) of the Statute (Count 2), for crimes set forth in Counts 3 to 5 and Count 10 to 11 in relation to events in specified locations in Kenema, Kono and Kailahun Districts;

(iii) **Extermination**, a Crime against Humanity, punishable under Article 2(b) of the Statute (Count 3), in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

(iv) **Murder**, a Crime against Humanity, punishable under Article 2(a) of the Statute (Count 4), in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

[1] Transcript of 25 February 2009.
[2] SCSL-04-15-T-1234, Judgement, 25 February 2009 ("Judgement").

(v) **Violence to life, health and physical or mental well-being of persons, in particular murder**, punishable under Article 3(a) of the Statute (Count 5), in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

(vi) **Rape**, a Crime against Humanity, punishable under Article 2(g) of the Statute (Count 6), in relation to events in specified locations in Kono District;

(vii) **Sexual slavery**, a Crime against Humanity, punishable under Article 2(g) of the Statute (Count 7), in relation to events in specified locations in Kono District and unspecified locations in Kailahun District;

(viii) **Other inhumane acts (forced marriage)**, a Crime against Humanity, punishable under Article 2(i) of the Statute (Count 8), in relation to events in specified locations in Kono District and unspecified locations in Kailahun District;

(ix) **Outrages upon personal dignity**, punishable under Article 3(e) of the Statute (Count 9), in relation to events in specified locations in Kono District and unspecified locations in Kailahun District;

(x) **Violence to life, health and physical or mental well-being of persons, in partieular mutilation**, punishable under Article 3(a) of the Statute (Count 10), in relation to events in specified locations in Kono District;

(xi) **Other inhumane acts (physical violence)**, a Crime against Humanity, punishable under Article 2(i) of the Statute (Count 11), in relation to events in specified locations in Kenema and Kono Districts;

(xii) **Enslavement**, a Crime against Humanity, punishable under Article 2(c) of the Statute (Count 13), in relation to events in Tongo Field in Kenema District and unspecified locations in Kono and Kailahun Districts; and

(xiii) **Pillage**, punishable under Article 3(f) of the Statute (Count 14), in relation to events in specified locations in Bo and Kono Districts.

4. Additionally, Issa Hassan Sesay was found guilty, pursuant to Article 6(1) of the Statute, of planning the following crimes:

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(i) **The use of children to actively participate in hostilities**, an other serious violation of International Humanitarian Law, punishable under Article 4(c) of the Statute (Count 12), in relation to events in Kailahun, Kenema, Kono and Bombali districts; and

(ii) **Enslavement**, a Crime against Humanity, punishable under Article 2(c) of the Stature (Count 13), in relation to events in specified and unspecified locations in Kono District.

5. Lastly, pursuant to Article 6(3) of the Statute, Issa Hassan Sesay was convicted of:

(i) **Enslavement**, a Crime against Humanity, punishable under Article 2(c) of the Stature (Count 13), in relation to events in Yengema in Kono District;

(ii) **Intentionally directing attacks against the UNAMSIL peacekeeping operations**, an other serious violation of International Humanitarian Law, punishable under Article 4(b) of the Statute (Count 15), in relation to events in Bombali, Port Loko, Kono and Tonkolili Districts; and

(iii) **Violence to life, health and physical or mental well-being of persons, in particular murder**, punishable under Article 3(a) of the Statute (Count 17), in relation to events involving UNAMSIL peacekeepers in Bombali and Tonkolili Districts.

2. Morris Kallon

6. Morris Kallon was found guilty of the crimes, set out below, by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute:

(i) **Acts of Terrorism**, punishable under Article 3(d) of the Statute (Count 1), for crimes set forth in Counts 3 to 11 and Count 13 in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

(ii) **Collective Punishments**, punishable under Article 3(b) of the Statute (Count 2), for crimes set forth in Counts 3 to 5 and Count 10 to 11 in relation to events in specified locations in Kenema, Kono and Kailahun Districts;

(iii) **Extermination**, a Crime against Humanity, punishable under Article 2(b) of the Statute (Count 3), in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

(iv) **Murder**, a Crime against Humanity, punishable under Article 2(a) of the Statute (Count 4), in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

(v) **Violence to life, health and physical or mental well-being of persons, in particular murder**, punishable under Article 3(a) of the Statute (Count 5), in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

(vi) **Rape**, a Crime against Humanity, punishable under Article 2(g) of the Statute (Count 6), in relation to events in specified locations in Kono District;

(vii) **Sexual slavery**, a Crime against Humanity, punishable under Article 2(g) of the Statute (Count 7), in relation to events in specified locations in Kono District and unspecified locations in Kailahun District;

(viii) **Other inhumane acts (forced marriage)**, a Crime against Humanity, punishable under Article 2(i) of the Statute (Count 8), in relation to events in specified locations in Kono District and unspecified locations in Kailahun District;

(ix) **Outrages upon personal dignity**, punishable under Article 3(e) of the Statute (Count 9), in relation to events in specified locations in Kono District and unspecified locations in Kailahun District;

(x) **Violence to life, health and physical or mental well-being of persons, in particular mutilation**, punishable under Article 3(a) of the Statute (Count 10), in relation to events in specified locations in Kono District;

(xi) **Other inhumane acts (physical violence)**, a Crime against Humanity, punishable under Article 2(i) of the Statute (Count 11), in relation to events in specified locations in Kenema and Kono Districts;

(xii) **Enslavement**, a Crime against Humanity, punishable under Article 2(c) of the Statute (Count 13), in relation to events in Tongo Field in Kenema District and unspecified locations in Kono and Kailahun Districts; and

(xiii) **Pillage**, punishable under Article 3(f) of the Statute (Count 14), in relation to events in specified locations in Bo and Kono Districts.

7. Additionally, Morris Kallon was found guilty, pursuant to Article 6(1) of the Statute, of the following crimes:

(i) **Instigating Murder**, a Crime against Humanity, punishable under Article 2(a) of the Sratute (Count 4), in relation to an event in Wendedu in Kono District;

(ii) **Instigating Violence to life, health and physical or mental well-being of persons, in particular murder**, punishable under Article 3(a) of the Statute (Count 5) in relation to an event in Wendedu in Kono District;

(iii) **Planning the use of children to actively participate in hostilities**, an other serious violation of International Humanitarian Law, punishable under Article 4(c) of the Statute (Count 12), in relation to events in Kailahun, Kenema, Kono and Bombali districts; and

(iv) **Committing and ordering attacks against peacekeepers**, and other serious violation of International Humanitarian Law, punishable under Article 4(b) of the Statute (Count 15), in relation to events in Bombali District.

8. Lastly, pursuant to Article 6(3) of the Statute, Morris Kallon was convicted of:

(i) **Acts of Terrorism**, punishable under Article 3(d) of the Statute (Count 1), for a crime under Count 7 in Kissi Town in Kono District;

(ii) **Sexual slavery**, a Crime against Humanity, punishable under Article 2(g) of the Statute (Count 7), in relation to an event in Kissi Town in Kono District;

(iii) **Other inhumane acts (forced marriage)**, a Crime against Humanity, punishable under Article 2(i) of the Statute (Count 8), in relation to an event in Kissi Town in Kono District;

(iv) **Outrages upon personal dignity**, punishable under Article 3(e) of the Statute (Count 9), in relation to an event in Kissi Town in Kono District;

(v) **Enslavement**, a Crime against Humanity, punishable under Article 2(c) of the Statute (Count 13), in relation to events in unspecified locations in Kono District;

(vi) **Intentionally directing attacks against the UNAMSIL peacekeeping operations**, an other serious violation of International Humanitarian Law, punishable under Article 4(b) of the Statute (Count 15), in relation to events in Bombali, Port Loko, Kono and Tonkolili Districts; and

(vii) **Violence to life, health and physical or mental well-being of persons, in particular murder**, punishable under Article 3(a) of the Statute (Count 17), in relation to events involving UNAMSIL peacekeepers in Bombali and Tonkolili Districts.

3. Augustine Gbao

9. By a majority, Justice Bouret dissenting, Augustine Gbao was found guilty of the following crimes by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute:

(i) **Acts of Terrorism**, punishable under Article 3(d) of the Statute (Count 1), for crimes set forth in Counts 3 to 5 and Counts 6 to 9 in relation to events in Kailahun Town and throughout Kailahun District;

(ii) **Collective Punishments**, punishable under Article 3(b) of the Statute (Count 2), for crimes set forth in Counts 3 to 5 in relation to events in Kailahun Town and throughout Kailahun District;

(iii) **Extermination**, a Crime against Humanity, punishable under Article 2(b) of the Statute (Count 3), in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

(iv) **Murder**, a Crime against Humanity, punishable under Article 2(a) of the Statute (Count 4), in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

(v) **Violence to life, health and physical or mental well-being of persons, in particular murder**, punishable under Article 3(a) of the Statute (Count 5), in relation to events in specified locations in Bo, Kenema, Kono and Kailahun Districts;

(vi) **Rape**, a Crime against Humanity, punishable under Article 2(g) of the Statute (Count 6), in relation to events in specified locations in Kono District;

(vii) **Sexual slavery**, a Crime against Humanity, punishable under Article 2(g) of the Statute (Count 7), in relation to events in specified locations in Kono District and unspecified locations in Kailahun District;

(viii) **Other inhumane acts (forced marriage)**, a Crime against Humanity, punishable under Article 2(i) of the Statute (Count 8), in relation to events in specified locations in Kono District and unspecified locations in Kailahun District;

(ix) **Outrages upon personal dignity**, punishable under Article 3(e) of the Statute (Count 9), in relation to events in specified locations in Kono District and unspecified locations in Kailahun District;

(x) **Violence to life, health and physical or mental well-being of persons, in particular mutilation**, punishable under Article 3(a) of the Statute (Count 10), in relation to events in specified locations in Kono District;

(xi) **Other inhumane acts (physical violence)**, a Crime against Humanity, punishable under Article 2(i) of the Statute (Count 11), in relation to events in specified locations in Kenema and Kono Districts;

(xii) **Enslavement**, a Crime against Humanity, punishable under Article 2(c) of the Statute (Count 13), in relation to events in Tongo Field in Kenema District and unspecified locations in Kono and Kailahun Districts; and

(xiii) **Pillage**, punishable under Article 3(f) of the Statute (Count 14), in relation to events in specified locations in Bo and Kono Districts.

10. Additionally, Augustine Gbao was found guilty, pursuant to Article 6(1) of the Statute, in relation to events in Bombali District, of **aiding and abetting attacks on peacekeepers**, an

other serious violation of International Humanitarian Law, punishable under Article 4(b) of the Statute (Count 15).

III. APPLICABLE LAW

1. Applicable Provisions

11. Article 19 of the Statute and Rules 100 and 101 of the Rules of Procedure and Evidence ("Rules") provide as follows:

> ***Article 19– Penalties***
>
> 1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.
>
> 2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> ***Rule 100 - Sentencing Procedure***
>
> (A) If the Trial Chamber convicts the accused or the accused enters a guilty plea, the Prosecutor shall submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence no more than 7 days after such conviction or guilty plea. The defendant shall thereafter, but no more that 7 days after the Prosecutor's filing submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.
>
> (B) Where the accused has entered a guilty plea, the Trial Chamber shall hear submissions of the parties at a sentencing hearing. Where the accused has been convicted by a Trial Chamber, the Trial Chamber may hear submissions of the parties at a sentencing hearing.
>
> (C) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Rule 102(B).
>
> ***Rule 101 - Penalties***
>
> (A) A person convicted by the Special Court, other than a juvenile offender, may be sentenced to imprisonment for a specific number of years.
>
> (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 19 (2) of the Statute, as well as such factors as:

23. The Chamber is cognisant of the impermissibility of "double-counting", meaning that the factors considered in assessing the gravity of the offence, cannot be used or considered as aggravating circumstances.[27] The Appeals Chamber has however endorsed the view that there is no double-counting merely because a Trial Chamber considers the impact of the crimes on the victim in one section and the vulnerability of the victims in the other section.[28] In this regard, this Chamber takes the view that factors which it considers and accepts as lessening the gravity of the offence, cannot be taken into account as mitigating circumstances.

3.2. Aggravating Factors

24. The Chamber opines that it is an accepted practice that aggravating factors should be established by the Prosecution beyond a reasonable doubt[29] and that only circumstances directly related to the commission of the offence charged, and for which the Accused has been convicted, can be considered to be aggravating.[30] Hence, when a particular circumstance is an element of the underlying offence, it cannot be taken into account as an aggravating factor.[31]

25. The Chamber acknowledges that the Statute and the Rules do not provide an exhaustive enumeration of the circumstances that the Trial Chamber may consider to be aggravating. Based on the established jurisprudence, factors considered as aggravating in other international criminal jurisdictions, however, include the leadership role of the Accused,[32] premeditation and motive,[33] a willing and enthusiastic participation in the crime,[34] the length of time during which the crime was committed,[35] the location of the attacks – attacks committed in traditional places of civilian sanctuary such as churches, mosques, schools and hospitals being generally considered as more serious,[36] sadism and a desire for revenge,[37] abuse

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[27] AFRC Appeals Judgement, para. 317.
[28] AFRC Appeals Judgement, para. 318.
[29] *Celibici* Appeals Judgement, para. 763.
[30] *Kunarac et al* Trial Judgement, para. 850; *Hadsahasanovic* Trial Judgement, para. 2069.
[31] *Blaskic* Appeals Judgement, para. 693; *Vasiljevic* Appeals Judgement, paras 172-173; *Ndindabahizi* Appeals Judgement, para. 137.
[32] *Jokic* Appeals Judgement, paras 28-29; *Obrenovic* Sentencing Judgement, para. 99; *Babic* Appeals Judgement, para. 80.
[33] *Blaskic* Appeals Judgement, para. 686.
[34] *Ibid.*
[35] *Blaskic* Appeal Judgement, para. 686. As noted, the Chamber has considered certain factors, such as the vulnerability and age of victims, and the humiliating or degrading nature of the acts, that are sometimes considered as aggravating factors, as part of the gravity of the offence (see n. 51).
[36] AFRC Trial Judgement, para. 22; *Muhimana* Trial Judgement, para. 605.

representatives from Ghana, Guinea, Libya, Sierra Leone, Canada, UK, USA, the then Organisation of African Unity (now African Union) and UNAMSIL.[305]

202. It was of utmost international interest that all the UNAMSIL peacekeepers were safely returned, those detained, wounded or injured, death or alive and all the missing peacekeepers.[306] The political effort to assist the Sierra Leonean people should be supplemented by a credible military force. The UK decided to deploy their spearhead battalion to restore relative calm in Freetown, Lungi and the Peninsula areas.

203. The objective of the international community was to assist in creating conditions for the establishment of lasting peace. At the 4139th meeting of the Security Council on 11 May 2000, many member states advocated that UNAMSIL should be given a strong peace enforcement mandate under Chapter VII of the Charter.[307] The Under-Secretary-General deemed it essential for the international community to show the necessary will and resolve to sustain such a commitment to impose peace in Sierra Leone and called on member states with ready capacity and necessary resources to assist.

1.8.6. Conclusion

204. Having carefully considered the instances of crimes against UNAMSIL personnel as we have found in the Judgement (Counts 15 and 17 of the Indictment) the Chamber concludes that the inherent gravity of the criminal acts in question is exceptionally high.

2. Individual Circumstances of the Accused

2.1. Applicable to all accused

2.1.1. Sentence possibly to be served outside of Sierra Leone

205. Having considered the submissions of the Parties in relation to serving a sentence in a foreign country,[308] as well as the submissions of the Registrar in this regard,[309] the Chamber

[305] *Ibid.* para. 78.
[306] *Ibid.* para. 94.
[307] *Ibid.* para. 100.
[308] Sentencing Hearing, Transcript of 23 March 2009, pp. 33, 126-127.
[309] SCSL-04-15-T-1248, Submission of the Registrar Pursuant to Rule 33(B) Regarding the Conclusion of Agreements for the Enforcement of Sentences, 25 March 2009 ("Registrar's Submission")

notes that whilst it seems more likely than not at this stage that the convicted persons in this trial will serve sentences outside of Sierra Leone,[310] this is a decision that ultimately lies within the discretion of the President of the Court, based upon agreements concluded by the Registrar.[311] The Chamber is unable to speculate on the result of these negotiations and decision making processes, upon which it has no conclusive information, and which lie outside of its control. It therefore notes for purposes of record that it has not given any weight to this factor in the consideration of the sentences of any of the convicted persons in this case.

206. The Chamber however wishes to recognise that, in general terms, sentences served abroad, where family visits are likely to be few, may be harder to bear. Such circumstances would normally amount to a factor in mitigation of sentence.

2.1.2. References in submissions to evidence adduced during trial

207. Although both the Prosecution and the Defence teams referred to evidence adduced at trial in support of their arguments on sentencing, the Chamber has not given this evidence substantial consideration unless such evidence resulted in a finding of fact in the Judgement. The Chamber had determined that some of the evidence adduced at trial was found to be not credible and therefore attached no probative value to it. In making its findings on the individual circumstances of the Accused for the purposes of sentencing, the Chamber has relied upon the findings in the Judgement, the arguments of the parties including any information adduced specifically in support thereof and the procedural history of the case.

2.2. Sesay

2.2.1. Convictions and form of liability

208. The Chamber recalls the crimes for which Sesay has been convicted, and the form of liability for each crime, as set out above in Section II of this Sentencing Judgement.

[310] Registrar's Submission, Annex B, Letter to the Special Court from the Republic of Sierra Leone.
[311] Rule 103(B) of the Rules of Procedure and Evidence.

legitimately so. We are therefore of the opinion that challenging the Court's jurisdiction is always a justiciable issue and cannot be considered an aggravating factor in sentencing because it is a fundamental legal right of an accused to raise any legal issue he considers valid to ensure his defence. The Chamber would therefore be contravening his universally accepted fundamental right if we were to uphold the Prosecution's thesis in this respect because such submission is clearly misconceived and fundamentally flawed in law.

276. In the same vein, the Chamber opines that Gbao's refusal at one stage to attend trial cannot be considered an aggravating circumstance. Rule 60 empowers the Chamber to continue the proceedings in the absence of an accused. Indeed, the Chamber proceeded in his absence when Gbao exercised his right own not to attend the proceedings.

2.4.4. Mitigating Circumstances

2.4.4.1. *Remorse*

277. The Chamber is unable to conclude that Gbao has demonstrated genuine remorse for the crimes for which he has been convicted, and thus gives no weight in mitigation of sentence in this respect.

2.4.4.2. *Advanced age*

278. The Chamber does not accept the Defence's submission that life expectancy is a relevant factor in sentencing;[394] however it does accept that a lengthy sentence can be harder to bear in older age. Gbao's age of 60 years has thus been taken into account as a relevant factor in mitigation of sentence.

2.4.4.3. *Lack of prior criminal conduct*

279. The Chamber has duly noted that it has not been demonstrated that Gbao has any prior criminal convictions, and that the Chamber is obliged to consider this as a factor in mitigation of sentence. The Chamber has done so, however we are of the opinion that only very limited credit for this factor can be given where the crimes committed are of a very serious nature, such as in this case.

[394] See Plavsic Sentencing Judgement.

SENTENCES Morris Kallon to the following:

For Count 1: Acts of Terrorism, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(d) of the Statute, a **TERM OF IMPRISONMENT OF 39 YEARS**;

For Count 2: Collective Punishments, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(b) of the Statute, a **TERM OF IMPRISONMENT OF 35 YEARS**;

For Count 3: Extermination, a Crime Against Humanity, punishable under Article 2(b) of the Statute, a **TERM OF IMPRISONMENT OF 28 YEARS**;

For Count 4: Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute, a **TERM OF IMPRISONMENT OF 35 YEARS**;

For Count 5: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, a **TERM OF IMPRISONMENT OF 35 YEARS**;

For Count 6: Rape, a Crime Against Humanity, punishable under Article 2(g) of the Statute, a **TERM OF IMPRISONMENT OF 35 YEARS**;

For Count 7: Sexual slavery, a Crime Against Humanity, punishable under Article 2(g) of the Statute, a **TERM OF IMPRISONMENT OF 30 YEARS**;

For Count 8: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute, a **TERM OF IMPRISONMENT OF 30 YEARS**;

For Count 9: Outrages upon personal dignity, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(e) of the Statute, a **TERM OF IMPRISONMENT OF 28 YEARS**;

For Count 10: Violence to life, health and physical or mental well-being of persons, in particular mutilation, a Violation of Article 3 Common to the Geneva Conventions

VI. DISPOSITION

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

SENTENCES Issa Hassan Sesay to the following:

For Count 1: Acts of Terrorism, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(d) of the Statute, a **TERM OF IMPRISONMENT OF 52 YEARS**;

For Count 2: Collective Punishments, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(b) of the Statute, a **TERM OF IMPRISONMENT OF 45 YEARS**;

For Count 3: Extermination, a Crime Against Humanity, punishable under Article 2(b) of the Statute, a **TERM OF IMPRISONMENT OF 33 YEARS**;

For Count 4: Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute, a **TERM OF IMPRISONMENT OF 40 YEARS**;

For Count 5: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, a **TERM OF IMPRISONMENT OF 40 YEARS**;

For Count 6: Rape, a Crime Against Humanity, punishable under Article 2(g) of the Statute, a **TERM OF IMPRISONMENT OF 45 YEARS**;

For Count 7: Sexual slavery, a Crime Against Humanity, punishable under Article 2(g) of the Statute, a **TERM OF IMPRISONMENT OF 45 YEARS**;

For Count 8: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute, a **TERM OF IMPRISONMENT OF 40 YEARS**;

For Count 9: Outrages upon personal dignity, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(e) of the Statute, a **TERM OF IMPRISONMENT OF 35 YEARS**;

For Count 10: Violence to life, health and physical or mental well-being of persons, in particular mutilation, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, a **TERM OF IMPRISONMENT OF 50 YEARS**;

For Count 11: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute, a **TERM OF IMPRISONMENT OF 40 YEARS**;

For Count 12: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(c) of the Statute, a **TERM OF IMPRISONMENT OF 50 YEARS**;

For Count 13: Enslavement, a Crime Against Humanity, punishable under Article 2(c) of the Statute, a **TERM OF IMPRISONMENT OF 50 YEARS**;

For Count 14: Pillage, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute, a **TERM OF IMPRISONMENT OF 20 YEARS**;

For Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(b) of the Statute, a **TERM OF IMPRISONMENT OF 51 YEARS**;

For Count 17: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, a **TERM OF IMPRISONMENT OF 45 YEARS**;

ORDERS that these sentences shall run and be served concurrently.

and of Additional Protocol II, punishable under Article 3(a) of the Statute, a **TERM OF IMPRISONMENT OF 35 YEARS**;

For Count 11: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute, a **TERM OF IMPRISONMENT OF 30 YEARS**;

For Count 12: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(c) of the Statute, a **TERM OF IMPRISONMENT OF 35 YEARS**;

For Count 13: Enslavement, a Crime Against Humanity, punishable under Article 2(c) of the Statute, a **TERM OF IMPRISONMENT OF 35 YEARS**;

For Count 14: Pillage, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute, a **TERM OF IMPRISONMENT OF 15 YEARS**;

For Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(b) of the Statute, a **TERM OF IMPRISONMENT OF 40 YEARS**;

For Count 17: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, a **TERM OF IMPRISONMENT OF 35 YEARS**;

ORDERS that these sentences shall run and be served concurrently.

SENTENCES Augustine Gbao, Justice Pierre Boutet dissenting, to the following:

For Count 1: Acts of Terrorism, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(d) of the Statute, a **TERM OF IMPRISONMENT OF 25 YEARS**;

For Count 2: Collective Punishments, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(b) of the Statute, a **TERM OF IMPRISONMENT OF 20 YEARS**;

For Count 3: Extermination, a Crime Against Humanity, punishable under Article 2(b) of the Statute, a **TERM OF IMPRISONMENT OF 15 YEARS**;

For Count 4: Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute, a **TERM OF IMPRISONMENT OF 15 YEARS**;

For Count 5: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, a **TERM OF IMPRISONMENT OF 15 YEARS**;

For Count 6: Rape, a Crime Against Humanity, punishable under Article 2(g) of the Statute, a **TERM OF IMPRISONMENT OF 15 YEARS**;

For Count 7: Sexual slavery, a Crime Against Humanity, punishable under Article 2(g) of the Statute, a **TERM OF IMPRISONMENT OF 15 YEARS**;

For Count 8: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute, a **TERM OF IMPRISONMENT OF 10 YEARS**;

For Count 9: Outrages upon personal dignity, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(e) of the Statute, a **TERM OF IMPRISONMENT OF 10 YEARS**;

For Count 10: Violence to life, health and physical or mental well-being of persons, in particular mutilation, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, a **TERM OF IMPRISONMENT OF 20 YEARS**;

For Count 11: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute, a **TERM OF IMPRISONMENT OF 11 YEARS**;

For Count 13: Enslavement, a Crime Against Humanity, punishable under Article 2(c) of the Statute, a **TERM OF IMPRISONMENT OF 25 YEARS**;

For Count 14: Pillage, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute, a **TERM OF IMPRISONMENT OF 6 YEARS**;

For Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(b) of the Statute, a **TERM OF IMPRISONMENT OF 25 YEARS**;

ORDERS that these sentences shall run and be served concurrently.

ORDERS that, pursuant to Rule 101(D) of the Rules, credit shall be given to each of the convicted persons for any period during which they were detained in custody pending trial;

FURTHER ORDERS that, pursuant to Rule 103 of the Rules, each of the convicted persons should remain in the custody of the Special Court pending the finalisation of arrangements for their transfer to the designated place of imprisonment where they shall serve sentence;

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER I

Before:	Hon. Justice Pierre Boutet, Presiding Judge Hon. Justice Benjamin Mutanga Itoe Hon. Justice Bankole Thompson
Registrar:	Herman von Hebel
Date:	2 March 2009

PROSECUTOR	**Against**	ISSA HASSAN SESAY MORRIS KALLON AUGUSTINE GBAO (Case No. SCSL-04-15-T)

Public Document

JUDGEMENT

Office of the Prosecutor:
Pete Harrison
Vincent Wagona
Charles Hardaway
Reginald Fynn
Elisabeth Baumgartner
Régine Gachoud
Amira Hudroge
Bridget Osho

Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Charles Taku
Kennedy Ogeto

Court Appointed Counsel for Augustine Gbao:
John Cammegh
Scott Martin

of the hostages.

4. Law on the Modes of Liability Charged

244. In order to assess and determine the culpability of each Accused, it is necessary for the Chamber to examine the criminal responsibility of each Accused on all the modes of liability which have been alleged against them in the Indictment, either collectively or individually. In this regard, it is alleged that the Accused are responsible, pursuant to Article 6(1) of the Statute, for planning, instigating, ordering, committing or otherwise aiding and abetting the planning, preparation, or execution of the crimes charged in the Indictment.[435] "Committing" would include committing through participation in a joint criminal enterprise.[436] In addition or in the alternative, the Accused are also alleged to be criminally responsible pursuant to Article 6(3) of the Statute, as superiors of members of the RUF.[437]

245. The relevant paragraphs of Article 6 of the Statute provide as follows:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime. [...]
>
> 3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. [...]

246. The Chamber considers that the principle of legality demands that the Court shall apply the law which was binding upon individuals at the time of the acts charged.[438] The application of the law of Sierra Leone to the forms of liability within the jurisdiction of the Special Court is restricted to the crimes envisaged in Article 5 of the Statute and no Accused

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[435] Indictment, para. 38.
[436] Indictment, paras 35-38.
[437] Indictment, paras 20, 24, 29, 34 and 39.
[438] *See*, for example, *Prosecutor v. Milutinovic, Sainovic and Ojdanic*, IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise (AC), 21 May 2003, para. 10 [*Ojdanic* Appeal Decision on Joint Criminal Enterprise].

providing that the basic elements of aiding and abetting as set out below are satisfied.[492]

277. The *actus reus* of aiding and abetting requires that the Accused perpetrates an act or an omission specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime and that this act or omission of the aider and abettor must have a substantial effect upon the perpetration of the crime.[493] The provision of material or physical assistance can also constitute the *actus reus* of aiding and abetting. "[P]roof of a cause-effect relationship between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required."[494]

278. Further, taking into account the specific wording of Article 6(1) of the Statute that "[a] person who [...] aided and abetted *in the planning, preparation or execution* of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime", this Chamber is of the opinion that the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated and at a location geographically removed from the location of the principal crime.[495] If the aiding and abetting occurs after the crime, it must be established that a prior agreement existed between the principal and the person who subsequently aided and abetted in the commission of the crime.[496] The Appeals Chamber has confirmed that acts of aiding and abetting "can be made at a time and place removed from the actual crime."[497] The Chamber reiterates, however, that the act of the aider and abettor must have a substantial effect upon the perpetration of the crime.

279. Mere presence at the scene of a crime, without more, will not usually constitute aiding and abetting. There may be situations, however, in which the physical presence at the crime scene of the Accused, combined with his or her position of authority, "allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement"

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[492] *Prosecutor v. Oric*, IT-03-68-A, Judgement (AC), 3 July 2008, para. 43 [*Oric* Appeal Judgement].
[493] *See Gacumbitsi* Appeal Judgement, para. 140; *Vasiljevic* Appeal Judgement, para. 102; *Oric* Appeal Judgement, para. 43. *See also Blaskic* Appeal Judgement, para. 46 referring to *Furundzija* Trial Judgement, para. 249. *And see also CDF* Appeal Judgement, para. 72: "The Appeals Chamber agrees that 'encouragement' and 'moral support' may constitute the *actus reus*" of aiding and abetting.
[494] *Blaskic* Appeal Judgement, para. 48.
[495] *Blaskic* Appeal Judgement, para. 48.
[496] *Blagojevic and Jokic Trial Judgement*, para. 731.
[497] *CDF* Appeal Judgement, para. 72.

case may be.[514]

284. The Chamber is satisfied that superior responsibility encompasses criminal conduct by subordinates under all modes of participation under Article 6(1) of the Statute.[515] "It follows that a superior can be held criminally responsible for his subordinates' planning, instigating, ordering, committing or otherwise aiding and abetting a crime."[516]

285. The Chamber opines that the following three elements must be satisfied in order to invoke individual criminal responsibility under Article 6(3) of the Statute:

(i) The existence of a superior-subordinate relationship between the superior and the offender of the criminal act;

(ii) The superior knew or had reason to know that the criminal act was about to be or had been committed; and

(iii) The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the offender thereof.[517]

4.2.1. Superior-Subordinate Relationship

286. Under Article 6(3) of the Statute, a superior is someone who possesses the power or authority in either a *de jure* or a *de facto* capacity to prevent the commission of a crime by a subordinate or to punish the offender of the crime after the crime has been committed.[518] This Chamber considers that it is thus this power or authority of the superior to control the actions of his subordinates which forms the basis of the superior-subordinate relationship.[519]

287. The Appeals Chamber has confirmed that the "effective control" test must be applied in determining whether a superior–subordinate relationship exists.[520] According to this test, the superior must possess the "material ability to prevent or punish criminal conduct".[521] The

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[514] *Bagilishema* Appeal Judgement, para. 35.
[515] *See Oric* Appeal Judgement, para. 21, citing *Nahimana et al.* Appeal Judgement, paras 485-486 and *Blagojevic and Jokic* Appeal Judgement, paras 280, 282.
[516] *Oric* Appeal Judgement, para. 21.
[517] *See Gacumbitsi* Appeal Judgement, para. 143; *Kordic and Cerkez* Appeal Judgement, para. 827; *Blaskic* Appeal Judgement, para. 484; *Aleksovski* Appeal Judgement, para. 72.
[518] *Bagilishema* Appeal Judgement, para. 50; *Celebici* Appeal Judgement, para. 192
[519] *Kordic and Cerkez* Appeal Judgement, para. 840. *See also Strugar* Trial Judgement, para. 359; *Celebici* Trial Judgement, para. 377.
[520] *AFRC* Appeal Judgement, paras 257 and 289.
[521] *Celebici* Appeal Judgement, para. 256.

indicators of effective control are more a matter of evidence than of substantive law[522] and must be determined on a case-by-case basis.[523] Mere substantial influence that does not meet the threshold of effective control is not sufficient under customary international law to serve as a means of exercising superior criminal responsibility.[524]

288. The power or authority of the superior to prevent or to punish does not arise solely from a *de jure* status of a superior conferred upon him by official appointment.[525] Someone may also be considered to be a superior based on the existence of *de facto* powers or degree of control. This may often be the case in contemporary conflicts where only *de facto* armies and paramilitary groups subordinated to self-proclaimed governments may exist.[526]

289. Moreover, while possession of *de jure* powers may "suggest a material ability to prevent or punish criminal acts of subordinates, it may be neither necessary nor sufficient to prove such ability[...]" The possession of *de jure* authority, without more, provides only some evidence of effective control.[527] In other words, while the *de jure* authority may be evidentially relevant to such a determination,[528] the Prosecution will still bear the burden of proving effective control beyond reasonable doubt.[529]

290. The necessity of proving that the principal perpetrator was the subordinate of the Accused "does not require direct or formal subordination. Rather the Accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrators."[530] Hierarchy, subordination and chains of command need not be established in the sense of a formal organisational structure as long as the test of effective control is met.[531] Further, "there is no requirement that the superior-subordinate relationship be immediate in

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[522] *See Blaskic* Appeal Judgement, para. 69 referring to *Aleksovski* Appeal Judgement, paras 73-74, 76 and *Celebici* Appeal Judgement, para. 206.
[523] *AFRC* Appeal Judgement, para. 289.
[524] *Celebici* Appeal Judgement, para. 266.
[525] *Gacumbitsi* Appeal Judgement, para. 143; *Bagilishema* Appeal Judgement, para. 50; *Celebici* Appeal Judgement, para. 193.
[526] *Celebici* Appeal Judgement, para. 193.
[527] *Oric* Appeal Judgement, paras 91-92. *See also Prosecutor v. Halilovic*, IT-01-48-A, Judgement (AC), 16 October 2007, para. 85 [*Halilovic* Appeal Judgement].
[528] *Kayishema and Ruzindana* Appeal Judgement, para. 294; *Celebici* Appeal Judgement, para. 197.
[529] *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-A, Judgement (AC), 22 April 2008, para. 21 [*Hadzihasanovic and Kubura* Appeal Judgement].
[530] *Halilovic* Appeal Judgement, para. 59.
[531] *Celebici* Appeal Judgement, para. 254.

which they do not:

> Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail. If the Trial Chamber did not refer to the evidence given by a witness, even if it is contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[915]

485. Adopting this approach, it should be understood that where the Chamber has not discussed the evidence of witnesses who gave testimony at variance with that found as established in the factual narrative, the Chamber has nevertheless fully considered the evidence of each and every witness in light of the evidence of the case as a whole. The Chamber has however determined that such evidence does not meet the threshold of reliability and credibility necessary to draw a factual conclusion upon it.

2. Evidence of Witnesses

2.1. Credibility and Reliability of Oral Testimony

486. In assessing the credibility and reliability of oral witness testimony, the Chamber has considered factors such as the internal consistency of the witnesses' testimony, its consistency with other evidence in the case; any personal interest witnesses may have that may influence their motivation to tell the truth; and observational criteria such as the witnesses' demeanour, conduct and character.[916] In addition, the Trial Chamber has considered the witnesses' knowledge of the facts on which they testify and the lapse of time between the events and the testimony.[917]

487. The Trial Chamber has also kept in mind that "the fact that a witness gives evidence honestly is not in itself sufficient to establish the reliability of that evidence. The issue is not merely whether the evidence of a witness is honest; it is also whether the evidence is objectively

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[915] *Kvocka et al.* Appeal Judgement, para. 23 [original footnotes omitted].
[916] *Blagojevic and Jokic* Trial Judgement, para. 23.
[917] *Halilovic* Trial Judgement, para. 17; *Blagojevic and Jokic* Trial Judgement, para. 23.

reliable."[918]

488. The Chamber may accept or reject the evidence of a witness in whole or in part, and may find a witness to be credible and reliable about certain aspects of their testimony and not credible or reliable with respect to others.[919]

2.2. Inconsistencies

489. The Chamber is of the view that the "mere existence of inconsistencies in the testimony of a witness does not undermine the witness's credibility."[920] The Chamber accepts that since the events in question took place many years ago, some details may be confused and some may be forgotten. The Chamber may accept such evidence as long as the witnesses have "nevertheless recounted the essence of an incident charged in acceptable detail, without undermining the fundamental features of their evidence."[921] Where there are material inconsistencies in the evidence of a witness, the Chamber has taken great care to address those issues and to assess, in light of all of the evidence, whether or not to rely on competing accounts of pertinent events.[922]

490. The Chamber is of the view that while inconsistency is certainly a factor to take into consideration when relying on evidence, this alone does not mean that the whole of the witness's testimony is unreliable.[923] Even if some aspects of a witness's testimony are not believed by the Chamber, the Chamber may still accept other portions of the evidence presented provided they are credible in their context and particularly where they are corroborated.[924] Further, the Chamber is of the opinion that where a witness' explanation is insufficient to place reliance on that witness' testimony, "[d]oubts about a testimony can be removed with the corroboration of other testimonies."[925]

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[918] *Brdjanin* Trial Judgement, para. 25, citing, *inter alia*, *Celebici* Appeal Judgement, paras 491, 506.
[919] *Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic*, IT-95-16-A, Judgement (AC), 23 October 2001, para. 333 [*Kupreskic et al.* Appeal Judgement].
[920] AFRC Appeal Judgement, para. 120.
[921] *Haradinaj et al.* Trial Judgement, para. 13, referring to *Celebici* Appeal Judgement, paras 484-485, 496-498 and *Kupreskic et al.* Appeal Judgement, para. 31.
[922] *See* AFRC Appeal Judgement, para. 121; *Kupreskic* Appeal Judgement, para. 157.
[923] *Celebici* Appeal Judgement, para. 496.
[924] *Naletilic and Martinovic* Appeal Judgement, para. 441; *Kupreskic et al.* Appeal Judgement, para. 332.
[925] *Kayishema and Ruzindana* Trial Judgement, para. 80.

493. During the course of the trial, some witnesses have been asked to identify one or more of the Accused in the courtroom. The Chamber is aware that it may be possible for a witness to point out an Accused person due to their physical placement in the courtroom and, in a multi-Accused trial, to pick out the Accused person who most closely resembles an individual they previously saw.[931]

494. The Chamber considers identification by a witness of someone previously known to be more reliable than identification of someone previously unknown.[932]

2.4. Hearsay Evidence

495. The Chamber followed the operative principle in the sphere of international criminal adjudication that hearsay evidence is admissible.[933] The Chamber is aware that hearsay evidence has inherent deficiencies. It cannot be tested by cross-examination, its reliability may be affected by compounded errors of perception and memory, its source and content can neither be confirmed nor is it subject to solemn declaration.[934] We are conscious of the fact that where such evidence is admitted to prove the truth of its contents, a tribunal ought to be satisfied that it is reliable for that purpose, in the sense of its being voluntary, truthful, and trustworthy, and that both its context and the circumstances under which it arose should be considered.[935]

496. Consistent with the Statute, the Rules of Procedure and Evidence and established international criminal jurisprudence, we acknowledge the fact that evidence which is hearsay in character does not necessarily deprive it of its probative value. In general, however, the weight or the probative value to be attached to such evidence will usually be less than that attributed

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the witness, the time lapse between the original observation and the subsequent identification to the authorities, and any discrepancies between the original description given by the witness and the actual appearance of the Accused.

[931] *See Limaj et al.* Trial Judgement, para. 17; *Vasiljevic* Trial Judgement, para. 19. *See also Kunarac et al.* Trial Judgement, para. 562.

[932] *Kayishema and Ruzindana* Trial Judgement, paras 455-458.

[933] *Fofana* Appeal Decision Refusing Bail, para. 29. See also *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence (AC), 16 February 1999, para. 14. [*Aleksovski* Appeal Decision on Admissibility of Evidence]

[934] *Kmojelac* Trial Judgement, para. 70. See also *Aleksovski* Appeal Decision on Admissibility of Evidence, para. 15.

[935] May and Wierda, *International Criminal Evidence*, p. 117.

to the testimony under oath of a witness who has been subjected to cross-examination.[936] Factors that influence the probative value of hearsay evidence include whether the evidence given was first-hand or further removed, the opportunity to cross-examine the person who made the statement, the potential for errors of perception and memory and the circumstantial guarantees of trustworthiness surrounding the statements.[937]

2.5. Accomplice Evidence

497. The Chamber has heard considerable evidence from "insider witnesses" – that is, persons who were former members of the RUF or the AFRC and who, even though they were not, could also have been indicted for these same offences whose commission they themselves openly and voluntarily admitted in the course of their testimony. These witnesses, as the Appeals Chamber has also observed, are, in law, considered as accomplices.[938]

498. The Chamber has approached the assessment of the reliability of the evidence of accomplice witnesses with caution and has always considered whether or not an accomplice has an ulterior motive to testify such as assurances of *a quid pro quo* from the Prosecution that they will not be prosecuted. Where possible, the Chamber has looked for corroboration of the evidence of accomplice witnesses.[939]

2.6. Circumstantial Evidence

499. Circumstantial evidence is evidence of circumstances surrounding an event or incident from which a fact at issue may be reasonably inferred.[940] Although the individual ingredients of circumstantial evidence may be insufficient to establish a fact, taken conjunctively and cumulatively their effect may be revealing and sometimes decisive.[941] As a matter of law, where

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[936] See *Prosecutor v. Blaskic*, IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability (TC), 21 January 1998, para. 12.

[937] *See*, for example, *Prosecutor v. Delic*, IT-04-83-T, Judgement (TC), 15 September 2008, para. 27 [*Delic* Trial Judgement]; *Haradinaj et al.* Trial Judgement, para. 19.

[938] AFRC Appeal Judgement, para. 127.

[939] AFRC Appeal Judgement, paras 128-129. *See also Muvunyi* Appeal Judgement, para. 98 [*Niyitegeka* Appeal Judgement].

[940] *Halilovic* Trial Judgement, para. 15. *See also Limaj et al.* Trial Judgement, para. 10.

[941] *See R. v. Exall* (1866), 4 F. & F. 922 (England), p. 928: "Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a conclusion of guilt, that is, with as much certainty as human

events. The Chamber has carefully analysed the entirety of the evidence and has set out below its findings on the material facts that we find have been established.

879. In the early hours of 6 January 1999, the AFRC entered Freetown. The troops were divided into two flanks and ordered to take different routes through Ferry Junction to converge on the ECOMOG troops at Upgun. The AFRC forces overwhelmed ECOMOG at Upgun and continued towards the central part of Freetown. At approximately 7:30am, the fighters secured State House, the seat of Government.[1723]

880. Gullit then dispatched a group of AFRC troops to Pademba Road Prison, where they released the inmates, including former President JS Momoh and RUF members Gibril Massaquoi and Steve Bio.[1724] The troops searched for Sankoh, but were informed by one of the prisoners that he had been moved to another location.[1725]

881. Gullit contacted Bockarie from State House and informed him that his troops were in control of Freetown.[1726] In the afternoon of 6 January 1999, Bockarie made an announcement on Radio France International that Gullit's troops had captured Freetown and would continue to defend it.[1727] While the AFRC were at State House, Bockarie also announced over BBC Radio that he was reinforcing the troops in Freetown and that he had ordered that strategic positions, including Government buildings, be burned.[1728]

882. Throughout 6 and 7 January 1999, the AFRC forces attempted to advance into the western part of Freetown, but ECOMOG engaged the rebels in heavy fighting and they were

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[1722] Transcript of 5 December 2005, TF1-184, pp. 35-37; Transcript of 21 July 2005, TF1-360, p. 31 (CS).
[1723] Transcript of 18 October 2004, George Johnson, pp. 40-48; Exhibit 119, AFRC Transcript of 14 June 2005, TF1-334, p. 4. The Chamber notes that TF1-334 testified that State House was captured 5.45am and 6.30am. We find the minor difference in timing immaterial. *See also* Transcript of 21 July 2005, TF1-360, p. 34.
[1724] Transcript of 21 July 2005, TF1-360, pp. 32-33 (CS); Transcript of 17 January 2008, DIS-214, p. 106 (CS); Transcript of 18 October 2004, George Johnson, pp. 49-50; Exhibit 119, AFRC Transcript of 14 June 2005, TF1-334, pp. 5-8; Transcript of 5 December 2005, TF1-184, pp. 43, 47.
[1725] Transcript of 21 July 2005, TF1-360, p. 33 (CS).
[1726] Transcript of 18 October 2004, George Johnson, p. 59; Transcript of 21 July 2005, TF1-360, pp. 34-35 (CS). *See also* Transcript of 5 December 2005, TF1-184, p. 46 where the witness testifies that AFRC Commander Bazzy contacted Bockarie by radio from State House. The witness's testimony regarding the incident is disjointed and the Chamber is mindful that Bazzy and Gullit may have both been present during the two communications that Gullit made from State House. Accordingly, in the absence of more detailed evidence, the Chamber is not satisfied that the witness's observations prove that Bazzy made a distinct radio call to Bockarie.
[1727] Exhibit 119, AFRC Transcript of 14 June 2005, TF1-334, p. 20.
[1728] Exhibit 119, AFRC Transcript of 14 June 2005, TF1-334, p. 48; *see also* Transcript of 18 October 2004, George Johnson, p. 59; Transcript of 15 November 2005, TF1-366, p. 25.

unable to penetrate further across the city.[1729]

883. On the afternoon of 7 January 1999, Gullit sent a radio message to Bockarie to inform him that the AFRC were pulling back to State House and were unable to advance further. Bockarie advised Gullit that if ECOMOG forced them to retreat further, the troops should burn the central part of Freetown, including all key buildings, to the ground.[1730] Gullit ordered that petrol be distributed to the Commanders at State House and troops were dispatched to burn buildings.[1731]

1.8.5. The AFRC Retreat From Freetown

884. On 9 January 1999, under pressure from ECOMOG, the AFRC abandoned State House and began retreating through the eastern part of the city. Gullit again radioed Bockarie and requested him to send RUF reinforcements. Bockarie promised to do so and the two men arranged that AFRC fighters would meet the RUF reinforcements at a factory near Wellington on the eastern edge of Freetown. A group of AFRC fighters were dispatched to Wellington and a group of RUF troops led by RUF Rambo and Superman moved from Lunsar to the Waterloo area. However, ECOMOG controlled Kossoh Town, Hastings and Jui, which are situated between Wellington and Waterloo. There appears to have been no communication between Gullit's fighters and Rambo's group and ultimately the RUF troops were unable or unwilling to break through the ECOMOG position to meet the AFRC fighters.[1732]

885. Subsequently, a small group of around 20 fighters led by AFRC Commander Rambo Red Goat broke away from the RUF contingent and managed to join the AFRC forces in

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[1729] Transcript of 18 October 2004, George Johnson, pp. 52-55.
[1730] Transcript of 18 October 2004, George Johnson, p. 55; Transcript of 21 July 2005, TF1-360, pp. 36-37 (CS). Exhibit 119, AFRC Transcript of 14 June 2005, TF1-334, pp. 49-53.
[1731] Exhibit 119, AFRC Transcript of 14 June 2005, TF1-334, pp. 53-55. *See also* Transcript of 5 December 2005, TF1-184, pp. 50-52.
[1732] Transcript of 18 October 2004, George Johnson, pp. 56-59, 65; Transcript of 21 July 2005, TF1-360, pp. 38-43 (CS); Transcript of 25 July 2005, TF1-360, pp. 41-47; Transcript of 5 December 2005, TF1-184, pp. 52-55; Transcript of 28 July 2005, TF1-036, p. 65 (CS); Transcript of 15 November 2005, TF1- 366, pp. 16-20; Exhibit 119, AFRC Transcript of 14 June 2005, TF1-334, pp. 55-56. Although TF1-334 testifies that the communication was between Gullit and RUF Rambo, the Chamber is satisfied from the consistent evidence of other witnesses that Gullit spoke to Bockarie and Rambo was the Commander sent to lead the reinforcements. *See also* Transcript of 18 July 2005, TF1-361 pp. 62-63 (CS) where the witness testifies that Bockarie deliberately withdrew the RUF reinforcements due to suspicions that Gullit was planning to maintain the ground gained in Freetown exclusively for AFRC troops.

near Port Loko, on 5 January 1999 and moved from there to Waterloo on 6 January 1999.[1743]

892. However, the contingent of Guinean ECOMOG troops stationed at Jui and Kossoh Town blocked the path of the RUF troops from Waterloo to Freetown. The RUF attacked the ECOMOG soldiers but were unable to pass through to Freetown. In addition, in-fighting persisted between Superman and Rambo.[1744] After about two weeks of heavy fighting, ECOMOG reinforcements arrived from Port Loko and opened a passage to secure the safe retreat of the Guinean ECOMOG troops to Port Loko.[1745] The removal of the ECOMOG troops appears to have facilitated the retreat of the AFRC from Freetown to Waterloo.[1746]

893. The Chamber finds that the RUF had no control over the AFRC forces in Freetown during the attack and further finds that the RUF did not form part of a common operation with the AFRC forces for this attack on 6 January 1999.

1.8.7. The AFRC and the RUF Meet at Waterloo

894. After the AFRC retreated from Freetown, Sesay chaired a meeting of AFRC and RUF Commanders including Kallon, Rambo and Superman at which the two groups planned to cooperate in a second attack on Freetown. This second attack failed because RUF fighters had seized from the retreating AFRC fighters the property, money and ammunition looted by the AFRC in Freetown, resulting in animosity between the two groups.[1747]

895. After the joined operation to capture Freetown failed, Sesay returned to Makeni and Kallon travelled to Magburaka. Superman retreated to Lunsar with fighters loyal to him. AFRC

[1743] Exhibit 227, Report from Overall Intelligent Officer Commander and Black Guard Adjutant to BFC Issa Sesay, dated 21 January 1999, p. 25494.
[1744] Exhibit 35, Salute Report from Sam Bockarie to Foday Sankoh, p. 2365; ; Exhibit 36, Salute Report from Issa Sesay to Foday Sankoh, pp. 2352-2354; Transcript of 18 May 2007, Issa Sesay, pp. 79, 81-83; Exhibit 277, Situation Report of Blackguard Commander to the Leader, date unknown, p. 9679, providing that 'Col. Rambo also tried his level best to link up with the other brothers that entered Freetown, but the Freetown operation was not coordinated as the said Commander Black Jah [Gullit] was not going by the instruction from the High Command.'
[1745] Transcript of 18 May 2007, Issa Sesay, pp. 84-86; Exhibit 36, Salute Report from Issa Sesay to Foday Sankoh, pp. 2352-2354; Transcript of 14 April 2008, Morris Kallon, p. 131; Exhibit 227, Report from Overall Intelligent Officer Commander and Black Guard Adjutant to BFC Issa Sesay, dated 21 January 1999, pp. 25494-25495.
[1746] Transcript of 28 July 2005, TF1-036, p. 65 (CS).
[1747] Transcript of 18 October 2004, George Johnson, pp. 78-80; Transcript of 21 July 2005, TF1-360, pp. 45-46 (CS); Transcript of 5 December 2005, TF1-184, pp. 65-66; Transcript of 18 July 2005, TF1-361 pp. 62-63 (CS); Transcript of 7 July 20006, TF1-334, p. 47 (CS); Exhibit 277, Situation Report of Blackguard Commander to the

humanity and war crimes as set out in the Applicable Law section above clearly each contain a materially distinct element that does not exist in the other. As a result, the Chamber is satisfied that it is permissible to enter convictions for the same conduct under Article 2 (Crimes against humanity) and Article 3 (Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II).[3986]

2303. Therefore, it is permissible to enter convictions in relation to the same conduct as found under Counts 6, 7 and 8. Similarly, it is permissible to enter convictions in relation to the same conduct under Count 5, 10, 15 and under Counts 4, 11, 16 respectively.

2.2. Cumulative Convictions on separate Crimes Against Humanity

2.2.1. Murder and Extermination

2304. The Chamber considers that is impermissible to convict for both murder and extermination under Count 4 and 3 based on the same conduct.[3987] However, the Chamber finds that it is permissible to convict on both counts if each count is based on *distinct* conduct.[3988]

2.2.2. Rape and Sexual Slavery

2305. The Chamber considers that the crime charged under Count 7 (sexual slavery) requires a distinct element from the crime of rape (Count 6). The offence of rape requires sexual penetration, whereas sexual slavery requires the exercise of powers attaching to the right of ownership and acts of sexual nature. As the acts of a sexual nature do not necessarily require sexual penetration, and rape does not require that the right to ownership is exercised, the Chamber finds that sexual slavery is distinct from rape. Where the commission of sexual slavery, however, entails acts of rape, the Chamber finds that the act of rape is subsumed by the act of sexual slavery. In such a case, a conviction on the same conduct is not permissible for rape and sexual slavery.

[3986] *Kunarac et al.* Appeal Judgement, para. 176, citing *Kupreskic* Appeal Judgement, para. 288 and *Jelisic* Appeal Judgement, para. 82.
[3987] *Ntakirutimana* Appeal Judgement, para. 542.
[3988] *AFRC* Trial Judgement, para. 2109.

IX. DISPOSITION

1. Sesay

FOR THE FOREGOING REASONS, having considered all the evidence adduced in this trial together with the submissions of the Parties, the Chamber finds with respect to the Accused, **Issa Hassan Sesay**, as follows:

Count 1: Acts of Terrorism, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(d) of the Statute: **GUILTY**, of committing Acts of Terrorism by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, for crimes set forth in Counts 3 to 11 and Count 13, as set out below, in relation to events in Tikonko, Gerihun and Sembehun in Bo District; Kenema Town and Tongo Field in Kenema District; in Koidu Town, Tombodu, Yardu, Penduma, Bumpeh, Bomboafuidu, Sawao, Wendedu and Kayima in Kono District; and in Kailahun Town in Kailahun District;

Count 2: Collective Punishments, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(b) of the Statute: **GUILTY**, of committing Collective Punishments by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, for crimes set forth in Counts 3 to 5 and Counts 10 to 11, as set out below, in relation to events in Kenema Town in Kenema District; Tombodu, Penduma and Yardu in Kono District, and Kailahun Town in Kailahun District;

Count 3: Extermination, a Crime Against Humanity, punishable under Article 2(b) of the Statute: **GUILTY**, of committing Extermination by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tikonko in Bo District; Tongo Field in Kenema District; Tombodu and Koidu Town in Kono District; and Kailahun Town in Kailahun District;

Count 4: Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute: **GUILTY**, of committing Murder by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tikonko, Sembehun and Gerihun in Bo

District; Kenema Town and Tongo Field in Kenema District; in Koidu Town, Tombodu, Penduma and Yardu in Kono District; and in Kailahun Town in Kailahun District;

Count 5: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute: **GUILTY**, of committing Murder by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tikonko, Sembehun and Gerihun in Bo District; in Kenema Town and Tongo Field in Kenema District; in Koidu Town, Tombodu, Penduma and Yardu in Kono District; and in Kailahun Town in Kailahun District;

Count 6: Rape, a Crime Against Humanity, punishable under Article 2(g) of the Statute: **GUILTY**, of committing Rape by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town, Bumpeh, Tombodu, Penduma, Bomboafuidu, Sawao and Wendedu in Kono District;

Count 7: Sexual slavery, a Crime Against Humanity, punishable under Article 2(g) of the Statute: **GUILTY**, of committing Sexual Slavery by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town and Wendedu in Kono District and in locations in Kailahun District;

Count 8: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute: **GUILTY**, of committing other inhumane acts (forced marriage) by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town and Wendedu in Kono District and in locations in Kailahun District;

Count 9: Outrages upon personal dignity, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(e) of the Statute: **GUILTY**, of committing outrages against personal dignity by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town, Bumpeh, Tombodu, Penduma, Bomboafuidu, Sawao and Wendedu in Kono District and in locations in Kailahun District;

Count 10: Violence to life, health and physical or mental well-being of persons, in particular mutilation, a Violation of Article 3 Common to the Geneva Conventions and of Additional

Protocol II, punishable under Article 3(a) of the Statute: **GUILTY**, of committing mutilations by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tombodu, Wendedu, Penduma, Yardu, Kayima and Sawao in Kono District;

Count 11: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute: **GUILTY**, of committing other inhumane acts (physical violence) by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Kenema Town in Kenema District; and in Tombodu, Wendedu, Penduma, Yardu, Kayima, and Sawao in Kono District;

Count 12: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(c) of the Statute: **GUILTY**, of planning the use of children to actively participate in hostilities, pursuant to Article 6(1) of the Statute in relation to events in Kenema, Kailahun, Kono and Bombali Districts;

Count 13: Enslavement, a Crime Against Humanity, punishable under Article 2(c) of the Statute: **GUILTY,** of committing Enslavement by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tongo Field in Kenema District; in Kono District; and in Kailahun District; of planning Enslavement pursuant to Article 6(1) of the Statute in relation to events in Tombodu and throughout Kono District; and pursuant to Article 6(3) of the Statute in relation to events in Yengema in Kono District;[3999]

Count 14: Pillage, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute: **GUILTY**, of committing Pillage by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in

[3999] In this, and in other counts, the Accused have been convicted under both Article 6(1) and Article 6(3) of the Statute in relation to the same count. However, the Chamber notes that in each such case, the conduct for which the Accused have been held liable under Article 6(1) is distinct from that for which they been held liable under Article 6(3). As noted previously in the Cumulative Convictions Section, the Chamber considers that convictions may be entered under Article 6(1) and 6(3) in relation to the same count if the convictions under each mode of liability are based on different sets of conduct: *supra* para. 2313. In cases in which the Accused have been convicted under both Article 6(1) and Article 6(3) in relation to the same count, the Chamber has clearly specified the incidents for which they have been held liable under each mode of liability.

relation to events in Sembehun in Bo District; and in Koidu Town and Tombodu in Kono District;

Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(b) of the Statute: **GUILTY**, of intentionally directing attacks against the UNAMSIL peacekeeping mission pursuant to Article 6(3) of the Statute, in relation to events in Bombali, Port Loko, Kono and Tonkolili Districts;

Count 16: Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute: **NOT GUILTY;**

Count 17: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute: **GUILTY**, of Murder pursuant to Article 6(3) of the Statute in relation to events in Bombali and Tonkolili Districts; and

Count 18: Taking of hostages, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(c) of the Statute: **NOT GUILTY**.

2. Kallon

WITH RESPECT to the Accused **Morris Kallon**, having considered all the evidence along with the arguments of the Parties, the Chamber finds as follows:

Count 1: Acts of Terrorism, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(d) of the Statute: **GUILTY**, of committing Acts of Terrorism by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, for crimes set forth in Counts 3-11 and Count 13, as set out below, in relation to events in Tikonko, Sembehun and Gerihun in Bo District; Kenema Town and Tongo Field in Kenema District; Koidu Town, Tombodu, Yardu, Penduma, Bumpeh,

Bomboafuidu, Sawao, Wendedu and Kayima in Kono District; and in Kailahun Town in Kailahun District; and pursuant to Article 6(3) of the Statute for a crime under Count 7 in Kissi Town in Kono District;

Count 2: Collective Punishments, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(b) of the Statute: **GUILTY**, of committing Collective Punishments by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, for crimes set forth in Counts 3 to 5 and Counts 10 to 11 as set out below in relation to events in Kenema Town in Kenema District, Tombodu, Penduma and Yardu in Kono District, and Kailahun Town in Kailahun District;

Count 3: Extermination, a Crime Against Humanity, punishable under Article 2(b) of the Statute, **GUILTY**, of committing Extermination by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tikonko in Bo District; in Tongo Field in Kenema District; in Tombodu and Koidu Town in Kono District; and in Kailahun Town in Kailahun District;

Count 4: Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute: **GUILTY,** of committing Murder by participating in a joint criminal enterprise, pursuant to Article 6(1), in relation to events in Tikonko, Sembehun and Gerihun in Bo District; Kenema Town and Tongo Field in Kenema District; in Koidu Town, Tombodu, Penduma and Yardu in Kono District; and in Kailahun Town in Kailahun District; and of instigating Murder pursuant to Article 6(1) in relation to an event in Wendedu in Kono District;

Count 5: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute: **GUILTY**, of committing Murder by participating in a joint criminal enterprise pursuant to Article 6(1) of the Statute in relation to events in Tikonko, Sembehun and Gerihun in Bo District; in Kenema Town and Tongo Field in Kenema District; in Koidu Town, Tombodu, Penduma and Yardu in Kono District; and in Kailahun Town in Kailahun District; of instigating Murder, pursuant to Article 6(1) of the Statute, in relation to an event in Wendedu in Kono District;

Count 6: Rape, a Crime Against Humanity, punishable under Article 2(g) of the Statute: **GUILTY**, of committing Rape by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town, Bumpeh, Tombodu, Penduma, Bomboafuidu, Sawao and Wendedu in Kono District;

Count 7: Sexual slavery, a Crime Against Humanity, punishable under Article 2(g) of the Statute: **GUILTY**, of committing Sexual Slavery by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town and Wendedu in Kono District and locations in Kailahun District; and pursuant to Article 6(3) of the Statute in relation to an event in Kissi Town in Kono District;

Count 8: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute: **GUILTY**, of committing other inhumane acts (forced marriage) by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town and Wendedu in Kono District and locations in Kailahun District; and pursuant to Article 6(3) of the Statute in relation to an event in Kissi Town in Kono District;

Count 9: Outrages upon personal dignity, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(e) of the Statute: **GUILTY**, of committing outrages against personal dignity pursuant to Article 6(1) of the Statute by participating in a joint criminal enterprise in relation to events in Koidu Town, Bumpeh, Tombodu, Penduma, Bomboafuidu, Sawao and Wendedu in Kono District and in locations in Kailahun District; and pursuant to Article 6(3) of the Statute in relation to an event in Kissi Town in Kono District;

Count 10: Violence to life, health and physical or mental well-being of persons, in particular mutilation, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute: **GUILTY**, of committing mutilations by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tombodu, Wendedu, Penduma, Yardu, Kayima and Sawao in Kono District;

Count 11: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute: **GUILTY**, of other inhumane acts (physical violence) by participating in a joint

criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Kenema Town in Kenema District; in Tombodu, Wendedu, Penduma, Yardu, Kayima and Sawao in Kono District;

Count 12: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an other serious Violation of International Humanitarian Law, punishable under Article 4(c) of the Statute: **GUILTY**, of planning the use of children under the age of 15 years to actively participate in hostilities pursuant to Article 6(1) of the Statute in relation to events in Kenema, Kailahun, Kono and Bombali Districts;

Count 13: Enslavement, a Crime Against Humanity, punishable under Article 2(c) of the Statute: **GUILTY,** of committing Enslavement by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tongo Field in Kenema District; in Kono District; and in Kailahun District; and pursuant to Article 6(3) in relation to events throughout Kono District;

Count 14: Pillage, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute: **GUILTY**, of Pillage, by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Sembehun in Bo District; and Koidu Town and Tombodu in Kono District;

Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(b) of the Statute: **GUILTY**, of committing and ordering attacks on peacekeepers pursuant to Article 6(1) in Bombali District; and pursuant to Article 6(3) of the Statute in relation to events committed in Bombali, Port Loko, Kono and Tonkolili Districts;

Count 16: Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute: **NOT GUILTY;**

Count 17: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional

Protocol II, punishable under Article 3(a) of the Statute: **GUILTY**, of Murder pursuant to Article 6(3) of the Statute in relation to events in Bombali and Tonkolili Districts; and

Count 18: Taking of hostages, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(c) of the Statute: **NOT GUILTY**.

3. Gbao

WITH RESPECT to the Accused **Augustine Gbao**, having considered all the evidence along with the arguments of the Parties, the Chamber finds as follows:

Count 1: Acts of Terrorism, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(d) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of committing Acts of Terrorism by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, for crimes set forth in Counts 3 to 5 and Counts 6 to 9, as set out below, in relation to events in Kailahun Town and throughout Kailahun District;

Count 2: Collective Punishments, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(b) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of committing Collective Punishments by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, for crimes set forth in Counts 3 to 5, as set out below, in relation to events in Kailahun Town in Kailahun District;

Count 3: Extermination, a Crime Against Humanity, punishable under Article 2(b) of the Statute,: **GUILTY**, *Justice Boutet Dissenting*, of committing Extermination by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tikonko in Bo District; in Tongo Field in Kenema District; in Tombodu and Koidu Town in Kono District; and in Kailahun Town in Kailahun District;

Count 4: Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of committing Murder by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tikonko, Sembehun and Gerihun in Bo District; Kenema Town and Tongo Field in Kenema District; in Koidu

Town, Tombodu, Penduma and Yardu in Kono District; and in Kailahun Town in Kailahun District;

Count 5: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of committing Murder by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tikonko, Sembehun and Gerihun in Bo District; Kenema Town and Tongo Field in Kenema District; Koidu Town, Tombodu, Penduma and Yardu in Kono District; and in Kailahun Town in Kailahun District;

Count 6: Rape, a Crime Against Humanity, punishable under Article 2(g) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of committing Rape by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town, Bumpeh, Tombodu, Penduma, Bomboafuidu, Sawao and Wendedu in Kono District;

Count 7: Sexual slavery, a Crime Against Humanity, punishable under Article 2(g) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of committing Sexual Slavery by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town and Wendedu in Kono District and locations in Kailahun District;

Count 8: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of committing other inhumane acts by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town and Wendedu in Kono District and locations in Kailahun District;

Count 9: Outrages upon personal dignity, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(e) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of committing outrages against personal dignity by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Koidu Town, Bumpeh, Tombodu, Penduma, Bomboafuidu, Sawao and Wendedu in Kono District and in locations in Kailahun District;

Count 10: Violence to life, health and physical or mental well-being of persons, in particular mutilation, a Violation of Article 3 Common to the Geneva Conventions and of Additional

Protocol II, punishable under Article 3(a) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of committing mutilations by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tombodu, Wendedu, Penduma, Yardu, Kayima and Sawao in Kono District;

Count 11: Other inhumane acts, a Crime Against Humanity, punishable under Article 2(i) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of other inhumane acts (physical violence) pursuant to Article 6(1) of the Statute in relation to events in Kenema Town in Kenema District; and in Tombodu, Wendedu, Penduma, Yardu, Kayima and Sawao in Kono District;

Count 12: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(c) of the Statute: **NOT GUILTY;**

Count 13: Enslavement, a Crime Against Humanity, punishable under Article 2(c) of the Statute: **GUILTY,** *Justice Boutet dissenting*, of committing Enslavement by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to events in Tongo Field in Kenema District; in Kono District; and in Kailahun District;

Count 14: Pillage, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute: **GUILTY**, *Justice Boutet dissenting*, of committing Pillage pursuant to Article 6(1) of the Statute in relation to events in Sembehun in Bo District; and Koidu Town and Tombodu in Kono District;

Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law, punishable under Article 4(b) of the Statute: **GUILTY**, of aiding and abetting attacks on peacekeepers pursuant to Article 6(1) in Bombali District;

Count 16: Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute: **NOT GUILTY;**

Count 17: Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute: **NOT GUILTY;**

Count 18: Taking of hostages, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(c) of the Statute: **NOT GUILTY**.

Hon. Justice Pierre G. Boutet appends a partly Dissenting Opinion to the Judgement.

Hon. Justice Bankole Thompson appends a Separate Concurring Opinion to the Judgement.

Delivered on 25 February 2009 in Freetown, Sierra Leone.

Hon. Justice Benjamin Mutanga Itoe	Hon. Justice Pierre G. Boutet Presiding Judge Trial Chamber I	Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

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TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Pierre Boutet
Hon. Justice Bankole Thompson

Registrar: Herman von Hebel

Date: 23rd of June 2008

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

DECISION ON SESAY DEFENCE APPLICATION FOR JUDICIAL NOTICE TO BE TAKEN OF ADJUDICATED FACTS UNDER RULE 94(B)

Office of the Prosecutor:
Mr Peter Harrison
Mr Joseph Kamara
Mr Vincent Wagona
Mr Reginald Fynn
Mr Charles Hardaway

Defence Counsel for Issa Hassan Sesay:
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defence Counsel for Morris Kallon:
Mr. Charles Taku
Mr. Kennedy Ogeto
Ms. Tanoo Mylvaganam

Court-Appointed Counsel for Augustine Gbao:
Mr. John Cammegh
Mr. Scott Martin

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17. The Chamber acknowledges that Rules 94(B) of the ICTY and ICTR are virtually identical to Rule 94(B) of the Rules of the Special Court.[28] Accordingly, guidance can be sought, persuasively, from the jurisprudence of those ad hoc Tribunals interpreting Rule 94(B).

1. The Legal Effect of Judicially Noticing an Adjudicated Fact

18. It is the Chamber's considered view that the rationale behind Rule 94 is two-fold. First, and foremost, Rule 94 aims to promote judicial economy by dispensing with the need for the parties to lead evidence in order to prove supplementary facts or allegations already proven in past proceedings. Second, Rule 94 aims to harmonise judgements in relation to certain factual issues that arise in multiple cases before the Special Court.[29]

19. Further, on a plain and ordinary interpretation of Rule 94, a Trial Chamber may take judicial notice of facts either pursuant to Rule 94(A) or pursuant to Rule 94(B). Facts judicially noticed under Rule 94(A) cannot be challenged during trial.[30] Under Rule 94(B), however, the facts in question must have been adjudicated in a different proceeding, between different parties, based on the evidence presented by those parties. The Chamber recognises that it is settled law that the proposed

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Appeals Chambers on this point: *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 (AC), para 5 ["*Dragomir Milosevic* Appeals Chamber Decision on Judicial Notice"]; *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 41; *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003 (AC), p. 2 ["*Slobodan Milosevic* Appeals Chamber Decision on Judicial Notice"] and Sep. Op. Judge Shahabuddeen, 31 October 2003, para 6 ["Sep. Op. Shahabuddeen"]. See Prosecution Response, *supra* note 8, para 3.

[28] Rule 94(B) of the ICTR Rules of Procedure and Evidence Provides:

> At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

Rule 94(B) of the ICTY Rules of Procedure and Evidence Provides:

> At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

[29] *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 39; Sep. Op. Shahabuddeen, *supra* note 27, para 35; *Prosecutor v. Delic*, Case No. IT-04-83-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Joint Motion Concerning Agreed Facts, 9 July 2007 (TC), para 8 ["*Delic*"]; *Krajisnik*, *supra* note 10, para 11; *Prosecutor v. Mejakic, Gruban, Fustar and Knezevic*, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B), 1 April 2004 (TC), p. 4 ["*Mejakic*"]; *Prosecutor v. Ljubicic*, Case No. IT-00-41-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 23 January 2003 (TC), p. 4 ["*Ljubicic*"]; *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-T and ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 September 2001 (TC), paras 27-28 ["*Ntakirutimana*"]; *Prosecutor v. Sikirica*, Case No. IT-95-8-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000 (TC), p. 4 ["*Sikirica*"]. See also *Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-2004-14-AR73, Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 16 May 2005 (AC), para 22 ["Fofana Appeals Chamber Decision on Judicial Notice"].

adjudicated facts must relate "to a matter at issue in the current proceedings."[31] Since the party not seeking judicial notice of proposed adjudicated facts did not have the chance to introduce evidence or make arguments in relation to the factual conclusions reached in a different case and their connection to the evidence heard in the present case, trial fairness requires that the opposing party be given the opportunity to challenge the accuracy of any facts admitted under Rule 94(B).[32] Consistent with the reasoning of the ICTY Appeals Chamber, this Chamber holds that Rule 94(B) creates a "well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial."[33]

2. Factors to be Considered in Determining whether an Adjudicated Fact may be Admitted in Evidence

9. The Chamber notes that Rule 94(B) does not define what constitutes an "adjudicated fact". Given that judicially noticing such an adjudicated fact has the effect of creating a well-founded presumption as to the accuracy of that fact, trial fairness requires that this term be defined and delimited. Based on settled international jurisprudence, the Chamber therefore opines that the following legal criteria must be met for a proposed fact to be considered an adjudicated fact susceptible of being judicially noticed at the discretion of a Trial Chamber:

a. The fact must be distinct, concrete and identifiable;[34]

b. The fact must be relevant and pertinent to an issue in the current case;[35]

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[31] Fofana Appeals Chamber Decision on Judicial Notice, *ibid.*, para 32.

[32] Rule 94(B).

[33] See Op. Shahabuddeen, *supra* note 27, paras 3-37; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999 (AC), paras 24-25 ["*Aleksovski*"].

[34] *Slobodan Milosevic* Appeals Chamber Decision on Judicial Notice, *supra* note 27, p. 3. See also *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 42; *Prosecutor v. Hadzihasanovic and Kubura*, Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005, 14 April 2005 (TC), p. 3 ["*Hadzihasanovic*"]. See also Prosecution Response, *supra* note 8, paras 6-8.

[35] *Delic*, *supra* note 29, para 10; *Krnojelnik*, *supra* note 10, para 14; *Hadzihasanovic*, *ibid.*, p. 3; *Prosecutor v. Popovic, Beara, Nikolic, Borovcanin, Miletic, Gvero and Pandurevic*, Case No. IT-05-88-T, 26 September 2006 (TC), para 6 ["*Popovic*"]; *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, para 16 ["*Blagojevic*"]; *Prlic*, *supra* note 10, para 12. See also Prosecution Response *supra* note 8, para 12.

[36] Rules 89(C) and 94(B); *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 48; *Prosecutor v. Strugar*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005 (AC), paras 17, 48, 55-56 ["*Nikolic* Appeals Chamber Decision on Judicial Notice"]; *Delic*, *supra* note 29, para 10; *Popovic*, *ibid.*, para 5; *Tolimir*, *supra* note 29, para 27; *Prlic*, *ibid.*, para 9; *Hadzihasanovic*, *supra* note 33, p. 4. See also Prosecution Response, *ibid.*, para 12

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TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Robin Vincent
Date:	2nd of May 2005

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

DECISION ON SESAY - MOTION SEEKING DISCLOSURE OF THE RELATIONSHIP BETWEEN GOVERNMENTAL AGENCIES OF THE UNITED STATES OF AMERICA AND THE OFFICE OF THE PROSECUTOR

Office of the Prosecutor:
Luc Côté
Lesley Taylor
Peter Harrison

Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Shekou Touray
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao
Andreas O'Shea
John Cammegh

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2. The Defence submits that the evidence that Dr. White used Prosecution funds during "FBI vetting" discloses a symbiotic relationship between the OTP and the FBI which would be inconsistent with the Prosecution's obligation pursuant to Article 15 to maintain its independence.[3] The Defence also states that the evidence of General Tarnue suggests that Dr. White played an integral role in the relocation and in the granting of asylum to General Tarnue.[4] The Defence submits that the above evidence raises serious questions about the integrity of the investigations[5] in this matter in that the Prosecution has violated Article 15 of the Statute of the Court in that it has not acted independently.

3. The Defence further avers that a *prima facie* breach of Article 15 raises issues which relate to an evaluation of the evidence and to an assessment of whether the Prosecution has complied with its disclosure obligations pursuant to Rule 68 of the Rules.[6]

4. The Defence submits that the Chamber will not be able to properly evaluate the veracity and reliability of the evidence of General Tarnue and other witnesses without a clear indication from the Prosecution as to the extent of the relationship between Dr. White acting for the OTP on the one hand, and the American Government and the FBI on the other since the involvement of the latter may have affected the evidence obtained.[7] The Defence further asserts that Dr. White's involvement with the outside agencies in assisting in the relocation of General Tarnue and his family must be disclosed since this assistance is capable of being an inducement and might have influenced General Tarnue's willingness to implicate the Accused.[8]

5. The Defence submits that the Prosecution must disclose anything that reveals the untruthfulness of General Tarnue's evidence pursuant to its obligation to disclose exculpatory evidence under Rule 68.[9] The Defence also asserts that General Tarnue's evidence, and in particular a statement made during his interview with Dr. White in April 2003, suggest that there were previous interviews with Dr. White and the FBI that have not been disclosed.[10]

6. In conclusion, the Defence requests that the Prosecution be required to disclose:

[3] Motion, paras 5-6.
[4] *Id.*, para. 7.
[5] *Id.*, para. 8.
[6] *Id.*
[7] *Id.*, paras 10-11.
[8] *Id.*, para. 9.
[9] *Id.*, para. 12.
[10] *Id.*, para. 13.

II. APPLICABLE LAW

(A) *Authority, Autonomy and Independence of the Office of the Prosecutor*

20. The law applicable to the subject-matter of the instant Motion is embodied in five key statutory provisions of the Court, to wit, Article 15(1) of the Statute, Section 15 of the Special Court Agreement, 2002 Ratification Act, 2002 ("Special Court Agreement") and Rules 8, 39, and 68 of the Rules.

21. Underscoring the centrality of the prosecutorial role within the Special Court's adversarial system for the adjudication of criminal cases, Article 15(1) of the Statute of the Court sets up an autonomous and independent machinery for the prosecution of crimes against humanity and war crimes in these terms:

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

22. In the Chamber's opinion, it is absolutely clear that Article 15(1) reinforces, in unambiguous terms, an internationally accepted norm governing the exercise of prosecutorial authority, in International Criminal Tribunals namely, autonomy and independence. To this end, the Chamber acknowledges that it is imperative not only in preserving the integrity of the administration of criminal justice in international law but also to ensure the confidence of the international community in mechanisms set up to ensure accountability for war crimes against humanity, that the Office of the Prosecutor enjoys an unfettered functional and investigative discretion, subject only to recognised and accepted judicial controls in respect of the functions conferred on it by the Statute of the Special Court.

(B) *Statutory Obligation on Sierra Leone to Provide Assistance to the Court.*

23. The Chamber acknowledges that it was in recognition of the need for co-operation between the Court, the relevant Sierra Leone authorities and other states to fulfil the Court's mandate that Article 15(1) of the Statute, Section 15 of the Special Court Agreement and Rule 39 of the Court's

certain key information allegedly arising out of the relationship between General Tarnue, Dr. White and the United States Government as set out in paragraph 6 herein.

(A) Alleged Breach of Article 15(1)

40. The Chamber notes that both the Defence and the Prosecution agree that within the proper context and interpretation of the Statute and the Rules, Article 15(1) does vest on the Prosecution, the autonomy and independence in the discharge of its functions, and that the Office of the Prosecutor must act as an independent body that does not take ***instructions*** from any other entity.

41. It seems clear to the Chamber that the arguments and submissions of the Defence as regards the alleged breach of Article 15(1) are predicated upon the assumption that the Office of the Prosecutor has taken ***instructions*** from another entity. The Prosecution submits that it has not. The crux of the matter, from the Chamber's perspective, is whether there is, at this point in time, any evidentiary basis or factual foundation for the allegation put forward by the Defence, to warrant a conclusive finding of fact that there has in law been a breach of Article 15(1). The Defence assert that the evidence from which such inference should be drawn is that of General Tarnue that Dr. White's actions were, according to Dr. White, to be based upon a decision of the State Department of the Government of the United States.

42. Does this piece of evidence irresistibly sustain the Defence contentions, even if given a liberal evaluation? In other words, does it necessarily follow that because General Tarnue stated that Dr. White told him that the latter's actions were to be based on a decision of the State Department of the U.S. Government, the Office of the Prosecutor was acting on the ***instructions*** 'received' from the U.S. Government? In the Chamber's opinion, an inference of this nature cannot lightly be drawn from such evidence, given its grave implications for the justice process.

43. The Chamber, likewise, emphasises that the suggestion of the Defence that General Tarnue's testimony revealed a relationship between the Office of the Prosecutor and the United States of America, even if it were true, could not in law justify, without more, the inference that the Prosecution was receiving ***instructions*** from the U.S Government in breach of Article 15(1). This is so even if the Office of the Prosecutor sought ***assistance*** from the U.S. Government as envisaged by Rule 8(C) of the Rules of Procedure and Evidence. Certainly, in the Chamber's view, it would do violence to the plain meaning and context of the Statute and the Rules if conceptually the words ***"instructions"*** and ***"assistance"*** were construed as being synonymous and interchangeable. The

contentions of the Defence on this issue, therefore, are legally unsustainable in that, on the whole, the Defence has failed to substantiate, by *prima facie* proof, the allegation of breach of Article 15(1), on the part of the Office of the Prosecutor. This Chamber does not find any, as the Defence contends, "master-servant" relationship between Dr. White, as FBI agent and the Prosecution which would occasion a breach of Article 15(1).

(B) ***Discretion to Seek Assistance***

44. The Chamber recalls that both the Defence and Prosecution agree that within the framework of the Court's Statute and Rules, the Office of the Prosecutor is vested with some measure of discretionary latitude in seeking ***assistance*** from internal and external agencies for the purpose of the conduct of its investigations. We observe that, unlike Article 15(1) of the Statute which is an exclusionary clause designed to protect and preserve prosecutorial independence, there is no similar statutory prohibition for the Prosecution, in the exercise of its prosecutorial discretion, to seek, within the confines of the law, any ***assistance*** from other bodies and Institutions in fulfilling the duties conferred on it by the Statute. Clearly, Article 15(2) of the Statute is explicit in its purport and intendment that:

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

45. By parity of reasoning, Rules 8(C), (D) and (E), 39, and 40 of the Court's Rules of Procedure and Evidence cumulatively establish a machinery for co-operation between the Office of the Prosecutor and external agencies or entities, be they States, Governments, Organisations, Bureaus, or related bodies.

46. In this regard, the Defence submissions do not really challenge the authority of the Office of the Prosecutor to seek ***assistance*** in the conduct of its investigations. Accordingly, the Chamber concludes that there is clear statutory authority for the Prosecution to seek ***assistance*** from both internal and external sources for the purposes of the conduct of its investigations in the course of fulfilling its mandate to bring to justice those who bear the greatest responsibility for crimes against humanity, war crimes and related offences during the hostilities that took place in Sierra Leone at the material times.

47. The complexity, roles, and functions of any such agencies or bodies cannot legally operate as limiting or restricting such authority in the absence of any express statutory provision to that effect.

(C) *Disclosure under Rule 68*

48. The third key issue relates to whether in the light of the contentions by the Defence about General Tarnue's testimony as to his dealings with Dr. White and the United States Government, Rule 68 is thereby implicated in fact and in law, requiring the Prosecution therefore to disclose certain key information as set out in the Defence Request (reproduced at paragraph 6 herein), the Chamber's findings are set out below in sub-paragraphs (iv) - (ix) of paragraph 64 herein.

49. In arriving at these conclusions, the Chamber notes that the requests made by the Defence in this application are either too broad, too vague, or indeed unspecific.

50. In seeking to establish a breach of Article 15(1) of the Statute, there has been a total lack of specificity on instructions received which the Defence alleges amounts to a breach by the Prosecution of its statutory obligations under Article 15(1). These same comments apply to the application where the Defence seeks to compel the Prosecution to disclose exculpatory evidence under Rule 68 as to the assistance offered by Dr. White to General Tarnue to obtain asylum and a relocation of himself and his family in the U.S.A.

51. In this regard, the Chamber would like to state here that for the Defence to succeed in this Motion, it is not enough to premise its application either on presumptions, on speculations, or on probabilities. If it does, as it seems, seek to establish the subservience of the Prosecutor to a foreign Government or Agency, it must provide concrete proof of those instructions and their contents and not just invite this Chamber, merely on the basis of speculation and without any legal or factual proof, to draw such a conclusion or even such an inference.

52. We are strongly of the opinion that mere evidence of the cooperation between the Prosecution and the FBI or the US Government, without proof that the former received instructions from the latter, including the nature and contents of such instructions, does not, per se, fulfill the test to establish a violation of Article 15(1) of the Statute.

(D) *Exculpatory Evidence Under Rule 68*

53. In the same vein, a mere speculative assertion without specifying or advancing concrete proof of the nature and content of the exculpatory evidence which the Defence is alleging to be in the

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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 13 September 2012

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

PUBLIC

SEPARATE OPINION OF JUSTICE GEORGE GELAGA KING ON DECISION ON CHARLES GHANKAY TAYLOR'S MOTION FOR PARTIAL VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF APPEALS CHAMBER JUDGES

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

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

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1. On 7 and 10 May 2012, the President of the Special Court for Sierra Leone ("Special Court"), at the time, Justice Jon M. Kamanda, convened an Emergency Plenary Meeting of Judges pursuant to Rule 15*bis* (B) of the Rules of Procedure and Evidence of the Special Court ("Rules"), which mandates the President to refer an allegation of unfitness of a Judge to sit to the Council of Judges. Should the Council determine that (i) the allegation is of a serious nature and (ii) that there appears to be a substantial basis for same, "it shall refer the matter to the Plenary Meeting which will consider it and, if necessary, **make a recommendation to the body which appointed the Judge.**" (Emphasis added)

2. The Plenary was **seized** of a Complaint, dated 26 April 2012, submitted by Justice Richard Lussick, Presiding Judge of Trial Chamber II, on behalf of the Judges of Trial Chamber II, against Justice Malick Sow, Alternate Judge in that Chamber, alleging misconduct and "Unfitness to Sit" pursuant to Rule 15*bis*.

3. The Complaint before the Plenary was contained in an email dated 26 April 2012 addressed to the President by the Presiding Judge of Trial Chamber II, Justice Richard Lussick, which said Complaint was published to the Judges constituting the Emergency Plenary.

4. Justice Malick Sow responded to the Complaint via email to the President dated 1 May 2012, which said Response was also before the Plenary.

5. At the start of the deliberations on the first day of the Plenary i.e. 7 May 2012, Justice Julia Sebutinde of Trial Chamber II read a written 6 page statement on behalf of Trial Chamber II, which purported to be a Complaint against Justice Malick Sow.

6. The Appeals Chamber Judges of the Emergency Plenary were only apprised of this statement at the time it was read out by Justice Julia Sebutinde, who was not the Presiding Judge of Trial Chamber II.

7. A *fortiori*, Justice Malick Sow, against whom the allegations in the statement were made was not given prior notice of it and, consequently, had not been given the opportunity to respond.

8. I objected to the procedural irregularity, which patently impinged on Justice Malick Sow's right to be heard, stating that it was against basic principles of natural justice, and submitted that the Emergency Plenary could not deliberate on the matter and that the views and recommendations of the Judges could not be sought when Justice Malick Sow had not been given an opportunity to

respond to what were to all intents and purposes 'new' allegations against him. I warned the Teleconference that unless Justice Malick Sow was given time to reply to the sudden and scurrilous allegations made against him by Justice Julia Sebutinde, the refusal to give him time to respond was tantamount to "a perversion of justice". I informed my colleagues that, accordingly, I was not, from that moment, taking any further part in the Emergency Plenary. I then walked out of the conference room and the Emergency Plenary.

9. The statement by Justice Julia Sebutinde was, however, already on the record and in my opinion, subsequent attempts to expunge it did not detract from the fact that it had been published.

10. I did not participate in any further deliberations either on 7 or 10 May 2012 or in any decision taken by the Plenary on the matter.

11. I opine that it is inaccurate and misleading to state in the so-called "Resolution On Complaint by Trial Chamber II against Justice Malick Sow", that

> "THE JUDGES of the Special Court for Sierra Leone ... HAVE REACHED the following conclusions:
>
> 1. The Plenary DECLARES that Justice Malick Sow's behaviour in Court on the 26th April 2012 amounts to misconduct rendering him unfit to sit as an Alternate Judge of the Special Court.
>
> 2. The Plenary RECOMMENDS to the appointing authority pursuant to Rule 15bis (B) to decide upon the further status of Justice Malick Sow.
>
> 3. Pursuant to Rule 24(iii), the Plenary DIRECTS Justice Malick Sow to refrain from further sitting in the proceedings pending a decision from the appointing authority."

I was not one of those Judges of the Emergency Plenary who allegedly passed that Resolution and I did not resolve as alleged or at all.

DISPOSITION

12. For the foregoing reasons, I decline to voluntarily withdraw with respect to Defence Grounds 36 and 37 in the Appellate proceedings in *Prosecutor v. Charles Ghankay Taylor.*

Done in Freetown, Sierra Leone, this 13 day of September 2012.

Justice George Gelaga King

[Seal of the Special Court for Sierra Leone]

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SCSL

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 13 September 2012

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC

DECISION ON CHARLES GHANKAY TAYLOR'S MOTION FOR PARTIAL VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF APPEALS CHAMBER JUDGES

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

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

IV. ANALYSIS

20. The Motion presents three issues for determination:

(i) Whether any Judge of the Appeals Chamber believes that he or she individually should voluntarily recuse him/herself with respect to Defence Grounds 36 and 37;

(ii) If every Judge does not individually and voluntarily recuse him/herself, who is empowered to decide on the request for disqualification under the Statute and Rules;

(iii) Whether a reasonable observer would apprehend indicia of bias with respect to Defence Grounds 36 and 37 on the part of the Judges of the Appeals Chamber.

A. Recusal

21. Each Judge of the Appeals Chamber, having considered Article 17(2) of the Statute and Rule 15(A), has declined to voluntarily withdraw with respect to Defence Grounds 36 and 37.

B. Procedure

22. Rule 15(B) plainly provides that a motion for disqualification of a Judge shall be decided by "the Chamber of which the Judge is a member".[58] Neither Rule 15(B) nor any other Rule empowers another person or body to decide on this request for disqualification.

23. The right to a fair trial is enshrined in Article 17 of the Statute and reflects the right to an impartial tribunal.[59] The Statute guarantees this right by providing that the "[J]udges shall be persons of high moral character, impartiality and integrity" and that they "shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government

[58] The Defence does not cite any provisions of the Rules in support of its invitation otherwise. No provision is made in the Statute or the Rules to refer the request for disqualification to any other panel of judges.

[59] The right to a fair trial is universally recognized by the international community and the international tribunals. *See e.g.* Article 10 of the Universal Declaration of Human Rights; Article 14 of the International Covenant on Civil and Political Rights; Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms; Article 8(1) of the American Convention on Human Rights; Article 7(1)(d) of the African Charter on Human and Peoples' Rights. *See* also Article 67(1) of the Rome Statute of the International Criminal Court; Article 21(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 20(2) of the Statute of the International Criminal Tribunal for Rwanda; Article 13(1) of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea. *See* also *Furundžija* Appeal Judgement, para. 177; *Galić* Appeal Judgement, para. 37.

or any other source."[60] The Judges of the Special Court further make a solemn declaration to serve "honestly, faithfully, impartially and conscientiously."[61]

24. Rule 15 is an instrument to safeguard the impartiality of the Chamber. Rule 15(A) requires each Judge to constantly and faithfully assess whether or not he or she may sit at a matter. Rule 15(B) provides the parties the opportunity to request the disqualification of a judge.

25. A number of national jurisdictions consider that the impartiality of a judge of the highest appellate courts is fully safeguarded by the judge him/herself.[62] The parties may not request another judge or body to disqualify a judge, and the parties cannot appeal the decision of the judge not to recuse him/herself. Likewise, the European Court of Human Rights does not permit the parties to move for the disqualification of a judge or participate in any process for the disqualification of a judge.[63] Among jurisdictions that provide for disqualification by another judge or body, disqualification has been described in some as an "incidental" administrative process[64] – as opposed to an adversarial process – in which the judges concerned have no personal stake.[65]

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[60] Article 13(1) of the Statute.

[61] Rule 14(A).

[62] In the United States of America, the United Kingdom, Australia, Canada and Uganda, for example, judges of the highest appellate courts decide on their own whether or not to recuse themselves. The parties may file a motion for disqualification, but the Judge or Judges concerned decide on the motion. *See e.g.* United States of America, *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J. as single Justice); *Cheney v. US District Court*, 541 U.S. 913 (2004) (Scalia, J. as single Justice); Canada, *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1; [2000] 1 S.C.R. 3 (January 13, 2000); Australia, *Bainton v. Rajski* [1992] 29 NSWLR 539; Uganda, *Rtd. Col. Dr. Kiiza Besigye & 5 Others v. Attorney General*, Constitutional Application No. 7 of 2005, Uganda Constitutional Court; *Uganda Polybags Ltd v. Development Finance Company of Uganda*, [1999] 2 EA 337. *See* also R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62, 4, Wash. & Lee L.Rev. at,1820 (2005). The suggestion that disqualification is a right contained in the Trial Chamber's decision on the disqualification of Justice Thompson is erroneous. *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-909, Trial Chamber, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007, para. 41. The Appeals Chamber considers that the Trial Chamber's findings in paras 26-44 must be read and interpreted in the context of the discussion regarding the judicial immunity claimed by Judge Thompson.

[63] Rule 28 of the Rules of Court of the European Court of Human Rights. The issue of a judge's disqualification for determination by other judges will only arise when the concerned judge and the President disagree as to whether the concerned judge should recuse him/herself.

[64] The Italian Constitutional Court has held that the process of disqualification consists of an incidental control of the necessary conditions for a trial to be conducted according to the fundamental principle of impartiality of the Judges. *See* Corte Cost., Sent. n. 78 del 21 Marzo 2002, para. 4 (Constitutional Court, 21 March 2002, n. 78, para. 4). The Colombian Constitutional Court has held that "[t]his incidental process at no time settles a dispute between the parties, what it resolves is the situation of the administrator of justice within the proceedings in question." *See* Corte Constitucional de Colombia, Sentencia C-323/06, Referencia D-6008, 24 de abril de 2006, pp. 16 – 17 (Colombian Constitutional Court, Judgment no. C-323/06, Ref. D-6008, 24 April 2006, pp. 16-17). The Internal Regulations of the Brazilian Supreme Court also refer to this process as being incidental in Article 283. Likewise, Spanish legislation refers to this process as an "incidente". *See e.g.* Articles 62, 62, 65, 67 and 69 of Ley de Enjuiciamiento Criminal (*Spanish Criminal Procedure Law*). The "incidental" nature of the disqualification process is further demonstrated by the fact that in a number of jurisdictions, the judges responsible for deciding on the disqualification may not themselves be disqualified from such proceedings. *See* Italy, Art. 40(3) Codice di Procedura Penale (*Code of Criminal Procedure*); Albania, Art. 21(3) Kodi i Procedurës Penale i Republikës së Shqipërisë (*Albanian Code of Criminal Procedure*); Moldova, Art. 34(3) Codul de Procedura Penala al Republicii Moldova (*Moldovan Code of Criminal Procedure*); Mexico, Art. 459(III) Código Federal de los Procedimientos Penales (*Criminal Procedure Code*); Peru, Art. 309(1)

26. The disqualification process pursuant to Rule 15(B) is a tool to verify a judge's impartiality by providing the parties the opportunity to request a reasoned decision in writing from the concerned Chamber whether the conditions of Rule 15(A) are satisfied in respect of that Judge. Both the plain meaning of Rule 15(B) and the object and purpose of the Rule require the conclusion that the Appeals Chamber is the only body empowered to decide on the request for disqualification under the Statute and Rules.

C. Appearance of Bias

27. Both Parties agree that the Judges of the Appeals Chamber are free from bias with respect to Defence Grounds 36 and 37. The Defence has clarified that it considers the Judges of the Appeals Chamber are not actually biased.[66] The Prosecution concurs.[67] The sole issue presented then is whether a reasonable observer, properly informed, would share the view of the Parties. The Appeals Chamber concludes that a reasonable observer would.

28. It is clear from the resolution entered into the record and the circumstances, and the Appeals Chamber underscores, that the question before the Plenary was whether Justice Sow's behaviour constituted misconduct.[68] Justice Sow's credibility, professional or otherwise, was not before the Plenary and was not judged by the Plenary.

29. The Appeals Chamber recalls that in determining whether "one can apprehend bias", what matters is that the Judge has not taken any position or expressed any view that may be reasonably perceived as prejudging his or her position on the guilt or innocence of the Accused.[69] The Plenary Resolution regarding Justice Sow's conduct did not involve and cannot reasonably be perceived as

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Código Procesal Civil (*Civil Procedure Code*); Nicaragua, Art. 33 Código Procesal Penal (*Code of Criminal Procedure*); Ecuador, Art. 875 Código de Procedimiento Civil (*Civil Procedure Code*); Colombia, Art. 61 Código de Procedimiento Penal (*Code of Criminal Procedure*); Panama, Art. 719 *Código de Procedimiento Civil* (*Civil Procedure Code*).

[65] Neither the judge whose disqualification is sought nor the judges deciding on the matter are considered to have personal interests in the matter. The judge whose disqualification is sought is seen as the object of the proceedings and not as a subject. *See* Corte Constitucional de Colombia, Sentencia C390/93, 16 Septiembre 1993, p. 6 (Colombian Constitutional Court, Judgment C390/93, 16 September 1993, p. 6) ("[i]n the disqualification process the Judge whose disqualification is being sought is not a party"). *See* also Article 152 Código de Procedimiento Civil (*Colombian Civil Procedure Code*); Morales Molina, Hernando, Curso de Derecho Procesal Civil (*Manual of Civil Procedure*), Parte General, Décima Edición. Editorial ABC. Bogotá, 1988, p. 120. In Brazil, a judge who has declined to recuse him/herself on one ground can impartially decide on the disqualification of another judge based on the same ground. *See e.g.* Article 281 of the Internal Regulations of Superior Tribunal de Justiça (*Superior Tribunal of Justice*), Article 284 of the Internal Regulations of Supremo Tribunal Federal (*Federal Supreme Court*), Article 289 of the Internal Regulation of Tribunal Regional Federal da 3ªRegião (*Regional Federal Tribunal of the Third Region*), and Article 162 of the Internal Regulations of Tribunal de Justiça do Estado de Ceará (*Tribunal of Justice of the State of Ceará*).

[66] Reply, para. 2.

[67] Response.

[68] Transcript, 16 May 2012, p. 49682, 49683.

[69] *Supra* para. 18.

involving Charles Taylor's guilt or innocence. The Plenary was not seized of, did not pronounce on nor express any views concerning the guilt or innocence of Mr. Taylor. In the language of the Motion, the Plenary was not seized of, did not pronounce on nor express any views concerning the content of Justice Sow's statement. The Plenary Resolution concerned only "Justice Malick Sow's behaviour in court on the 26th of April 2012".[70] A reasonable observer would not consider these distinctions "artificial"[71] but intrinsically judicial, reflecting the professional skills and responsibilities of Judges.[72]

30. The Appeals Chamber further holds that sanctioning judicial misconduct in a trial does not constitute nor give rise to the appearance of prejudgment of the guilt or innocence of the respective accused. In accordance with Article 17 of the Statute, the Plenary protects the fair trial rights of both parties and the integrity of the proceedings by considering serious allegations of judicial misconduct and taking appropriate action where misconduct is established.[73] The parties' rights would be severely violated were the Plenary to allow judicial misconduct only because sanctioning it could be falsely imagined as benefiting or harming a particular party. In deciding on allegations of judicial misconduct, the Plenary considers only whether such misconduct is established.[74] This Appeals Chamber firmly rejects any suggestion that the Plenary may or should do otherwise.

31. Many of the Defence's submissions do not address the impartiality of the Appeals Chamber, but the consequences of the Plenary Resolution. The Defence suggests that the Plenary Resolution "constitutes an adverse finding on the professional credibility of Justice Sow"[75] and that "the declaratory effect of the [decision] constitutes a particularly severe sanction because it seriously and publicly damages Justice Sow's professional reputation and standing."[76] The Defence proposes that "[i]t is no answer to assert that these findings were objectively correct because such an assertion reflects precisely the perception of pre-judgment claimed by the Defence."[77]

32. This is not pre-judgment nor the appearance of pre-judgment – the independence of judges would be fatally undermined if observers' perceptions of the consequences of judicial acts were considered indicia of bias.[78] Once seized of a complaint of misconduct, the Plenary considered it on

[70] Transcript, 16 May 2012, p. 49682.
[71] Motion, para. 15; Reply, para. 7.
[72] *Supra* para. 17 ("A fair-minded observer would know that a Judge's role can differ from one judicial context to another.").
[73] Rule 15*bis*; Rule 24.
[74] Rule 15*bis*.
[75] Motion, para. 18
[76] Motion, para. 21.
[77] Reply, para. 6.
[78] *See El Sayed* Riachy Disqualification Decision, para. 57.

its merits alone, without regard to extraneous considerations. Justice Sow's credibility, including as it may bear on any matters involving the guilt or innocence of Mr. Taylor, has not been judged by the Appeals Chamber. In any event, the Defence's characterizations of Justice Sow's credibility, professional reputation and standing are unwarranted and bordering on defamatory.

33. Likewise, the Defence's submissions with respect to the trial record are ill-founded.[79] The hearing of 26 April 2012 officially concluded when it was adjourned by the Presiding Judge of Trial Chamber II.[80] The official transcript accordingly ends with that adjournment, and could not have included further statements made after the hearing was officially closed.[81] On 16 May 2012, the Presiding Judge described for the record Justice Sow's behaviour following the adjournment.[82] The Plenary Resolution regarding Justice Sow's behaviour was further entered into the official record.[83] The Defence is fully aware of the content of Justice Sow's statement.[84] There is no basis to suggest that the official transcript is anything but accurate and transparent.

34. The Plenary did not consider any matters related to Charles Taylor's guilt or innocence nor the content of Justice Sow's statement. A reasonable observer would properly appreciate this fact, as both Parties do. The Appeals Chamber concludes that no reasonable observer, properly informed, would reasonably apprehend bias with respect to the Appeals Chamber's consideration of Defence Grounds 36 and 37. The Motion must therefore be dismissed.

35. In closing, the Appeals Chamber endorses the words of Judge Antonio Cassese, former President of the Special Tribunal for Lebanon, and draws the attention of the Parties and the public to them:

> I firmly believe that, while Judges must be absolutely free and appear to be free from any preconceived beliefs, it is also necessary for them to be sheltered from mere innuendoes as to their professional past or their current attitude. If they were not so safeguarded, they would be unable to discharge their difficult mission with equanimity. Charges of bias unsupported by compelling evidence can only sow confusion and uncertainty in the mind of all those who watch the unfolding of international justice, as well as trouble the conscience of Judges, thereby affecting their serenity. The Tribunal will firmly reject any attempt at guesswork or speculation intended to project onto the Tribunal political motivations that instead are, and shall always remain, extraneous to it, as is fitting and appropriate for any court of law.[85]

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[79] Motion, para. 11.
[80] Transcript, 26 April 2012, p. 49679.
[81] Transcript, 26 April 2012, p. 49679.
[82] Transcript, 16 May 2012, pp 49681, 49682.
[83] Transcript, 16 May 2012, pp 49682, 49683.
[84] Motion, Annex A.
[85] *El Sayed* Riachy Disqualification Decision, para. 72

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THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 23 July 2012

Case No.: SCSL-2003-01-A

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
23 JUL 2012
NAME: SAMUEL J. FORNAH
SIGN:
TIME: 10:45

THE PROSECUTOR
–v–
CHARLES GHANKAY TAYLOR

PUBLIC

CORRIGENDUM TO *NOTICE OF APPEAL OF CHARLES GHANKAY TAYLOR*

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

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

1. On 19 July 2012, the Defence filed the *Notice of Appeal of Charles Ghankay Taylor*[1] ("the Notice"). The Defence notes that there are two aspects to the Notice which require correction through this corrigendum.

2. Paragraph 121 of the Notice inadvertently refers to "Part V" instead of "Part VII" of the Notice. Accordingly, paragraph 121 should read: "For each of the Grounds of Appeal set out in Part VII, the precise relief sought as a result of the Trial Chamber's abuse of its discretion, is the quashing of the sentence imposed by the Trial Chamber, and the imposition of a new and appropriate sentence."

3. The content of Footnote 47 was also inadvertently inserted, and should be replaced in its entirety with the following: "Judgement, pp. 1255-1279, paras. 3553-3606; p. 1282, para. 3611 (xiv); p. 2464, para. 6966; p.2475 para. 6994 (b)."

Respectfully Submitted,

Morris Anyah
Lead Counsel for Charles G. Taylor
Dated this 23rd Day of July 2012
The Hague, The Netherlands

Eugene O'Sullivan
Co-Counsel for Charles G. Taylor

Christopher Gosnell
Co-Counsel for Charles G. Taylor

Kate Gibson
Co-Counsel for Charles G. Taylor

[1] *Prosecutor v. Taylor*, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012.

114

List of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012.

3034

1304)

SCSL-03-01-A
(112-114)

112

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 23 July 2012

Case No.: SCSL-2003-01-A

SPECIAL COURT FOR SIERRA LEONE
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CHARLES GHANKAY TAYLOR

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NOTICE: THIS PAGE HAS BEEN INSERTED IN LIUE OF PAGES 240 TO 399 DUE TO A PAGINATION ERROR IN THE AMENDED BOOK OF AUTHORITIES TO THE DEFENCE RULE 111 SUBMISSIONS. PAGES 240 TO 399 ARE NON-EXISTENT AND PAGES 239, 400, AND 401 CONSTITUTE THE ENTIRETY OF THE THREE PAGES THAT MAKE UP THE "NOTICE OF APPEAL"[1] REFERRED TO IN THE AMENDED BOOK OF AUTHORITIES.

Sign

James Tamba Kamara

Team Administrator

Charles Taylor Defence Team

Leidschendam

[1] SCSL-03-01-A-1304, Corrigendum to Notice of Appeal of Charles Ghankay Taylor, 23 July 2012; http://www.sc-sl.org/scsl/public/SCSL-03-01-Talyor%20Appeal/SCSL-03-01-A-1304.pdf

240 - 399

1. On 19 July 2012, the Defence filed the *Notice of Appeal of Charles Ghankay Taylor*[1] ("the Notice"). The Defence notes that there are two aspects to the Notice which require correction through this corrigendum.

2. Paragraph 121 of the Notice inadvertently refers to "Part V" instead of "Part VII" of the Notice. Accordingly, paragraph 121 should read: "For each of the Grounds of Appeal set out in Part VII, the precise relief sought as a result of the Trial Chamber's abuse of its discretion, is the quashing of the sentence imposed by the Trial Chamber, and the imposition of a new and appropriate sentence."

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Lead Counsel for Charles G. Taylor
Dated this 23rd Day of July 2012
The Hague, The Netherlands

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Co-Counsel for Charles G. Taylor

Christopher Gosnell
Co-Counsel for Charles G. Taylor

Kate Gibson
Co-Counsel for Charles G. Taylor

[1] *Prosecutor v. Taylor*, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012.

List of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012.

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1302)

SCSL-03-01-A
(091 - 108)

091

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 19 July 2012

Case No.: SCSL-2003-01-A

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
18 JUL 2012
NAME SAMUEL J. FORNAH
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TIME 15:51

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH PUBLIC ANNEX A AND CONFIDENTIAL ANNEX B

CHARLES GHANKAY TAYLOR'S MOTION FOR PARTIAL VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF APPEALS CHAMBER JUDGES

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

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

A. Introduction and Request for Relief

1. During the reading of the summary judgment against Charles Taylor on 26 April 2012, Justice Sow, an Alternate Judge of the Trial Chamber, who had been present throughout five years of trial[1] made an extraordinary and unprecedented declaration. His statement specifically indicates that the Trial Chamber failed to deliberate, and suggests more general, but equally serious, concerns about the propriety of proceedings and/ or deliberations. If true, his allegations would require that the Judgement, in whole or in part, be set aside. Justice Sow has since been found to be unfit to sit as a Judge and sanctioned by the judges of this Court acting in plenary, with the participation of all members of the bench hearing this appeal.

2. It is respectfully requested that, pursuant to Rules 15(A) and 15(B) of the Rules, [2] in respect of the grounds 36 and 37 of Mr. Taylor's Notice of Appeal dated 19 July 2012[3] that arise from the statement made by Justice Sow ("Grounds of Appeal"), that all of the members of the Appeals Chamber voluntarily withdraw from deciding these grounds. It is requested that a separate appeal panel, composed of judges who did not participate in the decision and sanctions against Justice Sow, should determine those Grounds of Appeal. In the event that the Appeals Chamber Judges do not withdraw voluntarily on the basis of the present motion, they are respectfully invited to refer the present request to a separate and impartial panel of judges for a determination as a motion for disqualification.

3. The basis of this motion is that a reasonable observer, properly informed, would apprehend bias on the part of the Judges of the Appeal Chamber, because they have already made an adverse finding in the plenary and therefore pre-judged a critical aspect of the credibility of a source of evidence which is fundamental to the Grounds of Appeal. Thus they are precluded from deciding on these grounds.

B. Applicable Law and Jurisprudence

[1] Justice Sow was designated as an Alternate Judge in the Trial Chamber by Justice Sebutinde pursuant to Article 12 (4) of the Statute. See *Prosecutor v. Taylor*, SCSL-03-1-PT-240, Order Designating Alternate Judge, 18 May 2007.
[2] Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 31 May 2012, "Rules" or "Rule").
[3] *Prosecutor v. Taylor*, SCSL-03-01-A, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012.

4. Mr. Taylor's right to be tried by an independent and impartial tribunal is integral to his right to a fair trial guaranteed under Article 17 of the Statute.[4] Pursuant to Rule 15(A) a judge may not sit on an appeal in a case in which "his impartiality might reasonably be doubted on any substantial ground." This Appeals Chamber has held that the applicable test under Rule 15(B) is "whether an independent bystander so to speak, or the reasonable man... will have a legitimate reason to fear that [the Judge] lacks impartiality. In other words, whether one can apprehend bias."[5]

5. This Appeal Chamber's test for bias is derived from[6] and consistent with[7] jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), in particular that of the *Furundžija* case. In that case the Appeals Chamber of the ICTY held that:

> "A. A Judge is not impartial if it is shown that actual bias exists.
> B. There is an unacceptable appearance of bias if:
> i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
> ii) *the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.*"[8] (Emphasis added.)

6. The Appeals Chamber of this court has held that, in the case of category B(ii) the applicable standard is "the objective test of whether there is a reasonable apprehension of bias."[9] Numerous

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[4] *Prosecutor v. Sesay et al.*, SCSL-2004-15- T, Decision on Sesay, Kallon and Gbao Appeal Against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson From the RUF Case, 24 January 2008 ("Justice Thompson Disqualification Appeal Decision"), para. 8. Independence and impartiality are fundamental cornerstones enshrined in the constitutive documents of the court. Article 12(1) of the Statute provides that the chambers shall be composed of independent judges and Article 13(1) of the Statute mandates that judges are impartial and independent.

[5] *Prosecutor v. Sesay*, SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004 ("Justice Robertson Disqualification Decision"), para. 15; *Prosecutor v. Norman*, SCSL-2004-14-PT, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004 ("Justice Winter Disqualification Decision"), para. 22; Justice Thompson Disqualification Appeal Decision, para. 10; *Prosecutor v. Sesay et al.*, SCSL-2004-15-T, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson From the RUF Case, 6 December 2007 ("Justice Thompson Disqualification Trial Decision"), para. 54.

[6] Justice Robertson Disqualification Decision, para. 4.

[7] Justice Winter Disqualification Decision, para. 23; Justice Thompson Disqualification Trial Decision, para. 54.

[8] *Prosecutor v. Furundžija.* IT-95-17/1-A, Judgment, 21 July 2000 ("Furundžija Appeal Judgment"), para. 189. This finding was based on an extensive review of the jurisprudence of the European Court of Human Rights, the United Kingdom, Australia, Canada, South Africa, the USA, Germany, France, Italy, the Netherlands and Sweden at paras. 181-188.

decisions assessing objective bias have followed the test first enunciated in the *Furundžija* Appeal Judgment, that is, whether "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias".[10] With respect to the definition of a 'reasonable observer', this Appeals Chamber has held that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[11]

7. Judges enjoy a presumption of impartiality.[12] In the absence of evidence to the contrary, it must be assumed that professional judges "can disabuse their minds of any irrelevant personal beliefs or predispositions."[13] Accordingly, the party seeking to disqualify a judge bears the burden of adducing reliable and sufficient evidence that the judge is not impartial.[14] Case law from the ICTY and the ICTR has stated that there is a high threshold to reach in order to rebut

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[9] Justice Winter Disqualification Decision, para. 23.

[10] Article 20(3) of the Statute provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decision of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. See eg. **International Criminal Tribunal for Rwanda ("ICTR") Appeal Chamber**: *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("Akayesu Appeal Judgement"), para. 203; *Prosecutor v Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("Rutaganda Appeal Judgement"), para. 39; *Prosecutor v. Nahimana et al*, ICTR-99-52-A, Judgement, 28 November 2007 ("Nahimana Appeal Judgement"), para. 49. **ICTY Appeal Chamber**: *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001 ("Celebici Appeal Judgement"), para. 683 citing Furundžija Appeal Judgement, para. 189; *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006 ("Galić Appeal Judgement"), para. 39. See also **International Criminal Court ("ICC") Presidency:** *Prosecutor v. Al Bashir*, ICC-02/05-01/09-76-ANN2, Notification of the Decision on the Request for Excusal of a Judge, Annex II, 19 March 2010. p. 5.

[11] Justice Thompson Disqualification Appeal Decision, para. 11; Justice Thompson Disqualification Trial Decision, para. 53. Also see Furundžija Appeal Judgement para. 190; Galić Appeal Judgement, para. 40; Rutaganda Appeal Judgement, para. 40; Nahimana Appeal Judgement, para. 50. The specific question to be determined in this context has been expressed by the ICTY and ICTR Appeals Chamber as "whether the reaction of the hypothetical fair-minded observer, with sufficient knowledge of the circumstances to make a reasonable judgement, would be that [the] Judge ...did not bring an impartial and unprejudiced mind to the issues arising in the case"; Celebici Appeal Judgement, para. 683; Galić Appeal Judgement, para. 44; Rutaganda Appeal Judgement, para. 41. This Appeals Chamber has held that a "hypothetically fair-minded observer" is someone from the outside, who, as an *observer* (and not a party) recognises and understands the circumstances well enough to tell whether or not the public sense of justice would be challenged by the presence of a particular judge on the bench in the case; Justice Winter Disqualification Decision, para. 27.

[12] Justice Winter Disqualification Decision, para. 25; Furundžija Appeal Judgement paras. 196-197; Galić Appeal Judgement, para. 41; Celebici Appeal Judgement, para. 707; Rutaganda Appeal Judgement, para. 42; Akayesu Appeal Judgement, paras. 91 & 269; Nahimana Appeal Judgement", para. 48.

[13] Furundžija Appeal Judgement paras. 196-197; Galić Appeal Judgement, para. 41; Rutaganda Appeal Judgement, para. 42; Akayesu Appeal Judgement, paras. 91& 269; Nahimana Appeal Judgement, para. 48.

[14] Nahimana Appeal Judgement, para. 48; Galić Appeal Judgement, para. 41; Furundžija Appeal Judgement, para. 197.

the presumption of impartiality and this must be firmly established.[15] This Appeals Chamber has held that the evidentiary threshold for establishing the appearance of bias does not rise to the level of requiring proof of actual bias.[16] Importantly, it has held that a judge will be disqualified and the threshold met where there are "some indicia of bias."[17]

C. Facts establishing indicia of apprehended bias

8. Mr. Taylor submits that the following facts establish indicia that are reliable and sufficient to discharge his evidentiary burden to rebut the presumption of impartiality of the Appeals Chamber Judges and to establish circumstances which would lead a reasonable observer, properly informed, to reasonably apprehend bias.

(i) Statement of Justice Sow

9. On 26 April 2012, the Trial Chamber in this case sat to deliver its summary judgment. At the conclusion of the sitting, Justice Sow made a public statement in open court in the presence of the parties. He said:

> "The only moment where a Judge can express his opinion, is during the deliberations or in the courtroom, and pursuant to the Rules, *where there is no ^ deliberations*, the only place left for me in the courtroom. I won't get - - because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, because for me under any mode of liability, under any accepted standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. *And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.* Thank you for your attention." ("Justice Sow's Statement" or "Statement"). (Emphasis added.) See Annex A.

[15] Furundžija Appeal Judgement para. 197; Galić Appeal Judgement, para. 41; Celebici Appeal Judgement, para. 707; Akayesu Appeal Judgement, para. 91; Nahimana Appeal Judgement, para. 48 (the presumption "cannot easily be rebutted").

[16] Justice Thompson Disqualification Appeal Decision, para. 9.

[17] Justice Thompson Disqualification Appeal Decision, para. 13. It stated that "'a reasonable apprehension of bias' is a sufficient basis for disqualification. *It necessarily flows that where a ...Chamber finds 'some indicia of bias,' the logical and reasonable conclusion must be that the Judge is disqualified.*"(Emphasis added.)

10. Justice Sow's Statement contains direct evidence of grave breaches of procedure in relation to the proceedings and the judgment against Mr. Taylor. As such it is the fundamental evidentiary basis for the Grounds of Appeal. Accordingly, any consideration of the Grounds of Appeal will necessarily involve an assessment of the Statement and the credibility of its source, Justice Sow.

(ii) Removal of Justice Sow's Statement from the Official Transcript

11. Justice Sow's Statement was transcribed by the court reporters and appeared on the live note transcript contemporaneously. A record of that transcription is contained in Annex A. The live note transcript notes that the sitting on that day ended after Judge Sow's Statement at 1.17 p.m. In contrast, the official transcript of that sitting day does not record Justice Sow's statement.[18] It records the Presiding Judge's last statement that court was adjourned[19] and in the next line states that the hearing was adjourned at 1.17 p.m.[20] Thus both the live note and official transcripts record proceedings ending at precisely the same time, however the transcription of Justice Sow's Statement has been removed from the official record prior to its official publication. It is reasonable to infer that the professional court reporters of the SCSL did not independently decide to remove Justice Sow's Statement from the official transcript prior to its publication and they would only do so if instructed by a court official(s) or organ with authority to issue such an instruction. At a minimum, it may be concluded from the foregoing that Justice Sow's Statement was deliberately removed from the official record of proceedings against Mr. Taylor prior to its publication, by an organ or official(s) of the court empowered to instruct or order such a removal.

(iii) Judicial Misconduct Decision of the Plenary regarding Justice Sow

12. On 16 May 2012, the Trial Chamber conducted a sentencing hearing in the case against Mr. Taylor. Prior to the commencement of the sentencing hearing, the Presiding Judge placed on the trial record the serious judicial misconduct allegations against Justice Sow which were referred by the Council of Judges to a Plenary meeting of the Judges of the Special Court ("Plenary").[21] The basis of these allegations was that in making his Statement, Justice Sow was "in

[18] Trial Transcript 26 April 2012, T. 49623 – T. 49679.
[19] Trial Transcript 26 April 2012, T. 49679 line 4.
[20] Trail Transcript 26 April 2012, T. 49679 line 5.
[21] Trial Transcript 16 May 2012, T. 49681- T. 49682.

contravention of the agreement, the Statute, and the Rules which govern this Court" and that this "amounted to misconduct".[22]

13. The Plenary met to consider the misconduct complaint against Justice Sow on the 7th and 10th of May, 2012. The Judges of the Plenary considered the response of Justice Sow to the allegations and discussed their views and recommendations on the matter,[23] and on 10 May 2012 resolved that:

> "1. *The plenary declares* that Justice Malick Sow's behaviour in court on the 26th of April, 2012, *amounts to misconduct rendering him unfit to sit as an Alternate Judge of the Special Court.*
> 2. *The plenary recommends to the appointing authority* pursuant to Rule 15 bis (B) *to decide upon the further status of Justice Malick Sow.*
> 3. Pursuant to Rule 24(iii), *the plenary directs Justice Malick Sow to refrain from further sitting in the proceedings* pending a decision from the appointing authority." [24] ("Judicial Misconduct Decision" or "Decision"). (Emphasis added.)

14. The Judicial Misconduct Decision against Justice Sow was considered and made by current Judges of the Appeals Chamber sitting as members of the Plenary. The Decision does not contain the names of the Judges that were sitting in the Plenary that made this decision however the record states that "the judges of the Special Court for Sierra Leone"[25] sat on the 7th and 10th of May, 2012. At time that the Decision was considered by the Plenary there were ten (10) Judges sitting at the court: four (4) Judges sat in Trial Chamber II in the case of Mr. Taylor[26] and six (6) Judges sat in the Appeals Chamber.[27] Justice Sow was the subject of the sitting and therefore did not sit in judgment of the misconduct of the allegations made against him. The record states that the remaining three Judges of Trial Chamber II abstained from voting.[28] Thus the remaining Judges that made the Judicial Misconduct Decision were the six (6) current sitting judges of the Appeal Chamber who are presently seized of Mr. Taylor's appeal. There is no indication on the record that any other Judge abstained from the vote or voted against the Judicial Misconduct

[22] Trial Transcript 16 May 2012, T. 49681.
[23] Trial Transcript 16 May 2012, T. 49682- T. 49683.
[24] Trial Transcript 16 May 2012, T. 49682- T. 49683.
[25] Trial Transcript 16 May 2012, T. 49682 lines 15-16.
[26] Justice Lussick (Presiding), Justice Doherty, Justice Sebutinde and Justice Sow (Alternate).
[27] Justice Fisher (President), Justice Ayoola, Justice Winter, Justice King, Justice Kamanda and Justice Waki (Alternate). These same judges currently sit in the Appeals Chamber and are seized of Mr. Taylor's appeal.
[28] Trial Transcript 16 May 2012, T. 49682 lines 10-11.

Decision. Thus a reasonable observer who is properly informed of these circumstances would conclude that all six (6) Judges of the Appeals Chamber participated in the findings and sanctions against Justice Sow contained in the Decision.

15. Even though the Decision was formally reached by the Plenary and not the Appeals Chamber, in this case the Judges making the decision are one and the same, that is, both of these bodies had the same *de facto* decision-making composition. Therefore, a reasonable observer, who is properly informed, would consider that any purported distinction that is sought to be made on the basis that the Appeal Chamber Judges have not formally made the decision sitting as the Appeals Chamber is artificial and belies the reality of the situation.

16. Judges that have already made an adverse finding on a critical aspect of the credibility of a source of evidence during the trial process should not again consider the credibility of that source of evidence in the same proceeding during the appellate process, as this gives rise to a reasonable apprehension of bias from the perspective of a properly informed reasonable observer.

17. The Judicial Misconduct Decision is directly relevant to and forms a part of the trial record in the proceedings against Mr. Taylor. Justice Sow sat as Alternate Judge in the trial; he made his Statement in the trial proceedings after the reading of the summary judgment; the Judicial Misconduct Decision against him was placed on the trial record; and the sanctions attaching to that decision effectively terminated his participation in the trial and his name was subsequently erased from the trial record.[29] As such, the Judicial Misconduct Decision would be viewed by a properly informed reasonable observer as a decision in the trial proceedings against Mr. Taylor.

18. The Judicial Misconduct Decision constitutes an adverse finding on the professional credibility of Justice Sow. A finding of misconduct is arguably the most serious denunciation that a judge can face in their judicial career. At minimum, it amounts to finding in these circumstances that the judge has extremely poor ability to make professional judgments and was

[29] It has been the practice of the Trial Chamber of the Special Court to include Justice Sow's name, as Alternate Judge on each of the transcripts and decisions in this trial. Justice Sow's name appeared on the official transcripts up until the delivery of summary judgement on 26 April 2012. After his Statement and subsequent Judicial Misconduct Decision made by the judges directing him to refrain from sitting, his name has been omitted from the subsequent Trial Transcripts and the written judgment in this case.

unprofessional in his conduct. In this case, the very basis of the Decision was Justice Sow's professional legal assessment of the serious procedural failings in trial and judgement against Mr. Taylor as expressed in his Statement. The Appeals Chamber Judges having already adversely pre-judged an aspect of the professional credibility of Justice Sow in the Decision during the course of trial proceedings would not be viewed by a properly informed reasonable observer as being able to again assess his credibility as a source of evidence on appeal, with an open mind.

19. This Appeals Chamber has found that a previous judicial opinion in a separate case that merely has some general factual connection to a subsequent case before the same judge, does not raise an issue of bias.[30] This situation can be clearly distinguished from the situation before the Judges of the Appeals Chamber in these circumstances as they are potentially being asked to rule on the same evidence a second time in the same proceedings. A reasonable observer properly informed of this circumstance would apprehend bias because they would view the judges as already having pre-judged the evidence. The current circumstance is therefore, more akin to the situation where trial judges, who have previously sat on a trial, and therefore made factual findings assessing the evidence, are asked to sit on the appeal of the same case.

20. The Judicial Misconduct Decision made in the proceedings against Mr. Taylor is not simply a general administrative decision relating to the internal functioning of the court. This decision is expressly made pursuant to Rule 15 *bis* relating to the unfitness of a judge to sit in proceedings,[31] which amounts to the judicial disqualification and sanction of the judge. Its key operative paragraph 1 and the following paragraph 2 are made pursuant to Rule 15 *bis*, a rule inherently connected to Rule 15. Reference is also made in this decision to the Plenary exercising its power to decide upon matters relating to the internal functioning of the Chambers and the Special Court pursuant to Rule 24(iii) with respect to paragraph 3 of the Decision;[32] however this flows from the critical substantive findings in paragraphs 1 and 2 made pursuant to the Rule 15 *bis*.

21. Furthermore, the Decision and the sanctions that flow from it are extremely serious and unprecedented in international criminal law. These sanctions directed Justice Sow to refrain

[30] Justice Thompson Disqualification Appeal Decision, paras. 14-15.
[31] Trial Transcript 16 May 2012, T. 49682 lines 14-22; T. 49683 lines 1-11.
[32] Trial Transcript 16 May 2012, T. 49682 lines 23-29; T. 49683 lines 12-14.

from sitting in further proceedings against Mr. Taylor. However, the Decision goes beyond the court's internal functioning by recommending that the authority that appointed him decide on his further status. This sanction could reasonably be interpreted as a recommendation by the Judges of the Plenary to the United Nations that Judge Sow's appointment be terminated.[33] The finding of misconduct and these two sanctions amounted to the disqualification of Justice Sow from the proceedings against Mr. Taylor and his role in the Special Court. Further, the declaratory effect of the Decision constitutes a particularly severe sanction because it seriously and publicly damages Justice Sow's professional reputation and standing.

22. The Appeals Chamber Judges that have sanctioned a source of evidence for making a statement during the course of trial proceedings would not be viewed by a properly informed reasonable observer as being able to then sit in judgement of the credibility of that source in appellate proceedings where that statement is the fundamental piece of evidence on appeal, without giving rise to a reasonable apprehension of bias.

23. It should be noted that the ICTY Bureau of judges has previously found that judges who make an administrative decision in plenary regarding the general competence of a judge to sit on a court unrelated to the specific question as to whether that judge should be disqualified from sitting a specific case, are not precluded from judicially considering the disqualification of the said judge on appeal.[34] However, the circumstances of the present case are markedly different and therefore this finding does not operate to preclude the appearance of bias. First, the Judges of the Plenary in this case have passed judgement on the specific issue as to whether Judge Sow could continue sitting in the case against Mr. Taylor pursuant to Rule 15*bis* and have effectively disqualified him from doing so. Second, the decision is not simply administrative because it involved serious sanctions going beyond the internal administration of the court. Third, the issue on appeal in this case is not Justice Sow's general competence to sit as a judge or the question of his disqualification, but his credibility as a source of evidence.

[33] See Email dated 11 May 2012 from Judge El Hadji Malick Sow to all of the Judges of the Special Court for Sierra Leone (except Justice Sebutinde), copying lead Defence and Prosecution Counsel. See CONFIDENTIAL ANNEX B.

[34] *Prosecutor v. Delalić et al.*, IT-96-21, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 25 October 1999, paras. 13-15.

24. While the issues before the Plenary and the issue before the Appeals Chamber may not formally be expressed in the same way, the specific issue for consideration is overlapping: the credibility of Justice Sow. A reasonable observer, properly informed, would reasonably apprehend bias because the Judges of the Appeal Chamber, sitting in plenary, have already passed an adverse judgement on an aspect of Justice Sow's professional credibility and as such they have pre-judged the issue of his credibility as a source of critical evidence on appeal.

D. Conclusion

33. As previously emphasised by this Appeals Chamber, the apprehension of bias test reflects the "sacred and overriding principle" that "justice must not only be done, but should manifestly and undoubtedly be seen to be done."[35] Ultimately, the decision taken with respect to this motion will reflect on the integrity and standing of the Special Court, and the fair conduct of this appeal. Accordingly, Mr. Taylor respectfully requests the relief sought herein.

Respectfully Submitted,

Morris Anyah
Lead Counsel for Charles G. Taylor
Dated this 19th Day of July 2012,
The Hague, The Netherlands

Eugene O'Sullivan
Co-Counsel for Charles G. Taylor

Christopher Gosnell
Co-Counsel for Charles G. Taylor

Kate Gibson
Co-Counsel for Charles G. Taylor

[35] Justice Robertson Disqualification Decision, para. 16. Also see Justice Thompson Disqualification Trial Decision, para. 52.

List of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-A, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012.

Prosecutor v. Taylor, SCSL-03-1-PT-240, Order Designating Alternate Judge, 18 May 2007.

Other SCSL Jurisprudence

Prosecutor v. Sesay et al., SCSL-2004-15-T, Decision on Sesay, Kallon and Gbao Appeal Against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson From the RUF Case, 24 January 2008.
http://www.sc-sl.org/LinkClick.aspx?fileticket=pUqk8yUB3yc%3d&tabid=195

Prosecutor v. Sesay et al., SCSL-2004-15-T, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson From the RUF Case, 6 December 2007.
http://www.sc-sl.org/LinkClick.aspx?fileticket=IAXPGHlx1jQ%3d&tabid=155

Prosecutor v. Norman, SCSL-2004-14-PT, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004.
http://www.sc-sl.org/LinkClick.aspx?fileticket=NZYRGz5ZqLI%3d&tabid=193

Prosecutor v. Sesay, SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004.
http://www.sc-sl.org/LinkClick.aspx?fileticket=uabm35Hc0jg%3d&tabid=195

ICTY Jurisprudence

Prosecutor v. Galić, IT-98-29-A, Judgement, 30 November 2006.
http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf

Prosecutor v. Delalić, et al., IT-96-21-A, Judgement, 20 February 2001.
http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf

Prosecutor v. Furundžija, IT-95-17/1-A, Judgment, 21 July 2000.
http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf

Prosecutor v. Delalić, et al., Case No. IT-96-21-T, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 25 October 1999.
http://www.icty.org/x/cases/mucic/acdec/en/91025DQX12987.htm

ICTR Jurisprudence

Prosecutor v. Nahimana et al., ICTR-99-52-A, Judgement, 28 November 2007.
http://unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgement.pdf

Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, Judgement, 26 May 2003.
http://unictr.org/Portals/0/Case/English/Rutaganda/decisions/030526.pdf

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001.
http://unictr.org/Portals/0/Case/English/Akayesu/decisions/index.pdf

ICC Jurisprudence

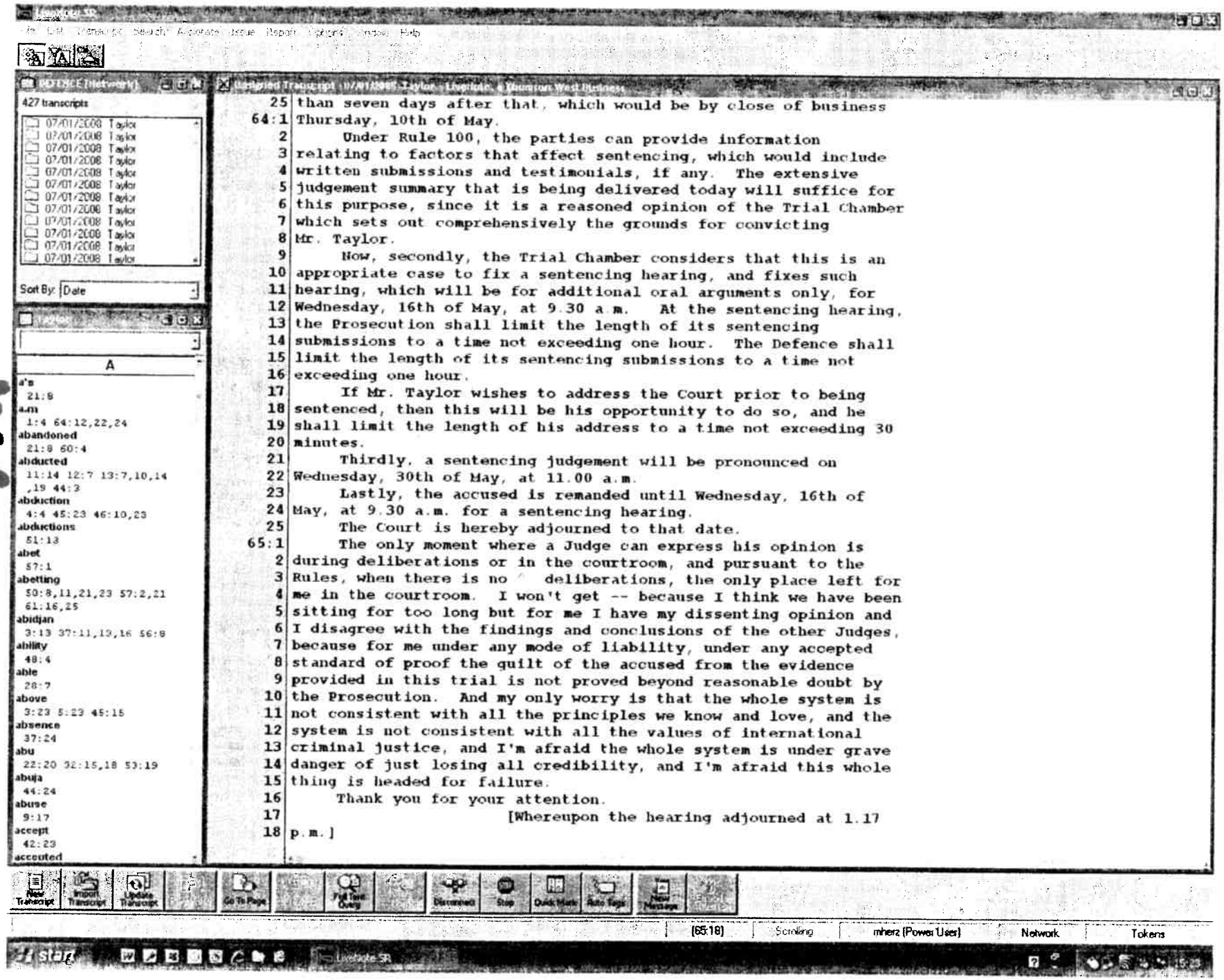
Prosecutor v. Al Bashir, ICC-02/05-01/09-76-ANN2, Annex II, Notification of the Decision on the Request for Excusal of a Judge, 19 March 2010.
http://www.icc-cpi.int/iccdocs/doc/doc848237.pdf

3050

104

Annex A

415


427 transcripts
07/01/2008 Taylor
Sort By: Date
A
a's
21:8
a.m
1:4 64:12,22,24
abandoned
21:8 60:4
abducted
11:14 12:7 13:7,10,14
,19 44:3
abduction
4:4 45:23 46:10,23
abductions
51:13
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57:1
abetting
50:8,11,21,23 57:2,21
61:16,25
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ability
48:4
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3:23 5:23 45:15
absence
37:24
abu
22:20 32:15,18 53:19
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abuse
9:17
accept
42:23
accepted
64:1 Thursday, 10th of May.
Under Rule 100, the parties can provide information relating to factors that affect sentencing, which would include written submissions and testimonials, if any. The extensive judgement summary that is being delivered today will suffice for this purpose, since it is a reasoned opinion of the Trial Chamber which sets out comprehensively the grounds for convicting Mr. Taylor.
Now, secondly, the Trial Chamber considers that this is an appropriate case to fix a sentencing hearing, and fixes such hearing, which will be for additional oral arguments only, for Wednesday, 16th of May, at 9.30 a.m. At the sentencing hearing, the Prosecution shall limit the length of its sentencing submissions to a time not exceeding one hour. The Defence shall limit the length of its sentencing submissions to a time not exceeding one hour.
If Mr. Taylor wishes to address the Court prior to being sentenced, then this will be his opportunity to do so, and he shall limit the length of his address to a time not exceeding 30 minutes.
Thirdly, a sentencing judgement will be pronounced on Wednesday, 30th of May, at 11.00 a.m.
Lastly, the accused is remanded until Wednesday, 16th of May, at 9.30 a.m. for a sentencing hearing.
The Court is hereby adjourned to that date.
65:1 The only moment where a Judge can express his opinion is during deliberations or in the courtroom, and pursuant to the Rules, when there is no ^ deliberations, the only place left for me in the courtroom. I won't get -- because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, because for me under any mode of liability, under any accepted standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.
Thank you for your attention.
[Whereupon the hearing adjourned at 1.17 p.m.]
(65:18)
Scrolling
mherz (Power User)
Network
Tokens

3052

SPECIAL COURT FOR SIERRA LEONE
DOKTER VAN DER STAMSTRAAT 1• 2265 BC LEIDSCHENDAM • THE NETHERLANDS

PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
Case Number: **SCSL-03-01-T-A**
Document Index Number: **1302**
Document Date: **19 July 2012**
Filing Date: **19 July 2012**
Document Type: **Confidential Annex B**
Number of Pages: **3** Number from: **106-108**

☐Application
☐Order
☐Indictment
☐**Other**
■Motion
☐Correspondence

Document Title:

Public with Public Annex A and Confidential Annex B Charles Ghankay Taylor's motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges

Name of Officer:

Samuel Fornah

Signed:

417

1301)

SCSL-03-01-A
(044-090)

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 19 July 2012

Case No.: SCSL-2003-01-A

SPECIAL COURT FOR SIERRA LEONE
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NAME SAMUEL J. FORMAH
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TIME 15:48

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH CONFIDENTIAL ANNEX A

NOTICE OF APPEAL OF CHARLES GHANKAY TAYLOR

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

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

418

101. This error of law invalidates all convictions based on aiding and abetting liability.

IV. ERRORS RELATING TO IRREGULARITIES IN THE JUDICIAL PROCESS

102. For each of the Grounds of Appeal enumerated below in this section, the precise relief sought is the quashing of Charles Taylor's convictions for aiding and abetting and planning the crimes set out in Counts 1 to 11[114] and the vacatur of the Judgement.

103. In respect of the first two Grounds of Appeal enumerated in this section, the Defence shall be filing a Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, shortly after the filing of this Notice of Appeal. Both of those Grounds of Appeal are set forth herein without prejudice to the said Motion for Disqualification; consequently, their inclusion in this Notice of Appeal should not be read as being inconsistent with the relief sought by the motion.

104. Furthermore, and in respect of the first three Grounds of Appeal enumerated in this section, the Defence intends to file a motion under Rule 115 to present additional evidence before the Appeals Chamber.

i) GROUND OF APPEAL 36: The Trial Chamber erred in law and/ or procedure in that deliberations, as contemplated and required by Rule 87, Rule 16*bis* and Rule 26*bis*, were not undertaken by the Trial Chamber in this case, as was declared in open court by Alternate Judge El Hadji Malick Sow on 26 April 2012 after the oral pronouncement of the Judgement when

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paras. 5121-5130; pp. 1793-1797, paras. 5152-5163; pp.1803-1807. paras. 5184-5195; pp. 1812-1816, paras. 5212-5224; pp. 1821-1824, paras. 5242-5252; pp. 1842-1848, paras. 5312-5330; pp. 1878-1881, paras. 5390-5394; p. 1886, paras. 5406-5408; pp. 1922-1932, paras. 5507-5527.

[114] Judgement, para. 6994 (a) and (b).

> **he said: "The only moment where a Judge can express his opinion is during deliberations or in the courtroom, and pursuant to the Rules, when there is no ^ deliberations, the only place left for me in [*sic*] the courtroom. I won't get -- because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, because for me under any mode of liability, under any accepted standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure."**

105. The irregularities which are the subject of this Ground of Appeal contravene Rule 87, Rule 16*bis*, and Rule 26*bis* of the Rules, as well as fundamental jurisprudential principles of due process. The resulting errors are material and applicable to all findings made, and convictions entered,[115] in the Judgement. Individually or collectively, the errors vitiate the proceedings, occasion a miscarriage of justice and invalidate the decision.

106. The specific remedy requested is the reversal of all adverse findings against Charles Taylor in the Judgment, the quashing of all convictions, and vacatur of the Judgement and Sentencing Judgement.

[115] Judgement, para. 6994.

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SCSL-03-01-T
(43136 - 43195)

43136

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Richard Lussick, Presiding Judge Justice Teresa Doherty Justice Julia Sebutinde
Registrar:	Binta Mansaray
Date:	30 May 2012
Case No.:	SCSL-03-01-T
PROSECUTOR	v. Charles Ghankay TAYLOR

SPECIAL COURT FOR SIERRA LEONE
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30 MAY 2012
NAME SAMUEL J. FORNAH
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TIME 15:45

SENTENCING JUDGEMENT

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian
Mohamed Bangura
Kathryn Howarth
Leigh Lawrie
Ruth Mary Hackler
Ula Nathai-Lutchman
Nathan Quick
Maja Dimitrova
James Pace

Defence Counsel for Charles G. Taylor:

Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Silas Chekera
James Supuwood
Logan Hambrick

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1284)

SCSL-03-01-T
(43127-43135)

43127

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Richard Lussick, Presiding Judge Justice Teresa Doherty Justice Julia Sebutinde
Registrar:	Binta Mansaray
Case No.:	SCSL-03-1-T
Date:	30 May 2012
	PROSECUTOR
	v.
	Charles Ghankay TAYLOR

SPECIAL COURT FOR SIERRA LEONE
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CORRIGENDUM TO JUDGEMENT FILED ON 18 MAY 2012

Office of the Prosecutor:
Brenda J. Hollis
Nicholas Koumjian
Mohamed Bangura
Kathryn Howarth
Leigh Lawrie
Ruth Mary Hackler
Ula Nathai-Lutchman
Nathan Quick
Maja Dimitrova
James Pace

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

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SCSL-03-01-T
(40588-43126)

1283)

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Richard Lussick, Presiding Judge Justice Teresa Doherty Justice Julia Sebutinde
Registrar:	Binta Mansaray
Date:	18 May 2012
Case No.:	SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
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30 MAY 2012
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PROSECUTOR v. **Charles Ghankay TAYLOR**

JUDGEMENT

<u>Office of the Prosecutor</u>:

Brenda J. Hollis
Nicholas Koumjian
Mohamed Bangura
Kathryn Howarth
Leigh Lawrie
Ruth Mary Hackler
Ula Nathai-Lutchman
Nathan Quick
Maja Dimitrova
James Pace

<u>Defence Counsel for Charles G. Taylor</u>:

Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Silas Chekera
James Supuwood
Logan Hambrick

I. INTRODUCTION

1. The Special Court for Sierra Leone ("Special Court" or "Court") was established to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[1] It is an international court[2] established under an Agreement between the United Nations[3] and the Government of Sierra Leone ("Agreement"),[4] and independent from the domestic legal system of Sierra Leone. The Statute of the Special Court ("Statute")[5] empowers the Court to prosecute persons who committed crimes against humanity, serious violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II, other serious violations of international humanitarian law and specified crimes under Sierra Leonean law.[6] The Special Court is governed by the Agreement, the Statute and by its Rules of Procedure and Evidence ("Rules").[7]

2. This Judgement is rendered by Trial Chamber II of the Special Court for Sierra Leone,[8] pursuant to the mandate granted to the Special Court by the United Nations and the Republic of Sierra Leone and in accordance with Article 18 of the Statute and Rule 88 of the Rules.

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1 Statute of the Special Court for Sierra Leone, Article 1(1) ("Statute").

2 *Prosecutor v. Taylor*, SCSL-03-01-I-059, Decision on Immunity from Jurisdiction, 31 May 2004, para. 57.

3 Authorised pursuant to United Nations Security Council Resolution 1315 (2000) of 14 August 2000, UN Doc. S/RES/1315 (2000).

4 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002.

5 Statute of the Special Court for Sierra Leone, annexed to the Agreement.

6 Articles 2 to 5 of the Statute.

7 Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules").

8 Composed of Justice Teresa Doherty (Northern Ireland), appointed by the Secretary General of the United Nations; Justice Richard Lussick (Samoa), appointed by the Government of Sierra Leone; Justice Julia Sebutinde (Uganda), appointed by the Secretary General of the United Nations; Justice El Hadji Malick Sow (Senegal) appointed as Alternate Judge by the Secretary General of the United Nations and by the Government of Sierra Leone.

Amended Indictment in accordance with Rule 52. The Amended Indictment was disclosed to the public the following day.[15637]

4. The President assigned the proceedings to Trial Chamber II, composed of Justice Richard Lussick, Justice Teresa Doherty and Justice Julia Sebutinde.[15638] Justice El Hadji Malick Sow was later appointed as an alternate Judge on 18 May 2007.[15639]

5. The Accused made his initial appearance and was formally arraigned before Presiding Judge Richard Lussick on 3 April 2006, pursuant to Rule 61. He was represented by the Principal Defender, Vincent Nmehielle, and pleaded not guilty to all counts of the Amended Indictment.[15640]

6. On 29 May 2007, the Prosecution filed a Second Amended Indictment with minor changes to three of the eleven counts.[15641] The Accused was re-arraigned on 3 July 2007 and again pleaded not guilty to the amended charges.[15642] On 3 August 2007, the Prosecution filed an Amended Case Summary. [15643]

(b) Preliminary Objection Based on Lack of Jurisdiction

7. Before the Accused's arrest and as an incumbent President of the Republic of Liberia, on 23 July 2003 the Accused pursuant to Rule 72 moved to quash his indictment and to set aside the outstanding arrest warrant on the grounds that, as incumbent Head of State of the sovereign Republic of Liberia, he was immune from any exercise of the Court's jurisdiction.[15644] The Appeals Chamber, composed of three Appeals Chamber Judges, dismissed the motion on 31 May 2004, holding that the Special Court for Sierra Leone was an international – not a national – court, and that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted

[15637] *Prosecutor v. Taylor*, SCSL-03-01-I-078, Decision and Order for Disclosure, 30 March 2006.
[15638] *Prosecutor v. Taylor*, SCSL-03-01-I-079, Order Assigning a Case to a Trial Chamber, 31 March 2006.
[15639] *Prosecutor v. Taylor*, SCSL-03-01-PT-240, Order Designating Alternate Judge, 18 May 2007.
[15640] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 3 April 2006, p. 14.
[15641] *Prosecutor v. Taylor*, SCSL-03-01-PT-263, Prosecution's Second Amended Indictment, 29 May 2007.
[15642] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 3 July 2007, pp. 401-402
[15643] *Prosecutor v. Taylor*, SCSL-03-01-T-327, Prosecution Notification of Filing of Amended Case Summary, 3 August 2007.
[15644] *Prosecutor v. Taylor*, SCSL-03-01-I-015, Applicant's Motion Made Under Protest and Without Waiving of Immunity Accorded to a Head of State President Charles Ghankay Taylor Requesting that the Trial Chamber Do Quash the Said Approved Indictment of 7th March 2003 of Judge Bankole Thompson, 23 July 2003.

ANNEX B: PROCEDURAL HISTORY

(e) Prosecution Case

(i) Overview

26. After delivering an opening statement on 4 June 2007, the Prosecution called its first witness on 7 January 2008 and rested its case 13 months later on 27 February 2009. During the Defence case, the Prosecution was granted leave to re-open its case to call three additional witnesses,[15689] who testified on 5, 9 and 10 August 2010. Overall, 94 witnesses testified *viva voce* for the Prosecution, including three expert witnesses.[15690] The prior testimony of one witness, who had testified in other cases before the Special Court, was admitted pursuant to Rule 92*bis* without any cross-examination by the Defence[15691] and the prior evidence of two deceased witnesses was admitted into evidence pursuant to Rule 92*quater*.[15692] The Prosecution tendered five expert reports into evidence,[15693] two of which were uncontested.[15694] A total of 782 documents were admitted as Prosecution exhibits,[15695] including the five expert reports.

27. Following the conclusion of the Prosecution's case, the Accused filed a motion for judgement of acquittal pursuant to Rule 98 of the Rules; the Trial Chamber dismissed the

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Notice of Adjudicated Facts from the RUF Judgement, 17 June 2010.

[15689] *Prosecutor v. Taylor*, SCSL-03-01-T-993, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010.

[15690] Exhibit P-019, "Diamonds, the RUF and the Liberian Connection", Report by Ian Smillie, 21 April 2007; Exhibit P-031, "Charles Taylor and the War in Sierra Leone", Report by Stephen Ellis and Corrigenda, 5 December 2006; Exhibit P-077 (confidential).

[15691] *Prosecutor v. Taylor*, SCSL-03-01-T-642, Decision on Public with Confidential Annexes B to G Prosecution Notice Under Rule *92bis* for the Admission of Evidence Related to *Inter Alia* Freetown and the Western Area- TF1-024, TF1-081 and TF1-084, 20 October 2008. The Defence withdrew its objection to the admission of the evidence of witness TF1-081 pursuant to Rule 92*bis* and therefore agreed that there was no need for the witness to be brought for cross-examination. See Transcript 17 October 2008, p. 18660.

[15692] *Prosecutor v. Taylor*, SCSL-03-01-T-720, Decision on Public with Confidential Annexes C to E Prosecution Motion for Admission of the Prior Trial Transcripts of Witnesses TF1-021 and TF1-083 Pursuant to Rule 92*quater*, 5 February 2009.

[15693] Exhibit P-019, "Diamonds, the RUF and the Liberian Connection", Report by Ian Smillie, 21 April 2007; Exhibit P-031, "Charles Taylor and the War in Sierra Leone", Report by Stephen Ellis and Corrigenda, 5 December 2006; Exhibit P-043, "Children Associated with Fighting Forces in the Conflict in Sierra Leone", Report by Jessica Alexander, 4 May 2007; Exhibit P-077 (confidential); Exhibit P-073, "Conflict-Related Sexual Violence in Sierra Leone", Report by Beth Vann, 14 May 2007.

[15694] Exhibit P-043, "Children Associated with Fighting Forces in the Conflict in Sierra Leone", Report by Jessica Alexander, 4 May 2007; Exhibit P-073, "Conflict-Related Sexual Violence in Sierra Leone", Report by Beth Vann, p. 31550, 14 May 2007.

[15695] When admitting documents, the Trial Chamber grouped similar documents together and admitted these documents with the same exhibit number, but with a distinct exhibit letter or sub-number. Therefore, while the Trial Chamber admitted a total of 615 Prosecution exhibits, the total number of Prosecution documents admitted was 782.

SCSL-03-01-T
(40586-40587)

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40586

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Richard Lussick, Presiding Judge Justice Teresa Doherty Justice Julia Sebutinde
Registrar:	Binta Mansaray
Case No.:	SCSL-03-1-T
Date:	29 May 2012

SPECIAL COURT FOR SIERRA LEONE
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30 MAY 2012
NAME SAMUEL J. FORNAH
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09:23

PROSECUTOR

v.

Charles Ghankay TAYLOR

ORDER AUTHORISING COURT PHOTOGRAPHY ON 30 MAY 2012

Office of the Prosecutor:
Brenda J. Hollis

Counsel for the Accused:
Courtenay Griffiths, Q.C.

427

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SCSL-03-01-T
(38087-40585)

1281)

38087

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Richard Lussick, Presiding Judge Justice Teresa Doherty Justice Julia Sebutinde
Registrar:	Binta Mansaray
Date:	18 May 2012
Case No.:	SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR v. Charles Ghankay TAYLOR

JUDGEMENT

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian
Mohamed Bangura
Kathryn Howarth
Leigh Lawrie
Ruth Mary Hackler
Ula Nathai-Lutchman
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James Pace

Defence Counsel for Charles G. Taylor:

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Terry Munyard
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James Supuwood
Logan Hambrick

428

I. INTRODUCTION

1. The Special Court for Sierra Leone ("Special Court" or "Court") was established to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[1] It is an international court[2] established under an Agreement between the United Nations[3] and the Government of Sierra Leone ("Agreement"),[4] and independent from the domestic legal system of Sierra Leone. The Statute of the Special Court ("Statute")[5] empowers the Court to prosecute persons who committed crimes against humanity, serious violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II, other serious violations of international humanitarian law and specified crimes under Sierra Leonean law.[6] The Special Court is governed by the Agreement, the Statute and by its Rules of Procedure and Evidence ("Rules").[7]

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---

1 Statute of the Special Court for Sierra Leone, Article 1(1) ("Statute").

2 *Prosecutor v. Taylor*, SCSL-03-01-I-059, Decision on Immunity from Jurisdiction, 31 May 2004, para. 57.

3 Authorised pursuant to United Nations Security Council Resolution 1315 (2000) of 14 August 2000, UN Doc. S/RES/1315 (2000).

4 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002.

5 Statute of the Special Court for Sierra Leone, annexed to the Agreement.

6 Articles 2 to 5 of the Statute.

7 Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules").

8 Composed of Justice Teresa Doherty (Northern Ireland), appointed by the Secretary General of the United Nations; Justice Richard Lussick (Samoa), appointed by the Government of Sierra Leone; Justice Julia Sebutinde (Uganda), appointed by the Secretary General of the United Nations; Justice El Hadji Malick Sow (Senegal) appointed as Alternate Judge by the Secretary General of the United Nations and by the Government of Sierra Leone.

3065

1280

SCSL-03-01-T
(38070-38086)

38070

THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
Registrar:	Ms. Binta Mansaray
Date:	18 May 2012
Case No.:	SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC, WITH ANNEXES A & B

STATEMENT OF DAHKPANNAH DR. CHARLES GHANKAY TAYLOR

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The Defence hereby files, as Annex A, a copy of Mr. Charles Ghankay Taylor's speaking notes, from which he addressed the Court during the Sentencing Hearing on 16 May 2012. During his statement,[1] and at para. 27 of the attached notes, Mr. Taylor referred to comments made by Femi Fani-Kayode, the Nigerian Press Secretary to President Obasanjo. The complete context of those comments is hereby attached as Annex B.

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles Ghankay Taylor
Dated this 18th Day of May 2012,
The Hague, The Netherlands

[1] *Prosecutor v. Taylor,* SCSL-03-01-T, Sentencing Hearing Transcript, 16 May 2012, p. 49730.

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Annex A

Final Speech Delivered by
DahKpannah Dr. Charles Ghankay Taylor in his case

1. Mr. President Justice Lussick; Justice Sebutinde; Justice Doherty; Justice El Hadji Sow; the Registrar; Principal Defender; and members of the Registry; the Prosecutors present and past; members of the Defence present and past; the visiting gallery; the world audience.

2. The last six years have been challenging years for all of us... Judges, Prosecutors, Defence lawyers, victims and their families, me and my family, and the Peoples of Liberia and Sierra Leone. And now this process is at its end and I am grateful that this Court has extended me the opportunity to be heard at this time.

3. The observations which I make today are deeply felt and are not limited exclusively to legal issues and this case. I am aware of my rights and without prejudice to any of those rights, I hereby make the following observations:

4. It seems to me as an Economist and lay person (not a lawyer) that Your Honors were dealt a difficult hand sitting at the helm of a Court whose rules allows a low threshold requirement for the presentation of evidence. The presumption is that everything is admitted into evidence, regardless, in about 98% of the time. Your Honors were also handicapped by not having the benefit of the full contextual picture of why and how I ended up before this Court. That contextual matrix is uniquely political (and not legal) in nature; and having ensnarled Charles Taylor this time around, only time will tell how many other African Heads of State stand to be destroyed in its continued wake.

5. These handicaps were no fault of your Honours', to be sure, in the sense that you could not be asked to know of so much that was never meant to ever see the light of day.

6. Despite obstacles to ascertaining the truth, what was clear beyond a shadow of a doubt, as I understood the summary of the judgment, was that Your Honors critically determined in fact, that I could not be held responsible for the substantial charges of Joint Criminal Enterprise and Superior Criminal Responsibility as had been pleaded by the Prosecution.

7. Following the civil war in Liberia, I stood before the Liberian people and apologized and expressed deep regret and contrition for the loss of lives and limbs, and the overall effects of the civil war. I stated that no words no matter how polished and sincere could heal the scars and pains all suffered.

8. I was not alone as a leader of a faction that fought during the civil war, when I took it upon myself to express those sentiments while aspiring for the Presidency; but I did.

9. There were many like me who owed an expression of sympathy and regret for what happened to the Liberian people. Indeed, none other than the current President of Liberia, Ellen Johnson-Sirleaf, was identified in the Liberian Truth and Reconciliation Commission Report as somebody from whom such an expression of regret and sympathy for what happened in Liberia should have been forthcoming, since she was one of the three principal leaders of the NPFL along with me.

10. Additionally, I said that wars were terrible; that there was no good war; that there are no just wars whether carried out by underdeveloped countries whose peoples are still deeply entrenched in tribal, ethnic and cultural conflicts, or by the world's only military super power. President Bush in 2000 tried to play the just war card, a card that goes back to the first century B.C.E., when Rome's Marcus Tullius Cicero theorized on the justified use of armed forces ... (*jus ad bellum*), and he lost the argument. Scholars still debate the concept today with no clear agreement.

11. As wars are no good, I condemn all atrocities across the world whether by bombs that are dropped by powerful nations from airplanes; or cruise missiles fired from ships,

submarines and aircrafts; and/or drones that kill women and children, by blowing off legs, arms, and leaving mangled bodies scattered all over the place; only to be justified as "collateral damage". That, too, is wrong. These are crimes also.

12. Following the verdict of 26 April, the Prosecutor, in a press release, said the following: "Today's historic judgment reinforces the new reality, that Heads of State will be held to account for war crimes and other international crimes... This judgment affirms that with leadership comes not just power and authority, but also responsibility and accountability; no person, no matter how powerful, is above the law". I could not agree more. President George W. Bush not too long ago ordered torture and admitted to doing so. Torture is a crime against humanity. The United States has refused to prosecute him. Is he above the law? Where is the fairness?

13. Terrible things happened in Sierra Leone and there can be no justification for the terrible crimes. During the war in Liberia, I punished people responsible for crimes against others. Factual evidence presented before this Court proved that several N.P.F.L. soldiers were put on trial for various crimes. Some were executed for rape, murder and other serious crimes. Witnesses from both sides testified to that fact.

14. Let me be very, very, clear about one thing: I do not condone impunity in any shape or form. Let me say in the strongest terms: I, DahKpannah Dr. Charles Ghankay Taylor, did not, could not have ever, and would never have knowingly, and, with responsibility and/or authority to prevent, stop or punish someone for carrying out acts of atrocities, fail to do so.

15. I say all of this not just in the context of Sierra Leone and the charges against me, but also in the wider context of impunity whether in Africa or the rest of our global community. There has to be a mechanism which is developed, embraced and perfected by the global community to deal with impunity in a way that is consistent with the history, customs, practices and cultures of their peoples and consonant with their spirit as independent peoples.

16. The Rome Statue is a Western document that does not take into account certain customs, cultures, and other sensitivities, unique to certain regions of the world. The practice of "one size fits all", within the legal context, is unfair and unjust.

17. I say, with respect, that though I disagree with your findings of guilt, it is easy for me to see how the absence of the "contextual framework" in which this case was put together by the prosecution seemingly contributed to your findings. Sadly, I am saddled with those findings today as you consider what sentence to impose.

18. A starting point for the "contextual framework" to which I am referring is the issue of money - the purchasing of witnesses' evidence with money. Money played a corrupting, influential, significant and dominant role in this trial. Money in this case, cumulatively prejudiced my rights and interests in an irreparable way. The Prosecution received millions of dollars from the United States Government outside of the official funding process to the court administration.

19. The Prosecution has never fully accounted for how those monies were spent ... who received how much and for what purpose or purposes. Witnesses were paid, coerced, and in many cases threatened with prosecution if they did not co-operate, only to extract statements and/ or confessions.

20. Families were rewarded with thousands of dollars to cover costs of children school fees, transportation, food, clothing, medical bills and given cash allowances for protected and non-protected witnesses in a country where income is less than a dollar a day. The question then is, what was the Prosecution buying?

21. Abu Keita testified openly and never felt it necessary to demand any type of protective measures from the Court. And yet, within a few weeks of having testified, it became public knowledge that he successfully coerced the Prosecution and the Witnesses and Victims' Section (WVS) to relocate him overseas. The details are

sketchy because the Prosecution and WVS have refused to provide any details regarding the extortion by Abu Keita (Exhibit D-468).

22. A more important point for the "contextual framework" to which I am referring is the role politics played. When Regime Change in Liberia became a policy of the US government, George W. Bush in May 2001 signed a second of two Executive Orders, #13213 (Exhibit D-310) in which it was stated: "The Government of Liberia's complicity in the RUF's illicit trade in diamonds and its other forms of support for the RUF are direct challenges to United States foreign policy objectives in the region as well as to the rule-base international order that is critical to the peace and prosperity of the United States. Therefore, I find these actions by the Government of Liberia contribute to the unusual and extraordinary threat to the foreign policy of the United States described in Executive Order 13194 with respect to which the President declared a national emergency". This Executive Order did not say "... the alleged complicity...". It concluded, "The complicity...". The conspiracy was born, all systems put into motion and here I stand today. I NEVER STOOD A CHANCE.

23. This is the broader contextual matrix that regrettably, did not and still has not seen the light of day in these proceedings, despite the gallant efforts by the Defence to unearth and reveal the contextual framework behind the charges against me.

24. With the two Executive Orders, the dogs were let out (so to speak). What followed was the dispatch of the attack pack led by:

    1) Lt. Col. David Crane, Defense Intelligence 30 years. Prosecutor. He, Crane, unlawfully unsealed the court's sealed indictment to his handlers ... senior U.S. Government officials at the U.S. Embassy in Freetown and was never held to account.

The rest of the operational team are:

2) Col. Brenda Hollis, Defense Intelligence, C.I.A., U.S. Air Force. Senior trial counsel and now Chief Prosecutor;
3) James C. Johnson, 20 years U.S. Army, expert on conventional and special operations. Chief of prosecutions for the S.C.S.L.;
4) Allan White, 30 years Defense Intelligence, recalled from retirement to head up investigations as the S.C.S.L.; and
5) Stephen L. Rapp, came on board as Chief Prosecutor for a short time with experience from Capital Hill where he served with a U.S. Senate Judiciary Subcommittee. It came as no surprise to me that as a reward of sorts for Stephen Rapp's diligence in the execution of U.S. foreign policy objectives through these ad hoc tribunals, he was appointed U.S. Ambassador-at-Large for War Crimes Issues.

25. In support of the "contextual framework" of politics, on February 8, 2006, Lt. Col. David Crane appeared before a U.S. Congress Subcommittee on Africa (Exhibit D-404), and spelled out in clear terms the decision taken in support of "Regime Change" in Liberia, and what needed to happen to solidify that process.

26. There was little mention if any, in his testimony about Sierra Leone. His principal focus was as he stated and I quote: "I posit that five years from now when the international community is challenged by other crises, Taylor, in Calabar, under the protection of Nigeria, will make his move. We will wake up one morning and watch on CNN as Taylor rides triumphantly down the main street in Monrovia to the Executive Mansion, daring all of us to come and get him. Unless he is handed over to the Special Court for Sierra Leone, this scenario is not out of the realm of possibility...". He then asked, "How do we assure Liberia's future?", "ultimately, what we do about Taylor in the next several weeks will determine the fate of Liberia and the new administration of its President, Ellen Johnson-Sirleaf…". Crane then sets out several plans of actions: "First, hand Charles Taylor over to the Special Court for Sierra Leone for a fair trial. This takes him out of the local and regional dynamic that

is West Africa... Second, tie any financial and political support to good governance in Liberia...". Time does not permit here for the other points.

27. Not even the Nigerian Nation was spared from threats and intimidation, as explained by Femi Fani-Kayode, Press Secretary to President Obasanjo the Nigerian Head of State, who was with him in Washington when George W. Bush promised to: "Bring Nigeria to its knees", if Taylor was not turned over to the Special Court. So Obasanjo buckled and capitulated. This demonstrates the significant pressure that was brought to bear on President Obasanjo, irrespective of his personal and leadership obligations to the West African sub-region. And therein lies the dilemma for current African Heads of State and governments - how to enter into binding commitments and obligations with their African peers and remain steadfast, resolute, and unyielding in their fidelity to those agreements in the face of such unrelenting and punishing pressure from powerful Western leaders.

28. Evidence can be deceiving. The world watched Gen. Colin Powell, a man of honor and respect, mislead the UN Security Council and the world about weapons of mass destruction in Iraq. I believe unintentionally. There were drawings of mobile laboratories for the production of gases and other nerve agents for use in weapons of mass destruction; none of that was true. Intelligence experts, we were told later, had relied on informers that deliberately lied or misinformed experts and analysts. Not even the world's only superpower knew what was actually obtaining on the ground in Iraq.

29. What happened afterward over a period of 10 years under the iron fists of the U.S. and Britain, caused the murder, rape, maiming, torture and mutilation of around 1,500,000 Iraqis; not to mention the 1,000,000 Iraqi babies that lost their lives as a result of crippling sanctions.

30. This tragedy, I believe, is a consequence, not anticipated, by a policy that set out, rightly so, to prevent the development and use of weapons of mass destruction against

civilians, but ended up a total disaster costing around a trillion dollars and a massive loss of lives and limbs on all sides, unfortunately.

31. What I did to help bring peace to Sierra Leone was done with honor. Foremost on my mind at all times was to help solve the problem because I was convinced that, unless peace came to Sierra Leone, Liberia would not be able to move forward. I pushed the peace process hard and used known mediating methods in trying to draw the parties close and gain their confidence and trust. This is a strategy used universally in mediation efforts. Indeed, my approach to peace in Sierra Leone was neither unique nor new.

32. All major activities leading to peace in Sierra Leone, except for the final signing of the Lome Peace Agreement, were done in Monrovia. Following that historic signing, we brought Foday Sankoh and Johnny Paul Koroma to Monrovia.

33. When Bockarie threatened the disarmament process, we extracted Sam Bockarie to give the disarmament process a chance to take hold.

34. We invited Issa Sesay to meet my colleagues and me in Liberia to get new leadership to the RUF to advance the peace when Foday Sankoh was arrested in Freetown, putting the whole process under strain.

35. Contrary to how I have been portrayed before this Court and what is now reflected in the summary of the judgment, I was not and could not have been "a two-headed Janus," EVER!, in the context of my efforts for peace in neighboring Sierra Leone. I too, believe in Honor and Integrity. These are seriously complex situations and are not as cut and dry as one may want to make them appear.

36. I was President of Liberia. I was not some petty trader on the streets of Monrovia or in the general market place. Liberia was still recovering from war, where at least five warring parties had come together for peace, but still with divided loyalties. My

personal security was still threatened as things were still fluid in the country. For anyone to believe that I had to be everywhere, know or be told everything, and monitor what every little corrupt ex-combatant, crook or petty hustler did at some checkpoint or border post is unfortunate, and disturbing.

37. National security briefings to leaders the world over are brief and intended to inform the leaders on strategic matters and not a journal to occupy the leader's schedule.

38. Right here in this little court building, according to classified documents leaked, an individual or individuals spied for, and reported to, the U.S. Embassy here in The Hague. I suggest Your Honors may still not know who did the spying. How then could any reasonable person suggest that any of what was happening within the frontal view of the President, he had to know? It simply defies logic.

39. I say without stupor that my actions were genuine and done with one thing in mind: helping to bring peace to Sierra Leone, thus providing an enabling environment for progress in both countries; Liberia being my Constitutional responsibility as President. Unfortunately, and as a result of efforts on the part of my government for peace in Sierra Leone, there now appears to have been collateral activities undertaken by some unsavory individuals that led to consequences that I was entirely unaware of, and could not have ameliorated or prevented.

40. As I have done many times before, I do again, Here and Now: "I express my sadness and deepest sympathy for the atrocities and crimes that were suffered by individuals and families in Sierra Leone".

41. I, too, have experienced pain and sadness and know what it is. I lost my father, my oldest brother, my youngest brother and a host of other relatives, friends, and acquaintances during the war in Liberia, as well as Liberian citizens. I am 64 years old and not young any more. I am a father of many children, grandchildren and a great-grand.

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42. I am no threat to society. In Liberia, I commenced the process of healing by putting into place a peace and reconciliation commission modeled after that of South Africa. I say with respect, Reconciliation and Healing, not Retribution, should be the guiding principles in Your Honors' task.

DahKpannah Dr. Charles Ghankay Taylor

16 May 2012

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Annex B

'I Miss Football'

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10 Comments

FEMI FANI-KAYODE: CHARLES TAYLOR, A MAN BETRAYED

By Femi Fani-Kayode

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FEMI FANI-KAYODE

"For, how can the criminal be the same time police?
By: *Desmond Ayim-Aboagye*"

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"AU leaders had an agreement that facilitated peace in Liberia. It's shameful how Obasanjo threw Charles Taylor under the bus after pressure from the Europeans and America (not a signatory to the so-called UN court). For four years Iraq went through a wave of brutal ethnic cleansing, I don't see the UN Court going after the Iraqi Cleric, Muqtada al-Sadr and Co. as well as those brutal Afghan

tribal war lords; all of whom the US States Dcpartmcnt and other foreign powers struck deals. I believe African leaders need to grow more "spine", there will be more ridiculous demands by western countries and the UN to change some part of our constitution in a few years."-- Yele Odofin-Belo.

In many respects Mr Yele Odofin-Belo is absolutely right. This was the betrayal of the century and, in my view, those that should have known better panicked at the last minute and broke ranks. But I do not believe that Obasanjo was amongst those that betrayed anybody. To be fair to President Olusegun Obasanjo he was infact the last man standing and he resisted the pressure until it all came to a head during a state visit to America when George W. Bush refused to see him until Taylor was produced. Ironically the real traitor was not Obasanjo but rather President Sirlief-Johnson of Liberia. The agreement with Taylor was put in place before she was elected but she was fully aware of it it's terms from day one. She was actually the American and Nigerian candidate for that election and she worked very closely indeed with the Americans, Obansanjo and Nigeria before she was elected to power. She was always at the Villa in Abuja in those days and I think that she was one of those people that used to work for the World Bank before she came home for the elections. The deal was simple and clear and the terms were as follows. Taylor would be persuaded to step down as President of Liberia by the ECOWAS leaders and the African Union and he was to be given a safe-haven in Nigeria after doing so. He would not be harassed, he would not face prosecution in Liberia, Sierra Leonne or at the International Court at the Hague andNigeria would not be pressured or harassed by anyone to extradite him anywhere. On his part Taylor was expected to live quietly in Calabar with his relatives, under the direct supervision and care of Donald Duke, the then Governor of Cross Rivers state and he was to stay out of Liberian politics and not in anyway interfere with what was going on over there. All went according to plan and once the African Union endorsed the whole thing no less than around 7 African Heads of State, including Kuffour of Ghana and Obasanjo himself, went to Liberia and physically accompanied Taylor back to Nigeria and to what was to be his new home and final point of destination for many years and possibly the rest of his life. As a consequence of this concession and sacrifice which was made by Taylor the civil war in Liberia came to an immediate end, peace returned to the land and eventually a free and fair election was conducted in which Mrs. Johnson Sirlief emerged as the new President as had been planned all along. However after the lady came to power everything changed. She ditched Obansanjo and Nigeria, turned her back on the ECOWAS leaders and the African Union and she became even closer to Bush and the Americans.

This was a great irony because Nigerian troops were dying in Liberia for many years in an attempt to bring peace to that country whilst the American soldiers were watching the fighting from their ships just off the Liberian coast. I know this because I went there and visited our soldiers with President Obasanjo during the course of the bitter fighting. Anyway Johnson Sirlief forgot all that and she started to talk only to the Americans. And of course the Americans wanted Taylor's blood and his head on a plate. At the end of it

all, and as is usually the case with such matters, everything boiled down to money. Johnson needed financial support, aid, grants, loans and funding from the international monetary institutions and from theUnited States directly for her small country and obviously she needed American support to get this. The Americans gave her one condition before any help could come her way.....She was to formally ask for Charles Taylor to be returned to Liberia by Nigeria in order to face allegations of genocide and funding the brutal civil war in Sierra Leone at the International Criminal Court at the Hague. Yes the Americans did a complete u-turn, broke their word, violated the previous agrcement and sought to turn all the African leaders that had guaranteed it. including Nigeria, into a bunch of unreliable and spineless liars. And sadly the lady called President Johnson Sirlief, played along with the Americans, capitulated and did precisely what they wanted to the utter shock and chagrin of virtually every African leader of that day and in total violation of the agreement and understanding that had been originally entered into by all the parties concerned and by all the major players including the Americans. After the formal request was made to Nigeria by Liberia, America now picked up the gauntlet and turned on Obasanjo compelling and threatening us in initially very subtle and eventually very direct tones and ways. The message was simple and clear. We were to release Taylor and send him back to Liberia or Nigeria was to be brought to her knees. President Obasanjo stood firm and resisted their threats for a very long time and took the matter to the other ECOWAS leaders and the AU who of course supported us wholeheartedly because they had been privy to and were indeed part of the original agreement and understanding that had been established between all the relevant parties and stakeholders.

After this there was a long stalemate and eventually the whole matter turned a little nasty and became the subject of a loud and acrimonious spat between our government and the administration of President George W. Bush. And of course I was deeply involved in that public spat as Presidential spokesperson. Things eventually came to a head when Obasanjo went on a state visit to America and a final demand was made for Taylor. President Obasanjo's argument, and it was a good one, was that no-one or no country would ever believe, trust or take Nigeria seriously again if we breached our word to Taylor and that this is not a Nigerian position but rather it is an African Union position. The old man fought the matter out long and hard and I assure you he did his very best. When the pressure got too much and President Johnson-Sirlief made a final and public demand for Taylor to be returned to Liberia by Nigeria, Obasanjo ordered that he should be dropped at some border post and allowed to go wherever he wanted rather than for us to formally hand him over to anyone. He was on a state visit in America at the time and when it was announced to the world that Taylor had suddenly disappeared from the face of the earth and was no longer with the Nigerians all hell broke loose and everyone panicked. It was at that point that George W.Bush pointblank refused to see Obasanjo whilst he remained in Washington unless and until Taylor was traced, found and handed over to the Liberians. Now I believe that this is where President Obasanjo may have made a mistake.

In my view he should have stood his ground, left America immediately and told them all, including George W. Bush, to go to hell especially since at that point and by that time we were engaged in a full-scale verbal war on the international airwaves with the White House and the American government over this issue. Our hand was quite strong then because virtually the whole of Africa was fully behind us with, of course, the exception of President Johnson-Sirlief who in my humble opinion was nothing but an ingrate and an American puppet. Anyway all of a sudden, and very mysteriously, Taylor resurfaced, was arrested and was handed over to the Liberians who I believe flew him to either Liberia or Sierra Leone, from where he was promptly and immediately flown to the International Court of Criminal Justice at The Hague in the Netherlands to face charges of genocide and crimes against humanity. The greatest irony of all of this is that the nation of America herself, who fought for and orchestrated all of this, is NOT a signatory to that Court and therefore no former or serving American President, leader, citizen or even soldier can ever be brought before it to face any charges of crimes against humanity. That tells you just how unfair and ridiculous the whole world system is. My position is that if you want to try the likes of President Charles Taylor for committing atrocities that is fine and by all means go ahead. However it is only

right and proper for you to then do the same to all the living American and western leaders who have also done the same thing in various parts of the world. This is especially so given the fact that they, more than any other set of leaders in the history of mankind, have been responsible for the most barbarous crimes against humanity that have ever been committed. The law is surely no respecter of persons. After all it was not an African leader that dropped nuclear bombs on Nagasaki and Hiroshima, with its attendant and horrific consequences, after the Second World War. It was not an African leader that committed terrible atrocities in Iraq by slaughtering hundreds of thousands of defenceless Iraqi women and children when bombing Baghdad, all in the name of regime change and the prosecution of an illegal and barbarous war. It was not an African leader that killed the defenceless Arab women and children of Sabra and Chatilla in Southern Lebanon just a couple of decades ago. It was not an African leader that enslaved a whole continent and pillaged it's resources and sold it's people into slavery for hundreds of years. I could go on and on. I have said this earlier and I repeat it here today, unless and until I see Tony Blair and George W. Bush being prosecuted by that same court at the Hague for their own undeniable and irrefutable acts of genocide and crimes against humanity, I cannot in any way be impressed with what they are doing to Charles Taylor or anyone else there.

And to make matters worse such is their utter desperation that they have now dragged super- model Naomi Campbell into the whole fray in a rather futile and childish attempt to confirm their sordid perceptions of the classical and stereotypical African dictator and warlord who they allege gave "blood diamonds" to a beautiful British model that he couldn't resist at President Mandela's dinner. This is indeed the stuff of which bestsellers and blockbuster films are made. Now the whole thing has backfired on them and blown up in their faces because Naomi Campbell, quite rightly and courageously, has not allowed herself to be used for such a sordid venture and exercise. She has refused to play the game according to their script. For that, I thank God. I watched Charles Taylor closely in the dock and I wondered if he would ever get the chance to tell his story to the world. I thought perhaps he shouldn't even bother with presenting a defence for himself against these terrible charges that have been made against him in court. I thought perhaps he should just spend his last few years in solitary confinement writing a book for posterity and tell the world his own version of events. I say this because the outcome of this so-called "trial" has already been determined by international public opinion and the world powers that be, who of course see themselves as being above that same law. In my candid view Charles Taylor will definitely be convicted for crimes against humanity and his powerful enemies will have their pound of flesh. But that may not be the end of the story. As a matter of fact it may just be the beginning. He was looking dejected, lonely, old and grey in that Court on yesterday (Thursday 5th of August, 2010) and as I looked at him the only words that came to my mind and spirit were: "There sits a man betrayed ". My view? A pox on all their houses, for we live in a truly treacherous world.

Chief Femi Fani-Kayode was the spokesperson to President Olusegun Obasanjo; he subsequently became Minister of Tourism & Culture & later served as Aviation Minister for Federal Republic of Nigeria.

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Justice Teresa Doherty
Justice Julia Sebutinde

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 11 May 2012

SPECIAL COURT FOR SIERRA LEONE
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11 MAY 2012
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PROSECUTOR

v.

Charles Ghankay TAYLOR

ORDER AUTHORISING COURT PHOTOGRAPHY ON 16 MAY 2012

Office of the Prosecutor:
Brenda J. Hollis

Counsel for the Accused:
Courtenay Griffiths, Q.C.

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SCSL-03-01-T
(37802-38067)

37802

THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 10 May 2012

Case No.: SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC, WITH ANNEXES A–AH AND CONFIDENTIAL ANNEX AI

SENTENCING BRIEF
ON BEHALF OF CHARLES GHANKAY TAYLOR

Office of the Prosecutor:
Ms. Brenda J. Hollis

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

The Chief Detention Officer described Mr. Taylor as "polite" and "respectful" toward the prison officers and other detainees. He also highlights that Mr. Taylor has not been subject to any disciplinary charges. Further, he notes that when Mr. Taylor has concerns about the detention regime, he discusses the issues with the authorities in "a frank but constructive manner, even when the outcomes have not always been favourable".

199. Mr. Taylor has attempted to keep himself mentally, physically and spiritually strong while in detention. Defence counsel attests that he avidly follows current events and has improved his French through interaction with the francophone African detainees. He takes advantage of the opportunities for fresh air and exercise. And he meets regularly with a rabbi, who assists him in his study of the Jewish books of faith. This conduct points toward Mr. Taylor's ability to be rehabilitated and successfully reintegrated into society.

Mitigating Factor or General Consideration for Reduction: Serving Sentence Abroad

200. As a pre-requisite to the Dutch Government agreeing to allow the Taylor Trial to take place in The Hague, the British Government signed a Sentence Enforcement Agreement with the Special Court, in which the British government agreed to host Mr. Taylor in the event that he was convicted and sentenced.[304] Should Mr. Taylor's appeal fail, all indications are therefore that he will serve his sentence in the United Kingdom. That Mr. Taylor should serve his sentence in a prison, culturally and geographically, thousands of miles from home should be considered a factor in mitigation as it in fact amounts to exile.

201. For the last six years, Mr Taylor has experienced difficulties in financing and coordinating visits from friends and family, most of whom have to travel from West Africa. Prohibitive flight costs and a stringent visa regime, even with the assistance of the court, are often prohibitive.

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accused was in detention. See *Nzabirinda* Sentencing Judgement, para. 92; *Rugambarara* Sentencing Judgement, para. 43.

[304] Annex K, UN Security Council Resolution 1688; Security Council Approves Trial Transfer of Former Liberian President Charles Taylor to Netherlands, Freetown-Based Special Court will Sit in The Hague; Resolution adopted unanimously.

202. These problems will undoubtedly continue unabated after Mr Taylor's transfer to the United Kingdom. Mr. Taylor's de facto exile, to the extent that it affects contact with his friends and family, flies in the face of the spirit, if not the letter, of the *Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone.* Rule 41(a) in particular states:

> Detainees *shall be allowed...* to receive visits from their families and others *at regular intervals* under such restrictions and supervision as the Chief of Detention, in consultation with the Registrar, may deem necessary in the interests of administration of justice or the security and good order of the Detention Facility.

203. An expansive teleological interpretation of Rule 41(a), which itself confers a detainee with a cardinal human right, is very much warranted. Rule 41(a) not only confirms that family visits must be permitted - on a reading of the expression "*shall be allowed*" in the rule - but that an environment conducive to the meaningful exercise of this right must exist and/or be established; for what other purpose does a right exist than to exercise it.

204. To this end, the Defence reminds the Chamber that international human rights standards must not be relegated to rhetoric. Rather, human rights of detainees are tangible, divisible rights, with corresponding obligations. They are reflected in a variety of instruments,[305] the interpretation of which must be in a manner consistent with current international practices. In this respect, the Defence underscores that a detainee's right to respect for family life explicitly encompasses the 'right to family visits'. The latter is enshrined in international human rights instruments, and is a right owed to *both* detainees and their family members. Thus, a decision to imprison Mr. Taylor outside of the West African region (and specifically outside of his country of birth, culture, tradition, family and friends), let alone outside of the African continent, is in of itself a restriction on his right to family visits; a wholly excessive and impractical one, we submit.

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[305] Articles 18, 27, 29 of the African Charter; Article 17 of the ICCPR; see also *Sesay* Enforcement of Sentence Decision, paras. 22-27.

205. It is established that serving one's sentence abroad causes an additional hardship. At the ICTY, the Trial Chamber recognized that, the fact that the accused *Mrđa* would have to serve his sentence in a foreign state may constitute an additional hardship for him and therefore must be taken into consideration when determining the appropriate sentence.[306] Likewise, in the RUF case, Trial Chamber I recognized that "in general terms, sentences served abroad, where family visits are likely to be few, may be harder to bear. Such circumstances would normally amount to a factor in mitigation".[307] Trial Chamber I however did not give any weight to this factor since, in that case, the President had not yet reached a decision (based on the sentence enforcement agreements negotiated and concluded by the Registrar) as to where the RUF convicts would be sent. The paragraphs in the RUF Appeals Judgement relied upon by the Prosecution[308] to suggest that serving a sentence in a foreign country should not be considered in mitigation only states that the RUF Trial Chamber did not err in not considering it in mitigation, not that it could not have properly been considered.

206. That situation is however different from the present case where, even as the President of the Court is yet to make a formal determination, it appears a foregone conclusion that Mr. Taylor will serve his sentence in the United Kingdom. Furthermore, Mr. Taylor would serve his sentence not just in another country, but on another continent. This mitigating factor should thus be given adequate weight.

207. The Defence notes that Mr. Taylor is in a unique position compared to every other individual convicted by an international criminal tribunal. He will be the first convicted person to serve a lengthy sentence on a continent other than that of his origin, thus stripping him of the last vestige of anything familiar. The ICTY convicted persons are all detained in Europe and all but one of the Rwandese ICTR convicted persons are detained in Africa.[309]

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[306] *Mrđa* Sentencing Judgement, para. 107.
[307] *RUF* Sentencing Judgement, para. 206.
[308] Prosecution Sentencing Brief, para. 44, citing *RUF* Appeal Judgement, paras. 1246 and 1316.
[309] The only exception is Bagaragaza, who served a short one-and-a-half year sentence in Sweden. See: Annex L, Early Release of Bagaragaza.

208. Besides the constrained family visits, as argued above, the hardships resulting from cultural and other social differences, where one is effectively re-located into another 'world' at such an advanced age and for what might be a long time, should not be underestimated. As Professor Schabas aptly pointed out, international prisoners will "be isolated from their families and probably from other support systems. They may find themselves in relative isolation, in a culturally unfamiliar environment, and unable to communicate and socialize with fellow inmates and prison personnel".[310]

209. This same concern was expressed earlier in the *Erdemović* case at the ICTY. In the very first Sentencing Judgement at the Tribunal, the Trial Chamber noted that "because persons found guilty will be obliged to serve their sentences in institutions which are often far from their places of origin, the Trial Chamber takes note of the inevitable isolation into which [such prisoner] will have been placed. Moreover, cultural and linguistic differences will distinguish them from the other detainees".[311]

210. In addition to the geographic component, the prisoner accommodation model the United Kingdom uses further compounds the problem of isolation, which Mr. Taylor will face. While African states which have signed Sentence Enforcement Agreements with international criminal tribunals such as the ICTR use the consolidation prison model (where the tribunal's prisoners interact exclusively with each other and receive special accommodation), the United Kingdom uses the dispersion model of incarceration (where tribunal prisoners are intermixed and interact with domestic prisoners).[312] While the consolidation model allows inmates of shared linguistic and cultural backgrounds to remain together, the dispersion model used in the United Kingdom isolates the prisoners, thereby making them more vulnerable to attack by domestic prisoners. The attack on ICTY convict, Krstic, in the British maximum security Wakefield prison,[313] is a lasting example.

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[310] Annex M, William Schabas Article, p. 494-495.
[311] *Erdemović* Sentencing Judgement, para. 75.
[312] Annex N, Richard Culp Article, p. 10-11.
[313] *Ibid*, p. 10.

211. The Defence therefore requests that the Chamber considers as mitigating the fact that Mr. Taylor will effectively serve his sentence in isolation from all culturally familiar circumstances, and very far removed from family and friends. That we submit is a punishment within a punishment.

VI. SUBMISSIONS ON TIME SERVED

212. Pursuant to Rule 101(D), Mr. Taylor shall be given credit for: "any period during which [he] was detained in custody pending his transfer to the Special Court or pending trial or appeal". Mr. Taylor has been detained in the custody of the Special Court since his arrest in Nigeria and subsequent transfer to Sierra Leone via Liberia on 29 March 2006.[314] There is no dispute that Mr. Taylor must therefore be given credit for the 6 years and one month that he has already served in detention.

213. The Defence submits that Mr. Taylor should also be given credit for the time that he was under de facto house arrest in exile in Calabar, Nigeria, between 11 August 2003 and 29 March 2006.[315] Thus, Mr. Taylor is entitled to an additional 2 year and 7 month reduction of any sentence rendered by the Court. In total, Mr. Taylor should be given credit for 8 years and 8 months for time spent in custody pending transfer to the Special Court or pending trial.

214. The Defence submits that the time Mr. Taylor spent in Calabar constitutes detention, "in custody", as it was a *de facto* house arrest. Mr. Taylor endured significant loss of liberties and freedom of movement when he left Liberia and took up President Obasanjo's invitation to go to Nigeria. Obasanjo's offer was directly related to the Special Court indictment that had been unsealed on 4 June 2003 in Accra. In Nigeria Mr. Taylor was accommodated in a fenced compound, with several smaller outer apartments and a heavy security presence.[316]

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[314] Judgement, p. 49625 (stating that the date Mr. Taylor was surrendered to the SCSL was 29 March 2006).
[315] TT, Charles Taylor, 10 Nov 2009, p. 31517.
[316] TT, Charles Taylor, 1 Dec 2009, p. 32824.

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SCSL-03-01-T
(37722-37798)

37722

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER II

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

Registrar: Ms. Binta Mansaray

Date filed: 3 May 2012

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION SENTENCING BRIEF

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

Counsel for the Accused:
Mr. Courtenay Griffiths QC
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Ms. Logan Hambrick

SPECIAL COURT FOR SIERRA LEONE
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"unprecedented in volume" flown in from Burkina Faso to enable the late 1998 offensive culminating in the Freetown Invasion.[247]

82. Perhaps the most telling example of Mr. Taylor's willing and enthusiastic participation is that, even in the face of the unimaginable cruelty and crimes inflicted upon the people of Freetown during the "January 6" invasion which he planned, Mr. Taylor responded by continuing to support the AFRC/RUF.[248]

3. Mr. Taylor's Leadership Positions and Betrayal of Positions of Trust

83. Throughout the Indictment period, Mr. Taylor held senior leadership roles, both nationally and internationally. He became President of Liberia in August 1997,[249] a position he still held when hostilities ended in Sierra Leone.[250] In addition, Mr. Taylor joined the ECOWAS Committee of Five shortly after his election.[251] As identified by the Trial Chamber, these positions imbued Mr. Taylor with an "inherent authority"[252] and "substantial influence over the leadership of the RUF, and to a lesser extent that of the AFRC."[253]

84. Rather than using his positions for positive change, Mr. Taylor abused his authority and influence. Mr. Taylor gave extensive advice, direction and guidance,[254] and "by virtue of his position", Bockarie deferred to him and generally followed his instruction.[255] The Trial Chamber further found that Mr. Taylor, as "an elder statesman and as president of Liberia," was accorded a certain deference by other AFRC/RUF leadership, which meant "his advice was generally heeded by them."[256] At no time did Mr. Taylor exert this influence over the AFRC/RUF high command to alleviate the suffering of the people of

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[247] *See, e.g.* T. 26 April 2012 p. 49649, lines 9-11.
[248] See Section III.B.2.
[249] T. 26 April 2012 p. 49624, lines 11-13 ("Charles Ghankay Taylor was elected president of Liberia and took office on the 2nd of August, 1997"); p. 49672, lines 13-16 ("the Trial Chamber is satisfied that as of August 1997, the accused knew of the atrocities committed against civilians in Sierra Leone by the RUF/AFRC forces and of their propensity to commit crimes").
[250] T. 26 April 2012 p. 49624, lines 14-15 (Taylor stepped down from the Presidency on 11 August 2003).
[251] T. 26 April 2012 p. 49661, lines 9-10.
[252] T. 26 April 2012 p. 49658, line 24.
[253] T. 26 April 2012 p. 49664, lines 17-18.
[254] See Section III.B.2.
[255] T. 26 April 2012 p. 49658, lines 24-26.
[256] T. 26 April 2012 p. 49671, lines 23-27.

Sierra Leone. Rather, he deliberately used his authority and position to fan the flames of conflict and to continue the perpetration of the crimes.

85. In addition to these general findings, the Chamber made many particular findings on Mr. Taylor's authority and influence relating to the period February 1998 to February 1999, a time that coincides with the perpetration of a significant proportion of the crimes. The Chamber referred to several discrete instances in which Mr. Taylor specifically exercised his influence over the AFRC/RUF.[257] These instances are characterized variously as "ordering", "instructing", "advising", "emphasizing", "communicating", or "telling". Regardless of the characterization, all are demonstrations of Mr. Taylor abusing his position of "inherent authority"[258] in relation to the AFRC/RUF.

86. Mr. Taylor was also a President who demonstrated a disregard for the international community's efforts to protect international peace and security. He deliberately flouted ECOWAS and UN arms embargoes practically from the first moment of their imposition.[259] While "the Junta was perceived by the international community as a threat to peace ... and it was recognised that military support could facilitate the commission of

[257] In relation to the immediate period after the Intervention, the Trial Chamber found that "[t]he Accused and his subordinates communicated to the AFRC/RUF forces the imperative to maintain control over Kono" (T. 26 April 2012 p. 49639, lines 8-10), Taylor "told Koroma to capture Kono" (T. 26 April 2012 p. 49639, lines 15-18), and "[a]fter the first failed attempt, the Accused gave instructions for a second attack" (T. 26 April 2012 p. 49639, lines 18-21). The Chamber also found that, once recaptured, "the Accused told Bockarie to be sure to maintain control of Kono" (T. 26 April 2012 p. 49639, lines 21-24). Further, the Chamber found that in June 1998 "[t]he accused advised Bockarie to recapture Kono following its loss to ECOMOG" (T. 26 April 2012 p. 49639, lines 25-26) and, in relation to the late 1998 offensive and the Freetown invasion, "the Accused emphasised to Bockarie the need to first attack Kono" (T. 26 April 2012 p. 49640, lines 11-12) and "told Bockarie to make the operation 'fearful'....as well as use 'all means' to get to Freetown" (T. 26 April 2012 p. 49640, lines 12-15). The Chamber also noted that Bockarie's invitation to Musa was "[c]onsistent with discussions with the accused" (T. 26 April 2012 p. 49640, lines 22-23) and that "[t]he accused gave advice to Bockarie and received updates in relation to the progress of the operations in Kono and Freetown" (T. 26 April 2012 p. 49641, lines 10-12). The Trial Chamber also found that the Accused instructed Bockarie to transfer some of the Pademba Road prisoners to Buedu (T. 26 April 2012 p. 49641, lines 20-21). Other findings bearing out the Accused's authority over the AFRC/RUF during this period include that the Accused "instructed Bockarie in 1998 to open a training base in Bunumbu, Kailahun district" (T. 26 April 2012 p. 49646, lines 4-6), as well as the finding that the decision to incorporate the Scorpion Unit into Bockarie's command was approved by the Accused through his subordinate Daniel Tamba (T. 26 April 2012 p. 49651, lines 4-8).

[258] T. 26 April 2012 p. 49658, line 24.

[259] T. 26 April 2012 p. 49661, lines 28-29 to p. 49662, lines 1-3 ("Following a coup on 29 August 1997, ECOWAS decided to place a total embargo on all supplies of petroleum products, arms and military equipment to Sierra Leone. Similarly on 8 October 1997, the United Nations Security Council decided to impose an embargo on arms and ammunition to Sierra Leone").

the crimes",[260] Mr. Taylor and his subordinates were already busy circumventing the embargoes by facilitating the above mentioned Magburaka arms shipment.[261] In addition, the Trial Chamber found that the "facilitation of road and air transportation of materiel as well as security escorts played a vital role of the operations of the RUF/AFRC during a period when an international arms embargo was in force."[262] As the embargo was in place during the Indictment period,[263] this finding applies equally to all instances where Mr. Taylor either provided or facilitated the provision of arms and ammunition to the AFRC/RUF in defiance of the international ban. Clearly, Mr. Taylor's acts ran directly counter to the purpose of the arms embargo. Rather than shorten the conflict and stabilise the region by denying weapons to those threatening international peace and security, Mr. Taylor sought to deliberately but clandestinely defy the international community and to prolong and exacerbate the war. These actions undertaken by a serving head of State are particularly reprehensible and blameworthy and should be recognised as such when sentencing Mr. Taylor.

87. The most egregious example of Mr. Taylor's abuse of his positions of leadership relates to his role in the Sierra Leone peace process which he actively worked against. As established by the Trial Chamber's findings, from Abidjan to Lomé and at all points thereafter, peace in Sierra Leone was never a genuine goal for Mr. Taylor.[264] While Sierra Leone literally burned, Mr. Taylor paid lip service to peace, deliberately deceiving all those who placed much store in his "considerable influence over the warring factions in Sierra Leone."[265]

88. During his Presidency, Mr. Taylor attempted to play the role of the concerned humanitarian. In a July 1998 statement, he strongly condemned the rebel activities and horrendous atrocities being committed in Sierra Leone.[266] While telling the ECOWAS Chairman and UN Secretary-General that he would "cooperate to promote an end to the

[260] T. 26 April 2012 p. 49661, lines 28-29 to p. 49662, lines 1-7.
[261] *See, e.g.* T. 26 April 2012 p. 49668, lines 6-8.
[262] T. 26 April 2012 p. 49645, lines 2-5. *See also* T. 26 April 2012 p. 49656, lines 24-26.
[263] T. 26 April 2012 p. 49644, line 25 to p. 49645, line 5.
[264] T. 26 April 2012 p. 49655, lines 7-9 ("The accused instructed Foday Sankoh to participate in the Abidjan peace talks from March to November 1996 in order to obtain ammunition and materiel for the RUF"); p. 49655, lines 23-27; p. 49657, line 26 to p. 49658, line 4.
[265] T. 26 April 2012 p. 49656, lines 17-18.
[266] T. 26 April 2012 p. 49663, lines 5-8.

fighting in Sierra Leone and to foster peace and security in the sub region",[267] he was in reality a "two-headed Janus".[268] At the same time as making such laudable statements, Mr. Taylor was coldly calculating how to ensure he continued to benefit from Sierra Leone's diamonds.

89. In relation to Mr. Taylor's "active role in the Lomé peace negotiations", the Trial Chamber found that Mr. Taylor "was engaged in arms transactions at the same time that he was involved in the peace negotiations in Lomé, publicly promoting peace ... while privately providing arms and ammunitions to the RUF."[269] As regards Mr. Taylor's participation in the ECOWAS Committee of Five (later Committee of Six) via his Presidency of Liberia, the Trial Chamber found "strong evidence showing that while publicly participating in regional efforts to broker peace in Sierra Leone, the accused was secretly fuelling hostilities between the AFRC/RUF and the democratically elected authorities in Sierra Leone" and was, thus, clandestinely "undermining ... the peace process".[270] Finally, Mr. Taylor's dealings with Issa Sesay in 2000 were also determined by the Trial Chamber to be part of Mr. Taylor's continued efforts to prolong the conflict. In May 2000, the Trial Chamber found that Mr. Taylor "had significant influence over the RUF decision to release the UN peacekeepers and that in his meeting with Issa Sesay, Taylor promised him assistance 'in the struggle.'"[271] Further, in July 2000, when it was proposed that Sesay take over the RUF leadership, the Trial Chamber found that, at a covert meeting held late at night, Mr. Taylor "privately advised Issa Sesay to say that he would disarm but 'not do it in reality.'"[272] The Chamber also found that "[a]t that time, the accused was supplying Sesay with arms and ammunition, and also calling on the RUF to send forces to help him fight his own enemies together with the AFL in Liberia and in Guinea."[273]

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[267] See the July 1998 statement alluded to by the Trial Chamber: Exh. D-36 (UN Document S/1998/629 dated 10 July 1998 containing Joint Communiqué issued on 2 July 1998 at Abuja), Annex para. 3(b).
[268] T. 26 April 2012 p. 49658, line 4.
[269] T. 26 April 2012 p. 49655, lines 23-27.
[270] T. 26 April 2012 p. 49656, lines 20-26.
[271] T. 26 April 2012 p. 49657, lines 7-10.
[272] T. 26 April 2012 p. 49657, lines 19-21.
[273] T. 26 April 2012 p. 49657, lines 22-25.

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SCSL-03-01-T
(35606-35607)

35606

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 18 March 2011

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR

v.

Charles Ghankay TAYLOR

ORDER RE: DEFENCE MOTION SEEKING TERMINATION OF THE DISCIPLINARY HEARING FOR FAILURE TO PROPERLY CONSTITUTE THE TRIAL CHAMBER AND/OR LEAVE TO APPEAL THE REMAINING JUDGES' DECISION TO ADJOURN THE DISCIPLINARY HEARING

Office of the Prosecutor:
Brenda J. Hollis

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

459

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

SEISED of the "Defence Motion Seeking Termination of the Disciplinary Hearing for Failure to Properly Constitute the Trial Chamber and/or Leave to Appeal the Remaining Judges' Decision to Adjourn the Disciplinary Hearing", filed on 28 February 2011 ("Motion"),[1]

RECALLING that the Disciplinary Hearing was in relation to an incident in court on 8 February 2011, wherein Lead Counsel for the Accused, Mr. Courtenay Griffiths withdrew from the proceedings, despite being ordered by the Presiding Judge to remain;[2]

RECALLING that on 11 March 2011, Mr. Griffiths, Lead Counsel for the Accused apologised for his conduct, thus bringing the matter to an end;[3]

FINDING therefore that the Motion is now moot;

DISMISSES THE MOTION.

Done at The Hague, The Netherlands, this 18th day of March 2011.

Justice Richard Lussick

Justice Teresa Doherty
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

[1] SCSL-03-01-T-1220.
[2] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 8 February 2011, pp. 49144-49145.
[3] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 11 March 2011, pp. 49621-49622.

SPECIAL COURT FOR SIERRA LEONE
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PUBLIC DEFENCE MOTION SEEKING TERMINATION OF THE DISCIPLINARY HEARING FOR FAILURE TO PROPERLY CONSTITUTE THE TRIAL CHAMBER AND/OR LEAVE TO APPEAL THE REMAINING JUDGES'DECISION TO ADJOUN THE DISCIPLINARY HEARING

Document Dated: **28 FEBRUARY 2011**

☐ The Defence submits that this filing is not deficient by exceeding any page limit. Article 6(D)(i) of the Practice Direction states that the motion of a party seeking leave to pursue an interlocutory appeal shall not exceed 15 pages or 4500 words, whichever is greater. The Defence's filing is 12 pages, less the table of authorities, which does not count toward the page limits. The fact that the Defence is seeking leave to appeal as an additional and alternate form of relief does not negate the fact that it is indeed a motion seeking leave to appeal. Thus, the Defence properly filed a pleading in excess of the usual 10 page limit.

Signed:
Rachel Irura

Dated: 28 February 2011

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SCSL-03-01-T
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34862

THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
Registrar:	Ms. Binta Mansaray
Date:	28 February 2011
Case No.:	SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE MOTION SEEKING TERMINATION OF THE DISCIPLINARY HEARING FOR FAILURE TO PROPERLY CONSTITUTE THE TRIAL CHAMBER AND/OR LEAVE TO APPEAL THE REMAINING JUDGES' DECISION TO ADJOURN THE DISCIPLINARY HEARING

Office of the Prosecutor:
Ms. Brenda J. Hollis

Counsel for Courtenay Griffiths, QC:
Mr. Peter Robinson

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

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7. On 9 February 2011, the Presiding Judge issued a "Direction to Lead Counsel to Appear Before the Trial Chamber"; Justice Julia Sebutinde dissented.[6] The Direction to Appear directed Lead Counsel to attend court on Friday 11 February 2011 and warned that unless he apologized for his behavior on 8 February 2011, then the Trial Chamber may impose sanctions pursuant to Rule 46.[7]

8. On 8 February 2011, Lead Counsel appeared in Court and, through co-counsel Terry Munyard, requested an adjournment of the hearing until Mr. Griffiths could find representation, given the seriousness of the matter.[8] The matter was adjourned for two weeks so that Mr. Griffiths could find representation.[9] On 18 February 2011, the Defence informed the Trial Chamber that Mr. Peter Robinson had agreed to represent Mr. Griffiths in the Parallel Proceedings scheduled for 25 February 2011.[10]

9. Mr. Griffiths and Mr. Robinson duly appeared on 25 February 2011. For the Trial Chamber, only the Presiding Judge (Justice Doherty), Justice Lussick, and the Alternate Judge (Justice Sow) appeared.[11] The Presiding Judge opened by noting that Justice Sebutinde was not present and read the following notification on her behalf:

> "This is to notify you that in view of the recent developments in the Trial Chamber, and consistent with my earlier opinion on this matter, both in Chamber and on the Bench wherein I dissented from the directive to lead counsel, I will on principle not attend Friday's hearing."[12]

10. The Presiding Judge then invited comments "on the question of the constitution of the Court, in light of the matter I have just read, and in light of Justice Sebutinde's absence". Mr. Robinson conferred with the Defence and thereafter invited the Trial Chamber to invite the alternate judge, Justice Sow, to participate so that the Bench could be constituted of three

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[6] *Prosecutor v. Taylor*, SCSL-03-01-T-1196, Direction to Lead Counsel to Appear Before the Trial Chamber, 9 February 2011 ("**Direction to Appear**"), Justice Julia Sebutinde dissenting; she explained her reasons for doing so at a subsequent hearing. See *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript of Hearing, 11 February 2011, p. 49302-3.
[7] Direction to Appear, p. 2.
[8] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript of Hearing, 11 February 2011, p. 49296-9.
[9] Transcript of Hearing, 11 February 2011, p. 49304-5.
[10] Email from the Defence to the Trial Chamber, dated 18 February 2011.
[11] Justices Doherty and Lussick will be referred to herein as the "remaining Judges", given that Justice Sebutinde had absented herself and Justice Sow was barred by them from participating.
[12] Transcript of Hearing, 25 February 2011, p. 49316.

judges.[13] Thereafter, Justice Sow expressed his willingness to participate. He stated, "This bench is regularly composed with three judges sitting, as it shows ... I am a judge. This Bench is regularly composed, as everybody can see".

11. Following Justice Sow's remarks, the Presiding Judge then issued the impugned decision(s):

> "The Articles governing the composition of this Court and the Trial Chamber mandate that it is to be composed of three judges. This is not a situation where Rule 16 applies. Accordingly, in our view, this Trial Chamber is not properly constituted and we consider we have no alternative but to adjourn this hearing today. The matter is adjourned for a date to be fixed".[14]

Appointment of Justice Sow as Alternate Judge

12. A brief history of the appointment of Justice Sow as an alternate judge for Trial Chamber II may be instructive to understanding the underlying purpose of having and utilizing an alternate judge. In December 2006, jurist Antonio Cassese, as part of his independent expert review of the functioning of the Special Court for Sierra Leone,[15] recommended that an alternate judge be appointed for the Taylor Trial. He opined that because it was important for the Taylor Trial to "run smoothly and not falter", he believed that "an alternate Judge should be appointed who could sit through each stage of the trial and step in to replace a Judge if, for any reason, the Judge cannot continue sitting"; Cassese noted that it would be "undesirable to gamble on the continuity of such an important case".[16]

13. Justice Sow was sworn in as an alternate judge for Trial Chamber II on 9 May 2007.[17] According to the Court's official press release of this event, Justice Sow's role was that he should be present at each stage of the trial and that he would replace a Judge if that Judge is unable to continue sitting, in accordance with Article 12(4).[18]

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[13] Transcript of Hearing, 25 February 2011, p. 49317.
[14] Transcript of Hearing, 25 February 2011, p. 49318.
[15] "Report on the Special Court for Sierra Leone", submitted by the Independent Expert Antonio Cassese, 12 December 2006 (**"Cassese Report"**), *available at*: http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&tabid=176.
[16] Cassese Report, paras. 228 and 229.
[17] "Justice El Hadji Malick Sow of Senegal Sworn in as Alternate Judge," Special Court for Sierra Leone, Press and Public Affairs, Press Release, Freetown, Sierra Leone, 9 May 2007, *available at*: http://www.sc-sl.org/LinkClick.aspx?fileticket=SIQl4Ssen%2Bc%3D&tabid=110
[18] The Defence notes that Rule 16*bis*, which provides for alternate judges was not in effect on the date Justice Sow was sworn in. Rule 16*bis* was adopted shortly thereafter on 14 May 2007.

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1193)

SCSL-03-01-T
(33971-33975)

33971

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Teresa Doherty, Presiding Judge Justice Richard Lussick Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate Judge
Registrar:	Binta Mansaray
Case No.:	SCSL-03-1-T
Date:	7 February 2011

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON URGENT AND PUBLIC WITH ANNEXES A-N DEFENCE MOTION FOR DISCLOSURE AND/OR INVESTIGATION OF UNITED STATES GOVERNMENT SOURCES WITHIN THE TRIAL CHAMBER, THE PROSECUTION AND THE REGISTRY BASED ON LEAKED USG CABLES

Office of the Prosecutor:
Brenda J. Hollis
Nicholas Koumjian
Leigh Lawrie

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

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TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");[1]

SEISED of the "Defence Motion Seeking Leave to Appeal the Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources Within the Trial Chamber, the Prosecution and the Registry Based on Leaked USG Cables", filed on 31 January 2011 ("Motion"),[2] wherein the Defence seeks leave to appeal the Trial Chamber's "Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources Within the Trial Chamber, the Prosecution and the Registry Based on Leaked USG Cables", dated 28 January 2011 ("Impugned Decision"),[3] on the basis that:

1) "exceptional circumstances" exist in that:

   a. The Trial Chamber's denial of the motion overlooks the fundamental and important nature of the request to the Accused's case and the centrality of the issues involved;[4]

   b. the Trial Chamber abused its discretion by refusing to investigate itself/and or members under it in circumstances where there is *prima facie* evidence that such person(s) are or have been in secret contact with the USG, an external party that has clearly demonstrated its animosity to the Accused, and that mere evidence of contact undermines any perception of judicial independence;[5]

   c. it is in the interests of justice that any issue that, *prima facie*, raises questions going to the independence and integrity of any of the organs of the court, particularly the Prosecution and Chambers, should be properly investigated;[6]

   d. such allegations also raise an issue of fundamental legal importance;[7]

   e. where the issues raised impacts on the Trial Chamber itself, further decision by the Appeals Chamber on the matter is conducive in the interests of justice;[8]

[1] Noting that Justice Sebutinde has voluntarily withdrawn herself from a decision on this Motion for the same reasons as stated in the Impugned Decision.
[2] SCSL-03-01-T-1178.
[3] SCSL-03-01-T-1174.
[4] Motion, para 2.
[5] Motion, para. 3(vi).
[6] Motion, para. 9.
[7] Motion, para. 10.
[8] Motion, para. 10.

466

2) the Defence would suffer irreparable prejudice if the identity of the persons in the three organs of the Court, and the nature and extent of the interactions of such persons with the USG is not established;[9]

RECALLING the "Order for Expedited Filing", dated 1 February 2011, wherein the Trial Chamber ordered expedited filing schedules for a response and a reply in relation to the Motion;[10]

NOTING the "Prosecution Response to Defence Motion Seeking Leave to Appeal the Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources Within the Trial Chamber, the Prosecution and the Registry Based on Leaked USG Cables", filed on 4 February 2011 ("Response"),[11] wherein the Prosecution submits that the Motion should be dismissed on the basis that:

1) The Defence has failed to establish "exceptional circumstances" in that:

   a. the mere fact that the Defence has identified possible grounds of appeal does not satisfy the first limb of Rule 73(B) as an erroneous ruling does not of itself give rise to exceptional circumstances;[12]

   b. the Defence argument that decisions concerning the independence and integrity of any organ of the court automatically satisfy the "exceptional circumstances" requirement is untenable as such an interpretation would be tantamount of inserting an alternative ground for leave to appeal into Rule 73(B);[13]

2) The Defence has failed to establish "irreparable prejudice" in that;

   a. the Defence arguments are predicated on its conclusion that it has established a prima facie case, this is a merits based argument which should be dismissed[14]

   b. the issue can be remedied on final appeal, as is evident from the *Sesay et. al.* case, in which the Appeals Chamber addressed a similar issue at the appeals stage;[15]

NOTING ALSO that the Defence did not file a Reply;

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[9] Motion, para. 11.
[10] SCSL-03-01-T-1179.
[11] SCSL-03-01-T-1187.
[12] Response, para 6.
[13] Response, para. 7.
[14] Response, para. 9.
[15] Response, para. 10, referring to the *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-A, Judgement, 26 October 2009, para. 186

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rule 73 of the Rules of Procedure and Evidence ("Rules");

NOTING that Rule 73(B) provides:

> Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

NOTING therefore that (i) as a general rule, interlocutory decisions are not subject to appeal; (ii) Rule 73(B) involves a high threshold that must be met before the Trial Chamber can exercise its discretion to grant leave to appeal; (iii) a party seeking leave to appeal against an interlocutory decision must show "exceptional circumstances" and "irreparable prejudice"; (iv) the two prong test prescribed under Rule 73(B) is conjunctive and not disjunctive;[16] (v) even where the conjunctive test is satisfied, leave to appeal remains in the discretion of the Trial Chamber;[17]

RECALLING the Appeals Chamber rulings that "[a]s a general principle, interlocutory appeals are a rare exception"'[18] and that "[i]n this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgement will be corrected in due course by this Chamber on appeal";[19]

RECALLING ALSO that this Court has held that an interlocutory appeal does not lie as of right and that "the overriding legal consideration in respect of an application of this nature is that the applicant's case must reach a level nothing short of "exceptional circumstances" and "irreparable prejudice", having regard to the restrictive nature of Rule 73(B) and the rationale that criminal trials must not be heavily encumbered and, consequently, unduly delayed by interlocutory appeals";[20] and

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[16] *Prosecutor v Brima, Kamara, Kanu*, SCSL-4-16-T, Decision on Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98 of 31 March 2006, 4 May 2006.

[17] Rule73(B) states that "in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal"; also, see for example *Prosecutor v. Popovic et al.*, IT-05-88-T, Decision on Gvero Motion Seeking Certification to Appeal the Decision on the Extension of Time for Filing the Final Trial Brief, 15 July 2009; *Prosecutor v. Stanisic & Zupljanin*, IT-08-91-T. Decision Denying Mico Stanisic's Motion for Certification to Appeal the Oral Decision Accepting Christian Nielsen as an Expert and Requesting for a Stay of Proceedings, 20 October 2009, para 3.

[18] *Prosecutor v. Taylor*, SCSL-03-01-T-1166, Decision on Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 21 January 2011.

[19] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

[20] *Prosecutor v. Taylor*, SCSL-03-01-T-584, Decision on Confidential Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168, 10 September 2008.

that "exceptional circumstances" may arise "where the cause of justice may be interfered with" or "where issues of fundamental legal importance" are raised;[21]

CONSIDERING that motions relating to the independence and integrity of a court do not *per se* give rise to exceptional circumstances;

CONSIDERING ALSO that the Motion is more concerned with arguing the merits of an appeal rather than with satisfying the conjunctive test required for leave to appeal to be granted and that merely pointing to alleged errors in law and/or fact does not of itself give rise to exceptional circumstances nor to an issue of fundamental legal importance;

CONSIDERING FURTHER that the Defence submission that it would suffer irreparable prejudice unless the identity of the persons in the Court and their interactions with the USG are established has no foundation or evidentiary basis;

FINDING therefore that the Defence has failed to satisfy the conjunctive test of exceptional circumstances and irreparable prejudice;

FOR THE ABOVE REASONS

HEREBY DISMISSES THE MOTION.

Done at The Hague, The Netherlands, this 7th day of February 2011.

Justice Teresa Doherty
Presiding Judge

Justice Richard Lussick

[Seal of the Special Court for Sierra Leone]

[21] *Prosecutor v. Taylor*, SCSL-03-01-T-764, Decision on Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, 18 March 2009; *Prosecutor v. Taylor*, SCSL-03-01-T-764, Decision on Public Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents, 11 December 2008, p. 3; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005.

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1174)

SCSL-03-01-T
(32384-32392)

32384

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Teresa Doherty, Presiding Judge Justice Richard Lussick Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate Judge
Registrar:	Binta Mansaray
Case No.:	SCSL-03-1-T
Date:	28 January 2011

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON URGENT AND PUBLIC WITH ANNEXES A-N DEFENCE MOTION FOR DISCLOSURE AND/OR INVESTIGATION OF UNITED STATES GOVERNMENT SOURCES WITHIN THE TRIAL CHAMBER, THE PROSECUTION AND THE REGISTRY BASED ON LEAKED USG CABLES

Office of the Prosecutor:
Brenda J. Hollis
Nicholas Koumjian
Leigh Lawrie

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

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");[1]

SEISED of the "Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources Within the Trial Chamber, the Prosecution and the Registry Based on Leaked USG Cables", filed on 10 January 2011 ("Motion"),[2] wherein, in light of the publication of two leaked United States Government ("USG") cables and an article in the New Democrat, a Liberian Newspaper ("Newspaper Article"), the Defence seeks, pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules") immediate disclosure and/or an investigation into:

(i) the identity of the source(s) within the Trial Chamber, Prosecution and Registry who provided the USG with the information in the Cables;[3]

(ii) the full nature of the respective sources' relationship with the USG, specifically including an explanation of the context and circumstances in which each of the comments recorded in the Cables were made to representatives of the USG;[4]

(iii) information tending to suggest that the Prosecution has sought or received instructions from the USG regarding any aspect of the Taylor trial;[5] and

(iv) a full explanation of the money provided by the USG to the Prosecution, including the amounts of money given and when; the purpose of the funds; how the funds were used; and who the OTP was accountable to in the distribution and use of the funds;[6]

on the basis that the USG Cables and Newspaper Article clearly indicate 1) the USG's desire to ensure that Mr. Taylor does not return to Liberia; and 2) proof that there is and have been contacts

[1] Noting that Justice Sebutinde has appended a declaration stating that she has voluntarily withdrawn herself from a decision on this Motion.
[2] SCSL-03-01-T-1143.
[3] Motion, paras 4-5, 22
[4] Motion, paras 4-5, 22.
[5] Motion, para. 22.
[6] Motion, para. 22.

between the Trial Chamber, the Office of the Prosecutor and the Registry, and agents of the USG outside the official lines of communication;[7] 3) the only way to remove any doubt about the independence and impartiality of the tribunal is to order the disclosure and/or the investigation into the identity of the sources within the Trial Chamber, Prosecution and Registry and the full nature of their relationship with the USG;[8]

NOTING the "Prosecution Response to Defence Motion for Disclosure and/or Investigation of United States Government Sources Within the Trial Chamber, the Prosecution and the Registry Based on Leaked USG Cables", filed on 20 January 2011 ("Response"),[9] wherein the Prosecution opposes the Motion and submits that it should be dismissed on the basis that;

(i) it is untimely and frivolous, appears to be a deliberate attempt to delay the proceedings, and rehearses the unfounded allegations made in the *Sesay et al.* case in relation to the Prosecution's link to the USG;[10]

(ii) the Cables do not provide any evidentiary basis or factual foundation for the allegations put forward by the Defence concerning any organ of the Court, and in fact clearly evidence the Court's impartiality and independence;[11]

NOTING ALSO the "Defence Reply to Prosecution Response to Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry Based on Leaked USG Cables", filed on 25 January 2011 ("Reply");[12]

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[7] Motion, para. 19.
[8] Motion, para. 21.
[9] SCSL-03-01-T-1164.
[10] Response, paras 4-6, citing *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay - Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2 May 2005 ("*Sesay* Decision").
[11] Response, paras 7-21.
[12] SCSL-03-01-T-1169.

COGNISANT of the provisions of Articles 13(1), 15(1) and 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rule 54 of the Rules of Procedure and Evidence ("Rules");

NOTING that two United States Government cables, one dated 10 March 2009 ("First USG Cable"),[13] and the other dated 15 April 2009 ("Second USG Cable"), were leaked through Wikileaks, an internet platform which allows anonymous disclosure of leaked information,[14] and published by the Guardian newspaper on 17 December 2010;[15]

NOTING that on 23 December 2010, an article was published in the New Democrat entitled "Sorry for the Leaks; Pres. Sirleaf Acknowledges US Ambassador's Apology";[16]

RECALLING that on 13 September 2010, the Trial Chamber ordered the Defence to file all remaining motions by 24 September 2010;[17]

CONSIDERING that, with respect to the Defence request for a full explanation of the funds provided by the USG to the Prosecution, the Defence relies on statements made by former Prosecutor David Crane in 2006 to the Subcommittee on Africa, Global Human Rights and International Operations of the United States House of Representatives' Committee on International Relations, a statement which is already in evidence in this case,[18] and which has already been used by the Defence in its opening statement and examination-in-chief of the Accused;[19]

HOLDING, therefore, that as the Defence has already had an opportunity to raise this issue prior to the deadline of 24 September 2010, and as this issue is unrelated to the recently leaked USG Cables,

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[13] Motion, Annex A.
[14] www.wikileaks.org.
[15] Motion, Annex B.
[16] Motion, Annex C.
[17] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 13 September 2010, p. 48323 ; Response, para. 5.
[18] Exhibit D-404-, p. 77.
[19] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 13 July 2009, p. 24290; Transcript 9 November 2009, pp. 31479- 31482.

this aspect of the Motion is untimely, but that it is in the interests of justice to consider the remainder of the Motion at this time;

NOTING that Article 13(1) of the Statute provides that:

> The judges shall be persons of high moral character, impartiality and integrity [. . .] They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or other source;

NOTING that Article 15(1) of the Statute provides *inter alia* that:

> The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or any other source;

NOTING that Rule 54 of the Rules provides that:

> At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial;

RECALLING that this Trial Chamber has previously held, in relation to Rule 54, that the "test for whether the Trial Chamber should issue an order under the Rule is whether to do so is necessary (not simply useful or convenient) for the purposes of an investigation or for the preparation or conduct of the trial";[20]

RECALLING that Trial Chamber I has held that, in order for a disclosure order to be granted in relation to a breach of Article 15(1), a party must establish a *prima facie* case that there has been such a breach,[21] and in so doing must determine, whether there is, at this point in time, any evidentiary basis or factual foundation to warrant a conclusive finding of fact that there has in law been such a breach;[22]

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[20] *Prosecutor v. Taylor*, SCSL-03-01-T-355, Decision on *Ex Parte* and Confidential Prosecution Motion for an Order to Provide to the Prosecution Non-Privileged Documents Recently Obtained from the Accused's Personal Archive, 5 November 2007, para. 10. See also *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-, Decision on Joint Defence Motion for General Orders Pursuant to Rule 54, 28 July 2005, para. 20.

[21] *Sesay* Decision, para. 43.

[22] *Sesay* Decision, para. 41.

CONSIDERING that with respect to a request for disclosure or an investigation in relation to a Judge or a member of the Trial Chamber, a party must specifically identify the information it seeks to have disclosed, and must make a *prima facie* showing that such information would demonstrate actual bias or the appearance of bias;[23]

CONSIDERING therefore that, in determining whether an order for disclosure and/or an investigation pursuant to Rule 54 is necessary, the Trial Chamber must determine whether a *prima facie* case has been established that there may have been interference with the independence and impartiality of the Court;

CONSIDERING that the First USG Cable does not indicate that the USG has any influence over any organs of the Court;

CONSIDERING moreover, that as the United States government raises concerns in this cable about the effect on the fragile peace in Liberia should Taylor be acquitted in The Hague or given a light sentence, it is clear that it does not have any influence over the final outcome of the trial;

CONSIDERING that while it is of concern to the Trial Chamber that the United States government may have received information from "contacts" in Chambers,[24] the Registry and the Prosecution, the Second USG Cable does not demonstrate whether these "contacts" have any relationship with the USG capable of interfering with the independence or impartiality of the Court or any organ of the Court;

CONSIDERING FURTHER that, as part of their official functions, the Registry and the Prosecution interact on a regular basis with government officials from a number of countries, and in

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[23] *Prosecutor v. Karemera, Ngirumpatse, and Nzirorera*, ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team, 5 May 2009, para. 11.

[24] The Trial Chamber notes that the cable does not specify whether the "Chamber contact" is in the Appeals Chamber or Trial Chamber, nor does it specify whether this contact is a judge or a staff member.

particular, with member states of the management committee, including the United States of America, about the progress of the trial, including "questions of efficiency" as provided for by Article 7 of the Agreement between the United Nations and the Government between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone,[25] which states that:

> It is the understanding of the Parties that interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee.

RECALLING that Trial Chamber I has held that that "mere evidence of the cooperation between the Prosecution and the FBI or the US Government, without proof that the former received instructions from the latter, including the nature and contents of such instructions, does not, per se, fulfill the test to establish a violation of Article 15(1) of the Statute";[26]

SATISFIED that, while the statements attributed to the sources within the Prosecution Registry, and Chambers in the Second USG Cable indicate that information may have been provided to the USG government by employees within the Court, the statements do not demonstrate that such sources were receiving instructions from the USG;

FINDING therefore that the Defence it has not shown any *prima facie* evidence that there has been interference with the independence and impartiality of the Court, and therefore has shown no evidentiary basis for either disclosure by, or an investigation of, any organ of the Court;

HEREBY DISMISSES THE MOTION.

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[25] 16 January 2002.

[26] *Sesay* Decision, para. 52.

Justice Sebutinde appends a declaration.

Done at The Hague, The Netherlands, this 28th day of January 2011.

Justice Teresa Doherty
Presiding Judge

Justice Richard Lussick

[Seal of the Special Court for Sierra Leone]

DECLARATION OF JUSTICE JULIA SEBUTINDE

1. For the reasons set out below, it is my considered opinion that it would be in the interests of justice for me to voluntarily withdraw myself from a decision on this Motion. The USG Code Cable contained in Annex B of the Motion involves a statement that un-named "sources in the Prosecution, Chambers and the Registry" of the Special Court allegedly made certain specific allegations against me.

2. In the Motion, the Defence requests an investigation into the contacts or sources in the Court who made these allegations. Indeed, the Defence has observed that "[t]he only sign of how seriously some members of this Court have taken the matter is through the personal response of Justice Julia Sebutinde to the allegations in one of the cables which impinge on her integrity, as reported in the media".[1]

3. I declare that while I am completely innocent of the allegations contained in the USG Code Cable and consider myself to be impartial and free of bias in relation to the issues at stake in this Motion, it is my considered view that in order for justice to be seen to be done, I should not participate in the deliberations or decision relating to this Motion.

4. Accordingly, I voluntarily withdraw from participating in the deliberations and the Decision on this Motion.

Done at The Hague, The Netherlands, this 26th day of January 2011.

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-1155, Public with Annex A Defence Motion Seeking Leave to Appeal the Decision on Defence Request for a Status Conference Pursuant to Rule 65*bis* and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 14 January 2011, para. 13.

1171)

SCSL-03-01-T
(32352-32358)

3235

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 27 January 2011

SPECIAL COURT FOR SIERRA LEONE
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27 JAN 2011
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PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON THE URGENT AND PUBLIC WITH ANNEXES A-C DEFENCE MOTION TO RE-OPEN ITS CASE IN ORDER TO SEEK ADMISSION OF DOCUMENTS RELATING TO THE RELATIONSHIP BETWEEN THE UNITED STATES GOVERNMENT AND THE PROSECUTION OF CHARLES TAYLOR

Office of the Prosecutor:
Brenda J. Hollis
Kathryn Howarth
Nicholas Koumjian

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

32353

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");[1]

SEISED of the "Urgent and Public with Annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship Between the United States Government and the Prosecution of Charles Taylor", filed on 10 January 2011 ("Motion"),[2] wherein the Defence seeks permission to re-open its case for the limited purpose of seeking admission of the following documents ("Defence Documents") into evidence pursuant to Rule 92*bis*:[3]

(a) marked portions of a United States Government ("USG") cable, dated 10 March 2009, which was leaked through Wikileaks and published by the Guardian newspaper ("Guardian") on 17 December 2010 ("First USG Cable");[4]

(b) the entirety of a USG cable, dated 15 April 2009, which was leaked through Wikileaks and published by the Guardian on 17 December 2010 ("Second USG Cable");[5]

(c) the first paragraph of an article from the New Democrat, a Liberian newspaper, entitled "Sorry for the Leaks; Pres. Sirleaf Acknowledges US Ambassador's Apology", dated 23 December 2010 ("Newspaper Article");[6]

on the basis that the Defence should be entitled to re-open its case for this limited purpose as:

(i) the evidence could not, with reasonable diligence, have been obtained and presented during its case in chief, as the cables are confidential and classified documents which were obtained by Wikileaks and published in the Guardian on 17 December 2010, five weeks after it had closed its case, and the publication of the Newspaper Article was in consequence of the leak and publication of the cables;[7]

(ii) the probative value of the cables is significant as the cables raise grave doubts about the independence and impartiality of the Special Court's prosecution of Charles Taylor;[8]

(iii) there would be limited delays to the trial proceedings if these documents are admitted;[9]

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[1] Noting that Justice Sebutinde has appended a declaration stating that she has voluntarily withdrawn herself from a decision on this Motion
[2] SCSL-03-01-T-1146.
[3] Motion, paras 3, 23.
[4] Motion, Annex A.
[5] Motion, Annex B.
[6] Motion, Annex C.
[7] Motion, para. 12.
[8] Motion, para. 13.
[9] Motion, para. 14.

and submits that the documents are admissible pursuant to Rule 92*bis* on the basis that:

(i) the documents are relevant as they support the Defence position that the prosecution of Mr. Taylor is political and his indictment was deliberately selective;[10]

(ii) the documents are susceptible of corroboration in due course, in regard to each other, and the evidence on record;[11]

(iii) the portions of the USG Cables and Newspaper Article sought to be admitted do not go to the acts and conduct of the Accused and;[12]

(iv) the information contained in the USG Cables are facts as reported by United States diplomatic personnel, as is the apology from the U.S. Ambassador to the Liberian President contained in the newspaper article, and they therefore do not constitute opinion evidence;[13]

NOTING the "Prosecution Response to Defence Motion to Re-Open its Case to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor", filed on 20 January 2011 ("Response"),[14] wherein the Prosecution opposes the Motion and submits that the Defence has failed to demonstrate the relevance of the Defence Documents,[15] on the basis that:

(i) the USG Cables refute, rather than support, the Defence allegations that the independence and impartiality of the Special Court is compromised by the involvement of the United States or any other government;[16]

(ii) the Newspaper Article has no relevance to this trial;[17]

(iii) there is nothing in any of the documents that provides any evidentiary basis for an argument that the Prosecution is in breach of its duty of independence under Article 15(1), or has sought or received instructions from the USG in relation to these proceedings;[18]

[10] Motion, paras 16-18.
[11] Motion, para. 19.
[12] Motion, para. 20.
[13] Motion, para. 21.
[14] SCSL-03-01-T-1163.
[15] Response, para. 5.
[16] Response, paras 6-8.
[17] Response, para. 11.
[18] Response, paras 9-10.

(iv) the Defence argument that the documents are relevant to the Defence theory of selective prosecution has no merit, as the Prosecution acted squarely within the bounds of its discretion pursuant to Article 1(1) of the Statute in bringing an Indictment against Charles Taylor as one of those who bears the "greatest responsibility";[19]

NOTING that the Prosecution further submits that the documents contain matters of opinion rather than matters of fact, and that they are therefore inadmissible under Rule 92*bis*;[20]

NOTING FURTHER that the Prosecution requests that should the Trial Chamber permit the Defence to re-open its case in order to admit the documents, the entire March 2009 cable should be admitted;[21]

NOTING ALSO the "Defence Reply to Prosecution Response to Defence Motion to Re-Open its Case to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor", filed on 25 January 2011 ("Reply");[22]

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 54, 92*bis* and 73(A) of the Rules of Procedure and Evidence ("Rules");

COGNISANT of the provisions of Rule 92*bis* which states:

> **Rule 92*bis*: Alternative Proof of Facts**
>
> (A) In addition to the provisions of Rule 92*ter*, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.
>
> (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
>
> (C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.

NOTING that the Appeals Chamber has ruled that the effect of Rule 92*bis* "is to permit the reception of 'information' - assertions of fact (but not opinion) made in documents or electronic communications - if such facts are relevant and their reliability is "susceptible of confirmation." This phraseology was chosen to make clear that proof of reliability is not a condition of admission: all that is required is that the information should be capable of corroboration in due course. It is for the trial chamber to decide whether the information comes in a form, or is of a kind, that is "susceptible of

[19] Response, paras 12-16.
[20] Response, para. 17.
[21] Response, para. 18.
[22] SCSL-03-01-T-1170.

confirmation". It follows, of course, from the fact that its reliability is "susceptible of confirmation", that it is also susceptible of being disproved, or so seriously called into question that the court will place no reliance upon it";[23]

RECALLING that the Trial Chamber has previously held that a party seeking to re-open a case must (i) meet the threshold test of establishing that the evidence could not, with reasonable diligence, have been obtained and presented during its case in chief, and (ii) if the first prong of the test is met, the party must demonstrate that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial;[24]

FINDING, given that (i) the Defence closed its case on 12 November 2010; (ii) the two USG Cables were published in the Guardian on 17 December 2010, and (iii) the Newspaper Article was published on 23 December 2010, that these documents could not, with reasonable diligence, have been obtained and presented by the Defence during its case-in-chief;

FINDING FURTHER that the admission of these documents will not have any bearing on the fairness of the trial since the Defence does not request the calling of any *viva voce* evidence and since either party may, if necessary, apply for leave to make supplementary submissions in relation to the documents;

FINDING ALSO, in relation to the admissibility of the documents, that:

(i) the two USG Code Cables can be related to submissions made by Defence Counsel as well as sworn evidence by the Accused and that they therefore meet the requirements of Rule 92*bis*(A) & (B) in that (i) they do not go to proof of the acts and conduct of the Accused, (ii) are relevant to the purpose for which they are submitted, and (iii) their reliability is susceptible of confirmation;

(ii) the First USG Code Cable should be admitted in its entirety in order to fully understand its context;

(iii) the Newspaper Article merely reports an apology by the US Ambassador to President Sirleaf and, as such, is not relevant to the present case and thus fails to satisfy the requirements of Rule 92*bis*;

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[23] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-AR73, Fofana - Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 16 May 2005, para. 26.

[24] *Prosecutor v. Taylor*, SCSL-03-01-T-993, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010, para. 8. *See also Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, 28 September 2006, para 17-18, 21.

3235

HEREBY ALLOWS the Motion in part; and

GRANTS leave to the Defence to re-open its case for the limited purpose of admitting the following documents into evidence pursuant to Rule 92*bis*:

(a) The United States Government ("USG") cable dated 10 March 2009, contained in Annex A of the Motion, is admitted into evidence as Defence Exhibit D-481;

(b) The USG cable dated 15 April 2009, contained in Annex B of the Motion, is admitted into evidence as Defence Exhibit D-482; and

DISMISSES the remainder of the Motion.

Justice Sebutinde appends a declaration.

Done at The Hague, The Netherlands, this 27th of January 2011.

Justice Teresa Doherty
Presiding Judge

Justice Richard Lussick

[Seal of the Special Court for Sierra Leone]

32358

DECLARATION OF JUSTICE JULIA SEBUTINDE

1. For the reasons set out below, it is my considered opinion that it would be in the interests of justice for me to voluntarily withdraw myself from a decision on this Motion. The USG Code Cable contained in Annex B of the Motion involves a statement that un-named "sources in the Prosecution, Chambers and the Registry" of the Special Court allegedly made certain specific allegations against me.

2. In the Motion, the Defence requests that this document be admitted into evidence pursuant to Rule 92bis of the Rules. Indeed, the Defence has observed that "[t]he only sign of how seriously some members of this Court have taken the matter is through the personal response of Justice Julia Sebutinde to the allegations in one of the cables which impinge on her integrity, as reported in the media".[1]

3. I declare that while I am completely innocent of the allegations contained in the USG Code Cable and consider myself to be impartial and free of bias in relation to the issues at stake in this Motion, it is my considered view that in order for justice to be seen to be done, I should not participate in the deliberations or decision relating to this Motion.

4. Accordingly, I voluntarily withdraw from participating in the deliberations and the Decision on this Motion.

Done at The Hague, The Netherlands, this 27th day of January 2011.

Julia Sebutinde

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-1155, Public with Annex A Defence Motion Seeking Leave to Appeal the Decision on Defence Request for a Status Conference Pursuant to Rule 65*bis* and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 14 January 2011, para. 13.

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1155)

SCSL-03-01-T
(31527 - 31543)

31527

THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 14 January 2011

Case No.: SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
THE HAGUE
14 JAN 2011
NAME ALHASSAN FORWAH
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TIME 16:30

THE PROSECUTOR
–v–
CHARLES GHANKAY TAYLOR

PUBLIC, WITH ANNEX A

DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON DEFENCE REQUEST FOR A STATUS CONFERENCE PURSUANT TO RULE 65*BIS* AND DEFENCE MOTION FOR STAY OF PROCEEDINGS PENDING RESOLUTION OF OUTSTANDING ISSUES

Office of the Prosecutor:
Ms. Brenda J. Hollis

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

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Annex A

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DAILY
MONITOR TRUTH EVERY DAY

URL: 691150 691150 - b5cpt3 - index.html -

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31543

NATIONAL

Sebutinde delaying Taylor trial, says US diplomat

By Talu Butagira (email the author <URL: javascript:void(0);>)
Posted Monday, December 20 2010 at 00:00

Kampala

A senior Ugandan judge has been accused by an American diplomat of delaying the ongoing trial of former Liberian President, Charles Taylor, in the Netherlands, and questioned her motive for slowing down the prosecution.

Justice Julia Sebutinde, speaking to this newspaper by phone yesterday, however, said the allegation contained in a diplomatic cable released by Julian Assange's whistleblower website, WikiLeaks, manifest "ignorance and racism" on the part of the author.

The April 15, 2009, dispatch from one Gallager and classified by Denise Manning, the legal counsellor at the American embassy in the Netherlands, summarises the UN Special Court for Sierra Leone's milestones, including "uncertainty in terms of timing, finances, and (trial) completion".

The diplomat, reportedly drawing from accounts offered by a contact at the court, wrote in the confidential report to Washington that "the Trial Chamber could have accelerated the court's work by excluding extraneous material and arguments".
"Moreover, contacts in Prosecution and Registry speculate that Justice [Julia] Sebutinde may have a timing agenda," the memo reads in part. "They think she, as the only African judge, wants to hold the gavel as presiding judge when the Trial Chamber announces the Taylor judgment."

The document says the delay is messing timing predictions yet the Court Registrar's budget showed the trial should have been concluded by October last year; judgment and sentencing expedited in April 2010, with October set as deadline for handling any appeal.

In yesterday's interview, Justice Sebutinde said the allegations against her are "odd and factually incorrect" since her colleague Richard Lussick, a Samoan, was the presiding Judge in 2009 when the memo was originated. "It's unjustified and I have no idea what the motivation (of the author) could be other than racism," she said, "Perhaps, since I am the only African Judge, some of these racists think it is easier to target the black one."

Together with Northern Ireland's Teresa Doherty, The Hague-based special court has three full-time judges. Senegalese Justice El Hadji Malick, designated as an alternate fourth judge, has no voting power and can, therefore, not practically influence the court's decision.

Justice Sebutinde, who took over as the court's rotational presiding judge on January 18, this year, said she is baffled by how she came to be singled out for attack for slowing Mr Taylor's trial yet "we take decisions on majority basis".
She said: "As a (trial) chamber, we are trying to run the trial in a fair and expeditious manner with due regard to fairness to both sides (prosecution and defence) and without bending to external pressures like those [contained in the diplomatic cable]."

It has emerged that the US, partly concerned about shrinking financing for the court, has quietly been nudging for a speedy conviction of Mr Taylor, 62. He is in the dock over eleven counts of unlawful killings, sexual violence, abductions and forced labour, conscripting child soldiers and terrorising civilians.
The war crimes, according to prosecution, were committed when Mr Taylor, a former warlord, backed the Revolutionary United Front rebel group in the neighbouring Sierra Leone.

An additional month for the court costs international financiers at least $1 nullion (Shs2.3b), according to details in the diplomatic cable. Justice Sebutinde suggested that Washington may be nervy that as an African, she may return favourable judgment for the former Liberian President. "My integrity speaks for itself," said the Lady Justice, remembered in Uganda for her no-nonsense handling of two separate inquiries into corruption in the country's police force and revenue body.

"I did not do such a thing [of delivering manipulated verdict] while a national judge, and why would I do so while in a high-profile position?" she asked.
Her current one-year tenure as presiding judge at the court ends on January 17, 2011, and she will hand over to Justice Doherty.

Mr Taylor, former leader of the National Patriotic Front of Liberia, was indicted in 2003, for allegedly arming and training Sierra Leone rebels. He is also accused of trafficking blood diamonds that fuelled and financed the fighting.
He denies all the charges.

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

31250

THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 10 January 2011

Case No.: SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
THE HAGUE
10 JAN 2011
NAME ALHASSAN FORNAH
SIGN
TIME 09:03

THE PROSECUTOR
–v–
CHARLES GHANKAY TAYLOR

URGENT AND PUBLIC WITH ANNEXES A-N

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

Office of the Prosecutor:
Ms. Brenda J. Hollis

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

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

Disclosure and/or Investigation

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

IV. ARGUMENT

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

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

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

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

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

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

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

V. CONCLUSION & RELIEF REQUESTED

22. Given the seemingly compromised impartiality and independence of the Special Court for Sierra Leone in light of its connection to the USG as alleged herein, the Trial Chamber must order disclosure and/or and investigation into the following:
    i. the identity of the source(s) within the Trial Chamber, Prosecution and Registry who provided the USG with the information in the Cables;
    ii. the full nature of the respective sources' relationship with the USG, specifically including an explanation of the context and circumstances in which each of the comments recorded in the Cables were made to representatives of the USG;
    iii. information tending to suggest that the Prosecution has sought or received instructions from the USG regarding any aspect of the Taylor trial; and
    iv. a full explanation of the money provided by the USG to the Prosecution, including the amounts of money given and when; the purpose of the funds; how the funds were used; and who the OTP was accountable to in the distribution and use of the funds.

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

Respectfully Submitted,

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

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Annex A

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guardian.co.uk

The US embassy cables:
The documents

US embassy cables: Rising concern about the Charles Taylor prosecution case

guardian.co.uk, Friday 17 December 2010 21.30 GMT

A larger | smaller

Tuesday, 10 March 2009, 12:51
C O N F I D E N T I A L SECTION 01 OF 02 MONROVIA 000188
SIPDIS
EO 12958 DECL: 03/10/2019
TAGS PREL, PGOV, UNSC, PHUM, KCRM, LI
SUBJECT: PRO-TAYLOR ELEMENTS STILL A FORCE TO BE RECKONED WITH
Classified By: Ambassador Linda Thomas-Greenfield for Reasons 1.4 (b) a nd (d).

Summary

A US ambassador warns that a cash shortfall could jeopardise the case against the former Sierra Leone president, stirring up old resentments in Sierra Leone and Liberia. Key passages highlighted in yellow.

1. (C) Summary: The recent remarks by Special Court for Sierra Leone prosecutor Stephen Rapp suggesting Charles Taylor may go free because of budgetary reasons caused alarm within the GOL and has emboldened Taylor supporters. Communication inside the Taylor camp remains intact, and those in leadership roles continue to be active and unrepentant. Should Taylor be acquitted in The Hague or given a light sentence, his return to Liberia could tip the balance in a fragile peace. *The international community must consider steps should Taylor not be sent to prison for a long time. We should look at the possibility of trying Taylor in the United States.* End Summary.

RAPP'S COMMENTS RAISE CONCERN WITHIN THE GOL

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2. (C) Chief Prosecutor Stephen Rapp's ill considered announcement in the press February 24 that Charles Taylor may walk free because of a supposed budget shortfall for the Special Court for Sierra Leone, where Taylor is presently on trial, made

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headlines in the local press, and raised anxiety here about Taylor's imminent return. The GOL was alarmed enough that President Sirleaf called Ambassador on February 28 to raise her concerns. Sirleaf pointed out that Liberia's stability remains fragile, and such remarks reverberated throughout the country, as people are still traumatized by Taylor and the war.

3. (C) The press accounts out of The Hague have also emboldened the pro-Taylor factions here, including his extended family members, financiers and National Patriotic Party (NPP) loyalists, raising their hopes that Taylor might be acquitted soon. Despite their rhetoric about "moving on," they have thus far refused to appear before the Truth and Reconciliation Commission (TRC) to account for their activities, and those on the UN Sanctions lists continue to request delisting on the basis they have done nothing wrong rather than demonstrating what they have done to provide restitution for their activities.

GOL TREADING CAREFULLY WITH TAYLOR FACTIONS

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4. (C) The government itself is caught in the middle. There is quite little the GOL can do legally to arrest, prosecute or freeze assets of those who were close to Taylor, even if the political will were there, which remains an open question. The TRC has recommended a domestic war crimes court be set up, but under statute an Independent National Commission on Human Rights (INHCR) would implement the recommendation, and the Legislature (some of whom had close ties to Taylor) has thus far failed to establish the INCHR. The Legislature has also refused to pass any law that would allow the GOL to freeze assets of those on the UN sanctions list, and the Supreme Court has ruled that any confiscation of property can be done only after a trial.

5. (C) The Accra Comprehensive Peace Agreement (CPA) of August 2003 that ended the 14-year civil war, did not require the NPP to disband and in fact permitted the NPP to participate in the transitional government and in the 2005 elections. The NPP now holds seven seats in the Legislature (which may be one reason the legislation is being blocked). As well, none of Taylor's properties have been seized by the government and they remain in good shape and remarkably free of squatters, as no one dares to take the risk of retribution.

COMMUNICATIONS AMONG TAYLOR SUPPORTERS REMAIN STRONG

---

6. (C) *The pro-Taylor forces still have the ability to organize themselves.* An NPP rally in December 2008 gathered a sizeable crowd, and Taylor supporters in June 2008 succeeded in preventing FBI investigators from entering Taylor's residence "White Flower" to obtain evidence for the Chucky Taylor trial in Florida. The most recent example was their effort on March 7 to disrupt the International Women's Colloquium. Taylor remains popular within many rural communities, especially in Bong, Lofa and Nimba counties, and is seen as someone who was able to unite Liberia's different ethnic groups. We also suspect there is some sympathy within the Americo-Liberian

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population who saw him as their deliverance from their losses following the 1979 coup. While we do not suggest they would want Taylor to return, we are sure that they do no want too many rocks to be turned over.

7. (C) Although we do not have any direct evidence to support the belief that pro-Taylor factions are behind much of the

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armed robbery on the premise that crime will keep the government weak and the country unstable, the GOL is certainly convinced of this, and has taken steps to counteract the threat. The most recent act was to put Taylor-era head of police Paul Mulbah into the LNP as an "advisor" that some accuse (and the government denies) was in order to placate the Taylor people in advance of the March 7-8 International Women's Colloquium. That the Taylor crowd can still motivate such a reaction in the government is a testament to their influence.

8. (C) Lines of communications within Taylor's faction, the National Patriotic Front of Liberia (NPFL) remain intact. To be sure, the disarmament of the factions following the CPA has been extremely successful, and we have thus far been unable to confirm the existence of any large weapons caches, despite the persistent rumors. But the reintegration of the ex-combatants is far from complete. Former NPFL commanders Roland Duo (the only senior Taylor supporter to have testified before the TRC), Christopher "General Mosquito" Vambo and Melvin Sogbandi (none of whom are on the sanctions lists) remain in contact with the ex-combatants, and would have the capability to organize an uprising or even criminal activity.

9. (C) Certainly, the same is true for the other factions, the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL). While apparently unarmed and not active in Liberia, we continue to receive reports that LURD is recruiting ex-combatants for militias in Guinea and MODEL is doing the same for Cote d'Ivoire.

THREAT OF TAYLOR'S RETURN ADVANCES THEIR CAUSE

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10. (C) XXXXXXXXXXXX

11. (C) The threat of a return of Taylor strengthens their hand and for now they see no need to give in at all. However, if Taylor is put away for a long time, the government may feel a bit bolder in recovering assets and bringing Taylor backers who committed war crimes to justice.

12. (C) The international community has just a few tools to pressure the Taylor people into accepting the new reality. The UN sanctions appear to have the intended effect of keeping them somewhat marginalized and fearful of further attempts to strip them of their ill-gotten gains. However, we have regularly heard of travel outside Liberia of those on the travel ban list without prior approval.

NEXT STEPS FOR THE INTERNATIONAL COMMUNITY

31265

13. (C) However, the best we can do for Liberia is to see to it that Taylor is put away for a long time and we cannot delay for the results of the present trial to consider next steps. All legal options should be studied to ensure that Taylor cannot return to destabilize Liberia. Building a case in the United States against Taylor for financial crimes such as wire fraud would probably be the best route. There may be other options, such as applying the new law criminalizing the use of child soldiers or terrorism statutes.

14. (C) The peace in Liberia remains fragile, and its only guarantee is the robust and adaptable UNMIL presence. The GOL does not have the ability to quell violence, monitor its borders or operate independently to fight crime. A free Taylor could tip the balance in the wrong direction. THOMAS-GREENFIELD

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Annex B

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The US embassy cables:
The documents

US embassy cables: The protracted case against Charles Taylor

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SUBJECT: SCSL'S TAYLOR TRIAL MEETS KEY MILESTONE, BUT SCSL STILL FACES SERIOUS HURDLES
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Classified By: Legal Counselor Denise G. Manning per reasons 1.5(b, d).

Summary
US officials wonder why a special court judge might be interested in slowing down the prosecution case against the former Sierra Leonean president. Key passages highlighted in yellow.

-- SUMMARY: SCSL MEETS A KEY MILESTONE, BUT FACES UNCERTAINTY IN TERMS OF TIMING, FINANCES, AND COMPLETION ISSUES --

1. (SBU) On February 27, 2009, the Special Court for Sierra Leone (SCSL or Court) took another step toward completing its work when the Prosecution rested its case against former Liberian President Charles Taylor -- the last SCSL case at the trial stage. The Court could potentially complete its work before the end of 2010. A number of open issues, however, may affect timing, including the start date and length of the Taylor Defense case. Timing may be particularly important given expected funding shortfalls and the possible loss of courtroom space this coming September. Additionally, the current Registrar, Herman von Hebel (Netherlands), has resigned effective June 1, and his successor will inherit a host of difficult issues and a complex transition during the final days of the Court,s operations.

--BACKGROUND: A SMALL COURT WITH SEVERAL FIRSTS --

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2. (U) A Trailblazing Court. The hybrid SCSL, created in 2002 through an agreement between the United Nations and the Government of Sierra Leone (GOSL) and funded entirely by voluntary contributions, has jurisdiction over those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone after November 30, 1996. Although established almost ten years after the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), the SCSL is poised to complete its work before these tribunals. The SCSL has also been the first internationalized criminal tribunal to: 1) issue an indictment for an African head of state (Liberian President Charles Taylor); 2) enter convictions for the crime of recruiting and using child soldiers; and 3) successfully prosecute forced marriage as a crime against humanity and intentional attacks on U.N. peacekeepers as a serious violation of international humanitarian law.

3. (U) Last Trial Standing. In 2003, the SCSL indicted Charles Taylor, the leader of the National Patriotic Front of Liberia from 1989 to 1997 and the President of Liberia from 1997 until the 2003 indictment. The indictment alleges Taylor,s deep involvement in the Sierra Leone conflict including his role in arming, training and acting in concert with the RUF and in trafficking the Sierra Leonean &blood diamonds8 that fueled and financed the fighting. The SCSL charged Taylor with eleven counts, including, inter alia, terrorizing the civilian population, unlawful killings, sexual violence, abductions and forced labor, and conscripting child soldiers.

))TIMING: TAYLOR TRIAL'S LINK TO CLOSING SCSL))

4. (SBU) Status of Trial. As the only ongoing SCSL trial, the Taylor trial is the linchpin to the SCSL completing its work. From April 6-9, 2009, the Court held the &judgment of acquittal8 hearing, with Defense arguing for acquittal on all of the charges. (Comment: In the &judgment of acquittal8 hearing, the Court considers whether Prosecution Qacquittal8 hearing, the Court considers whether Prosecution has presented any evidence that could sustain conviction on the charges, acquitting only if Prosecution has presented &no evidence8 to sustain the charge. End Comment.) In this hearing, Defense acknowledged that crimes had occurred in Sierra Leone but argued that the Prosecution had failed to 1) present evidence linking Taylor to those crimes and 2)establish that Taylor had been part of a joint criminal enterprise (JCE) because, if a JCE existed, it existed before November 30, 1996, the date at which the temporal jurisdiction of the SCSL begins. The Prosecution responded to these arguments by summarizing Taylor,s responsibility for the crimes and pointing to Taylor,s liability for JCE crimes committed after November 30, 1996, even if the planning of the JCE took place before that date. (Comment: The Court will most likely not issue its Rule 98 decision in April, especially since the Judges may recess through May. An acquittal does not seem likely. End Comment.)

5. (SBU) Next Up: Defense Case. A contact in the Registry has indicated that Defense will likely request three months to prepare for trial and four months to present its case. If the Court grants this request, the Defense case may start at the end of August. However, the same Registry source predicts that the Trial Chamber may order Defense

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to begin its case as early as June, working through July and August with a possible recess in September. One wild-card factor, however, is the Defense,s pending interlocutory appeal arguing that the Prosecution failed to properly plead the JCE theory of liability. The Trial Chamber may not schedule the Defense case before the appeals decision so the Defense knows which mode(s) of liability it must defend against. (Comment: Currently, the Registry,s budget milestone document projects an October 31 trial termination date, a March 2010 judgment, sentencing in April 2010, and the conclusion of appeals in October 2010. If, however, the Defense case starts in August, the timeline could be pushed back by approximately two months. End Comment.)

6. (U) Spill-Over Timing Effects. A delay in the timing for the Taylor trial may create additional challenges. First, the International Criminal Court (ICC), the location of the Taylor trial, has informed the SCSL that it will need its second courtroom as of September 2009. (The ICC scheduled its second trial to start September 24th, and will likely need the courtroom prior to September 24th for pre-trial work). Back-up options explored by the Registry include finding other space or working during gaps in the ICC schedule. Second, according to Registry sources, each additional month of trial time costs approximately one million dollars.

))THE JUDICIAL FACTOR))

7. (C) *Judges Slowing Things Down? Further muddying timing predictions, Court employees have intimated that the Trial Chamber could work more expeditiously.* The Taylor Chamber consists of three judges who take turns presiding: Justice Richard Lussick (Samoa), Justice Teresa Doherty (Northern Ireland) and Justice Julia Sebutinde (Uganda), along with an alternate judge, Justice El Hadji Malick Sow (Senegal). A couple of Court employees have grumbled that when the last Prosecution witness testified on January 30, 2009, the Court still had 11 outstanding motions, some over a year old. Additionally, one Chamber contact believes that the Trial Chamber could have accelerated the Court,s work by excluding extraneous material and arguments. Moreover, *contacts in Prosecution and Registry speculate that Justice Sebutinde may have a timing agenda. They think she, as the only African judge, wants to hold the gavel as presiding judge when the Trial Chamber announces the Taylor judgment. Reportedly, her next stint as presiding judge begins in January.*

8. (SBU) Expedited Appeals? The Appeals Chamber, with one empty seat, consists of President Renate Winter (Austria); Vice President Jon Kamanda (Sierra Leone); Justice George Gelaga King (Sierra Leone); and Justice Emmanuel Ayoola (Nigeria). President Winter reportedly has indicated that the Appeals Chamber intends to expedite any Taylor trial Qthe Appeals Chamber intends to expedite any Taylor trial appeals. Up for election in May, Winter may not, however, preside over the Appeals Chamber for any Taylor trial appeals, reportedly she will step down after the RUF appeal if she is not re-elected President.

))DEFENSE STRATEGY: WHO ME?))

9. (SBU) Drama-Bound Defense Case. A British Queen,s Counsel, Courtenay Griffiths, heads Charles Taylor,s top-notch and quick-tongued defense team, which reportedly

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finds itself in the midst of identifying and proofing witnesses. All signs indicate that Taylor himself will take the stand as their first witness possibly staying in the box for 6 to 8 weeks, and based on Defense,s actions to date, the Defense team will likely argue that although the crimes may have occurred, Taylor has no link to the crimes.

))AN IMMINENT BUDGET CRISIS))

10. (C) Funding Shortfall. The Registry fears that the Court will run out of money as early as next month, although an expected Canadian USD 6 million contribution would keep the Court financed until early July 2009. In a marathon campaign, Registrar Von Hebel attended 250 meetings in 15 months to drum up funds from potential donor countries, but with, according Von Hebel, little traction, due to donor fatigue, the difficult economic situation, and contributions going to other tribunals (e.g., the Special Tribunal for Lebanon (STL) or the Extraordinary Chambers in the Courts of Cambodia). Von Hebel wants to make another run at the Arab countries of Saudi Arabia, Qatar, Kuwait, and the United Arab Emirates. He also believes that a letter from U.N. Secretary General Ban Ki-Moon asking countries to contribute might help open wallets. According to Von Hebel, when Ban sent out a similar letter in 2007, a number of countries made first-time donations. In addition, a couple of traditional donor countries have advised him they may need a similar letter in order to donate this year.

11. (U) Cost-cutting Measures: Concerned about the looming financial crisis, the Registry has undertaken cost-saving measures, reducing staffing costs by downsizing, incorporating liquidation clauses in contracts, and encouraging The Hague staff to use leave during the break between prosecution and defense cases. The Registry also plans to hand over the Freetown facilities to the GOSL in July 2010, reserving some space for its own continued use. Finally, Registry may look to consolidate the Appeals Chamber and the Taylor trial operations in The Hague, after the Appeals Chamber finalizes the RUF appeal.

12. (SBU) Help from Washington. The Registry may also seek USG,s assistance on financial issues. First, it may press the USG not to reduce its FY2009 contribution by 2 million, but to stay at last year,s level of 9 million USD. (Comment: The extra sum would not solve the Court,s immediate financial problem, since the USG generally contributes in the fall. End Comment.) Second, the Registry may ask for USG political support in the form of demarches to Arab countries, impressing upon the targeted Arab countries the critical nature of the SCSL,s financial situation.

))COMPLETION HICCUPS AND ISSUES))

13. (SBU) Registrar Musical Chairs. On April 8, 2009, the Court announced Registrar von Hebel,s resignation, effective as of June 1, 2009. Von Hebel will assume the Deputy Registrar position at the newly established Hague-based STL. (According to Embassy contacts, STL offered Von Hebel the position at the insistence of and to placate the Dutch, who believe the Dutch ICTY Registrar had been treated unfairly when the ICTY President unexpectedly declined to renew his contract). Given that the STL Registrar Robin Vincent (U.K.) recently resigned, Von Hebel may eventually step into Vincent,s shoes. Von Hebel is also tying up as many SCSL loose ends as possible, including signing

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a sentence-enforcement agreement with the Government of Rwanda. In terms of a successor Registrar, a Registry contact believes that the current Deputy Registrar Binta Mansaray (Sierra Leone) will surface as a strong candidate.

))COMMENT: RESIDUAL ISSUES))

14. (SBU) A Larger Role for The Hague? Although currently headquartered in Freetown, Sierra Leone, the Registry has toyed with the possibility of locating any Residual Mechanism Qtoyed with the possibility of locating any Residual Mechanism) or parts thereof) in The Hague. For instance, Von Hebel believes that the Court may need to move its archives out of Sierra Leone in order to properly maintain and secure them. The City of The Hague has indicated its willingness to provide archiving facilities in connection with the ICTY,s closure. Some have also suggested combining some or part of the SCSL,s residual functions with those of The Hague-based ICTY and the Arusha-based ICTR. A combined residual mechanism might prevent duplication, but it would also face significant hurdles, given SCSL,s structural differences, e.g. funding, oversight mechanism and applicable legal framework. Furthermore, GOSL desires will be key, since a joint GOSL-UN agreement created the Court.

GALLAGHER

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SCSL-03-01-T
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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 17 December 2010

Case No.: SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
THE HAGUE
17 DEC 2010
NAME RACHEL IRURA
SIGN
TIME 12.50 HRS

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH ANNEXES A-H AND CONFIDENTIAL ANNEXES I-J

DEFENCE MOTION TO RECALL FOUR PROSECUTION WITNESSES AND TO HEAR EVIDENCE FROM THE CHIEF OF WVS REGARDING RELOCATION OF PROSECUTION WITNESSES

Office of the Prosecutor:
Ms. Brenda J. Hollis

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

I. INTRODUCTION

1. The Defence hereby seeks leave to recall four Prosecution witnesses regarding the issue of relocation. The Defence also seeks an order from the Trial Chamber to hear evidence from Saleem Vahidy, Chief of the Witnesses and Victims Section ("WVS"), pursuant to Rule 85(A). In light of new and compelling information, the Defence requests the Trial Chamber allow the Defence to reopen cross-examination of four Prosecution witnesses in relation to the circumstances of their recent or impending relocations and any impact any promise of relocation may have had on the truthfulness of their prior testimony. The Trial Chamber should order Mr. Vahidy to give evidence on this issue, as he is the officer of the court who has the best information pertaining to the circumstances surrounding the relocation of Prosecution witnesses.
2. The extent of the Prosecution's use of relocation (absent any genuine security risk) as an inducement for witness cooperation and/ or testimony and WVS's complicity in that process is becoming increasingly clear. The Defence believes that there was and is no genuine security risk or threat to these witnesses necessitating their relocation.[1] The Defence submits that the Prosecution promised witnesses that they would be relocated after their testimony and WVS and the Prosecution purposefully delayed relocating those witnesses until recently, the assumption being that the Defence would be unable to raise the issue at trial. Furthermore, the Registry is shielding the Prosecution by failing to disclose exculpatory material regarding relocation, despite repeated requests from the Defence.
3. Information pertaining to the relocation of these witnesses was not available to the Defence when they were cross-examined during the Prosecution's case, and the Registry has subsequently refused to disclose the information. The Defence has made the issue of improper inducements to prosecution witnesses, including unwarranted promises of relocation, a mainstay of cross-examination and argumentation. Consequently, this motif bears further interrogation in light of new evidence and unfolding circumstances.
4. The Defence proposes that the following Prosecution witnesses be recalled: TF1-371, TF1-375, Abu Keita (TF1-276) and Varmuyan Sherif (TF1-406). The Defence anticipates that additional cross-examination would take no more than two hours for each witness and not more than a full day would be required for the examination of Mr. Vahidy. The entire

[1] Statement of Prince Taylor, National Investigator [Confidential Annex J].

exercise could thus be concluded in less than a week (including any possible "re-examination" by the Prosecution).

5. Consequently, and in the interests of justice in the face of these compelling circumstances, the Defence requests that these Prosecution witnesses be recalled for further cross-examination and that Mr. Vahidy be ordered to appear and give evidence before the Trial Chamber.

II. Factual Background

6. TF1-371, TF1-375, Abu Keita and Varmuyan Sherif are all insider, linkage witnesses who testified during the Prosecution's case. Some of them were cross-examined regarding payments made to them by the Prosecution and, to some extent, expenses covered on their behalf by WVS.[2] In recent months, and as detailed in Confidential Annex J, the Defence has been informed by its investigator that these witnesses have been relocated post-testimony.

7. A summary of expenses relating to testifying prosecution witnesses was disclosed to the Defence by WVS in advance of each witness's testimony during the Prosecution's case. This was done as a matter of routine by WVS. However, and since closure of the Prosecution's case, the Defence has diligently sought information from WVS regarding any post-testimonial benefits provided by WVS to Prosecution witnesses to no avail. More specifically, Lead Defence Counsel wrote Mr. Vahidy on 26 January 2009, requesting disclosure (on a continuing basis) of WVS witness expenditures relating to, *inter alia*, school fees, relocation/ rent, food, money disbursed, health bills, mobile phones, etc., as well as an explanation thereof.[3] Given that there was no response by Mr. Vahidy, the Defence assumed that no relevant WVS expenditures had been made in those regards.

8. On 4 October 2010[4] and 26 October 2010[5], the Defence followed-up on its initial request to WVS. Mr. Vahidy then spoke informally to the Defence and stated that he could not and would not provide the requested information. The Defence subsequently sent Mr. Vahidy an

[2] See generally *Prosecutor v. Taylor*, SCSL-03-01-T, **Testimony of TF1-371,** 24, 25, 28-30 Jan 2008 and 1, 4 Feb 2008. See specifically **Testimony of TF1-375,** 22 Aug 08, p. 14334, 26 Aug 08, p. 14640-6 and 14649-73, 27 Aug 08, p. 14694-7, 28 Aug 08, p. 14870-1; **Testimony of Abu Keita**, 24 Jan 08, p. 2153-7; and **Testimony of Varmuyan Sherif**, 14 Jan 08, p. 1121-6, 1146-7, 1152-4, 1162-75 and 1193.
[3] Letter from Courtenay Griffiths, Q.C., to Saleem Vahidy, dated 26 January 2009 [Annex A].
[4] Email from Logan Hambrick to Saleem Vahidy, dated 4 October 2010 [Annex B].
[5] Email from Courtenay Griffiths, Q.C., to Saleem Vahidy, dated 26 October 2010 [Annex C].

email recapping the conversation and attempting to clarify and narrow down its request.[6] No response was received from Mr. Vahidy for the third time.

9. On 12 November 2010, the Defence brought the request and Mr. Vahidy's lack of response to the attention to the Registrar.[7] The Registrar responded on 17 November 2010 but stated that the Registry did not have a duty to disclose exculpatory information.[8] A further attempt by the Defence to clarify its request[9] was also rejected by the Registrar.[10] It is this set of circumstances, the interests of justice, and the fair trial rights of the Accused that impels this motion.

III. LEGAL PRINCIPLES

Recalling Witnesses

9. Rule 90(F)(i) of the Special Court Rules of Procedure and Evidence ("Rules") mandates that the Trial Chamber exercise control over the mode and order of interrogating witnesses and presenting evidence so as to make them "effective for the ascertainment of the truth."

10. Rule 85(A) sets out the general order for the presentation of evidence, stating that after evidence for the Prosecution, the Defence, and any of the Prosecution in rebuttal,[11] there may be evidence as ordered by the Trial Chamber.

11. While the Rules do not contain a specific provision for recalling a witness, the criteria has been previously been determined by this Trial Chamber. Leave to recall a witness should only be granted in the most compelling of circumstances.[12] The moving party must show good cause as to why the witnesses must be recalled, demonstrating "a substantial reason amounting in law to a legal excuse for failing to perform a required act."[13]

12. When determining whether to recall a witness, a Chamber of the Special Court must consider: (i) The purpose of the proposed testimony; (ii) The party's justification for not

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[6] Email from Logan Hambrick to Saleem Vahidy, dated 27 October 2010 [Annex D].
[7] Letter from Courtenay Griffiths, Q.C., to Binta Mansaray, dated 12 November 2010 [Annex E].
[8] Letter from Binta Mansaray to Courtenay Griffiths, Q.C.,, dated 17 November 2010 [Annex F].
[9] Letter from Courtenay Griffiths, Q.C., to Binta Mansaray, dated 22 November 2010 [Confidential Annex I].
[10] Letter from Binta Mansaray to Courtenay Griffiths, Q.C.,, dated 30 November 2010 [Annex G].
[11] The Rule requires leave of the Trial Chamber before evidence in rebuttal may be presented by the Prosecution.
[12] *Prosecutor v. Brima et al*, SCSL-04-16-T-425, Decision on Defence Motion for Leave to Recall Witness TF1-023, 25 October 2005 ("**AFRC Recall Decision**"), para. 16 (citing *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6).
[13] AFRC Recall Decision, para. 14.

offering the evidence when the witness originally testified; (iii) The right of the accused to be tried without undue delay; and (iv) Judicial economy.[14]

Interim and Ancillary Orders

13. The Trial Chamber has the general power to make any order necessary for the conduct of trial, pursuant to Rule 54.

Relocating Witnesses

14. Article 16(4)[15] of the Statute and Rule 34(A)[16] outline the functions of WVS, which operates under the authority of the Registry. The provisions envision that WVS will, *inter alia*, provide for the security of witnesses in consultation with the parties.

15. The possibility of the relocation of witnesses by WVS is arguably provided for by Article 16(4) and Rule 34(A)(ii) as part of a security arrangement or a long-term plan for a witness' protection and support. The Prosecution does not have the power to relocate *witnesses* (emphasis added). Rule 39(ii) only allows the Prosecution, as part of its investigative powers, to "take all measures deemed necessary [arguably including relocation] for the purpose of the investigation, including the taking of any special measures to provide for the safety, the support and the assistance of *potential witnesses and sources*" (emphasis added).

IV. SUBMISSIONS

This Request Does Not Constitute Reopening the Defence Case

16. The witnesses the Defence seeks to recall are Prosecution witnesses and the Defence merely wishes to cross-examine them on matters that have only come to light after they were first made available for cross-examination; accordingly, this does not constitute the re-opening of

[14] AFRC Recall Decision, para. 15.

[15] Article 16(4) states "The Registry shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of their testimony given by such witnesses. [...]".

[16] Rule 34(A) states "[...] in consultation with the Office of the Prosecutor, for Prosecution witnesses, and the Defence Office, for Defence witnesses, shall, amongst other things, perform the following functions with respect to all witnesses, victims who appear before the Special Court and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

i. Recommend to the Special Court the adoption of protective and security measures for them;
ii. Provide them with adequate protective measures and security arrangements and develop long- and short-term plans for their protection and support;
[...]."

the Defence case.[17] A similar circumstance arose at the ICTY after the close of the Accused Gvero's case when new information came to light, necessitating that the Accused file a motion to recall Prosecution witnesses for cross-examination on issues relating to the new information, and a further filing by the Accused requesting the re-opening of the Defence case to call new witnesses on issues relating to the new information.[18] Accordingly, the Defence at bar only seeks to recall the relevant Prosecution witnesses.

17. The Defence's request that Mr. Vahidy be ordered to appear and testify before the Trial Chamber, pursuant to Rule 85(A)(iv), is being made at the appropriate stage of the proceedings -- i.e., after the conclusion of the Defence case and/ or any Prosecution rebuttal evidence. The request naturally and necessarily flows from the request to recall the Prosecution witnesses because Mr. Vahidy's evidence would complement theirs and is necessary for completion and the ascertainment of the truth. The Defence intends to cross-examine Mr. Vahidy and its request that he be called does not transform him into a Defence witness, bearing in mind the provisions of Rule 85(A)(iv).[19]

Purpose of the Proposed Testimony

18. The purpose of the proposed testimony is to enable the Trial Chamber to more fully assess the credibility of these insider linkage witnesses, especially how the promise of relocation impacted the truthfulness of their testimony. Furthermore, the Trial Chamber would be better able to understand the Prosecution's *modus operandi* in relation to the recruitment and inducement of witnesses. Besides the attached declaration which suggests that these witnesses were promised relocation at a time when they faced no genuine security risk and

[17] *Prosecutor v. Karemera et al,* ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness BTH, 12 March 2008, para. 9 (stating, "As Witness BTH is a Prosecution witness his recall on the request of Joseph Nzirorera must be considered as a reopening of the cross-examination by the Defence").

[18] *Prosecutor v. Popovic et al,* IT-05-88-T, Motion on Behalf of Milan Gvero Seeking the Recall of Certain Prosecution Witnesses and the Re-opening of Milan Gvero's Case, 12 June 2009, para. 12. The Defence notes that the Motion was subsequently denied, but for substantive rather than procedural reasons, *Prosecutor v. Popovic et al,* IT-05-88-T, Partial Decision on Gvero Motion Seeking the Recall of Certain Prosecution Witnesses and the Reopening of the Case, 15 June 2009.

[19] The Defence wishes to be forthright from the start with its request that Mr. Vahidy be called to testify and be cross-examined. This is to be compared with, for example, the approach taken by the Prosecution in regard to Naomi Campbell, whom the Prosecution called as a prosecution witness during the re-opening of the Prosecution's case and then attempted to cross-examine her and classify her as "Court" witness. See *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 5 August 2010, p. 45512-4.

prior to testifying for the Prosecution, the affidavits of several potential Prosecution witnesses who were promised the same are worth noting at this juncture.[20]

19. The Defence appreciates that the Trial Chamber has previously determined that there is "nothing inappropriate in providing security measures to a potential witness where threats to his or her security exist"[21] and that "it is standard procedure to assure the witnesses that any fears will be taken seriously."[22] Likewise, the Defence is aware that relocation of a potential witness can properly be undertaken by the Prosecution pursuant to Rule 39(ii) and that relocation of a witness who is going to or has testified can properly be undertaken by WVS pursuant to Rule 34. However, the Defence strenuously rejects the proposition that the Prosecution can *promise* relocation (either by itself or by WVS) in exchange for a witness' testimony, where no proper security risk assessment has been done to establish that there is a genuine threat to the witness.[23] The Defence submits that the Trial Chamber must hear evidence in relation to such inducements because it impacts the credibility of at least these four Prosecution witnesses whose evidence is crucial to the credibility of the linkage evidence in this case.

20. Recalling a witness in relation to new evidence intended to impeach his credibility is an established practice.[24] Specifically, it is proper to recall a Prosecution witness for further cross-examination in regard to payments or inducements to him because the issue is "relevant and probative for assessing that witness's credibility".[25] In *Prosecutor v. Karemera et al.*, the Trial Chamber held that a Prosecution witness could be recalled and cross-examined about payments made to him "by the Tribunal" which were only disclosed

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[20] *Prosecutor v. Taylor*, SCSL-03-01-T-1090, Public with Confidential Annexes A-J and Public Annexes K-O, *Corrigendum to* Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 27 September 2010, Confidential Annexes C, D, F, and I. See also, *Prosecutor v. Taylor*, SCSL-03-01-T, **Testimony of Sam Kolleh**, 3 Nov 2010, p. 48608-9 and 9 Nov 2010, p. 49062-63.

[21] *Prosecutor v. Taylor*, SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 11 November 2010 ("**Contempt Decision**"), para. 78.

[22] Contempt Decision, para. 104. See also prior discussion of and findings regarding allegations of relocation pertaining to Abu Keita, Contempt Decision, paras. 122 to 127, but note that the Defence's challenges to these findings are currently certified on appeal in *Prosecutor v. Taylor*, SCSL-03-01-T-1134, Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 10 December 2010 ("**Contempt Appeal**"), paras. 21and 35.

[23] See, for example, further explanation of the Defence position in the Contempt Appeal, para. 42.

[24] *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Bagosora Request for Certification or Reconsideration Concerning Admission of School Documents, 9 May 2007, paras. 5, 7 (stating that considerations of fairness dictate that a witness be confronted with evidence intended to discredit them).

[25] *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witnesses ALG, AWD, G and T, 16 April 2009, para. 11.

to the Defence after his testimony had concluded, even where the Defence had generally cross-examined him on the basis of payments before.[26] Likewise, and notwithstanding that the Defence has generally cross-examined some of these four Prosecution witnesses in relation to inducements and payments, the Defence should be allowed to conduct further cross-examination on this point, since the issue of relocation has come to the attention of the Defence only after the conclusion of their evidence.

21. In *Karemera et al.*, an ICTR Trial Chamber determined that "[i]nformation concerning the nature of the benefits provided by the witness protection program and their duration could be relevant to the determination of the credibility of the Witness."[27] In *Prosecutor v. Martic*, an ICTY Trial Chamber found that witnesses' hope of relocation through the assistance of the Prosecution resulted in there being "significant doubt" as to the witnesses' credibility.[28] Thus, the question of inducements vis-à-vis the truthfulness of the witnesses' testimony has significant probative value and should be a matter on the record.

Good Cause: Relocation of these Witness Occurred after their Respective Testimony

22. The ICTR has defined the "good cause" which the Defence needs to demonstrate as being "a substantial reason amounting in law to a legal excuse for failing to perform a required act."[29] The Defence submits that "good cause" exists to recall the witnesses and to call Mr. Vahidy, given that the Defence is in possession of new information pertaining to the recent relocation of these witnesses and could not have obtained it before. Moreover, the Registry's intransigence has undoubtedly left the Defence with little choice than seeking the recall of these witnesses and the testimony of Mr. Vahidy at this time. In *Prosecutor v. Katanga and Ngudjolo*, an ICC Trial Chamber has ordered that a representative of the Registry appear in court and provide information regarding the amount of money spent on and for the

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[26] Id, para. 11.
[27] *Prosecutor v. Karemera et al*, ICTR-98-44-PT, Decision on Josephn Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005, para. 10.
[28] *Prosecutor v. Martic*, IT-95-11-T, Trial Judgement, 12 June 2007, paras. 36-38.
[29] *Prsoecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 2 ("***Bagosora* Decision to Recall OAB**"). See also, *Prosecutor v. Niyiramasuhuko et al*, ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY for Additional Cross-Examination, 3 March 2006, para. 32; *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Bagosora Defence Motion to Recall Witness Frank Claeys for Additional Cross Examination, 19 February 2007, para. 3; *Prosecutor v. Ndindliyimana et al*, ICTR-00-56-T, Decision on Defence Motion to Recall Witness AOE for Additional Cross Examination, 3 April 2007, para. 6.

protection of witnesses and intermediaries.[30] The Defence submits it is appropriate for the Trial Chamber to order the Registry to divulge such information to the parties and the Chamber at bar.

The Accused Does Not Consider Recalling these Witnesses Undue Delay

23. There is no concern on the part of the Accused regarding the time that further cross-examination of these witnesses will take. Indeed, the Accused is anxious that their testimony be heard in the interests of the truth. As this Trial Chamber logically noted in the AFRC Recall Decision, since it is the Defence that is making the application, "it must be taken to have accepted any delay that could result from such an application".[31]

Judicial Economy is a Secondary Concern given the Compelling Circumstances

24. The ICTR has previously determined that a Trial Chamber should consider whether the probative value of further cross-examination outweighs the prejudice caused by delaying the proceedings. The Defence does not wish to deplete the admittedly limited financial resources that are available to the Special Court[32] by bringing witnesses back to The Hague for further cross-examination. However, the testimony which the witnesses are likely to give is of significant probative value and is not cumulative in nature, and thus such expenditure must be made in this instance.[33]

25. Bearing in mind the need for judicial economy, the Defence intends to limit the scope of the additional cross-examination to the issue of relocation and any matters arising therefrom. Thus the estimated week of additional court time is not so long such that considerations of judicial economy should force the Trial Chamber to overlook an otherwise serious issue.

No Parties should be Permitted to Contact the Witnesses Prior to Cross-Examination

26. The Defence requests as an interim order that the Trial Chamber prohibit the parties and Mr. Vahidy from communicating (directly or indirectly) with the witnesses regarding the substance of their anticipated testimony upon being recalled. The Defence appreciates that WVS as a unit will have to liaise with the recall witnesses in order to process their travel

[30] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-173-Red-ENG WT, Trial Transcript (English, Redacted), 15 July 2010, p. 78 and *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-180-Red-ENG, Trial Transcript (English, Redacted), 30 August 2010, p. 3-17.
[31] AFRC Recall Decision, para. 19.
[32] See article, "The U.S. Provides $4.5 Million to Fund Special Court for Sierra Leone Trial of Charles Taylor", U.S. Department of State Office of the Spokesman, dated 23 November 2010 [Annex H].
[33] Note that in the ICTR, the Trial Chamber may only grant leave to recall witnesses if the evidence is of significant probative value and is not of a cumulative nature. See, for example, *Bagosora* Decision to Recall OAB, para. 2.

logistics, etc. However, the Defence requests that the Trial Chamber specifically order that Mr. Vahidy not be allowed to communicate or interact with the recalled witnesses at all, as he has a clear conflict of interest. This is a reasonable, practical, and necessary request, given the alleged malfeasance of the implicated parties. The Trial Chamber has the general power to issue such orders, pursuant to Rule 54. Furthermore, such no-contact orders have previously been made at the ICTR and ICTY for witnesses who are recalled.[34]

27. The Defence requests the Trial Chamber urgently order that the no-contact provision be put in place as an interim measure, pending the final outcome of the decision on this motion, in order to preserve the integrity of the witness' testimony.

V. Conclusion & Relief Requested

28. For all of the foregoing reasons, it is in the interests of justice that the Trial Chamber recall the four prosecution witnesses for further cross-examination on the limited issue of relocation and any issues arising, as well as call Mr. Vahidy to testify, given that his testimony would provide context to the circumstances surrounding the witness relocations. Refusal by the Trial Chamber to hear evidence relating to relocation of these witnesses would be a clear violation of the Accused's right to a fair trial under Article 17 of the Statute. The Defence requests that the Trial Chamber urgently issue an interim order that the parties and Mr. Vahidy not contact any of the recall witnesses before they appear in court, given the contentious nature of their anticipated evidence and the alleged malfeasance of one of the parties.

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 17th Day of December 2010
The Hague, The Netherlands

[34] *Prosecutor v. Ndindiliyimana et al*, ICTR-00-56-T, Decision on Ndindiliyimana's Motion to Recall Identified Prosecution Witnesses and to Call Additional Defence Witnesses, 4 December 2008, p. 9; *Prosecutor v. Delic*, IT-04-83-T, Decision on Defence Motion to Recall Witness, 4 April 2008, paras. 3 and 7 (finding that as the witness' "scheduled re-appearance before the Tribunal is tantamount to a continuation of his previous testimony in this case, the Tribunal is of the view that both the Prosecution and Defence should abide by that [no-contact] prohibition, the rationale of which is to avoid the risk of affecting or calling into question the integrity of the testimony").

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Prosecutor v. Taylor, SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 11 November 2010

Prosecutor v. Taylor, SCSL-03-01-T-1090, Public with Confidential Annexes A-J and Public Annexes K-O, *Corrigendum to* Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 27 September 2010

Prosecutor v. Brima et al.

Prosecutor v. Brima, Kamara, Kanu, SCSL-04-16-T-425, Decision on Defence Motion for Leave to Recall Witness TF1-023, 25 October 2005

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Prsoecutor v. Bagosora et al, ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005

http://www.ictrcaselaw.org/docs/doc68282.pdf

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http://www.ictrcaselaw.org/docs/20070509-dco-9841-02-en.pdf

Prosecutor v. Bagosora et al, ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004

http://www.ictrcaselaw.org/docs/doc57211.pdf

Prosecutor v. Karemera et al, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witnesses ALG, AWD, G and T, 16 April 2009

http://www.ictrcaselaw.org/docs/20090416-dco-9844-01-en.pdf

Prosecutor v. Karemera et al, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness BTH, 12 March 2008

http://www.ictrcaselaw.org/docs/20080312-dco-9844-01-en.pdf

Prosecutor v. Karemera et al, ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005

http://www.ictrcaselaw.org/docs/doc63711.pdf

Prosecutor v. Ndindiliyimana et al, ICTR-00-56-T, Decision on Ndindiliyimana's Motion to Recall Identified Prosecution Witnesses and to Call Additional Defence Witnesses, 4 December 2008

http://www.ictrcaselaw.org/docs/20081204-dco-0056-01-en.pdf

ICTY Jurisprudence

Prosecutor v. Delic, IT-04-83-T, Decision on Defence Motion to Recall Witness, 4 April 2008

http://icr.icty.org/exe/ZyNET.exe?ZyActionD=ZyDocument&Client=LegalRefE&Index=DecisionE&Query=&File=E%3A\Legal_Ref\BatchStore\Decision\English\ExportedText\0000000X\200016ALCR.txt&QField=DocumentId^2000254319&UseQField=DocumentId&FuzzyDegree=1&ImageQuality=r85g16%2Fr85g16%2Fx150y150g16%2Fi500&Display=hpfrw&DefSeekPage=f&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results+page&MaximumPages=1&ZyEntry=1&SeekPage=f&User=ANONYMOUS&Password=ANONYMOUS

Prosecutor v. Martic, IT-95-11-T, Trial Judgement, 12 June 2007

http://icr.icty.org/Exe/ZyNET.exe/2000161IEM.txt?ZyActionD=ZyDocument&Client=LegalRefE&Index=JudgementE&Docs=&Query=&Time=&EndTime=&SearchMethod=&TocRestrict=&Toc=&TocEntry=&QField=DocumentId^2000233294&QFieldYear=&QFieldMonth=&QFieldDay=&UseQField=DocumentId&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=E%3A\LEGAL_REF\BATCHSTORE\JUDGEMENT\ENGLISH\EXPORTEDTEXT\00000000\2000161IEM.txt&User=ANONYMOUS&Password=ANONYMOUS&SortMethod=&MaximumDocuments=0&FuzzyDegree=1&ImageQuality=r85g16/r85g16/x150y150g16/i500&Display=hpfrw&DefSeekPage=f&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=16

Prosecutor v. Popovic et al, IT-05-88-T, Motion on Behalf of Milan Gvero Seeking the Recall of Certain Prosecution Witnesses and the Re-opening of Milan Gvero's Case, 12 June 2009

http://icr.icty.org/LegalRef/CMSDocStore/Public/English/Motions/NotIndexable/IT-05-88/MOT7680R0000269652.pdf

Prosecutor v. Popovic et al, IT-05-88-T, Partial Decision on Gvero Motion Seeking the Recall of Certain Prosecution Witnesses and the Reopening of the Case, 15 June 2009

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ImageQuality=r85g16%2Fr85g16%2Fx150y150g16%2Fi500&Display=hpfrw&DefSeekPage=f&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results+page&MaximumPages=1&ZyEntry=1&SeekPage=f&User=ANONYMOUS&Password=ANONYMOUS

ICC Proceedings

Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-T-173-Red-ENG WT, Trial Transcript (English, Redacted), 15 July 2010

http://www.icc-cpi.int/iccdocs/doc/doc924796.pdf

Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-T-180-Red-ENG, Trial Transcript (English, Redacted), 30 August 2010

http://www.icc-cpi.int/iccdocs/doc/doc939621.pdf

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Annex A

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SPECIAL COURT FOR SIERRA LEONE
DEFENCE FOR CHARLES TAYLOR
The Hague Sub-Office, Binckhorstlaan 400
2516 BL The Hague, The Netherlands
Telephone: +31 70 515 9744; Facsimile: +31 70 322 2711
E-mail: Courtenay Griffiths, Q.C. (Lead Counsel): cgxqc@btinternet.com;
Salla Moilanen (Case Manager) moilanens@un.org

26 January 2009

Mr. Saleem Vahidy
Chief, Witness and Victims Section

RE: Post-Testimony WVS Witness Payments and Benefits

Dear Saleem,

The Defence would like to know if any post-testimony benefits (money, food, relocation/rent, school fees, health bills, top up cards, mobile phones, etc) have been given to any of the witnesses (or their families) who have already testified in *Prosecutor v. Taylor* at The Hague. The Defence would further like to know if any post-testimony benefits have been promised to past and/or future witnesses.

As the Defence believe the issue of witness payments and benefits affects the credibility of the witnesses' evidence, and thus has a bearing on the Accused's right to a fair trial under Article 17 of the Special Court Statute, the Defence and the Court should have access to this information, which falls under Rule 68.

If any such post-testimony payments or benefits have been or will be given to witnesses by the Witness and Victims Section, the Defence request a copy of the date, amount, and purpose of the payment or benefit given. The Defence request this Rule 68 information on a continuing basis.

We appreciate the cooperation WVS showed throughout the past year as regards the disclosure of witness expenses for upcoming witnesses, and we look forward to your continued cooperation in regard to disclosure of post-testimony witness expenses.

Kind Regards,

Courtenay Griffiths, QC

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Annex B

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Gmail by Google

Logan Hambrick <logan.hambrick@gmail.com>

Update on Witness Expenses for Prosecution Witnesses Who Testified

Logan Hambrick <[redacted]>
To: Saleem Vahidy <[redacted]>
Cc: Courtenay Griffiths <[redacted]>, Silas Chekera <[redacted]>, Salla Moilanen <[redacted]>

Mon, Oct 4, 2010 at 6:03 PM

Dear Saleem --

You will remember that in January 2009 (letter attached) we asked for an accounting of expenses paid to or on behalf of Prosecution witnesses by WVS. Could you please send us an update account in this regard?

Also, could you tell us two specifics:

-- whether WVS has, or is in the process of relocating Abu Keita?
-- whether WVS has rented or bought a house for Varmuyan Sheriff in Kenema or thereabout?

Courtenay has asked me to obtain these records as a matter of urgency, as they are related to various issues before the Trial Chamber.

Kind Regards,
Logan

--
Logan Christi Hambrick
Taylor Defence - Legal Assistant
Special Court for Sierra Leone
The Hague: [redacted]

090126 Letter to WVS Re Witness Payments and Benefits.PDF
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Annex C

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Gmail by Google

Logan Hambrick <logan.hambrick@gmail.com>

Witness Expenses

C GRIFFITHS <cgxqc@btopenworld.com>
To: Saleem Vahidy <vahidy@un.org>
Cc: Logan C Hambrick <logan.hambrick@gmail.com>

Tue, Oct 26, 20

Dear Saleem,

Logan wrote to you some weeks ago regarding witness expenses. We are still awaiting a response be grateful if you ccould attend to this matter urgently.

We would be happy to re-forward the letter.

Courtenay Griffiths Q.C.

Lead Counsel

Confidentiality Notice: E-mail may be intercepted between the se
and the receiver and is therefore neither secure nor confidentia
Your continued use of e-mail communication confirms that you acc
this risk. If this is an urgent matter, please contact me at the
phone number provided. This e-mail, including any attachments, i
the sole use of the intended recipient(s)and may contain private
confidential, and privileged information. Any unauthorized revie
use, disclosure or distribution is prohibited. If you are not th
intended recipient or this information has been inappropriately
forwarded to you, please contact the sender by reply e-mail and
destroy all copies of the original.

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Annex D

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Gmail by Google

Logan Hambrick <logan.hambrick@gmail.com>

Update on Witness Expenses for Prosecution Witnesses Who Testified

Logan Hambrick <logan.hambrick@gmail.com>
To: Saleem Vahidy <vahidy@un.org>
Cc: Courtenay Griffiths <cgxqc@btinternet.com>, Silas Chekera [redacted], Salla Moilanen [redacted], Terry Munyard <terrymunyard@googlemail.com>, Morris Anyah <mazumaany@yahoo.com>
Wed, Oct 27, 2010 at 6:06 PM

Dear Saleem --

Following our conversation, can I now make our request more specific in order to assist you to comply with it.

Our primary concern is in relation to linkage witnesses. I will send you a list of their TF1 numbers and names in a separate email. Thus, we are talking about records of approximately 40 witnesses of the 94 witnesses that traveled to give live evidence.

We are not asking for records of money WVS spent in terms of DSA or travel expenses to bring these witnesses to The Hague. We are only asking for money spent on behalf of or given to witnesses *after they testified*, such as: school fees, medical bills, job packages, rent/housing allowances, security allowances and relocation, etc. We also need to know who requested that such money be paid or such benefits be provided.

We are not asking for disclosure of confidential information such as the name of the country where a person was relocated to, or the type of medical ailment for which a person needed treatment.

It is our position that you have a duty to disclose this information as it is potentially exculpatory.

You have just indicated to Terry and I that by tonight you could at least tell us whether you are willing to provide the requested information, and so we await your response. If we do not hear anything from you by the end of the day tomorrow (Thursday) we will assume you are not willing to comply with our request. If you are willing to comply, could you please indicate a date by which we could expect the requested information.

Best,
Logan

[Quoted text hidden]

090126 Letter to WVS Re Witness Payments and Benefits.PDF
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Annex E

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SPECIAL COURT FOR SIERRA LEONE
DEFENCE FOR CHARLES TAYLOR
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Salla Moilanen (Case Manager) moilanens@un.org

By email

12 November 2010

Ms Binta Mansaray
Registrar
Special Court for Sierra Leone
Freetown

RE: Disclosure of Post-Testimony Benefits and Relocation Facilitated by the Registry's Witnesses and Victims Section in respect of Prosecution Witnesses

Dear Ms Mansaray,

Since January 2009, the Defence has requested from Saleem Vahidy, Chief of WVS, records of payments and benefits and relocation packages provided to Prosecution witnesses upon conclusion of their testimony.[1] No information has been forthcoming. The Defence has recently followed-up on this request in person and via email, and Mr Vahidy has stated that he will not provide the requested information.[2] Mr Munyard brought the issue to the attention of the Deputy-Registrar Fidelma Donlon during her recent mission to The Hague Sub-Office, but still the Defence has not received the requested information.

I bring this to your attention at this point, because if the issue is not soon and satisfactorily resolved, I will have no choice but to ask the Trial Chamber to compel disclosure. The Witnesses and Victims Section is set up by the Registry pursuant to Rule 34(A) and the Registry generally has an obligation to assist the parties in the performance of their functions pursuant to Rule 33(A). Part of the Defence's functions is to test the credibility of Prosecution witnesses, whose credibility can be affected by the provision of benefits which go beyond those reasonably required for their maintenance.

[1] Letter from Courtenay Griffiths, QC to Saleem Vahidy, dated 26 January 2009 [Enclosure A].
[2] Email from Logan Hambrick to Saleem Vahidy, dated 4 October 2010 [Enclosure B]; Email from Courtenay Griffiths, QC to Saleem Vahidy, dated 26 October 2010 [Enclosure C]; Email from Logan Hambrick to Saleem Vahidy [Enclosure D].

Could you please indicate if and when the requested material will be provided to the Defence.

Kind Regards,

Courtenay Griffiths, QC
Lead Counsel for Charles G. Taylor

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Annex F

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SPECIAL COURT FOR SIERRA LEONE
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FAX: +232 22 297001 or UN Intermission: 178 7001

Ref/REG/639, 2010/SG

17 November 2010

Courtenay Griffiths, QC
Lead Counsel, Taylor Defence Team

Re: Defence Request for Disclosure of Post-Testimony Benefits and Relocation Facilitated by the Registry's Witnesses and Victims Section (WVS) in respect of Prosecution Witnesses

Dear Mr. Griffiths,

I am in receipt of your letter dated 12 November 2010 requesting records of alleged payments of post – testimony benefits and relocation packages provided to Prosecution witnesses upon conclusion of their testimony together with accompanying enclosures.

With reference to Enclosure A – your letter addressed to the Chief of the Witness and Victims Section dated 26 January 2009 – there are two important points I wish to clarify. Firstly, you refer to Rule 68 of the Rules of Procedure and Evidence entitled "Disclosure of Exculpatory Evidence". However, Rule 68 explicitly regulates the disclosure obligations of the Prosecutor, not the Registrar, concerning exculpatory material. Therefore, please note that the Registrar is under no obligation to disclose information under Rule 68.

Secondly, the Witness and Victims Section does not pay what you refer to as "post-testimony benefits" to Defence or Prosecution witnesses. The payment of allowances to Defence and Prosecution witnesses is guided by the Court's obligation to ensure the welfare of the witnesses in accordance with Rule 34 (A) (ii) and (iii) and the applicable *Practice Direction on Allowances for Witnesses and Expert Witnesses Testifying in The Hague* of 8 June 2007.

Concerning your request for information regarding the relocation of Prosecution witnesses please note that the Registry as a matter of policy does not disclose information in relation to relocation measures and/or security arrangements set in place for Defence and Prosecution witnesses should such measures be deemed necessary following a threat assessment conducted by the Witness and Victims Section. As you know, the Registrar is obliged by Rule and Statute to provide long-and short-term plans for the protection and support of witnesses. Therefore, you will appreciate that the information related to the care and protection of both Defence and Prosecution witnesses by the Court, following threat assessments conducted by WVS, must be kept strictly confidential and restricted and, as such, will not be shared with the opposing party in order to avoid compromising the security of these witnesses.

Sincerely,

Binta Mansaray
Registrar
Special Court for Sierra Leone

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Annex G

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SPECIAL COURT FOR SIERRA LEONE
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FAX: +232 22 297001 or UN Intermission 178 7001

Ref/REG/662/2010/SG

30 November 2010

Courtenay Griffiths, QC
Lead Counsel, Taylor Defence Team

Re: Registrar Response to Defence Reply to Letter Denying Defence Request for Disclosure of Post-Testimony Benefits and Relocation Facilitated by the Registry's Witnesses and Victims Section (WVS) in respect of Prosecution Witnesses

Dear Mr. Griffiths,

I am in receipt of your letter dated 22 November 2010 which elaborates on your 12 November 2010 request for information regarding the relocation of Prosecution witnesses and alleged payments of post-testimony benefits.

In my letter dated 17 November 2010 I advised you that payment of allowances to Defense and Prosecution witnesses is guided by the Court's obligation to ensure the welfare of witnesses in accordance with Article 16 of the Special Court Statute, Rule 34 (A) (ii) and (iii) and the applicable *Practice Direction on Allowances for Witnesses and Expert Witnesses Testifying in The Hague* of 8 June 2007.

With reference to your request for information regarding the relocation of Prosecution witnesses, as I indicated in my previous letter the Registry does not disclose information in relation to relocation measures and/or security arrangements set in place for Defense and Prosecution witnesses should measures be deemed necessary following a threat assessment conducted by the Witness and Victims Section. This includes all confidential information related to agreements with Governments, the continent of relocation and the timing of relocation. Under Rule 34 (A) (ii) of the Rules of Procedure and Evidence the Witness and Victims Section is obliged to provide witnesses with "adequate protective measures and security arrangements and develop long- and short-term plans for their protection and support." To fulfill the obligations set forth in the Special Court's Statute and Rules of Procedure and Evidence and to ensure both the short- and long-term wellbeing of witnesses the Registry does not divulge information related to relocations.

Sincerely,

Binta Mansaray
Registrar
Special Court for Sierra Leone

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Annex H

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The U.S. Provides $4.5 Million to Fund Special Court for Sierra Leone Trial of Charles Taylor

Office of the Spokesman
Washington, DC
November 23, 2010

On November 22 the Department of State released a $4.5 million grant for FY2011 to the Special Court of Sierra Leone. This grant demonstrates the U.S. commitment to ensuring that those most responsible for the atrocities committed during the war in Sierra Leone are brought to justice. This grant was expedited due to the financial crisis the Court is currently facing. By all calculations, the Court would have run out of money by early December which could have jeopardized the continuation of the Charles Taylor trial before the Court reached a verdict.

The Special Court for Sierra Leone was set up jointly by the Government of Sierra Leone and the United Nations. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.

The SCSL indicted former Liberian President Charles Taylor and 12 others for war crimes and crimes against humanity in 2003, due to their involvement in and support of some of the worst atrocities in Sierra Leone's civil war. The trials of three former leaders of the Armed Forces Revolutionary Council (AFRC), of two members of the Civil Defense Forces (CDF) and three former leaders of the Revolutionary United Front (RUF) have been completed, including appeals, leaving only the trial of Charles Taylor (two indictees died before the trial stage).

On June 16, 2006, the trial of Charles Taylor was transferred to The Hague because Taylor's continued presence and trial in Freetown represented an impediment to stability in the sub-region, a threat to the peace of Liberia and Sierra Leone, and a threat to international peace and security in the region. The trial of Charles Taylor is close to completion; the defense evidence concluded on November 12 and a trial judgment is due in mid-2011 with an appeal to be resolved by early 2012.

The trial of Charles Taylor is of enormous historical and legal significance as he is the first African head of state to be brought before an international tribunal to face charges for mass atrocities and gross violations of international humanitarian law. The Taylor prosecution delivers a strong message to all perpetrators of atrocities, including those in positions of power that they will be held accountable. It is imperative the international community prevents the Taylor trial from being suspended due to lack of financial resources, which is why the United States rushed its FY2011 contribution to the Court. We hope other donor states will follow our lead and find ways to financially support the Court until it has finished its mandate and justice has been served.

As a major donor to the Special Court, the United States serves on the Special Court's Management Committee in New York. To date, the United States has contributed $81,189,445 amount to the Special Court.

PRN: 2010/1694

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SPECIAL COURT FOR SIERRA LEONE
DOKTER VAN DER STAMSTRAAT 1 • 2265 BC LEIDSCHENDAM • THE NETHERLANDS

PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
Case Number: **SCSL-03-01-T**
Document Index Number: **1142**
Document Date: **17 December 2010**
Filing Date: **17 December 2010**
Document Type: **Motion**
Number of Pages: **6** Number from: **31244 - 31249**
☒ **Application**
☐ Order
☐ Indictment
☐ Other
☐ Response
☐ Correspondence

Document Title:

Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS regarding Relocation of Prosecution Witnesses

Name of Officer:

Rachel Irura

Signed:

544

1118)

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

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
THE HAGUE
12 NOV 2010
NAME ALHASSAN FORNAH
SIGN
TIME 09:00

PROSECUTOR

v.

Charles Ghankay TAYLOR

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

Office of the Prosecutor:
Brenda J. Hollis
Leigh Lawrie

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

40. The Trial Chamber notes that the Prosecution has disclosed all payments made to witnesses to the Defence and that the Defence cross-examined those witnesses during the course of the trial.[60] As outlined above,[61] the issue raised does not fall within the ambit of Rule 77 as such. It is instead a question of discretionary payments and a possible abuse of that discretion under Rule 39(ii) in that the payments might not have been necessary for the safety, support or assistance of the potential witnesses and sources. The alleged abuse of any discretion under Rule 39(ii) will however only be considered at the stage of final deliberations, taking into account the evidence adduced and the cross-examination of the witnesses in question. It is not a matter that falls within the ambit of Rule 77.

3) Allegations relating to DCT-192

41. The Defence submits that during the course of questioning DCT-192, Prosecution Investigator Gilbert Morissette physically assaulted DCT-192, a suspect and/or potential witness, in order to elicit his cooperation and confession.[62] It cites in support of this allegation a signed statement of Logan Hambrick, Legal Assistant to the Defence, and an excerpt of Prosecution interview transcripts with Witness DCT-192.[63]

42. In her statement, Hambrick declares that during a proofing session with DCT-192 in 2010, the latter told her that he was taken from the Pademba Road Prison in Freetown in November 2002 where he was being held on charges of subversion, to meet with Prosecution investigators; that during this meeting Morissette accused him of giving an answer that was not "good enough",[64] grew angry and slapped him in the presence of other investigators; that following this interview, the Prosecution continued to solicit his cooperation and suggested that they would not indict him if he would agree to testify against Chief Sam Hinga Norman; that upon his release from Pademba Road, a member of the Sierra Leonean Police who worked for the Prosecution, Tamba Mbeki, made sure he had "clearance" to continue his subversive activities as an operative for LURD; and that "ultimately, due to these benefits and threats, [he] felt pressured to cooperate with the Prosecution and provide them with information, even though he refused to testify against Norman."[65] The 10 pages of interview

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[60] See only Defence references in Annex N.
[61] See para. 28 supra.
[62] Motion, para. 15.
[63] Motion, Confidential Annex B.
[64] Motion, Confidential Annex B, para. g.
[65] Motion, Confidential Annex B, para. l.

evidence against Taylor and that they would grant him protection, including relocation. He stated that he gave the Prosecution information on diamond for arms transactions between Taylor and the RUF as well as the political climate in the region, but that he could not vouch for "its entire accuracy." He also stated that he recommended other persons for the Prosecution to speak to.

110. The Trial Chamber notes that the allegations date back to 2005 and 2006. The Trial Chamber therefore finds that there was undue delay in bringing the allegations to the Trial Chamber's attention. The Trial Chamber has already dismissed the Prosecution's submission that DCT-097 was not one of its witnesses, and found that the "evidence strongly suggests that for all intents and purposes [DCT-097] was a potential Prosecution witness."[164] The Trial Chamber notes that the documentation of payments indicates amounts including $ 4,700 provided to the witness for a reason that was redacted by the Prosecution; $ 6,180 for lodging and expenses for the witness and his family as well as smaller instalment amounts ranging from hundreds to thousands of dollars for communication, transportation, meals, subsistence and expenses relating to a trip to Ghana.[165] The Trial Chamber finds that the Defence has not demonstrated how these allegations relate to charges of contempt. There is no indication that the payments were not necessary; rather, both DCT-097 and the Prosecution have provided legitimate reasons for these payments and the Trial Chamber finds that such payments fall within the discretion of the Prosecution pursuant to Rule 39(ii).

111. Further, the Trial Chamber finds that the evidence presented by the Defence does not suggest that the payments were made in exchange for DCT-097's testimony. Rather, the Trial Chamber finds that DCT-097 was exploiting the Prosecution to the point of giving them false information. Given these facts, the Trial Chamber finds no reason to believe that the Prosecution may have knowingly and wilfully interfered with the administration of justice. The Trial Chamber notes that DCT-097 received a total amount of $ 40,441.37 from the Prosecution.[166] The Prosecution explained that these were discretionary payments pursuant to Rule 39(ii). The Trial Chamber finds that the Defence has not demonstrated how this discretion pursuant to Rule 39(ii) has been abused or in which way the payments can be considered as exorbitant. Further, the Trial Chamber finds that the Defence has not demonstrated how the conduct of the Prosecution prevents the Defence from calling DCT-097. The

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[164] See *Prosecutor v. Taylor*, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097, 23 September 2010, para. 10.
[165] Motion, Annex M.
[166] Motion, Annex N, which is based on Prosecution disclosure of payments made to DCT-097.

Trial Chamber accordingly finds that the allegations are not sufficiently credible to provide it with reason to believe that a member of the Prosecution knowingly and wilfully interfered with the administration of justice in the present case.

112. In relation to the Defence allegations of other improper inducements, the Trial Chamber considers that the Prosecution has a legitimate interest in discussing matters relating to witness protection with potential witnesses, including matters relating to relocation. It finds that there nothing to give the Trial Chamber reason to believe that such protective measures were extended to DCT-097 with the intent of interfering with the administration of justice. The Trial Chamber notes further that DCT-097 was not called as a Prosecution witness in this case and that, therefore, there is no link between the allegedly improper inducements and the Prosecution's case against the Accused, nor DCT-097's failure to testify for the Defence. The Trial Chamber accordingly finds that the allegations are not sufficiently credible to provide it with reason to believe that a member of the Prosecution knowingly and wilfully interfered with the administration of justice in the present case.

8) Allegations relating to DCT-032

a) Gifts of money

113. The Defence alleges that the Prosecution offered or made payments or inducements to witnesses, potential witness or sources in order to elicit their assistance, cooperation or evidence. It alleges that the Prosecution approached DCT-032 with gifts of money before ever having a substantive conversation with him.[167] The Defence cites in support of this allegation the affidavit of DCT-032.[168]

114. The Prosecution submits that DCT-032 acted as a source for the Prosecution, was never listed as a witness, never given a TFI number nor given protective measures.[169] The Prosecution also submits that DCT-032 is an admitted liar[170] and cites his affidavit wherein he admits to having made up a story relating to the death of Johnny Paul Koroma and knowingly showing a false grave to

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[167] Motion, para. 26.
[168] Motion, Confidential Annex G.
[169] Response, Confidential Annex 5.
[170] Response, para. 11.

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SCSL-03-01-T
(30725 - 30743)

30725

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Julia Sebutinde, Presiding Judge Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate Judge
Registrar:	Binta Mansaray
Case No.:	SCSL-03-1-T
Date:	20 October 2010

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC WITH CONFIDENTIAL ANNEXES A-D DEFENCE MOTION FOR DISCLOSURE OF EXCULPATORY INFORMATION RELATING TO DCT-032

Office of the Prosecutor:
Brenda J. Hollis
Leigh Lawrie
Nathan Quick

Defence Counsel for Charles G. Taylor:
Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Silas Chekera
James Supuwood

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

SEISED of the "Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032", filed on 24 September 2010" ("Motion");[1]

NOTING the "Prosecution Response to 'Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032'", filed on 1 October 2010 ("Response");[2]

NOTING ALSO the "Public with Confidential Annex A Defence Reply to Prosecution Response to Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032" filed on 5 October 2010 ("Reply");[3]

COGNISANT of the provisions of Article 17(4) of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 66, 68 and 73(A) of the Rules of Procedure and Evidence ("Rules");

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

I. BACKGROUND

1. As part of its case against the Accused, the Prosecution has sought to adduce evidence of the actions of the Accused "after the Indictment period", in particular, that he systematically "murdered or eliminated persons who were in his inner circle and who were aware of the crimes perpetrated by the Accused" in order to prevent their turning against him and exposing him during his trial, which conduct the Prosecution maintains, is indicative of "consciousness of his criminal responsibility" for the crimes charged in the Indictment.[4] One such individual who the Prosecution, through its evidence, maintains was murdered by or on the orders of Mr. Taylor in order to silence him is Johnny Paul Koroma, the former head of the AFRC/RUF Junta in Sierra Leone. In this regard, a number of

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[1] SCSL-03-01-T-1088.
[2] SCSL-03-01-T-1096.
[3] SCSL-03-01-T-1098.
[4] See Opening Statement of the Prosecutor, *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 4 June 2007, pp. 276-280.

Prosecution witnesses including Moses Blah[5], a former Vice-President of Liberia, Joseph 'Zig Zag' Marzah (TFI-399)[6] and a protected Witness, TFI-375[7], testified regarding the circumstances of Johnny Paul Koroma's alleged murder. While none of the said witnesses actually witnessed the alleged murder or saw the body of Johnny Paul Koroma, they gave evidence implicating a number of alleged subordinates of the Accused in the murder of Johnny Paul Koroma and in particular, the individual referred to in this Motion as Witness DCT-032, as the person or one of the persons who actually carried out the killing in Foya, Liberia, in 2003, on orders of the Accused.

2. As part of its investigations into the alleged death of Johnny Paul Koroma, the Prosecution contacted and interviewed DCT-032 in May, June, July and October of 2008.[8] DCT-032 provided the Prosecution with information about the alleged death of Johnny Paul Koroma, and in particular, about his alleged burial site at a location in Lofa County, Liberia. Following information provided by DCT-032, the Prosecution had exhumations carried out at two seperate locations, and DNA tests carried out on the bodies. According to the Defence, the DNA test or tests turned out negative in that the body or bodies were found to be not that of Johnny Paul Koroma. The Defence maintains, based on the information given to them by DCT-032, that Johnny Paul Koroma may in fact not be dead as alleged by the Prosecution. In addition, the Prosecution made certain payments to DCT-032 and wrote him a letter indemnifying him from criminal prosecution. The Defence claims, based on information from DCT-032, that the Prosecution payments and indemnity letter were intended to induce DCT-032 to cooperate with the Prosecution in fabricating evidence against the Accused and that consequently, the details and results of the DNA investigation as well as the Prosecution payments to DCT-032, are exculpatory in that they tend to "suggest the innocence of the Accused or mitigate his guilt or may affect the credibility of the prosecution evidence." As such, the Defence submits, they should have been disclosed by the Prosecution pursuant to Rule 68(B). While the Prosecution did not call or list DCT-032 as a witness or potential witness, the Defence listed him as a Defence witness but did not call him to testify.

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[5] *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 15 May 2008, pp. 9998-10000.
[6] *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 12 March 2008, pp. 5935-5937.

II. SUBMISSIONS

Motion

3. The Defence seeks orders for the disclosure pursuant to Rule 68(B), of the following information which it submits is in the Prosecution's possession and is exculpatory:

(i) the details and results of an investigation that was conducted by the Prosecution into the alleged death of Johnny Paul Koroma, including DNA tests on corpses that were exhumed by the Prosecution during that investigation;

(ii) records of all the disbursements that were made to Defence Witness DCT-032 (estimated at $1500);

(iii) an original duplicate copy of the letter of indemnity against prosecution before the Special Court for Sierra Leone written by Stephen Rapp to Defence Witness DCT-032 or confirmation of such indemnity and the circumstances in which it was given; and

(iv) an explanation of why the above requested information was not disclosed to the Defence;[9]

4. The Defence invites the Trial Chamber, subject to the disclosure requested above, to exercise its discretion and draw adverse inferences against the Prosecution's failure of its disclosure obligations.[10]

5. In support of its application, the Defence submits that it has satisfied the first prong of the applicable legal test for the disclosure of exculpatory information pursuant to Rule 68(B), as it has identified the requested information with sufficient specificity.[11]

6. The Defence submits that the Prosecution contacted DCT-032 between May June and July of 2008[12] and that he gave them information about the alleged death of Johnny Paul Koroma, in particular regarding his alleged grave site in Foya, Liberia. The Defence claims that based on that information the Prosecution exhumed and conducted DNA tests on two corpses that were separately

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[7] *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 25 June 2008, pp. 12754-12766, 14489-14603
[8] Motion, Confidential Annex A; Reply, Confidential Annex A.
[9] Motion, para. 2.
[10] Motion, para. 28.
[11] Motion, paras 4-7.

indicated to them to be the remains of Johnny Paul Koroma and that at least one of the DNA tests turned out negative.[13] The Defence submits that the details and results of the said investigation and in particular the DNA results, are exculpatory in that they refute wholly or in part, the Prosecution's allegation that Johnny Paul Koroma is dead, or that the Accused was involved in his death.[14] The Defence further submits that the Prosecution made payments to DCT-032 in small instalments amounting to approximately $1000, most of which were given to him as an incentive to cooperate with their investigation. The Prosecution paid him an additional $500 for showing them a body and promised him a further $5000 if the body was confirmed to be that of Johnny Paul Koroma.[15] The Defence maintains that the said payments are exculpatory as they were an intended as an inducement for DCT-032 to cooperate with the investigation and were not reasonably incurred while he was involved in the investigation.[16]

7. The Defence submits that in June 2008 DCT-032 received a letter from the Chief Prosecutor of the Special Court, indemnifying him from criminal prosecution.[17] The Defence submits that such indemnity offered to DCT-032 when he was a potential witness, is capable of affecting the credibility of information DCT-032 gave to the Prosecution and the credibility of the Prosecution case as a whole. As such, the indemnity letter is exculpatory.[18] Although the Defence is already in possession of a copy of the indemnity letter, it requires the Prosecution's independent confirmation of the same as well as an explanation of the circumstances in which it was given.[19]

8. Lastly, the Defence requests that the Prosecution provide an explanation for the failure to disclose the requested information and submits that "such information is exculpatory in that non-disclosure of Rule 68 material may result in the Trial Chamber drawing adverse inferences against the Prosecution".[20] The Defence submits that all the exculpatory information sought is or should be in

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[13] Motion, Confidential Annex C.
[14] Motion, para. 9, Confidential Annex A.
[15] Motion, para. 8-10.
[16] Motion, para. 12, Confidential Annex A.
[17] Motion paras 11-12.
[18] Motion para. 13, Confidential Annexes A and B.
[19] Motion, paras 13-15.
[20] Motion, para. 15.
[20] Motion, para. 16.

the possession or custody of the Prosecution[21] and that despite earlier requests by the Defence for its disclosure[22] and in breach of Rule 68(B), none of the information was disclosed to the Defence.[23]

Response

9. The Prosecution opposes the Motion and requests that the Trial Chamber to dismiss it on the grounds that the Defence allegations therein are unfounded and the information requested is not exculpatory.[24] The Prosecution submits that it has discharged its disclosure duties in accordance with the relevant Rules and jurisprudence, but that such disclosure obligations do not mean that it must operate an "open files policy".[25] The Prosecution challenges the Motion and makes submissions only in relation to the requirement that the Defence must make a *prima facie* showing of the exculpatory or potentially exculpatory nature of the materials requested.

10. In relation to the results of the investigations into the death of Johnny Paul Koroma, the Prosecution submits that although it led evidence that Johnny Paul Koroma was killed, it led no evidence suggesting that his remains were buried at a particular location. Consequently, the fact that the remains found at the locations named by DCT-032 were not those of Johnny Paul Koroma does not contradict existing Prosecution evidence and is therefore not exculpatory.[26]

11. In relation to the disbursements made to DCT-032 the Prosecution submits that DCT-032 was never listed as a Prosecution witness or victim or regarded as a potential witness and was only used as source. The Prosecution argues that under the Rules, it has no disclosure obligation in relation to benefits paid or promises made to sources.[27]

12. In relation to the indemnity letter, the Prosecution submits that it is under no obligation to disclose the indemnity letter as DCT-032 was not a witness or potential witness for the Prosecution at the time the letter was written.[28]

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[21] Motion, paras 18-22.
[22] Motion, Confidential Annex D.
[23] Motion, paras 23-26.
[24] Response, para. 3.
[25] Response, para. 14.
[26] Response paras 4-5.
[27] Response, paras 6-11.
[28] Response, para. 12.

13. The Prosecution concludes that as none of the material requested is exculpatory, the Defence request to draw adverse inference against the Prosecution for its failure to disclose the requested material should be refused.[29]

Reply

14. In reply to the Prosecution Response, the Defence submits that the exculpatory nature of the requested information has to be seen in relation to the entire Prosecution case and in particular in relation to the testimony of Moses Blah, Joseph Marzah and TFI-375. Those witnesses implicated subordinates of the Accused, in particular DCT-032, in the murder of Johnny Paul Koroma and suggested that the killing was ordered by the Accused.[30] The Defence argues that any information that might suggest that Johnny Paul Koroma is still alive or that he was not killed on the orders of Charles Taylor as alleged by the Prosecution, is clearly exculpatory regardless of the fact that the Prosecution did not lead evidence of a particular burial site.[31]

15. The Defence asserts that in a summary of information that DCT-032 gave to the Prosecution in May, June July and October of 2008 which was disclosed to the Defence on 4 June 2010 ("Proffer"), the Prosecution purposely left out information regarding the negative results from the exhumation and DNA tests of Johnny Paul Koroma, which information the Prosecution knew to be exculpatory. The Defence asserts that in disclosing this "proffer" the Prosecution merely intended to use it to cross-examine DCT-032 and to discredit his testimony in the event that he was called by the Defence to testify.[32]

16. In relation to the status of DCT-032, the Defence argues contrary to the Prosecution assertion that he was merely a source, that he was more than a source in that he did more than just point the Prosecution towards independent evidence. In this regard, the Defence claims that in the course of several months that the Prosecution interviewed him, DCT-032 was asked substantive questions going to his background, his role in the conflict and his alleged links to the death of Johnny Paul Koroma and that he provided the Prosecution with substantial information, albeit false, going to

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[29] Response, para. 13.
[30] Reply, para. 6.
[31] Reply, para. 7.
[32] Reply, paras 9-10.

material allegations in the Prosecution case.[33] The Defence further argues that most importantly, members of the Prosecution told DCT-032 that they would want him to testify if the exhumed body turned out to be that of Johnny Paul Koroma, and that "in the plainest sense of the phrase, this makes him a potential Prosecution witness."[34] The Defence also argues that the fact that the Prosecution issued DCT-032 with a letter indemnifying him from criminal prosecution is further indication that he was a potential witness and not just a source as the Prosecutions claims, and that the letter is exculpatory in that it served as an incentive for DCT-032 to cooperate and to fabricate a story that fed into the Prosecution case.[35]

III. APPLICABLE LAW

17. Rules 66 and 68 of the Rules govern the disclosure of materials by the Prosecutor. Rule 66 provides in relevant part as follows:

> **Disclosure of Materials by the Prosecutor**
>
> (A) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:
>
> (i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92*bis* at trial.
>
> (ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time.

18. Rule 68 relating to the disclosure of exculpatory materials provides as follows:

> **Disclosure of Exculpatory Evidence**

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[33] Reply, para. 13.
[34] Reply, para. 14.
[35] Reply, paras 18-19.

> (A) The Prosecutor shall, within 14 days of receipt of the Defence Case Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.
>
> (B) The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

19. The Trial Chamber has reiterated the continuing obligation upon the Prosecution to continuously disclose exculpatory material which in any way tends to suggest the innocence or mitigate the guilt of the Accused or which may affect the credibility of the Prosecution evidence.[36]

20. The Trial Chamber has held that in order to establish that the Prosecution has breached its Rule 68(B) disclosure obligations, the onus is upon the Defence to:

(i) identify the material sought with requisite specificity;

(ii) make a *prima facie* showing of the exculpatory or potentially exculpatory nature of the materials requested;

(iii) make a *prima facie* showing of the Prosecution's custody or control of the materials requested;

(iv) show that the Prosecution has, in fact, failed to disclose the targeted exculpatory material.[37]

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[36] *Prosecutor v. Taylor*, SCSL-03-01-T-770, Decision on Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call, 30 March 2009, para. 12; *Prosecutor v. Taylor*, SCSL-03-01-T-735, Decision on Confidential Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68, 18 February 2009, para. 5; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-246, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigator's Notes pursuant to Rule 66 and/or 68, 4 May 2005, para. 16; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-363, Decision on Sesay Motion Seeking Disclosure of the relationship Between Governmental Agencies of the United States of America and of the Office of the Prosecutor, 2 May 2005, para. 35.

[37] *Prosecutor v. Taylor*, SCSL-03-01-T-516, Decision on Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68 of the Rules of Procedure and Evidence, 22 May 2008, p. 4; *Prosecutor v. Taylor*, SCSL-03-01-T-770, Decision on Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in redacted Witness Statements of Witnesses the Prosecution does not Intend to Call, 30 March 2009, para. 13; *Prosecutor v. Taylor*, SCSL-03-01-T-735, Decision on Confidential Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68, 18 February 2009, para. 5; *Prosecutor v. Taylor*, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097, 23 September 2010; See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-03-05-PT, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, paras 27, 43; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-436, Decision on Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witnesses TF1-141, 26 October 2005, para. 24.

21. Further, in interpreting the provisions of Rule 68(B), the Trial Chamber has held that "materials or information within the Prosecutor's knowledge concerning any benefits paid to and/or promises made to witnesses and victims beyond that which is reasonably required [for the management of witnesses and victims] has a different character and should therefore be disclosed as evidence which may affect the credibility of witnesses under Rule 68".[38]

22. Rule 68 has been liberally construed to apply to all exculpatory material that is in the custody or control of the Prosecutor, and is not limited to material relating to "Prosecution witnesses".[39]

IV. DELIBERATIONS

1) Status of Witness DCT-032 prior to his listing as a Defence witness

23. As the Motion largely turns of the status of Witness DCT-032 prior to his listing as a Defence witness, the Trial Chamber will start by making a determination on this issue. The Defence maintains that before it spoke to Witness DCT-032, he was in fact a potential Prosecution witness and not just a source as alleged by the Prosecution. As such, the Defence argues, the Prosecution had a duty as soon as it learnt of the true identity of DCT-032 from the Defence on 12 April 2010,[40] to disclose to the Defence "any material within its possession which is relevant to the named witness including but not limited to witness statements and/or disbursement records" and "any exculpatory material in relation to the witness."[41] The Defence assertion that DCT-032 was a potential Prosecution witness and not just a source is based on *(a)* his role in the alleged death of Johnny Paul Koroma as described by other Prosecution witnesses; *(b)* the content of the Prosecution's interview with DCT-032 as summarised in the "Proffer";[42] *(c)* the payments made and/or promised to DCT-032 by the Prosecution during the course of the investigation;[43] *(d)* a promise by one of the Prosecution investigators for relocation of

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[38] *Prosecutor v. Taylor*, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097, 23 September 2010, para. 21, citing *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005 para. 7.

[39] *Prosecutor v. Taylor*, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097, 23 September, 2010, para. 11.

[40] According to Confidential Annex D to the Motion, the Defence disclosed the real names of DCT-032 to the Prosecution on 12 April 2010.

[41] Motion, paras 23-26, Reply paras 13-19.

[42] Reply, Confidential Annex A.

[43] Motion, paras 11-12 and Confidential Annex A.

DCT-032;[44] and *(e)* a letter from the Chief Prosecutor of the Special Court indemnifying DCT-032 from criminal prosecution.[45]

24. The Prosecution, while not disputing any of the facts relied upon by the Defence, maintains that DCT-032 has never been listed as a Prosecution witness or potential witness and that he was simply a source. As such, the Prosecution claims it has no disclosure obligation under Rule 68(B) in relation to this individual.[46] Firstly, the Trial Chamber recalls that a number of Prosecution witnesses including Moses Blah[47], a former Vice President of Liberia, Joseph 'Zig-Zag' Marzah (TFI-399)[48] and a protected Witness TFI-375[49], testified regarding the circumstances of Johnny Paul Koroma's alleged murder. While none of the said witnesses actually witnessed the alleged murder or saw the body of Johnny Paul Koroma, they gave evidence implicating a number of alleged subordinates of the Accused in the murder of Johnny Paul Koroma and in particular, the individual referred to in this Motion as Witness DCT-032 as the person or one of the persons that actually carried out the killing in Foya, Liberia in 2003, on orders of the Accused.[50] According to these witnesses, DCT-032 played a key role in the alleged murder of Johnny Paul Koroma, which role would qualify him as a potential Prosecution witness rather than a mere source.

25. Secondly, according to the "Proffer" disclosed to the Defence[51], the Prosecution contacted and interviewed DCT-032 in May, June, July and October of 2008 as part of its investigations into the alleged death of Johnny Paul Koroma.[52] DCT-032 provided the Prosecution with detailed information about his own role in the conflict, his role and that of other subordinates of the Accused in the alleged murder of Johnny Paul Koroma, and in particular, about the latter's burial site at a location in Lofa County, Liberia.[53] It is clear from the information provided by DCT-032 to the Prosecution that he did not merely provide information pointing the Prosecution to independent evidence. Rather, he went further by providing substantial information (whether true or false) not

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[44] Motion, Confidential Annex A, para. 12.
[45] Motion, paras 2, 13-15.
[46] Response, paras 6-11.
[47] *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 15 May 2008, pp. 9998-10000.
[48] *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 12 March 2008, pp. 5935-5937.
[49] *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 25 June 2008, pp. 12754-12766, 14489-14603.
[50] *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 12 March 2008, pp. 5935-5937 and Transcript 25 June 2008, pp. 12754-14603.
[51] Response, para. 9; Reply, Confidential Annex A.
[52] Motion, Confidential Annex A; Reply, Confidential Annex A.
[53] Reply, Confidential Annex A.

only corroborating the testimony of other Prosecution witnesses, but also going to material allegations in this trial. In the Trial Chamber's view, the foregoing shows that DCT-032 was a potential witness rather than a source.

26. Thirdly, while the Prosecution describes the payments it made to DCT-032 as "recompense for his services as a source"[54] the Trial Chamber is of the view that these payments cannot be viewed or assessed in isolation but rather must be viewed in the context in which they were made. The Prosecution has not challenged the Defence assertion that these payments were paid to DCT-032 in order to encourage him to cooperate with the Prosecution by providing the required information about the death and burial place of Johnny Paul Koroma and that further payments were promised after the Prosecution confirmed that the body found was indeed that of Johnny Paul Koroma. Based on that information, the Trial Chamber opines that the Prosecution payments were not used to buy information from a source, but rather were given to a potential witness for his own benefit.

27. Lastly, in view of the alleged involvement of Witness DCT-032 not only in the conflict, but also in the alleged murder of Johnny Paul Koroma, the Trial Chamber is of the opinion that the letter from the former Chief Prosecutor of the Special Court, indicating that he did not inrend to lay charges against him, supports the inference that the Prosecution wanted to ensure his cooperation, including his testimony if required. The granting of an indemnity from prosecution in such circumstances is not consistent with DCT-032 being considered to be a mere source. Accordingly, the Trial Chamber holds that prior to his listing as a Defence witness, Witness DCT-032 was for all intents and purposes, a potential Prosecution witness, notwithstanding that he was never listed by the Prosecution as such. The Trial Chamber will now examine the specific Defence requests for disclosure.

2) Disclosure of the results of the Prosecution investigation into the alleged death of Johnny Paul Koroma

28. The Prosecution, while not disputing that it conducted an investigation into the death of Johnny Paul Koroma, including the exhumation and DNA testing of a body or bodies, submits that nothing in the details or results of that investigation contradicts existing Prosecution evidence. The Prosecution argues that its evidence relates only to the killing and not to the burial of Johnny Paul Koroma. Accordingly, "no evidence is contradicted by the fact that the remains found at a particular

location were not those of Johnny Paul Koroma".[55] As stated in the background to this Decision, the Prosecution has as part of its case against the Accused,[56] adduced evidence of the actions of the Accused "after the Indictment period" in particular, that he systematically "murdered or eliminated persons who were in his inner circle and who were aware of the crimes perpetrated by [him]" in order to prevent their turning against him and exposing him during his trial, which conduct the Prosecution maintains, is indicative of "consciousness of his criminal responsibility" for the crimes charged in the Indictment. One such individual that the Prosecution, through its evidence, maintains was murdered by or on the orders of Mr. Taylor in order to silence him is Johnny Paul Koroma. Furthermore, the Prosecution evidence on record specifically implicates DCT-032 as the person or one of the persons that actually carried out the alleged killing on orders of the Accused. The fact that the Prosecution interviewed this alleged murderer and that he led them to a grave site or grave sites that later turned out not to be that of Johnny Paul Koroma is relevant to the issue of whether Johnny Paul Koroma is dead or alive, and may affect the credibility of the Prosecution evidence.

29. The fact that DCT-032 was not able to provide the Prosecution with adequate information in relation to the burial site of Johnny Paul Koroma, despite being promised $5000 and indemnity against criminal prosecution, is potentially exculpatory in that it may affect the credibility of the Prosecution evidence implicated him in the killing. This information with respect to the Prosecution investigation should therefore also have been disclosed to the Defence. The Trial Chamber therefore agrees with the Defence and finds that the details and results of the Prosecution investigation into the alleged death of Johnny Paul Koroma are potentially exculpatory in nature. The Prosecution neither disputes the fact that it has this material in its possession, nor the fact that it has not disclosed the material to the Defence. The Trial Chamber accordingly holds that this material should be disclosed pursuant to Rule 68(B) of the Rules.

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[54] Response, para. 11.
[55] Response, paras 4-5.
[56] See Opening Statement of the Prosecutor: *Prosecutor v. Taylor* SCSL-03-01-T, Transcript 4 June 2007, pp. 276-280; 15 March 2008.

3) Disclosure of Records of all the disbursements made to Defence Witness DCT-032

30. The Prosecution, while not disputing that it made payments to DCT-032, describes the payments as "recompense for his services as a source" and submits that it has no obligation to disclose them under Rule 68(B).[57] The Trial Chamber has previously held that:

> Materials or information within the Prosecutor's knowledge concerning any benefits paid to and/or promises made to witnesses and victims beyond that which is *reasonably required [for the management of witnesses and victims]* has a different character and should therefore be disclosed as evidence which may affect the credibility of witnesses under Rule 68."[58] [emphasis added]

31. Having found above that DCT-032 was in fact a potential Prosecution witness, the Trial Chamber needs to determine whether or not the said payments were "*reasonably required for the management of the witness*". According to information provided to the Defence, which information is not disputed by the Prosecution, the funds provided to DCT-032 amounting to $1500 were used for such things as buying a phone, food, rent and school fees. A further $5000 was promised to DCT-032 "if the body exhumed was confirmed to be that of Johnny Paul Koroma". More importantly, DCT-032 admits that he was "making up a story in order to get money from the Prosecution".[59] The Trial Chamber finds that these payments made by the Prosecution to DCT-032 went beyond that which is reasonably required for the management of a witness and assumed a potential exculpatory character. The Prosecution does not dispute that it has the records of these payments and that it has not disclosed them to the Defence. The Trial Chamber accordingly holds that this material should be disclosed pursuant to Rule 68(B) of the Rules.

4) Disclosure of the 'original duplicate copy' of the indemnity letter to DCT-032 or a confirmation of such indemnity

32. The Defence has annexed a photo copy of the letter of indemnity written by the former Prosecutor of the Special Court to DCT-032 on 12 April 2008, submitting that the copy in the possession of DCT-032 is "tattered". The Prosecution, while not denying the existence of this letter,

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[57] Response, paras 6-11.

[58] *Prosecutor v. Taylor*, SCSL-03-01-T-1084, Decision on Defence Motion for disclosure of Statement and Prosecution Payments made to DCT-097, 23 September 2010, where the Trial Chamber adopted the jurisprudence in *Prosecutor v. Karemera, Ngirumpatse, Nzirorera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005 para.6. See also *Prosecutor v. Nzirorera et al*, ICTR-98-44-I, Decision on Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para.16 and *Prosecutor v. Bizimungu, Mugeni, Bicamumpaka and Mugiraneza*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006, para. 13.

[59] Motion, Confidential Annex A.

claims that such a letter is not exculpatory within the meaning of Rule 68(B), as DCT-032 was only used as a source and not as a potential witness. The Trial Chamber having already held that prior to his listing as a Defence witness, DCT-032 was a potential Prosecution witness finds that the indemnity letter is potentially exculpatory and is satisfied that it is in the Prosecution's possession and has not been disclosed to the Defence. The Trial Chamber accordingly holds that this material should be disclosed pursuant to Rule 68(B) of the Rules.

5) Request for an explanation as to why information was not disclosed to the Defence, and request to Trial Chamber to draw adverse inferences for the non-disclosure

33. The Trial Chamber notes the submissions of the Prosecution in its Response justifying, albeit wrongly, its non-disclosure of the requested material, namely that the Prosecution considered DCT-032 a source and not a witness or potential witness, in respect of whom it had no Rule 68 disclosure obligation.[60] Consequently, the Trial Chamber considers that no additional "explanation" is warranted. Furthermore, at this stage of the proceedings the potentially exculpatory material has not yet been disclosed, and it is therefore pre-mature to consider whether it is appropriate for the Trial Chamber to "draw adverse inferences" from the Prosecution's non-disclosure. Accordingly, the Trial Chamber declines the fourth Defence request.

FOR THE ABOVE REASONS

GRANTS THE MOTION IN PART; and

ORDERS the Prosecution to disclose forthwith to the Defence, pursuant to Rule 68(B):

1. The details and results of an investigation that was conducted by the Prosecution into the alleged death of Johnny Paul Koroma including DNA tests on corpses that were exhumed during that investigation;

2. Records of all disbursements that were made to Defence witness DCT-032; and

3. An original duplicate copy of the letter of indemnity against the prosecution before the Special Court for Sierra Leone written by Stephen Rapp to Defence witness DCT-032;

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[60] Response, paras 6-15.

Justice Julia Sebutinde appends a Separate Concurring Opinion hereto.

Done at The Hague, The Netherlands, this 20th day of October 2010.

Justice Richard Lussick

Justice Julia Sebutinde
Presiding Judge

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

SEPARATE CONCURRING OPINION OF JUSTICE JULIA SEBUTINDE

1. I agree with all aspects of the Trial Chamber's reasoning, findings, conclusions and Orders as contained in the Decision to which this Opinion is appended. However, I am judicially compelled to include this Separate Concurring Opinion in relation to the fourth request of the Defence, namely, that the Trial Chamber should in addition to ordering disclosure of the exculpatory material, draw adverse inferences against the Prosecution's failure to disclose the said information.[1] I do so in order to point out and underscore the effect of the Prosecution's non-compliance of its Rule 68 obligations upon the fair-trial rights of the Accused, particularly at this late stage of the trial, which effect is not necessarily cured by any late disclosures that may ensue pursuant to the Trial Chamber's Orders herein. In this regard, it is pertinent to examine the timeline of events leading up to this Motion.

2. Firstly, the Prosecution closed its case on 27 February 2009,[2] while the Defence has indicated to the Trial Chamber on several occasions that it is "unlikely that [it] would call any other live witnesses."[3] It is therefore fair to assume that at this stage of the proceedings, neither party is likely to be calling or recalling any more witnesses. Secondly, it is apparent from the Prosecution Proffer disclosed to the Defence[4] that the Prosecution interviewed Witness DCT-032 as far back as May, June, July and October of 2008; while the record of proceedings has Prosecution Witnesses Joseph 'Zig-Zag' Marzah, Moses Blah and TFI-375 as testifying over two years ago, in March, May and June of 2008, respectively. Thus, despite its continuing disclosure obligations under the Rules, and despite a specific Defence request for disclosure in relation to Witness DCT-032 in April 2010,[5] the Prosecution did not disclose any information in relation to this individual until as late as 4 June 2010, two years after Prosecution witnesses had already testified. Even then, the selected material that the Prosecution chose to disclose to the Defence in its "Proffer" contained little that would put the Defence on notice about the existence of any exculpatory material in relation to DCT-032.

3. The Defence, on the other hand, most probably learnt of the existence of the exculpatory material only after interviewing Witness DCT-032 in September 2010, as is apparent from the information in Confidential Annex A to the Motion, but none-the-less filed this Motion without

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[1] Motion, para. 28.
[2] Transcript 27 February 2009, p. 24057.
[3] Transcript 13 September 2010, p. 48312; see also Transcript, 27 February 2009, p. 24057, where Defence Counsel stated that: "I'm not ruling it out completely, but I think it's unlikely that we would call any other live witnesses."
[4] Reply, Confidential Annex A.

undue delay in September 2010.[6] In these circumstances, it is clear that in failing to disclose the exculpatory information in a timely manner, the Prosecution not only failed in its duty to assist in the administration of justice, but also clearly violated the fair trial rights of the Accused by denying him the right to use the said exculpatory information in cross-examining the Prosecution witnesses referred to in this Decision. Considering that the disclosures ordered by the Trial Chamber in this Decision come at a very late stage in the proceedings, such a violation should not go without a remedy.

4. In this regard, I am persuaded by the approach of the ICTR Trial Chamber in the *Prosecutor v. Ndindiliyimana et. al.* Case[7] where, in considering the Prosecution's disclosure obligations under a rule similar to our Rule 68, the ICTR held:

> The Prosecution's obligation to disclose exculpatory material is essential to a fair trial. In determining whether Rule 68 has been violated, considerations of fairness are the overriding factor. According to the Appeals Chamber, the obligation to disclose exculpatory material forms part of the Prosecution's duty to assist in the administration of justice, and is as important as the obligation to prosecute. The duty to disclose exculpatory material under Rule 68(A) is of a positive and continuing nature notwithstanding the public or confidential character of the material. In discharging its obligation under Rule 68(A), the Prosecutor will be presumed to be acting in good faith, unless the moving party adduces prima facie evidence proving otherwise.[8] [....] However, not every violation of the duty to disclose exculpatory material warrants a remedy. Before granting a remedy for a breach of Rule 68 obligations, the Chamber must ascertain that material prejudice has been caused to the accused, amounting to an infringement of his or her right to a fair trial. Likewise the choice of remedy is a matter falling within the Trial Chamber's discretion and must be determined on a case by case basis taking into account the scope and significance of the violation vis-à-vis the allegations in the Indictment, the persistence of the Prosecution's non-compliance, and the timing of any late disclosure in light of the stage of the proceedings. For example where the Prosecution shows persistent disregard or lack of diligence in discharging its Rule 68 obligation to such an extent that he could be deemed to be obstructing the proceedings or the interests of justice, the Trial Chamber may consider imposing sanctions against the Prosecutor. On the other hand, where the Prosecution delays the disclosure of exculpatory material until its case closes, the Trial Chamber may consider recalling some prosecution witnesses for further cross-examination by the Defence based on the lately - disclosed material. In addition, or in the alternative, the Trial Chamber may allow the Defence to submit a list of additional witnesses it wishes to call in order to testify on the specific areas relevant to the lately – disclosed exculpatory material....[a] Trial Chamber may, where the violation of the disclosure is so extensive or occurs at such a late stage of the proceedings that it would violate the right of the accused to trial without delay, or where it would be impossible or impracticable to recall prosecution witnesses without effectively re-opening the case in its entirety, opt to draw

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[5] Motion, Confidential Annex D.
[6] The See Confidential Annax A; the affidavit of DCT-032 is dated 23 September 2010.
[7] *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Defence Motions Alleging Violations of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008 ("*Ndindiliyimana Case*").
[8] *Ibid.*, para. 12.

reasonable inferences from the disclosed material at the stage of its definitive evaluation of the evidence.[9] Where material requested by the Defence under Rule 68 is known and could be retrieved by the Defence with relative ease, then material prejudice cannot be shown.[10]

5. Taking into account the seriousness of Prosecution allegations implicating the Accused in the alleged murder of Johnny Paul Koroma, the impracticability of recalling the said Prosecution witnesses for cross-examination at this late stage of the proceedings, as well as the right of the Accused to be tried without undue delay, I am of the view that the Trial Chamber not only has the discretion, but also the responsibility at this stage, to secure justice and ensure a fair trial for the Accused by determining a suitable remedy following the late disclosures ordered. The Chamber must consider a remedy that is appropriate in the circumstances; that preserves the integrity of the judicial process; and that assists the Trial Chamber in ascertaining the events surrounding the alleged murder of Johnny Paul Koroma.[11] That said, I do however, agree that at this stage of the proceedings when the potentially exculpatory material has not yet been disclosed, it may not be practicable for the Trial Chamber to "draw adverse inferences" from the Prosecution's non-disclosure of the same without knowing the full content of this material. Rather, it is more realistic to consider the appropriate remedy at the stage of evaluation of the evidence and Judgement deliberations, having taken into account the nature and effect of the exculpatory material disclosed.

Done at The Hague, The Netherlands, this 20th day of October 2010.

Justice Julia Sebutinde
Presiding Judge

[Seal of the Special Court for Sierra Leone]

[9] *Ibid.*, para. 14.
[10] *Ibid.*, para. 15.
[11] See *Ndindiliyimana Case*, para. 61.

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SCSL-03-01-T
(30450-30604)

30450

THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before:	Justice Julia Sebutinde, Presiding Justice Richard Lussick, Justice Teresa Doherty, Justice El Hadji Malick Sow, Alternate
Registrar:	Ms. Binta Mansaray
Date:	27 September 2010
Case No.:	SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
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27 SEP 2010
NAME Al Hassan Fofana
SIGN
TIME 09:32

THE PROSECUTOR
–v–
CHARLES GHANKAY TAYLOR

PUBLIC,
WITH CONFIDENTIAL ANNEXES A-J AND PUBLIC ANNEXES K-O

CORRIGENDUM TO DEFENCE MOTION REQUESTING AN INVESTIGATION INTO CONTEMPT OF COURT BY THE OFFICE OF THE PROSECUTION AND ITS INVESTIGATORS

Office of the Prosecutor:
Ms. Brenda J. Hollis

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

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1. Noting that there are a number of typographic and administrative errors in the *Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators*, filed on 24 September 2010 ("Original Motion").[1]
2. Further noting that "Confidential Annex A – Table of Annexes" when listing attachments to Confidential Annex B should have included the first ten pages, not only the first three pages of the Suspect Statement of DCT-192; the ten pages are properly annexed hereto in Confidential Annex B.
3. Further noting that "Annex M – Prosecution disclosure of payments made to DCT-097" should have included the actual disclosure, not just the cover letter; the disclosure is properly annexed hereto in Annex M.
4. Further noting that "Annex N – Table of Improper Prosecution Payments" was overlooked and not attached at all; the table is properly annexed hereto in Annex N.
5. Further noting that the scanned affidavits and signed statements in Annexes B-J were not not of the clearest quality and therefore replacing them with better copies of the originals.
6. The Defence hereby files a corrigendum to correct those mistakes. For ease of reference, the Defence proposes to substitute the Original Motion with the revised version with annexes attached hereto. The revised parts of the original motion are reflected below.
7. In this corrigendum, the Defence also attaches to the substitute motion, in which the following changes are made:
    a. Para. 12: By the relocation of footnote 22 from the end of the sentence to the middle.
    b. Para. 14: By the substitution of the word "Prosecution" with "Prosecution's".
    c. Para. 16: By the addition of the word "the" before the words "attached affidavits".

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-1089, Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 24 September 2010.

d. Para: 17. By the substitution of the word, "the" before the word "ransacked" with the word, "they".

e. Para: 19: By rephrasing, "... inducements that were offered and made by the Prosecution by its Witness Management Unit...", to read "... inducements that were offered and made by the Prosecution's Witness Management Unit...".

f. Para. 27: By rephrasing the phrase: "... earlier an agreement..." to read "...an earlier agreement...".

g. Para. 28: By rephrasing the phrase: "... and/or that the Prosecution could do so", to read "and/or that the Prosecution could have done so" and by correcting "TF1-360" to "TF1-362".

h. Additionally in para. 28, by changing the tenses from the present to the past, in the sentence: "Such displays of power and munificence by the Prosecution poison the pool of potential witnesses and further interfere with the administration of justice in that the credibility of such witnesses who come to testify is severely impacted", to read: "Such displays of power and munificence by the Prosecution poisoned the pool of potential witnesses and further interfered with the administration of justice in that the credibility of such witnesses who came to testify was severely impacted."

i. Para. 31(i) by the addition of "in this case" after "potential witnesses" such that the sentence would end as "...in relation to witnesses and potential witnesses in this case."

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 27th Day of September 2010,
The Hague, The Netherlands

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before:	Justice Julia Sebutinde Justice Richard Lussick, Presiding Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
Registrar:	Ms. Binta Mansaray
Date:	24 September 2010
Case No.:	SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC,
WITH CONFIDENTIAL ANNEXES A-J AND PUBLIC ANNEXES K-O

DEFENCE MOTION REQUESTING AN INVESTIGATION INTO CONTEMPT OF COURT BY THE OFFICE OF THE PROSECUTION AND ITS INVESTIGATORS

Office of the Prosecutor:
Ms. Brenda J. Hollis

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

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I. INTRODUCTION

1. The Defence requests the Trial Chamber to direct the Registrar to appoint experienced independent counsel to investigate the Prosecution and its Investigators, whom the Defence have reason to believe have been conducting their investigations in a manner that is an abuse of process, brings the administration of justice into disrepute, and is contemptuous of the Special Court for Sierra Leone.
2. The Defence files this request pursuant to Rules 73, 46(C) and 77 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules"). Specifically, under Rule 77(A)(iv), the Defence submit that there is reason to believe that the Prosecution and its Investigators have knowingly and wilfully interfered with the administration of justice by, *inter alia,* threatening, intimidating, causing injury or offering bribes to, or otherwise interfering with witnesses or potential witnesses. Rule 77(C)(iii) gives the Trial Chamber the discretion to appoint experienced independent counsel to investigate possible instances of contempt.
3. The Defence attaches several affidavits and supporting documentation as Annexes B-J.

II. APPLICABLE LAW

4. The Office of the Prosecutor, which is charged with wide ranging powers of prosecution, is provided for by Article 15 of the Statute of the Special Court ("Statute") and Rule 37. These include powers to investigate crimes within the jurisdiction of the Special Court, as well as the power to question suspects,[1] victims and witnesses, collect evidence,[2] and seize physical evidence.[3] The Prosecutor also enjoys limited powers of arrest and detention,[4] and ultimately, has the power to formally charge and bring a suspect to justice before the court.[5]
5. In exercising these powers, the Prosecution enjoys full autonomy[6] and near absolute discretion.[7] As a result, in exercising these powers, it is important that the Prosecutor conducts himself in a manner that is consistent with the public trust accorded him. Indeed

[1] Article 15(2) of the Statue; Rules 42 and 43.
[2] Article 15(2) of the Statute and Rule 39 of the Rules.
[3] Rule 40(A)(ii) .
[4] Rules 40(A)(i), 40(B) and 40*bis*.
[5] Rule 47.
[6] Article 15(1) of the Statute.
[7] See Hassan Jallow article, *Prosecutorial Discretion and International Criminal Justice,* Journal of International Criminal Justice, Vol 3, Isl (2005), p. 145-161, at http://jicj.oxfordjournals.org/content/3/1/145.short

this requires that the Prosecutor and all his subordinates act with utmost integrity and professionalism.[8]

6. Be that as it may, the working documents of the Special Court recognise that the conduct of the Prosecutor, including all other legal and to an extent non-legal personnel in the Prosecutor's office, is not above reproach and provide for the necessary regulation. Under Rule 46(C),[9] it is an act of misconduct for counsel before the Special Court to act in any manner that in the opinion of the Chamber would constitute an abuse of process. Under Rule 95, the court shall disregard *any* evidence that would, if admitted, bring the administration of justice into serious disrepute.[10] Rule 95 is thus also a form of sanction against the unbecoming conduct by either of the parties, which could bring the administration of justice into serious disrepute.
7. The Code of Professional Conduct for Counsel with Rights of Audience before the Special Court for Sierra Leone ("Code of Conduct") amplifies the conduct expected of all counsel[11] before the court.[12] While breach of the Code would ordinarily attract personal sanctions against the offending counsel,[13] when read in conjunction with the Court's other legal instruments, where the offending conduct of counsel reaches a threshold where it affects the integrity of the proceedings, the Court can also impose other measures.
8. In terms of Rule 77, the Trial Chamber has the inherent power to hold in contempt of court, any conduct by *any person* who knowingly and wilfully interferes with the administration of justice. Punishable conduct includes interference with witnesses or potential witnesses through threats or other coercive means as well as bribery or other incentives.[14]

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[8] Thus, under **Article 15(5)** of the Statute, the Prosecutor shall, *inter alia*, be a person of high moral character and possess the highest level of professional competence.
[9] **See Rule 46(C)** which also applies to the Prosecution per **Rule 46(F)**.
[10] See for instance, *Prosecutor v. Sesay et al,* SCSL-04-15-T-1188, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008, paras. 66-68 (finding that the confessional statements made to the Prosecution by Issa Sesay were inadmissible under Rule 95 because they were obtained in violation of the Rules and were obtained "out of fear of prejudice and hope of advantage"). See also *Prosecutor v. Taylor,* SCSL-03-01-T-1045, Decision on Defence Motion to Exclude Custodial Statements of Issa Sesay, 12 August 2010, Separate Dissenting Opinion of the Hon. Justice Julia Sebutinde, para. 12.
[11] See definition of "Counsel" under **Article 1**.
[12] See for instance, Code of Conduct: **Article 5(i)**; **Article 6(A)** and **Article 6(B)**; **Articles 7 and 8**; **Article 10** and in particular Article 10(B) and (C).
[13] **Rule 32**. See also *Prosecutor v. Taylor,* SCSL-03-01-T-722, Decision on Defence Motion for Disclosure of Evidence Underlying Prejudicial Statements Made by the Chief Prosecutor, Stephen Rapp, to the Media, 6 February 2009, para. 30.
[14] **Rule** 77**(A)(iv)**

9. The Appeals Chamber has held that the standard for an independent investigation for contempt is:

> "[...] not that of a *prima facie* case, which is the standard for committal for trial. It is the different and lower standard of "reason to believe" that an offence may have been committed, which is the pre-condition for ordering an independent investigation".[15]

10. An allegation of contempt must therefore only raise a "reason to believe" that a person may be in contempt.[16]

III. SUBMISSIONS

11. The Defence submits that there is reason to believe that the Prosecutor, David Crane and all his successors in title, through their own acts of commission or omission and/or through the acts and conduct of their subordinates and/or agents,[17] have violated the Statute, the Rules and the Code of Conduct in that they have: i) assaulted a suspect and/or potential witness or source;[18] ii) exerted undue pressure by threatening, intimidating, or harassing suspects, witnesses, potential witnesses or sources ("undue pressure");[19] and iii) offered and/or provided improper, unjustifiable or undue payments, benefits or other incentives, including relocation, to witnesses, potential witnesses or sources ("improper inducements").[20]

12. These acts amount to acts of misconduct, abuse of process and most importantly, contempt of court. The Trial Chamber must therefore order a thorough investigation of these instances in order to establish the full extent of the Prosecution's investigatory misconduct.[21] From the outset, the Prosecution approach to this case has not only been overly zealous, it has also been underhanded, malicious and overboard, [22] and this has corrupted its entire investigation and case in the courtroom.

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[15] *Prosecutor v. Taylor,* SCSL-03-01-T-960, Confidential Decision, 8 December 2008, para. 22, citing *Prosecutor v. Brima et al,* SCSL-04-16-AR77-315, Decision on Defence Appeal Motion Pursuant to Rule 77(J) on both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii), 23 June 2005, para. 17.
[16] *Id,* para. 23.
[17] Including, but not limited to, the following named individuals: Alan White, Gilbert Morissette, Brenda Hollis, Chris Bomford, Rob Diack, John Berry, Chris Morris, Pete McLaren, Sharan Parmar, Yusuf Dafae, Mustapha, Umaru, Kelvin, and Sophie Swart.
[18] See, Signed Statement in Confidential Annex B.
[19] See, for example, affidavits in Confidential Annexes B, C, D, E and F.
[20] See, for example, affidavits in Confidential Annexes B, C, D, E, F, G, H, I, and J.
[21] See *Prosecutor v. Seselj,* IT-03-67-T, Redacted Version of the "Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Seselj's Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", 29 June 2010.
[22] See for instance, the power point presentation at Annex O where the Prosecutor acknowledges deliberately trying to embarrass Charles Taylor; Annexes B and I which allege collusion between LURD forces and the Prosecution and the **Testimony of DCT-190** on that same issue.

13. In addition to being *ultra vires* and contemptuous, the Prosecution's acts also affect the case in two principal ways. Firstly, the Prosecution's conduct casts doubt on the credibility of its entire evidence before this court. An investigation into the manner in which the Prosecution conducted itself in relation to witnesses, potential witnesses or suspects in this case, in view of its tremendous powers and resources, and its veil of secrecy, would assist the Trial Chamber in fully assessing that evidence. As argued above, the Chamber has the discretion to disregard any evidence that would bring the administration of justice into disrepute.
14. Secondly, the Prosecution's misconduct has negatively affected the Accused's fair trial rights in that it has generally poisoned the environment and has made it difficult to for the defence to find witnesses who have not compromised themselves with Prosecution.[23]

Causing an Injury: Assault on a suspect during questioning

15. There is sufficient reason to believe that in the course of questioning a suspect and/or potential witness, Gilbert Morissette of the Prosecution, physically assaulted a suspect and/or potential witness, in order to elicit his cooperation and confession.[24] The Defence submits that this is a knowing and wilful interference by the Prosecution with the administration of justice in order to secure favourable evidence.

Threats, Intimidation and Other Interference

16. Based on the attached affidavits at Annexes B-F, the Defence submits that there are credible reasons to believe that the Prosecution is in contempt for wilfully and knowingly exerting undue pressure through threats and intimidation of witnesses, potential witnesses or sources in order to secure their cooperation and/or their evidence, which interferes with the administration of justice.
17. The acts complained of, included acts and conduct of its direct employees or agents and the acts and conduct of other outside organs that the Prosecution directly worked or cooperated with such as the Sierra Leonean and Liberian Police or Intelligence and UNAMSIL. In Kailahun, for instance the Prosecution, INTERPOL and the Sierra Leonean police used a system called "sweeping" in which those who refused to cooperate

[23] The Defence for instance was forced to withdraw the following witnesses after disclosure of inculpating statements to the Prosecution. In all instances, the witnesses alleged that the information was not accurate and that they had been induced: DCT-023, DCT-032, DCT-133, DCT-192, and DCT-097.
[24] Confidential Annex B: Signed Statement of Logan Hambrick and the first three pages of disclosed Prosecution interview transcripts with DCT-192, which indicate that he was read his suspect rights before commencing the interview.

would be arrested.[25] In Monrovia, the Prosecution passed on false intelligence[26] against a potential witness and got him arrested, only to then twist his arm into cooperating.[27] Furthermore, through an unnecessary show of force[28] they ransacked the Accused's residence in Monrovia. In the course of this search, Alan White of the Prosecution also made unnecessary threats to the caretaker and confiscated his personal items.[29] The next day the caretaker narrowly escaped a kidnap attempt by or involving the Prosecution.

18. The [then] Chief Prosecutor, David Crane also made direct verbal threats and intimidated a potential witness. Crane threatened to imprison DCT-102, like Issa Sesay, if he did not cooperate. [30] DCT-102 even has a souvenir from Crane to corroborate his account.[31] The Prosecution also made up a story that DCT-133's life was in danger from persons associated with Charles Taylor simply intimidate him into cooperating at the back of an offer for protective measures.[32]

Offers of Bribes and Other Inducements

19. Based on all of the affidavits and signed statements attached in Annexes B-J , the Defence submits that there are credible reasons to believe that the Prosecution is in contempt for offering and/or providing monetary bribes and/or other inducements, such as relocation, in exchange for cooperation and testimony. With respect to this question, the Defence takes no issue with any payments that were made to prosecution witnesses by the Witness and Victims Section ("WVS") of the Registry;[33] WVS payments apply to both prosecution and defence witnesses. Rather the Defence takes issue with the inducements that were offered and made by the Prosecution's Witness Management Unit ("WMU")[34]

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[25] Confidential Annex F: Affidavit of DCT-102.
[26] The Defence submits that this "intelligence" was based on information gathered from DCT-097, during the time in which DCT-097 was receiving over $40,000 from the Prosecution to, *inter alia,* provide information. See Confidential Annex J and Annex M.
[27] Confidential Annex D: Affidavit of DCT-133.
[28] Confidential Annex E: Affidavit of DCT-086, and copy of search warrant for White Flower.
[29] Confidential Annex E: Affidavit of DCT-086.
[30] Confidential Annex F: Affidavit of DCT-102.
[31] Confidential Annex F: Affidavit of DCT-102 and "Don Ray" calling card.
[32] Confidential Annex D: Affidavit of DCT-133, and copies of plane tickets to Accra, hotel invoices in Accra, pictures of DCT-133's gate and fence with razor wire, calling cards of various Prosecution investigators and a slip of paper with Brenda Hollis' name and phone number.
[33] The Defence assumes these payments were made in accordance with the "Practice Direction on Allowances for Witnesses and Expert Witnesses", issued by the Registrar on 16 July 2004. The Practice Direction properly provides for a wide range of allowances to be paid to witnesses testifying before the Special Court. These include an attendance allowance as compensation for earnings and time lost as a result of testifying, accommodation, meals, transport, medical treatment, childcare and other allowances.
[34] For some insight into the apparent mandate of the WMU, see attached at Annex L a 2007 Vacancy Announcement for the Chief of the Witness Management Unit.

directly to its witnesses, potential witnesses or sources in relation to expenses that squarely fall within the purview of WVS. The Defence submits that these payments, administered through the opaque Witness Management Unit, are contemptuous.

20. While in terms of Rule 39(ii), the Prosecution may "[t]ake all measures deemed necessary for the purpose of the investigation, including the taking of any *special measures* to provide for the safety, the support and assistance of *potential witnesses* and *sources*" [emphasis added] such discretion is limited in at least two ways. Firstly, by the wording of the Rules itself, and secondly by the limitations in the Statute, Rules and Code of Conduct, as considered above. In terms of Rule 39, any payment must be objectively "necessary" and must be for the safety, the support and assistance of potential witnesses and sources.[35]
21. The specific limitation of the remit to *potential witnesses* and *sources* was deliberate as Rule 39 was designed to cover the Prosecution's pre-trial investigative phase whereafter the welfare of the witnesses would be taken over by WVS, which is neutral and independent of the parties. Article 16(4) thus allows the Registrar, through the WVS, to provide "protective measures and security arrangements, counseling and other appropriate assistance for witnesses" and even sources. In terms of Article 2(B) of the Practice Direction,[36] which amplifies the functions of the WVS, the WVS shall "ensure the payment of all allowances". In terms of both provisions, although WVS may act in consultation with the parties, WVS, to the exclusion of both parties, retains sole jurisdiction for the management and payment of witnesses.
22. Even accepting, *arguendo*, that the WMU's and WVS's functions could overlap with respect to witness payments, it would still be impermissible for the Prosecution to, without justification, duplicate or supplement payments made by the WVS.
23. The Defence submits that in making certain payments to witnesses, potential witnesses or sources, the WMU usurped the role of the WVS, which unlike the Prosecution is an independent organ of the court and therefore less susceptible to abusing the process. Further, by continuing to pay witnesses throughout the life of the trial, the Prosecution is undermining any need for an independent witness section. The Defence submits that this conduct by the Prosecution is deliberate and was designed to influence the cooperation, and consequently, the evidence of potential witnesses, witnesses, suspects or sources.

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[35] The latter wording is, it is true, wider than that of the Rules of the ICTY or the ICTR, but it is not as wide as to permit an "unfettered discretion".
[36] Practice Direction on Allowances for Witnesses and Expert Witnesses Testifying in The Hague, 8 June 2007.

24. The Defence further submits that even some of the pre-trial payments to witnesses that were properly within the Prosecution's WMU purview were irregular as they went well beyond the proscribed rationale and were willfully and knowingly designed to interfere with the administration of justice. The exorbitant payments to DCT-097 at the time he was a Prosecution witness, recently disclosed,[37] are a ready example.
25. In Annex N is a list of many smaller but equally improper payments that were made by the Prosecution to witnesses who came and testified before this Court. As the Trial Chamber would observe, these were payments which, according to the witnesses' own evidence, were not justified by the explanations given by the Prosecution.
26. Aside from these, the Prosecution offered or made other payments or inducements to witnesses, potential witnesses or sources in order to elicit their assistance, cooperation or evidence. For instance, the Prosecution approached DCT-032[38] and DCT-133[39] with gifts of money before ever having a substantive conversation with them.
27. The most egregious examples are offers of relocation and/or security protection where none was requested or warranted, or worse yet, where the suggested security threat was actually created by the Prosecution. Abu Keita for instance testified openly before this Chamber at the back of earlier an agreement for relocation.[40] DCT-102 was told he could relocate to America and should open a bank account so the Prosecution could deposit $90,000, as his knowledge of RUF and diamonds was critical to the Prosecution case.[41]
28. Another of the Prosecution's stratagems was inducement by reference. Through this method, the Prosecution would, directly or indirectly try to induce potential witnesses by alluding to benefits or inducements they would have given to other persons known to the targeted witness. DCT-102, for instance, was told by a Prosecution investigator to consider how well off Gibril Massaquoi and Abu Keita were living on Prosecution largess. John Tarnue, listed as a Prosecution witness in this case,[42] called DCT-086 from America and tried to convince him to cooperate. In the case of DCT-032, one Kelvin of the Prosecution alluded to Vamuyan Sheriff's largess (a Prosecution-financed house in Kenema) and even called Sheriff for DCT-032 to confirm. Sheriff tried to persuade DCT-

[37] Confidential Annex J: Signed Statement of DCT-097 and Annex M: Prosecution disclosure of payments made to DCT-097.
[38] Confidential Annex G: Affidavit of DCT-032.
[39] Confidential Annex D: Affidavit of DCT-133.
[40] See Exhibit D-468, recently admitted per CMS 1082, dated 22 September 2010.
[41] Confidential Annex F: Affidavit of DCT-102
[42] Confidential Annex K: Prosecution disbursement records of TF1-139. Furthermore, TF1-139 was listed among the first ten Prosecution witnesses to testify, had the trial begun as scheduled in June 2007.

032 to cooperate with the Prosecution. It is common knowledge amongst RUF ex-combatants that TF1-362 testified and lied before the Special Court and in exchange made approximately $10,000.[43] It is also common knowledge that Foday Lansana and Isaac Mongor both witnesses in this case were released from prison at the behest of the Prosecution, and/or that the Prosecution could have done so.[44] Such displays of power and munificence by the Prosecution poisoned the pool of potential witnesses and further interfered with the administration of justice in that the credibility of such witnesses who came to testify was severely impacted.

IV. CONCLUSION AND RELIEF REQUESTED

29. The Defence submits that for any one or more of the foregoing reasons, and based on other examples abounding within the attached affidavits, numerous members of the Prosecution are in contempt of court. The instances highlighted above are sufficiently credible indicia of a reason to believe that contempt has occurred, warranting the appointment of an independent investigation. The issue at stake not only affects the integrity of the Prosecution, but the entire judicial process.

30. The Trial Chamber should, pursuant to Rule 77(C)(iii) and subject to the necessary protective measures in place and any other measures the Trial Chamber might deem fit, order an independent investigation into:

    i) The conduct of the Prosecution, including all its employees or agents, since the inception of the Court, in relation to witnesses and potential witnesses in this case, that is in breach of the Statute, Rules and Code of Conduct, including but not limited to the acts indicated in the attached affidavits and signed statements in Annexes B-J;

    ii) All payments and benefits, including ongoing payments and relocations, offered and/or paid by the Prosecution to witnesses, potential witnesses or sources in connection with this case. This investigation should explore the full mandate of the Prosecution's Witness Management Unit, the source of its funding, and all disbursements made by that Unit in relation to this case.

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[43] Confidential Annex F: Affidavit of DCT-102. See also **Testimony of Charles Taylor**, 16 September 2009, at p.29066 to 29077 and **Testimony of John Vincent**, 30 March 2010 at p. 38245 *et seq.*

[44] Confidential Annex F: Affidavit of DCT-102; Confidential Annex H: Affidavit of DCT-023. See also **Testimony of Foday Lansana.**

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Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 24th Day of September 2010,
The Hague, The Netherlands

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-960, Confidential Decision, 8 December 2008

Prosecutor v. Taylor, SCSL-03-01-T-722, Decision on Defence Motion for Disclosure of Evidence Underlying Prejudicial Statements Made by the Chief Prosecutor, Stephen Rapp, to the Media, 6 February 2009

Prosecutor v. Taylor, SCSL-03-01-T-1045, Decision on Defence Motion to Exclude Custodial Statements of Issa Sesay, 12 August 2010, Separate Dissenting Opinion of the Hon. Justice Julia Sebutinde

Prosecutor v. Brima et al.

Prosecutor v. Brima et al, SCSL-04-16-AR77-315, Decision on Defence Appeal Motion Pursuant to Rule 77(J) on both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii), 23 June 2005

Prosecutor v. Sesay et al.

Prosecutor v. Sesay et al, SCSL-04-15-T-1188, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008

ICTY

Prosecutor v. Seselj, IT-03-67-T, Redacted Version of the "Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Seselj's Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", 29 June 2010
http://www.icty.org/x/cases/seselj/tdec/en/100629.pdf

Other

Hassan Jallow article, *Prosecutorial Discretion and International Criminal Justice,* Journal of International Criminal Justice, Vol 3, Is1 (2005), p. 145-161, at
http://jicj.oxfordjournals.org/content/3/1/145.short

3208

SPECIAL COURT FOR SIERRA LEONE
DOKTER VAN DER STAMSTRAAT 1• 2265 BC LEIDSCHENDAM • THE NETHERLANDS

PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
Case Number: **SCSL-03-01-T**
Document Index Number: **1089**
Document Date: **27 September 2010**
Filing Date: **27 September 2010**
Document Type: **- Confidential Annexes** A-J
Number of Pages: **88** Number from: **30464 - 30551**
☐ Application
☐ Order
☐ Indictment
☐ Response
☒ **Motion**
☐ Correspondence

Document Title:

Public with confidential Annexes A-J and public Annexes K-O Corrigendum to Defence motion requesting an investigation into contempt of court by the office of the Prosecution and its investigation

Name of Officer:

Alhassan Fornah

Signed:

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Annex K

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SPECIAL COURT FOR SIERRA LEONE
SCSLP0757

Wednesday, June 13, 2007

SPECIAL COURT FOR SIERRA LEONE
WITNESS PERSONAL PROFILE WITNESS MANAGEMENT UNIT
[redacted] **EXTREMELY SENSITIVE** TF1-139

DISBURSEMENTS:

1
Date: Monday, March 05, 2007
Made By: PMCLAREN
Reason: Transportation/Meals for 2 days during clarification interviews
Category: TRANSPORT/MEALS **Amount:** 100.00
Receipt ☐ ☑ **SUS Dollars** ☐ **Local Currency**
Approved By: JVBERRY

2
Date: Friday, October 31, 2003
Made By: AWHITE
Reason: Payment made to SCSLP0757 for communications, top up card and subsistance for family, by Al White.
Category: COMMUNICATIONS **Amount:** 500.00
Receipt ☑ ☑ **SUS Dollars** ☐ **Local Currency**
Approved By: AWHITE

3
Date: Wednesday, December 18, 2002
Made By: AWHITE
Reason: [redacted]
Category: **Amount:** 150.00
Receipt ☑ ☑ **SUS Dollars** ☐ **Local Currency**
Approved By: AWHITE

3211

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SPECIAL COURT FOR SIERRA LEONE
SCSLP0757

Wednesday, June 13, 2007

SPECIAL COURT FOR SIERRA LEONE
WITNESS PERSONAL PROFILE WITNESS MANAGEMENT UNIT
EXTREMELY SENSITIVE TF1-139

[redacted]

4 **Date:** Tuesday, December 31, 2002
Made By: AWHITE
Reason: [redacted]
Category: [redacted] **Amount:** 4,700.00
Receipt ☑ ☑ **$US Dollars** ☐ **Local Currency**
Approved By: AWHITE

5 **Date:** Saturday, November 23, 2002
Made By: AWHITE
Reason: Payment made to SCSLP0757 for Air Ticket to Ghana to US, by Al White.
Category: **Amount:** 1,453.00
Receipt ☑ ☑ **$US Dollars** ☐ **Local Currency**
Approved By: AWHITE

6 **Date:** Monday, February 18, 2002
Made By: AWHITE
Reason: Payment made to SCSLP0757 for communications, top up card , by Al White.
Category: COMMUNICATION **Amount:** 100.00
Receipt ☑ ☑ **$US Dollars** ☐ **Local Currency**
Approved By: AWHITE

7 **Date:** Wednesday, December 18, 2002
Made By: AWHITE
Reason: Payment for SCSLP0757 for lodging expenses in Accra, Ghana pending FBI vetting Investigation.
Category: LODGING EXPENSES **Amount:** 517.31
Receipt ☑ ☑ **$US Dollars** ☐ **Local Currency**
Approved By: AWHITE

SPECIAL COURT FOR SIERRA LEONE
SCSLP0757

Wednesday, June 13, 2007

SPECIAL COURT FOR SIERRA LEONE
WITNESS PERSONAL PROFILE WITNESS MANAGEMENT UNIT
EXTREMELY SENSITIVE TF1-139

[redacted]

8 **Date:** Wednesday, January 08, 2003
Made By: AWHITE
Reason: Payment obtain lodging, purchase clothing, food and miscellaneous expenses for SCSLP0757 and Nine (9) family members.
Category: **Amount:** 6,180.00
Receipt ☑ ☑ **SUS Dollars** ☐ **Local Currency**
Approved By: AWHITE

9 **Date:** Thursday, November 14, 2002
Made By: AWHITE
Reason: Payment made to SCSLP0757 for communication, top up cards, by Al White.
Category: COMMUNICATIONS **Amount:** 200.00
Receipt ☑ ☑ **SUS Dollars** ☐ **Local Currency**
Approved By: AWHITE

10 **Date:** Thursday, December 19, 2002
Made By: AWHITE
Reason: Payment made to SCSLP0757 for subsistance allowance by Al White.
Category: SUBSISTANCE ALLOWANCE **Amount:** 281.00
Receipt ☑ ☑ **SUS Dollars** ☐ **Local Currency**
Approved By: AWHITE

11 **Date:** Friday, December 13, 2002
Made By: AWHITE
Reason: Payment made in incurred lodging expenses paid on behalf of SCSLP0757 [redacted] receipt obtained. And also extra payment of $40 in additiona to the $780, by Al White.
Category: LODGING EXPENSES **Amount:** 820.00
Receipt ☑ ☑ **SUS Dollars** ☐ **Local Currency**
Approved By: AWHITE

SPECIAL COURT FOR SIERRA LEONE
SCSLP0757

Wednesday, June 13, 2007

SPECIAL COURT FOR SIERRA LEONE
WITNESS PERSONAL PROFILE WITNESS MANAGEMENT UNIT

[redacted] EXTREMELY SENSITIVE TF1-139

12

Date: Monday, November 18, 2002

Made By: AWHITE

Reason: Payment made to SCSLP0757 for communications, top up card , by Al White.

Category:

Amount: 100.00

Receipt ☑

☑ **$US Dollars** ☐ **Local Currency**

Approved By: AWHITE

13

Date: Wednesday, November 06, 2002

Made By: AWHITE

Reason: Payment made to SCSLP0757 for communications by Al White.

Category: COMMUNICATION

Amount: 100.00

Receipt ☑

☑ **$US Dollars** ☐ **Local Currency**

Approved By: AWHITE

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Annex L

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Special Court for Sierra Leone

The Special Court for Sierra Leone is not a United Nations body. It is an international organization in its own right created by an agreement between the United Nations and the Government of Sierra Leone.

Vacancy Announcement *External/internal*

VACANCY ANNOUNCEMENT NUMBER	**SCSL- 2007- 064 (RE-CIRCULATION)**
DEADLINE FOR APPLICATIONS	**21 NOVEMBER 2007**
POST TITLE AND LEVEL	**CHIEF, WITNESS MANAGEMENT UNIT, P-4**
POST NUMBER	**SCSL-OTPI/1000.4/03-P4-001**
DUTY STATION	**SIERRA LEONE (FREETOWN)**
ORGANIZATIONAL UNIT	**OFFICE OF THE PROSECUTOR SPECIAL COURT FOR SIERRA LEONE**
ANNUAL NET SALARY	**US$ 61,834.00**
PLUS DAILY LIVING ALLOWANCE IN SIERRA LEONE	**US$ 115.00 from date of arrival in Sierra Leone**
PLUS ANNUAL RECRUITMENT ALLOWANCE	**US$ 4,328.00 for staff members without dependents, or US$ 12,267.00 for staff members with dependents**

DUTIES AND RESPONSIBILITIES:

Under the overall direction and supervision of the Chief of Investigations, the incumbent's responsibilities are to:

- Supervise the Witness Management Unit, which includes two contractors, two international seconded police officers, four national seconded personnel and one translator;
- Coordinate with the attorneys of the Prosecutions Section to establish and maintain a prioritized list of witnesses for pre-trial interviews and court orientation;
- Coordinate, supervise and direct all Witness Management field missions and the investigators performing them while they are on mission;
- Assist Investigations Section in coordination with Prosecutions Section on follow-up questions required of the witnesses during pre-trial interviews;
- Coordinate with the Prosecutions section in the development of a Court Orientation Program and schedule for each witness;
- Coordinate and supervise the preparation of Threat/Risk Assessment on all witnesses interviewed by the Office of the Prosecutor;
- Supervise the implementation of Special Protective Measures that are forwarded to the Chief of Investigations and ensure that all necessary procedures are carried out in conjunction with the Chief of Investigations and Witnesses and Victims Section (WVS);
- Develop operational contingency plans to deal with the protection of witnesses;
- Liaise with the WVS regarding the care and needs of all witnesses under the Office of the Prosecutor;
- Set up schedules for all witnesses to meet with members of the OTP;
- Supervise staff responsible for the input and retrieval of all data entered into the Witness Management Database (WMD);

Staff members of the Special Court will not serve as staff members of the United Nations. External appointments are limited to the Special Court only. In accordance with Article 24 of the Statute of the Special Court for Sierra Leone the working language will be English.

1. Both internal and external applicants must complete a Personal History form (P.11) together with a detailed curriculum vitae including date of birth, nationality, educational qualifications. This form is available upon request from scsl-personnel@un.org, or at the Special Court website http://www.sc-sl.org/

2. ALL APPLICATIONS SHOULD BE SENT BY MAIL TO:
   Chief of Personnel, Special Court for Sierra Leone, New England, Freetown, Sierra Leone.
   OR BY EMAIL TO: scsl-personnel@un.org
   OR BY FAX TO: +232 22 279 204; or +39 0831 257204

Sierra Leone is a non-family duty station.

PLEASE INDICATE THE VACANCY ANNOUNCEMENT NUMBER ON THE ENVELOPE OR THE FAX, AND ON THE APPLICATION.
Date of Issuance: 02 November 2007

589

30559

Special Court for Sierra Leone

The Special Court for Sierra Leone is not a United Nations body. It is an international organization in its own right created by an agreement between the United Nations and the Government of Sierra Leone.

Vacancy Announcement *External/internal*

- Supervise the integrity of the data that is entered into the WMD. Research the witness details and ensure accuracy of information being entered;
- Ensure that all photographs entered are of sufficient quality and dimensions to be an accurate representation of the witness;
- Ensure that all witness contact information whether initiated by the WMU, WVSS or by a third party is entered for the appropriate witness within 24 hours of being received;
- Supervise all reporting and production of reports from the WMU and ensure that they are not disseminated without prior authorization;
- Create and maintain regular contact by the Unit with both current and potential witnesses;
- Direct and supervise the financial control of all payments made to or for a witness by the Office of the Prosecutor.

COMPETENCIES AND SKILLS:

Professionalism: Ability to maintain absolute confidentiality and tact, sensitivity, loyalty, discretion and good judgement, including particular sensitivity to the needs of victims of sexual violence, children, the elderly and disabled. Ability to deal effectively with witnesses in stressful situations and also to gather evidence and interview suspects and witnesses;

Planning and Organization: Strong organisational skills and ability to coordinate the work of others, plan own work and manage conflicting priorities.

Cultural Diversity: Ability to work in a multi-cultural environment.

Communication: Strong interpersonal and communication (spoken, written and presentational) skills.

Technology: Fully proficient computer skills and ability to use relevant software applications including information databases, internet/intranet services, library sources, etc.

Managing Performance: Ability to delegate responsibility appropriately, matching tasks to skills.

QUALIFICATIONS

- Advanced University Degree in related area and/or equivalent formal training in Criminal Investigations from a recognized National Police College, Academy and experience.

- Broad knowledge of criminal investigation and/or witness management practices and procedures.

WORK EXPERIENCE

Staff members of the Special Court will not serve as staff members of the United Nations. External appointments are limited to the Special Court only. In accordance with Article 24 of the Statute of the Special Court for Sierra Leone the working language will be English.

1. Both internal and external applicants must complete a Personal History form (P.11) together with a detailed curriculum vitae including date of birth, nationality, educational qualifications. This form is available upon request from scsl-personnel@un.org, or at the Special Court website http://www.sc-sl.org/

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Sierra Leone is a non-family duty station.

PLEASE INDICATE THE VACANCY ANNOUNCEMENT NUMBER ON THE ENVELOPE OR THE FAX, AND ON THE APPLICATION.
Date of Issuance: 02 November 2007

Special Court for Sierra Leone

30560

The Special Court for Sierra Leone is not a United Nations body. It is an international organization in its own right created by an agreement between the United Nations and the Government of Sierra Leone.

Vacancy Announcement *External/internal*

- Minimum of 20 years experience at both national and international level in criminal investigations and/or witness management, at least ten (10) of which should have been at the supervisory level.

- Relevant experience in field operations and witness logistics.

- Familiarity with witness relocations and experience working in conflict and post-conflict environments.

- Experience with an International Criminal Tribunal is desirable.

LANGUAGES:

English is the working Language of the Special Court for Sierra Leone (SCSL). For the post advertised, fluency in both oral and written English is mandatory.

Staff members of the Special Court will not serve as staff members of the United Nations. External appointments are limited to the Special Court only. In accordance with Article 24 of the Statute of the Special Court for Sierra Leone the working language will be English.

1. Both internal and external applicants must complete a Personal History form (P.11) together with a detailed curriculum vitae including date of birth, nationality, educational qualifications. This form is available upon request from scsl-personnel@un.org, or at the Special Court website http://www.sc-sl.org/

2. ALL APPLICATIONS SHOULD BE SENT BY MAIL TO:
   Chief of Personnel, Special Court for Sierra Leone, New England, Freetown, Sierra Leone.
   OR BY EMAIL TO: scsl-personnel@un.org
   OR BY FAX TO: +232 22 279 204; or +39 0831 257204

Sierra Leone is a non-family duty station.

PLEASE INDICATE THE VACANCY ANNOUNCEMENT NUMBER ON THE ENVELOPE OR THE FAX, AND ON THE APPLICATION.
Date of Issuance: 02 November 2007

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Annex M

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INDEX OF PAYMENTS MADE TO DCT-097

NO.	DATE	PURPOSE OF PAYMENT	AMOUNT IN US $	RECEIPT, VOUCHER, MONEYGRAM RECEIPTS
1.	26.03.2004	TRAVEL Payment made to DCT-097 for travel expenses for initial meetings with OTP investigators as a potential source. -Sent via wire transfer.	$1000.00	No receipt, voucher, MoneyGram receipt available.
2.	02.04.2004	TRAVEL Payment made to DCT-097 for travel expenses for initial meetings with OTP investigators as a potential source.	$600.00	No receipt, voucher, MoneyGram receipt available.
3.	02.04.2004	COMMUNICATION Payment made to source DCT-097 for source related communications expenses.	$300.00	No receipt, voucher, MoneyGram receipt available.
4.	02.04.2004	ASSISTANCE Payment made to source DCT-097 to locate potential witnesses. No potential witnesses identified by, or contacted through this source.[1]	$300.00	No receipt, voucher, MoneyGram receipt available.

[1] See Confidential Annex C.

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NO.	DATE	PURPOSE OF PAYMENT	AMOUNT IN US $	RECEIPT, VOUCHER, MONEYGRAM RECEIPTS
5.	14.04.2004	INFORMATION Payment to source DCT-097 for providing information. -Sent via wire transfer.	$400.00	No receipt, voucher, MoneyGram receipt available.
6.	04.08.2004	<u>TRAVEL & ACCOMODATION</u> Payment to source DCT-097 for travel accommodation expenses to locate high level insiders close to Charles Taylor as potential witnesses. No such potential witnesses identified through, or contact made through, this source. - Payment made via wire transfer - $1900.00 - Wire Transfer fee - $100.00	$2000.00	MoneyGram receipt & signed receipt from DCT-097
7.	07.10.2004	TRAVEL, ACCOMODATION & COMMUNICATION Payment to source DCT 097 for travel, communication and accommodation expenses for travel from the country of source's residence to a third country to meet with OTP investigators in re efforts related to Number 6 above. No such potential witnesses identified through, or contact made through, this source. - Payment sent via wire transfer - $660.00 - Wire Transfer fee - $40.00	$700.00	MoneyGram & Signed Receive Form from DCT-097

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No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram receipts
8.	09.10.2004	COMMUNICATION, ACCOMMODATION, TRAVEL RELATED LIVING EXPENSES Payment to source DCT 097 for communication, accommodation and living expenses while attempting to locate and contact two high level insiders close to Charles Taylor as potential witnesses and facilitate introduction between such potential witnesses and OTP investigators. No such potential witnesses identified through, or contact made through, this source.	$200.00	Signed receipt by DCT-097

595

30564

3221

NO.	DATE	PURPOSE OF PAYMENT	AMOUNT IN US $	RECEIPT, VOUCHER, MONEYGRAM RECEIPTS
9.	20.10.2004	TRAVEL & COMMUNICATION Payment to source DCT 097 for communication and transportation expenses for attempting to locate and contact two high level insiders close to Charles Taylor as potential witnesses and facilitate introduction between such potential witnesses and OTP investigators. No such potential witnesses identified through, or contact made through, this source. - Payment made via wire transfer - $280 - Wire Transfer fee - $20.00	$300.00	MoneyGram receipt and Receive Form signed by DCT-097

596

30565

3222

No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram receipts
10.	09.11.2004	TRAVEL & COMMUNICATION Payment to source DCT-097 for transportation and communication expenses related to: a. locating and monitoring activities of potential suspects and locating, monitoring and contacting high level insiders close to Charles Taylor as potential witnesses. No such potential witnesses identified through, or contact made through, this source. b. for providing information to OTP investigators on the whereabouts of Johnny Paul Koroma or his remains. [2] - Payment made via wire transfer - $950 - Wire Transfer fee - $50.00	$1000.00	MoneyGram receipt

[2] Source's information was not corroborated and was contradicted by potential witnesses and other sources, such as DCT-192 who in May and June 2003 indicated Johnny Paul Koroma was in charge of a 3,000 member unit including Charles Taylor personnel and that Johnny Paul Koroma had been killed by Taylor forces in Lofa county.

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No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram receipts
11.	12.11.2004	TRAVEL AND RELATED EXPENSES Payment made to source DCT-097 for airfare and other travel expenses to gather information related to activities which may undermine the security of the SCSL, including Charles Taylor's possible involvement in efforts to destabilize the West African subregion and/or return to Liberia, movements of those who may be working with Charles Taylor in these efforts. - Payment made via wire transfer - $ 470.00 - Wire transfer fee - $ 30.00	$500.00	MoneyGram receipt Signed receipt by DCT-097
12.	18.11.04	TRAVEL AND RELATED EXPENSES Payment made to source DCT-097 for airfare and other travel expenses to gather information related to activities which may undermine the security of the SCSL, including Charles Taylor's possible involvement in efforts to destabilize the West African sub region and/or return to Liberia, movements and activities of those who may be working in concert with Charles Taylor in these efforts. - Payment made via wire transfer - $ 2850.00 - Wire transfer fee - $ 150.00	$3000.00	MoneyGram receipt (for the signed receipt by DCT-097 please see the signed receipt behind No.11)

30567

3224

No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram receipts
13.	22.11.2004	INFORMATION Payment made to source DCT-097 for providing information to OTP investigators. . - Payment made via wire transfer - $1000.00 - Wire transfer fee - $50.00	$1050.00	MoneyGram receipt
14.	22.11.2004	INFORMATION Payment made to source DCT-097 for providing information to OTP investigators. - Payment made via wire transfer - $1720.00 - Wire transfer fee - $80.00	$1800.00	MoneyGram receipt

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30568

3225

No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram Receipts
15.	03.12.2004	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for infiltrating group suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, monitoring and providing information regarding their activities, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $1200.00 - Wire transfer fee - $60.00	$1260.00	MoneyGram receipt, signed Receive Form by DCT-097 & Signed receipt by DCT-097
16.	10.12.2004	INFORMATION Payment made to source DCT-097 for providing information	$1200.00	Signed receipt by DCT-097

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No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram receipts
17.	21.12.2004	INFORMATION Payment made to source DCT-097 for providing information on background, activities and whereabouts of persons believed to be involved in activities which may undermine the security of the sub-region and of the SCSL, that is, on individuals believed to be planning to overthrow and kill the President of Guinea, Lansana Conte, the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $1430.00 - Wire transfer fee - $70.00	$1500.00	MoneyGram receipt and signed receipt by DCT-097

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No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram receipts
18.	28.01.2005	<u>INFORMATION</u> Payment made to source DCT-097 for providing information. - Payment made via wire transfer - $1200.00 - Wire transfer fee - $60.00	$1260.00	MoneyGram receipt
19.	09.03.2005	<u>INFORMATION</u> Payment made to source DCT-097 for providing information on the whereabouts of Johnny Paul Koroma or his remains.[3] - Payment made via wire transfer - $1200.00 - Wire transfer fee - $60.00	$1260.00	MoneyGram & Signed receipt by DCT-097

602

[3] Source's information was not corroborated and was contradicted by potential witnesses and other sources, such as DCT-192 who in May and June 2003 indicated Johnny Paul Koroma was in charge of a 3,000 member unit including Charles Taylor personnel and that Johnny Paul Koroma had been killed by Taylor forces in Lofa county.

30571

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No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram Receipts
20.	14.03.2005	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, monitoring and providing information regarding their activities, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $1000.00 - Wire transfer fee - $50.00	$1050.00	MoneyGram & Signed receipt by DCT-097

603

30572

3229

No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram Receipts
21.	22.03.2005	INFORMATION Payment made to source DCT-097 for providing information related to: a. activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. b. for providing information relating to the whereabouts of Johnny Paul Koroma or his remains.[4] - Payment made via wire transfer - $2000.00 - Wire transfer fee - $100.00	$2100.00	MoneyGram receipt and signed receipt by DCT-097

[4] Source's information was not corroborated and was contradicted by potential witnesses and other sources, such as DCT-192 who in May and June 2003 indicated Johnny Paul Koroma was in charge of a 3,000 member unit including Charles Taylor personnel and that Johnny Paul Koroma had been killed by Taylor forces in Lofa county.

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3230

No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram Receipts
22.	19.04.2005	<u>INFORMATION</u> Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $1000.00 - Wire transfer fee - $50.00	$1050.00	MoneyGram & Signed receipt by DCT-097

605

30574

32231

No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram Receipts
23.	02-03.05.2005	INFORMATION Payment made to source DCT-097 for providing information related to: a. activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. b. providing information relating to the whereabouts of Johnny Paul Koroma or his remains. - Payment made via wire transfer - $1000.00 - Wire transfer fee - $50.00 - Payment to a family member of DCT-097 at the request of source - $200.00	$1250.00	MoneyGram receipt & signed receipts by DCT-097 and family member

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30575

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No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram Receipts
24.	16.05.2005	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $2000.00 - Wire transfer fee - $100.00	$2100.00	MoneyGram receipt & Signed receipt by DCT-097
25.	27.05.2005	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $1000.00 - Wire transfer fee - $50.00 - Payment to a family member of DCT-097 at the request of source - $200.00	$1250.00	MoneyGram receipt & signed receipts by DCT-097 and family member

NO.	DATE	PURPOSE OF PAYMENT	AMOUNT IN US $	RECEIPT, VOUCHER, MONEYGRAM RECEIPTS
26.	03.06.2005	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $1000.00 - Wire transfer fee - $50.00	$1050.00	MoneyGram & signed receipt by DCT-097

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30577

3234

No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram receipts
27.	07.07.2005	INFORMATION Payment made to source DCT-097 for providing information related to: a. activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. b. providing information relating to the whereabouts of Johnny Paul Koroma or his remains. - Payment made via wire transfer - $800.00 - Wire transfer fee - $40.00 - Payment to a family member of DCT-097 at the request of source - $400.00	$1240.00	MoneyGram & signed receipts by DCT-097 and family member

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30578

32315

No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram Receipts
28.	09.08.2005	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $800.00 - Wire transfer fee - $40.00 - Payment to a family member of DCT-097 at the request of source - $400.00	$1240.00	MoneyGram & signed receipts by DCT-097 and family member

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30579

32361

NO.	DATE	PURPOSE OF PAYMENT	AMOUNT IN US $	RECEIPT, VOUCHER, MONEYGRAM RECEIPTS
29.	29.08.2005	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $990.00 - Wire transfer fee - $50.00 - Payment to a family member of DCT-097 at the request of source - $500.00	$1540.00	MoneyGram & signed receipts by DCT-097 and family member
30.	22.09.2005	INFORMATION Payment made to source DCT-097 for providing information.	$1050.00	No receipt, voucher, MoneyGram receipt available.
31.	22.03.2006	INFORMATION Payment to source DCT-097 for providing information.	$200.00	No receipt, voucher, MoneyGram receipt available.

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3237

NO.	DATE	PURPOSE OF PAYMENT	AMOUNT IN US $	RECEIPT, VOUCHER, MONEYGRAM RECEIPTS
32.	22.03.2006	TRAVEL, ACCOMMODATION, COMMUNICATION Payment to source DCT-097 for transport, accommodation and communication costs related to gathering and providing information to OTP investigators.	$300.00	No receipt, voucher, MoneyGram receipt available.
33.	21.04.2006	COMMUNICATION Payment made to source DCT-097 for communication costs associated with providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte , and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $200.00 - Wire transfer fee - $15.00	$215.00	MoneyGram receipt and signed receipt by DCT-097

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NO.	DATE	PURPOSE OF PAYMENT	AMOUNT IN US $	RECEIPT, VOUCHER, MONEYGRAM RECEIPTS
34.	01.06.2006	TRAVEL Payment to source DCT 097 for travel to meet with OTP investigators regarding provision of information related to activities which may undermine the security of the sub-region and of the SCSL, that is, information as to the activities of individuals suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, associated arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates.	$616.37	No receipt, voucher, MoneyGram receipt available.
35.	06.06.2006	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $900.00 - Wire transfer fee - $20.00	$920.00	No receipt, voucher, MoneyGram receipt available.

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No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram receipts
36.	06.06.2006	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $500.00 - Wire transfer fee - $50.00	$550.00	No receipt, voucher, MoneyGram receipt available.
37.	19.06.2006	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates.	$1200.00	No receipt, voucher, MoneyGram receipt available.

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No.	Date	Purpose of Payment	Amount in US $	Receipt, Voucher, MoneyGram receipts
38.	23.06.2006	INFORMATION Payment made to source DCT-097 for providing information related to activities which may undermine the security of the subregion and of the SCSL, that is, for monitoring and providing information regarding activities of persons suspected of planning to overthrow and kill the President of Guinea, Lansana Conte, and providing information concerning arms, location of fighters, operational meetings, and the involvement of Charles Taylor and/or Charles Taylor subordinates. - Payment made via wire transfer - $600.00 - Wire transfer fee - $30.00	$630.00	MoneyGram receipt
39.	21.07.2006	INFORMATION Payment made to source DCT-097 for providing information related to whereabouts and activities of Benjamin Yeaten. - Payment made via wire transfer - $1200.00 - Wire transfer fee - $60.00	$1260.00	MoneyGram receipt

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Annex N

Table of Improper Prosecution Payments

TF1-	Transcript Reference	WMU Payment	Impropriety
015	9 Jan 2008, p. 786-9	Money for family welfare	No provision for assistance for family under Rule 39(ii)
406	14 Jan 2008, p. 1123	Money for expenses	Money exceeded legitimate expenses
406[1]	14 Jan 2008, p. 1124	Money for "reactivation of source development"	Witness cannot explain what the money was given for
275	26 Feb 2008, p. 4757-8	Money for meals and drinks and medicine	No interview record disclosed in relation to this meeting with Witness (on 6 Feb 2007) where Witness was given money for food and drink and medicine
275	26 Feb 2008, p. 4758-63	Money for school fees and uniforms for Witness' children	No provision for assistance for family under Rule 39(ii)548
548	13 Feb 2008, p. 3766-2810	Money for "assistance" without any specified purpose	For "assistance" to be legitimate, it must have a clearly stated purpose
362	3 Mar 2008, p. 5148 and 4 Mar 2008, p. 5157-61	Money for children's school fees or "child's care"	No provision for assistance for family under Rule 39(ii)
337	6 Mar 2008, p. 5499-501	Money for lodging and meals	Witness was interviewed for one day but provided lodging for five days
337	10 Mar 2008, p. 5596-8	Money for lost wages	Witness was dealing with a medical emergency, not undergoing interviews with the OTP, so no clear reason for why he was paid for lost wages by the OTP
337	10 Mar 2008, p. 5600	Money for medical assistance for wife	No provision for assistance for family under Rule 39(ii)
399	14 Mar 2008, p. 6138	Money for transportation	Money given ($400) was beyond that necessary to reimburse transportation cost ($130)
532	31 Mar 2008, p. 6264-66	Money for transport and lost wages	Witness did not understand that he was given money for lost earnings
532	1 Apr 2008, p. 6388	Money for lost wages	Money for lost wages paid on a Sunday, and Witness was not clear that he typically worked on a Sunday
532	7 Apr 2008, p. 6706-9	Money provided during "clarification" interviews	A clarification interview would suggest that the Witness is now a witness and not a potential witness and thus WVS, not WMU should be responsible for such expenses
516	11 Apr 2008, p. 7292	Money provided for "taking his time"	No legitimate reason for assistance

[1] The Defence notes that TF1-406 was used both as a Prosecution Witness in this trial and worked for the Prosecution as a source for finding other potential witnesses. See, ex., *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 14 January 2008, p. 1124-5 and p. 1152. Based on WMU payment records, it seems TF1-360 was also used both as a Prosecution witness and as a source. See, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 7 February 2008, p. 3396-3402.

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Table of Improper Prosecution Payments

TF1	Transcript Reference	WMU Payment	Impropriety
516	16 Apr 2008, p. 7790	Money for "lost wages" and "time spent"	Money seems to have been paid twice for same purpose
516	16 Apr 2008, p. 7791	Money for "lost wages"	Witness was paid for lost wages but does not remember missing any work
334	29 Apr 2008, p. 8884-7	Money for transport allowance	Witness was in prison at the time and was escorted by prison officers to the SCSL and therefore did not pay for his transportation; Witness said he believed the money given to him was just an "allowance"
334	29 Apr 2008, p. 8889 et seq	Money for transport, meals, communication and lost wages	Witness was given 47 payments to the witness for such expenses in 2006, but there are no corresponding interviews or records of meetings with the Prosecution
571	14 May 2008, p. 9767-8	Money for transportation	Payments were made for transportation, but Witness does not recall going anywhere to meet the Prosecution
561	16 May 2008, p. 10078	Money for family expenses	Witness given $1000 for his family while he went to Ghana to take care of "unpaid receipts". No reasonable connection to Witness' interaction with the Prosecution
561	19 May 2008, p. 10127	Money for medical expenses	Witness was given money to cover his medical expenses, the cost of which he said he could meet on his own; Witness considered this a "goodwill gesture" by the Prosecution
561	19 May 2008, p. 10128	Money for fuel, family assistance, transport and lodging	Witness says he received payments on days he was not interviewed
388	15 July 2008, p. 13680-1	Money from Prosecution	Witness was offered $50 by the Prosecution but rejected it
375[2]	26 Aug 2008, p. 14644-50	Money for transportation	Witness given $50 for a five minute motorbike ride
375	27 Aug 2008, p. 14717-8	Money for family and family security	No provision for assistance for family under Rule 39(ii)
568	15 Sept 2008, p. 16262-3	Money for prepping and lost wages	Witness denies that any prepping was done; if it was done, then expenses should have rightfully been covered by WVS instead of WMU
274[3]	11 Dec 2008, p. 22227	Money for communication, lost wages,	Witness received payments for meeting purposes but

[2] It appears that TF1-375 was used both as a Prosecution witness and as a source of information, for which he was paid. See, ex., *Prosecutor v. Taylor*, SCSL-03-01-T, 26 August 2008, p. 14644-69; 27 August 2008, p. 14708-12.

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Table of Improper Prosecution Payments

TF1-	Transcript Reference	WMU Payment	Impropriety
		transport, etc	the Prosecution has not provided records of any such meetings
274	11 Dec 2008, p. 22229	Money for communication	Witness given money for top-up cards which he used on personal business as well as OTP business
274	11 Dec 2008, p. 22237-8	Money for lost wages	There was no interview with this witness during the time the lost wages were supposedly lost
274	11 Dec 2008, p. 22242	Money for one year's house rent	Witness' one-year house rent was paid by the Prosecution at a time when such costs should have been borne by WVS

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[3] It appears that TF1-274 was used both as a Prosecution witness and as a source for information, for which he was paid. See, ex., *Prosecutor v. Taylor*, SCSL-03-01-T, 11 December 2008, p. 22229-30 and p. 22242-3.

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Annex O

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The Triumph of Good Over Evil...

The Investigation, Indictment, and Arrest of Charles Taylor

A Regional Approach to Justice

Professor David M. Crane
Syracuse University
College of Law

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What we'll talk about today...

What we'll talk about today...

Review the conflict.

Discuss the joint criminal enterprise.

Consider the crimes committed.

Highlight Operation Justice.

The key appellate decision: Prosecutor v. Taylor.

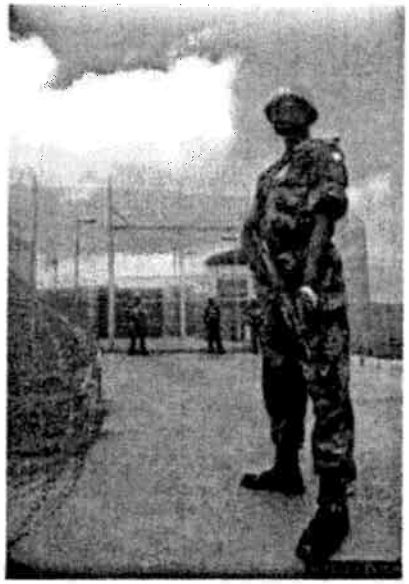
Focus on the Summer of 2003.

Taylor in Nigeria.

The international operation to bring him in!

Justice for West Africa.

Concluding thoughts/lessons



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IN GENERAL...

CONFLICTS ARE EVOLVING INTO UNCIVILIZED EVENTS.

THEY ARE LESS POLITICAL...MORE ECONOMIC IN ORIGIN/SCOPE.

THE COMBATANTS ARE MERE PAWNS IN A DEADLY CRIMINAL ENTERPRISE.

RESPECT FOR THE LAW OF ARMED CONFLICT—DIMINISHING AS THE CRIMINAL ELEMENT INCREASES

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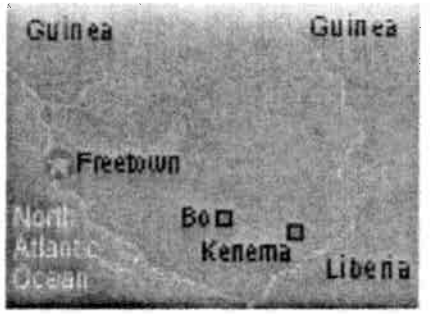
The Conflict in Sierra Leone



Horrific destruction of life and property!

1.2 million murdered, raped, maimed and mutilated.

5 million internally displaced.

2 countries destroyed...Sierra Leone and Liberia.

Sustained by a joint criminal enterprise backed by three heads of state...Libya, Liberia, and Burkina Faso.

Motive was geopolitical influence and personal greed and avarice.

Lasted over 10 years.

The Special Court for Sierra Leone was established to seek justice for the victims.

Ultimately all those who bore the greatest responsibility were accounted for.

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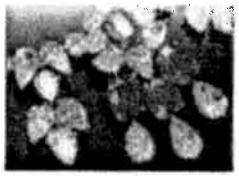
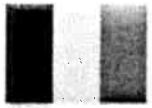


Eastern European
Mafia-guns
Victor Bout
Vladimir Menin
(Italy)

AQ and
Afghanistan

Aziz
Nasur
Lebanon



USA

Sammy Osally
Belgium-diamonds

Cash

Guns
Diamonds
Cash

Israeli
Diamond
Dealers

Blasé Campore/
Ibrahim Bah
Burkina Faso

Muammar
Ghadafi

Hamas
PLA

500,000
destroyed lives/
2.5 million
internally
displaced

Guns
Diamonds
cash

Charles
Taylor
Liberia

Samuel
Bokerie
Cote d'voi

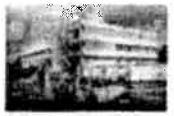
Guns
diamonds

Foday
Sankoh
Sierra Leone

Cash
guns

Safe haven

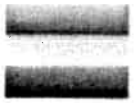
Bombings
in Kenya and
Tanzania--AQ



France
China

Timber
cash

OTC-**Gus K**
Netherlands.



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The horror of the crimes committed...

13 indicted...

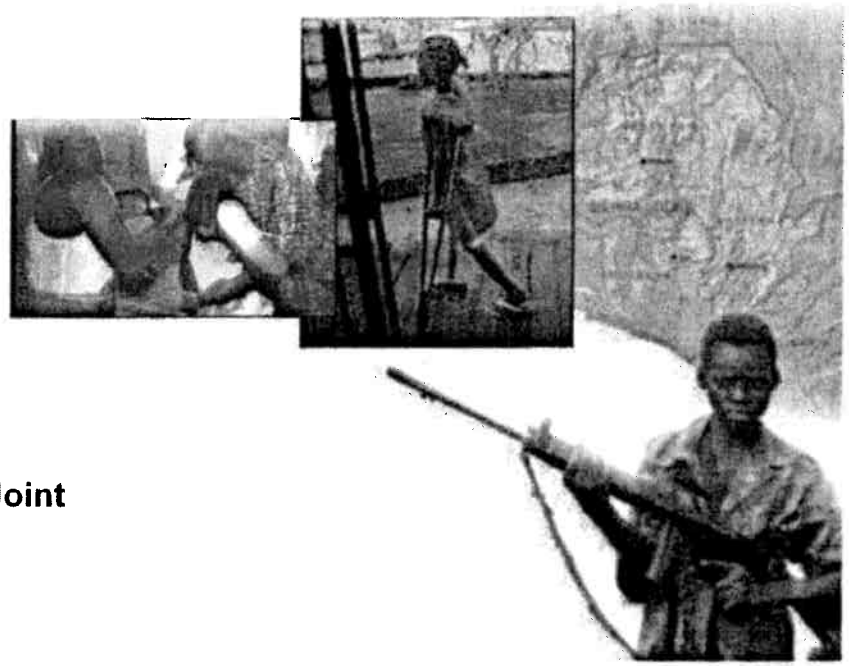
A sitting head of state, President Charles Taylor was indictment #1.

The initial indictment signed on 3 March 2003 consisted of 17 counts.

Amended to 11 counts.

Indicted for:

Murder
Rape
Pillaging
Use of Child Soldiers
Enslavement
Among other crimes



Charles Taylor was the heart of the Joint Criminal Enterprise

621

30596

3253

Operation Justice

628

10 March 2003.

7 months after arrival.

Allied involvement.

Bonthe Island.

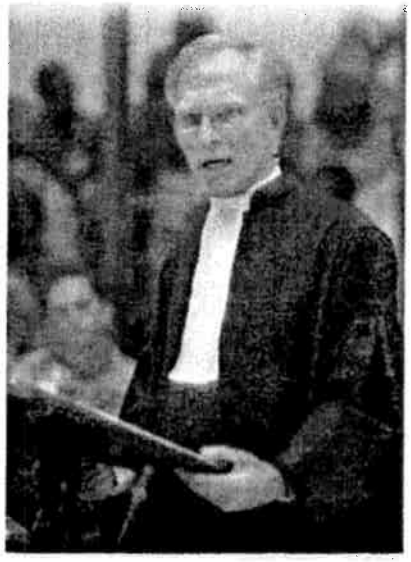
The “take down”.

A new dawn for Sierra Leone!

30597

3254

A Key Decision...

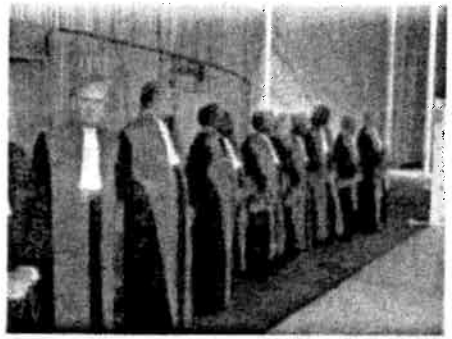


Prosecutor v. Charles G. Taylor:

First time ever...

Following dicta in the Congo case...

Heads of state who, for the own personal criminal gain, commit international crimes are NOT immune from those crimes.



The head of state immunity hurdle had cracked if not eroded.

A tactical error on Charles Taylor's part making an "appearance" before the appellate chamber.

629

30598

3255

The Summer of 2003

April/May planning to focus attention on Charles Taylor…

Information operation against him.

Exposed his involvement in the Ivory Coast.

J.P. Karoma and "the Maskita"…

The Ghana Peace Accords. "Lets publicly humiliate him!"

CT humbled before the law.

Several weeks of indecision

August 11, 2003: Removed!

"I'll be back!"

930

30597

3256

Taylor in Nigeria...

Taylor in Nigeria...

Ultimately there for almost three years…lived in luxury.

Ran Liberia from Calabar!

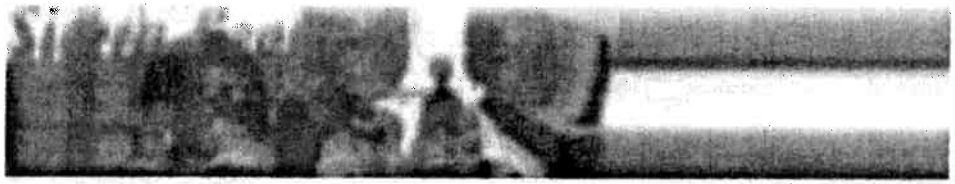
Meddled in the elections.

Continued to influence the region.

Terrorists

Attempted assassination

Moved assets.



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The Noose Tightens...

The International Effort to Bring Taylor in!

Dec 2004: Red Notice issued from INTERPOL.

Feb 2005: EU passes resolution.

Spring 2005: US lobbying.

April/May 2005: At the UN: UNSC "seized" of the Taylor issue.

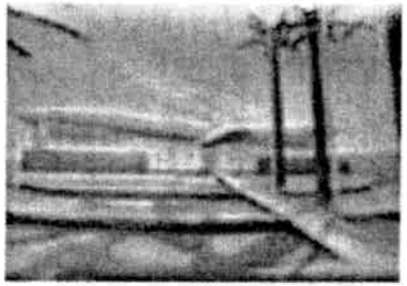
US Congress: Resolution 127: Immediate handover.

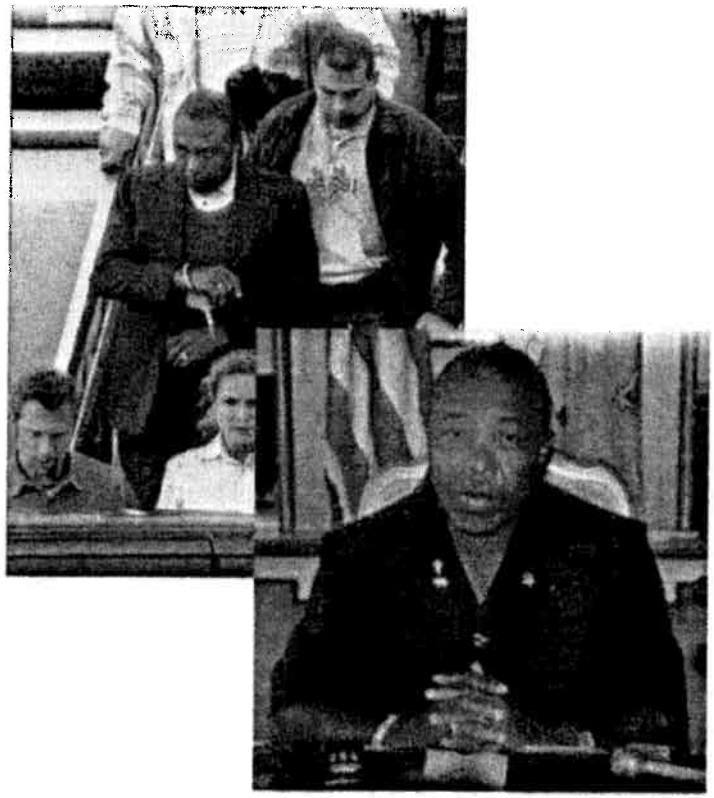
632

30601

3258

Justice for West Africa





President Johnson-Sirleff visit to US…

"There must be justice."

Nigeria…"you want him…come get him."

The attempted "escape"…

"The President will not see you tomorrow."

The arrest and handover to the SCSL.

Arraignment and movement to the Hague.

Concluding thoughts and perspectives...

Concluding thoughts and perspectives...

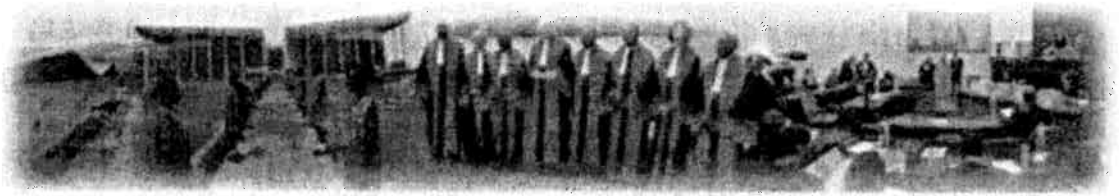
No one is above the law.

The rule of law is more powerful than the rule of the gun.

Politics is the bright red thread in international criminal justice.

The beast of impunity must be faced down wherever it rears its ugly head.

Indifference.



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Thank you for your attention…

I look forward to your questions/comments and a dialog!

635

30604

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3262

1084)

SCSL-03-01-T
(30237-30248)

30237

SCSL

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 23 September 2010

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
THE HAGUE
23 SEP 2010
NAME ALHASSAN FORNAH
SIGN
TIME 14:42

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON DEFENCE MOTION FOR DISCLOSURE OF STATEMENT AND PROSECUTION PAYMENTS MADE TO DCT-097

Office of the Prosecutor:
Brenda J. Hollis
Leigh Lawrie

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

636

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

SEISED of the "Public, with Public Annex F and Confidential Annexes A, B, C, D, E, G, H, I Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097", filed on 4 August 2010 ("Motion");[1]

NOTING the "Prosecution Response to Public with Public Annex F and Confidential Annexes A, B, C, D, E, G, H, I, Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097", filed on 13 August 2010 ("Response");[2]

NOTING ALSO the "Defence Reply to Prosecution Response to Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097", filed on 18 August 2010 ("Reply");[3]

NOTING FURTHER the "Public with Confidential Annex A Addendum to Defence Reply to Prosecution Response to Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097", filed on 19 August 2010 ("Addendum");[4]

RECALLING that on 7 September 2010 the Trial Chamber delivered a brief oral Decision granting the Motion in part and undertook to publish its reasoned Decision in writing in due course ("Oral Decision");[5]

RECALLING FURTHER the Trial Chamber's oral Order to the Prosecution to:

1. Disclose to the Defence forthwith, pursuant to Rule 68:
   (a) an account of all payments made to or benefits conferred upon Witness DCT-097/TF1-354 by the Prosecution for the period 2004 to 2006, or at any time before or after that period.
   (b) all documents relating to such payments, including receipts, vouchers, Money Gram receipts, etc;
2. Provide an explanation for those payments.

COGNISANT of the provisions of Article 17(4) of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 66, 68 and 73(A) of the Rules of Procedure and Evidence ("Rules");

HEREBY delivers its reasoned Decision based solely on the written submissions of the parties, pursuant to Rule 73(A):

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[1] SCSL-03-01-T-1039.
[2] SCSL-03-01-T-1046.
[3] SCSL-03-01-T-1052.
[4] SCSL-03-01-T-1053.
[5] Transcript 7 September 2010, pp. 48082, 48083.

I. BACKGROUND

1. "Witness DCT-097" is the pseudonym of a protected Defence witness[6] listed on the Defence Core Witness List.[7] According to the Defence, Alex Yearsley of "Global Witness"[8] interviewed Witness DCT-097 in Abidjan in 2001 or 2002 and recorded a statement from the latter ("Global Witness Statement"), which statement allegedly related to the witness's involvement in trading diamonds for the Revolutionary United Front (RUF) in Monrovia from 2000.[9] Subsequently, the Prosecution contacted Witness-DCT-097 through Yearsley and communicated with him from 2004 until sometime in 2006.[10] The Defence maintains that during this period, the Prosecution made numerous payments to Witness DCT-097 estimated at $ 30,000 in total.[11] The Prosecution in accordance with its disclosure obligations under the Rules disclosed to the Defence certain material in relation to Witness DCT-097 under the pseudonym "TF1-354" although it ultimately did not call Witness DCT-097 as a witness in any case before the Special Court.[12] However, the Prosecution did not disclose the Global Witness Statement nor the payments made to Witness DCT-097.

2. The Defence submits that despite repeated requests from the Defence for disclosure of the statement or statements given by Witness DCT-097 and records of moneys given to the witness, the Prosecution has breached its Rule 68(B) obligations by failing to disclose information relating to:

(i) the existence and substance of a statement given by DCT-097 to Global Witness, which the Prosecution is aware of and which pre-dated Prosecution interviews with DCT-097; and

(ii) an accounting and explanation of money (estimated at almost $ 30,000) paid to or benefits conferred on DCT-097 by the Prosecution from 2004 to 2006.[13]

3. The Defence maintains that the Global Witness Statement is exculpatory in that it states that Charles Taylor was not connected to the RUF diamond trading in Monrovia and clearly suggests the

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[6] See *Prosecutor v. Taylor*, SCSL-03-01-T-782, Decision on Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials, 27 May 2009, where the witness was granted *inter alia*, the protective measure of use of a pseudonym.

[7] *Prosecutor v. Taylor*, SCSL-03-01-T-957, Defence Rule 73ter Filing of Witness Summaries - Version Five, 12 May 2010, Annex C.

[8] According to the website www.globalwitness.org, Global Witness is a non-Governmental organisation that "exposes the corrupt exploitation of natural resources and international trade systems in order to drive campaigns that end impunity, resource-linked conflict and human rights and environmental abuses."

[9] Motion, para. 10.

[10] Motion, para. 10.

[11] Motion, paras 2, 10, 11, 18, 19 and Confidential Annex G.

[12] Letter from Courtenay Griffiths, QC, to Brenda Hollis, 19 May 2010 [Confidential Annex B to the Motion] (" First Disclosure").

[13] Motion, paras 1-2.

innocence of the Accused.[14] The Defence argues that the Prosecution "must have this statement within its custody or control" or "at the very least, it must have been privy to the contents of the statement".[15] The Defence further maintains that the payments made to Witness DCT-097 by the Prosecution are an exculpatory factor that "necessarily impacts on the credibility and reliability" of the witness's statements disclosed to the Defence. The Defence maintains that by failing to disclose the Global Witness Statement and the said payments, the Prosecution is in breach of its Rule 68(B) obligations in relation to Witness DCT-097 whom the Defence intends to call as a witness[16] and accordingly, requests the Trial Chamber to compel the Prosecution to do so.

II. APPLICABLE LAW

4. The Trial Chamber is mindful of the rights of the Accused as provided for in Article 17(4) of the Statute of the Special Court.

5. The Trial Chamber takes note of the legal provisions governing the disclosure of materials by the Prosecutor as set out in Rule 66, which provides in relevant part that:

> (i) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:
>
> (i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92bis at trial.
>
> (ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time.

6. The specific provisions of the law relating to the disclosure of exculpatory materials is embodied in Rule 68 of the Rules, which provides in relevant part as follows:

> (A) The Prosecutor shall, within 14 days of receipt of the Defence case Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.
>
> (B) The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

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[14] Motion, para. 17.
[15] Motion, para. 16.
[16] Motion, para. 21.

III. DELIBERATIONS

Arguments relating to the status of Witness DCT-097

7. The Prosecution maintains that it is under no duty to disclose any materials relating to Witness DCT-097 as the latter is a Defence witness and has never been included on any of the Prosecution's witness lists filed with the Court in this case, nor has he ever testified on behalf of the Prosecution in this or any other case before the Special Court.[17] The Prosecution submits that its disclosure to the Defence on 14 June 2010 of un-redacted materials relating to the witness was "on a bona fide basis and in the spirit of the jurisprudence in this area",[18] rather than out of an obligation under the Rules. The Prosecution maintains that it has strictly complied with its disclosure obligations under the Rules and has "disclosed details of all payments to and benefits conferred on *Prosecution* witnesses. However, there is no jurisprudence to support the Defence contention that such disclosure must be made in respect of Defence witnesses."[19]

8. The Defence submits that on 21 July 2010 a Defence Lawyer and Defence investigator interviewed Witness DCT-097 who *inter alia*, disclosed to the Defence *(a)* that in 2004 the Prosecution approached him through Alex Yearsley of Global Witness; *(b)* that Witness DCT-097 was subsequently interviewed by various members of the Prosecution (including David Crane, Gilbert Morissette, John Berry, Maggie and an Australian); *(c)* that the Prosecution wanted him to confirm what they said they had heard from other sources, namely, that Witness DCT-097 was the main RUF person who carried diamonds to Charles Taylor; *(d)* that the Prosecution paid DCT-097 a "monthly allowance" of approximately $ 1,200 from sometime in 2004 until sometime in 2006 generally for his "upkeep"; *(e)* that the Prosecution stopped paying this allowance to DCT-097 in 2006 when they met him for the final time and told him that "they were not getting what they needed from him"; and *(f)* that on this occasion, the Prosecution had been prepared to relocate Witness DCT-097 and his family but that he ultimately refused to cooperate.[20]

9. The Defence further submits that the nine statements and/or correspondences dated between 27 May 2004 and 15 January 2006 disclosed by the Prosecution to the Defence on 14 June 2010 in relation to DCT-097[21] are further proof that the Prosecution was in contact with and/or interviewed the witness from May 2004 to January 2006.[22] The Defence submits further that during the RUF

[17] Response, paras 7-10.
[18] Response, para. 5.
[19] Response, para. 8.
[20] Motion, para. 10, Confidential Annex E.
[21] Motion, para. 9, Confidential Annex A.
[22] Reply, para. 11.

Case before Trial Chamber I,[23] the Prosecution assigned the witness the pseudonym TF1-354 and obtained protective measures for him as a "Category 1(C) insider witness", including a provision wherein the Defence could not contact TF1-354 without the Court's prior approval[24]. The Defence argues in view of the above, that DCT-097/TF1-354 remains a Prosecution witness and the fact that the Defence now intends to call him as a Defence witness should not relieve the Prosecution of its disclosure obligations under Rule 66 and/or Rule 68.[25] The Defence further submits that the Prosecution's use of Witness DCT-097 as an informant or source rather than as a potential witness is not significant for purposes of a Rule 68(B) disclosure[26]. Rather it is the nature and/or content of the material in relation to the witness that determines whether or not it is exculpatory and therefore should be disclosed.[27]

Findings

10. There is evidence to suggest that between May 2004 and January 2006 the Prosecution interacted with and/or interviewed Witness DCT-097 (otherwise known to the Prosecution as TF1-354), notwithstanding that he ultimately was never called to testify. The Prosecution admits making redacted and un-redacted disclosures to the Defence of nine statements and/or correspondences in relation to these interactions, on 17 May 2006 and 14 June 10, respectively.[28] The fact that the Prosecution obtained protective measures from Trial Chamber I for this individual including the use of the pseudonym "TF1-354" in order to protect his identity as a "Category 1(C) insider witness"[29] further illustrates the Prosecutions' regard of this individual as a potential Prosecution witness. This evidence strongly suggests that for all intents and purposes Witness DCT-097 or TF1-354 was a potential Prosecution witness.

11. The Trial Chamber notes in any event, that the Defence request is for disclosure of potentially exculpatory material pursuant to Rule 68(B) rather than a request for general disclosure pursuant to Rule 66. Under Rule 68(B), the Prosecution is required to continuously disclose to the Defence "the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or

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[23] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T.
[24] Reply, para. 11.
[25] Reply, paras 11-12.
[26] Reply, para. 13.
[27] Reply, paras 14-15.
[28] Response, para. 5.
[29] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004 and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-102, Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures, 2 April 2004, where TF1-354 is listed in Annex A as No. 23 on the list of Category C Insider Witnesses.

mitigate the guilt of the Accused or which may affect the credibility of the Prosecution evidence". This provision has been liberally construed to apply to all exculpatory material that is in the custody or control of the Prosecutor, and is not limited to material relating to "Prosecution witnesses" as argued by the Prosecution.[30] Accordingly the Trial Chamber finds that the Prosecution is under an obligation to disclose to the Defence in relation to Witness DCT-097/TF1-354, any exculpatory material in its custody or control, regardless of whether or not the latter was called by the Prosecution to testify.

Arguments in relation to the Disclosure of the Global Witness Statement:

12. Firstly, the Defence requests the Trial Chamber to compel the Prosecution to fulfil its Rule 68 obligations by disclosing "the existence and substance of a statement given by Witness DCT-097 to Global Witness, of which the Prosecution is aware and which predated Prosecution interviews with DCT-097."[31] The Defence submits that in his interview of 21 July 2010, Witness DCT-097 informed members of the Defence *(a)* that in 2001 or 2002 he was interviewed by one Alex Yearsley of Global Witness who recorded a statement from the witness; *(b)* that the Global Witness Statement related to the witness's involvement in trading diamonds for the RUF in Monrovia from 2000 *(c)* that DCT-097 told Global Witness that the RUF were not involved in trading diamonds with Charles Taylor or the Liberian Government but that this was the story Global Witness wanted DCT-097 to confirm; *(d)* that Alex Yearsley called DCT-097 from the Congo in 2004 to say that a contact of his from the Special Court from Sierra Leone would be in touch with DCT-097 and that he (DCT-097) should cooperate; *(e)* that a few days later, Gilbert Morissette of the Prosecution called DCT-097 and asked to meet with the latter at a place chosen by DCT-097; *(f)* that the Prosecution wanted DCT-097 to confirm what they said they heard from other sources, namely, that DCT-097 was the main RUF person who carried diamonds to Charles Taylor; and *(g)* that DCT-097 was interviewed by various members of the Prosecution including David Crane, Gilbert Morissette, John Berry, Maggie and an Australian.[32] The Defence argues that since the crux of the Prosecution case rests on allegations that blood diamonds were provided by the RUF to Charles Taylor in exchange for his support of their revolution, the information given by Witness DCT-097 in the Global Witness Statement that the

[30] *Prosecutor v. Taylor*, SCSL-03-01-T-770, Decision on Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call, 30 March 2009, para. 12; *Prosecutor v. Taylor*, SCSL-03-01-T-735, Decision on Confidential Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68, 18 February 2009, para. 5; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-363, Decision on Sesay Motion Seeking Disclosure of the relationship Between Governmental Agencies of the United States of America and of the Office of the Prosecutor, 2 May 2005, para. 35.

[31] Motion, paras 2, 16-17, 25.

[32] Motion, para. 10.

RUF was not involved in trading diamonds with Charles Taylor or the Liberian Government, clearly suggests the innocence of the Accused.[33]

13. Although Global Witness responded to a query from the Defence indicating that "they no longer have the requested information on record and are unable to provide it," [34] the Defence claims that, before the Prosecution decided to contact DCT-097 it is only logical that Global Witness must have given the Prosecution some indication or summary of the substance of its interview with DCT-097 thus knowledge of this exculpatory material should be imputed to them[35] and that the Prosecution must have this Statement within its custody or control, or at the very least, been privy to the contents of the Statement.[36] The Defence further submits that given the demonstrated level of cooperation between Global Witness and the Prosecution the Prosecution is better placed to obtain the Statement and should have obtained and disclosed it[37]. The Defence accordingly requests the Trial Chamber to compel the Prosecution to disclose the extent of its knowledge in regard to the Global Witness Statement as well as a copy the Statement itself or Investigative Notes based on the lead Alex Yearsley gave to Gilbert Morissette in 2004.[38]

14. The Prosecution opposes the Motion on the grounds that it does not have any Global Witness Statement in its possession, nor does it know of the existence of any Rule 68 evidence in such material as speculated by the Defence.[39]

Findings

15. The Trial Chamber has held that in order to establish that the Prosecution has breached its Rule 68(B) disclosure obligations, the onus is upon the Defence to:

(i) identify the material sought with requisite specificity;

(ii) make a *prima facie* showing of the exculpatory or potentially exculpatory nature of the materials requested;

(iii) make a *prima facie* showing of the Prosecution's custody or control of the materials requested;

(iv) show that the Prosecution has, in fact, failed to disclose the targeted exculpatory material.[40]

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[33] Motion, para. 17; Reply, para. 5.
[34] Addendum, paras 1-3.
[35] Reply, paras 6, 8.
[36] Motion, para. 16.
[37] Reply, paras 8, 9.
[38] Motion, para. 16.
[39] Response, para. 4.
[40] *Prosecutor v. Taylor*, SCSL-03-01-T-516, Decision on Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68 of the Rules of Procedure and Evidence, 22 May 2008, p. 4; *Prosecutor v. Taylor*, SCSL-03-01-T-770, Decision on Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in redacted

16. Regarding the alleged Global Witness Statement, the Defence has not made a *prima facie* showing that the Global Witness Statement actually exists; that its content is potentially exculpatory or that it is in the custody or control of the Prosecution. On the contrary, the Defence has provided information showing that Global Witness "no longer has the information requested by the Defence and that they cannot be of assistance".[41] Furthermore, the Trial Chamber is of the view that the Defence's allegation that before the Prosecution decided to contact DCT-097 it is only logical that Global Witness must have given the Prosecution some indication or summary of the substance of its interview with DCT-097[42] and that the Prosecution must have this Statement within its custody or control, or at the very least, been privy to the contents of the Statement,"[43] have no factual basis and are pure speculation or conjecture on the part of the Defence. The Trial Chamber finds that the Defence has not demonstrated on a *prima facie* basis, the Prosecution's breach of Rule 68(B) obligation with regard to the alleged Global Witness Statement and accordingly dismisses this part of the Motion.

Arguments in relation to the Disclosure of Payments made to Witness DCT-097

17. Secondly, the Defence requests the Trial Chamber to compel the Prosecution to fulfil its Rule 68 obligations by disclosing "an accounting and explanation of money (estimated at $ 30,000) paid to or benefits conferred on DCT-097 by the Prosecution from 2004 to 2006."[44] It argues that the payments made to Witness DCT-097 during this period of cooperation with the Prosecution are "exculpatory" within the meaning of Rule 68(B) as they "necessarily impact on the credibility and reliability" of statements made by the witness to the Prosecution.[45]

18. The Defence submits that in his interview of 21 July 2010, Witness DCT-097 further informed members of the Defence *(a)* that after meeting with and while being interviewed by various members of the Prosecution (including David Crane, Gilbert Morissette, John Berry, Maggie and an Australian), the Prosecution paid DCT-097 a monthly "allowance" of approximately $ 1,200 a month from sometime in 2004 until 2006; *(b)* that the Prosecution did not provide this allowance for any

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Witness Statements of Witnesses the Prosecution does not Intend to Call, 30 March 2009, para. 13; *Prosecutor v. Taylor*, SCSL-03-01-T-735, Decision on Confidential Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68, 18 February 2009, para. 5; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-03-05-PT, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, paras 27, 43; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-436, Decision on Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witnesses TF1-141, 26 October 2005, para. 24.

[41] Addendum to Reply, Confidential Annex A.

[42] Reply, paras 6, 8.

[43] Motion, para. 16.

[44] Motion, paras 2, 16-17, 25.

[45] Motion, paras 21-24.

specific purpose, but for DCT-097's general "upkeep"; *(c)* that this allowance would be given to DCT-097 in cash if he was in Freetown or would be sent to him via Money Gram if he was travelling throughout the sub-region; *(d)* that this allowance stopped when DCT-097 met with the Prosecution for a final time in Senegal in 2006 and the Prosecution told DCT-097 that they were not getting what they needed from him.[46]

19. In support of the above submissions, the Defence annexed copies of 17 Money Gram receipts to the Motion which, it submits, were provided to the Defence investigators by Witness DCT-097, showing payments being sent via the money transfer service known as Money Gram, from five former or current Prosecution employees (including Mustapha Koroma, Aiah Komeh, Miatta Samba, Prince Sannoh and Umaru Kamara) to DCT-097 in various West African Countries, during the period 8 April 2004 to 19 June 2006 in amounts such as $ 2,000; € 1,552 Euros; 8,989,200 Ghanaian Cedis and 526,269 CFA Francs.[47] The Defence further submits that based on the information from DCT-097, the 17 Money Gram receipts do not represent the sum total of payments made to or benefits conferred upon DCT-097 by the Prosecution and that additional payments were also made in cash.[48]

20. The Prosecution, whilst not denying that it made the alleged payments to DCT-097, submits that "at this stage it is not under an obligation to disclose material relating to payments made to or benefits conferred upon DCT-097 as the latter was not called to testify on behalf of the Prosecution".[49]

Findings

21. The Trial Chamber adopts the view of the ICTR in the *Prosecutor v. Karemera et al.* where the Trial Chamber in interpreting a rule similar to our Rule 68(B) stated:

> Materials or information within the Prosecutor's knowledge concerning any benefits paid to and/or promises made to witnesses and victims beyond that which is reasonably required [for the management of witnesses and victims] has a different character and should therefore be disclosed as evidence which may affect the credibility of witnesses under Rule 68.[50]

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[46] Motion, para 10.
[47] Motion, paras 11, 18, Public Annex F and Confidential Annex G.
[48] Motion, para. 18.
[49] Response, paras 7-10.
[50] *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005, para. 7; see also *Prosecutor v. Nzirorera et al.*, ICTR-98-44-I, Decision on Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para.16 and *Prosecutor v. Bizimungu, Mugeni, Bicamumpaka and Mugiraneza*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006, para. 13.

22. With regard to the alleged payments made to or benefits conferred on Witness DCT-097, the Trial Chamber notes that the Prosecution has neither challenged the contents of the 17 Money Gram receipts annexed to the Motion nor the fact that the payments were made by five of its staff to Witness DCT-097. Furthermore, the Trial Chamber notes that some of the "sender names" indicated on the 17 Money Gram receipts are names of Prosecution employees listed on a Special Court telephone directory attached as Annex H to the Motion. In the Trial Chamber's view, these 17 receipts link the Prosecution to the payments made to Witness DCT-097 during the period 8 April 2004 to 19 June 2006. The payments do not appear to have been made by the Witness and Victims Service of the Special Court (WVS) and on the face of it, appear to be beyond that which is reasonably required for the management of witnesses or victims. Accordingly the Trial Chamber holds that they should have been disclosed by the Prosecution as evidence which may affect the credibility of the Prosecution evidence under Rule 68(B). The Trial Chamber is satisfied in relation to the alleged payments, that the Defence has *(a)* identified the material in question with sufficient specificity; *(b)* made a *prima facie* showing of the exculpatory or potentially exculpatory nature of the said payments; *(c)* made a *prima facie* showing of the Prosecution's custody or control of the materials requested; and *(d)* shown that that the Prosecution has, in fact, failed to disclose the said exculpatory material. The Trial Chamber finds that the Defence has discharged its burden of proof under Rule 68(B) in relation to the payments made to Witness DCT-097.

FOR THE ABOVE REASONS, on 7 September 2010 the Trial Chamber in its Oral Decision

GRANTED THE MOTION in part; and

ORDERED the Prosecution as follows:

1. To disclose to the Defence forthwith, pursuant to Rule 68:

   (a) An account of all payments made to or benefits conferred upon DCT-097/TF1-354 by the Prosecution for the period 2004 to 2006, or at any time before or after that period;

   (b) All documents relating to such payments, including receipts, vouchers, Money Gram receipts, etc;

2. To provide an explanation for those payments.

DISMISSED the remainder of the Motion.

Done at The Hague, The Netherlands, this 23rd day of September 2010.

Justice Richard Lussick

Justice Julia Sebutinde
Presiding Judge

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

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SCSL-03-01-T
(29631 - 29680)

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 4 August 2010

Case No.: SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
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04 AUG 2010
NAME Alhassan Foray
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TIME 14:12

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC, WITH PUBLIC ANNEX F
AND CONFIDENTIAL ANNEXES A, B, C, D, E, G, H, I

DEFENCE MOTION FOR DISCLOSURE OF STATEMENT AND PROSECUTION PAYMENTS MADE TO DCT-097

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nick Koumjian

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

I. INTRODUCTION

1. The Defence submits that the Prosecution has failed to comply with its Rule 68 obligations in regard to Witness DCT-097/TF1-354.[1]
2. Despite repeated requests for disclosure of statements given by DCT-097 and records of money given to DCT-097 by the Prosecution, the Prosecution has failed to disclose information relating to the following:

   i) the existence and substance of a statement given by DCT-097 to Global Witness, which the Prosecution is aware and which pre-dated Prosecution interviews with DCT-097 ("Statement"), and

   ii) an accounting and explanation of money (estimated at almost $30,000) paid to or benefits conferred on DCT-097 by the Prosecution from 2004 to 2006 ("Payments").
3. The Defence have established on a *prima facie* basis that the Prosecution has failed to disclose the Statement and Payments which tend to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. Thus the Defence request the Trial Chamber to compel the disclosure of the Statement and Payments forthwith.

II. BACKGROUND

4. On 12 May 2010 the Defence indicated that DCT-097 was on its Core Witness List.[2] DCT-097 is a protected defence witness according to the 27 May 2009 Defence Protective Measures Decision.[3]
5. On 19 May 2010, the Defence disclosed the name of DCT-097 to the Prosecution.[4] In its First Disclosure Letter, the Defence specifically requested:

   "[...] any material, within its possession, which is relevant to the named witnesses including, but not limited to, witness statements and/or disbursement records. The Defence have reason to believe that the Prosecution has previously been in contact with DCT-097 and thus asks specifically for unredacted copies of any statements

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[1] The Prosecution have acknowledged that DCT-097 is the same as TF1-354. See Letter from Brenda Hollis to Courtenay Griffiths, QC, 14 June 2010 [Confidential Annex A] ("**Disclosure Receipt**").
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-957, Defence Rule 73*ter* Filing of Witness Summaries – Version Five, 12 May 2010, Annex C.
[3] Any materials which may identify the witness are included in confidential annexes. *Prosecutor v. Taylor*, SCSL-03-01-T-782, Decision on Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials, 27 May 2010.
[4] Letter from Courtenay Griffiths, QC, to Brenda Hollis, 19 May 2010 [Confidential Annex B] ("**First Disclosure Request**").

taken as well [*sic*] records of any expenses paid to (or on behalf of) this witness through the Prosecution's Witness Management Unit".

6. The Prosecution did not disclose anything. So the Defence followed its First Disclosure Letter with a second, stating that the delay in disclosure was hindering the Defence's progress in preparation asking the Prosecution to clarify whether:

> "[…] you do not have any of the requested material in your possession; you are in the process of disclosing it, and if so, when such disclosure would be made; or you have the requested material in your possession but are not inclined to disclose it".[5]

7. The Prosecution did not immediately disclose anything nor respond directly to the Second Disclosure Request.

8. On 10 June 2010, the Prosecution sent the Defence a letter (in relation to another witness) noting that:

> "[…] when the Prosecution does not reply to your requests for the disclosure of all statements/disbursement records in relation to Defence witnesses, it indicates that there are neither statements nor disbursement records in the Prosecution's possession to be disclosed".[6]

9. On 14 June 2010, the Prosecution disclosed nine statements and/or correspondences in relation to DCT-097,[7] dated: 27 May 2004, 28 May 2004, 11 October 2004, 14 February 2005, 22 February 2005, 28 November 2005, 15 January 2006. One disclosure was undated. The Prosecution did not disclose the existence or substance of the Global Witness Statement nor a record of Payments. The Prosecution has given no explanation to the Defence regarding its lack of disclosure in relation to DCT-097.

10. On 21 July 2010, a Defence lawyer and a Defence investigator met with DCT-097 and interviewed him, partially in respect to his interaction and cooperation with the Prosecution. On this occasion, DCT-097, *inter alia*, told the Defence the following:[8]

    i) That he was first approached by the Prosecution in 2004 through Alex Yearsley of Global Witness;[9]

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[5] Letter from Courtenay Griffiths, QC, to Brenda Hollis, 3 June 2010 [Confidential Annex C] ("**Second Disclosure Request**").
[6] Letter from Brenda Hollis to Courtenay Griffiths, QC, 10 June 2010 [Confidential Annex D] ("**Disclosure Explanation**").
[7] Confidential Annex A, Disclosure Receipt.
[8] See Signed Statement by Logan Hambrick, Legal Assistant, 22 July 2010. [Confidential Annex E] ("**Interview Notes**").
[9] See, FYI, www.globalwitness.org.

ii) That Alex Yearsley of Global Witness had interviewed and taken a statement from him in Abidjan in 2001 or 2002;

iii) That the person who put Alex Yearsley of Global Witness in touch with DCT-097 was [Prosecution Witness TF1-151];[10]

iv) That the statement he (DCT-097) gave to Global Witness in 2001 or 2002 related to DCT-097's involvement in trading diamonds for the RUF in Monrovia from 2000;

v) That he told Global Witness that the RUF were not involved in trading diamonds with Charles Taylor or the Liberian Government, but that this was the story Global Witness wanted DCT-097 to confirm;

vi) That Alex Yearsley of Global Witness called DCT-097 from the Congo in 2004 to say that a contact of his from the Special Court from Sierra Leone would be in touch with DCT-097 and that he should cooperate;

vii) That a few days later, Gilbert Morissette of the Prosecution called DCT-097 and asked DCT-097 to meet with him in a location of his choice;

viii) That the Prosecution wanted DCT-097 to confirm what they said they had heard from other sources – that DCT-097 was the main RUF person who carried diamonds to Charles Taylor;

ix) That after meeting with and while being interviewed by various members of the Prosecution (including David Crane, Gilbert Morissette, John Berry, Maggie, and an Australian), the Prosecution paid DCT-097 a monthly "allowance" of approximately $1200 a month from sometime in 2004 until sometime in 2006;

x) That the Prosecution did not provide this allowance for any specific purpose, but for DCT-097's general "upkeep";

xi) That this allowance would be given to DCT-097 in cash if he was in Freetown or would be sent to him via MoneyGram if he was travelling throughout the sub-region;

[10] DCT-097 referred to the contact by his proper name, but the Defence knows him to be TF1-151.

xii) That this allowance stopped when DCT-097 met with the Prosecution for a final time in Senegal in 2006 and the Prosecution told DCT-097 that they were not getting what they needed from him.

11. DCT-097 has given the Defence color copies of seventeen MoneyGram receipts showing payments being sent from five different Prosecution employees to DCT-097 in various West African countries, during the period of 8 April 2004 to 19 June 2006, in amounts such as $2000, €1552, 8,989,200 Ghanaian Cedis, and 526,269 CFA Francs.[11]

III. APPLICABLE LAW & LEGAL BASIS

12. The plain language of Rule 68(B) states:

> The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

13. The ongoing nature of the Prosecution's Rule 68(B) disclosure obligations is indisputable.[12]

14. In order to comply with its Rule 68(B) obligations, the Prosecution must disclose to the Defence "the existence of exculpatory material known to the Prosecutor, but that such statement is not required to be in any particular form".[13]

15. This Trial Chamber has previously determined the Defence must satisfy the following before it will issue an order for further disclosure under Rule 68(B):

i) identify the material sought with the requisite specificity;

ii) make a *prima facie* showing of the exculpatory or potentially exculpatory character of the materials requested;

iii) make a *prima facie* showing of the Prosecution's custody or control of the

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[11] MoneyGram Receipts [Confidential Annex F]. A table summarizing the sender's name, the date the money was sent, the country in which DCT-097 received the money, and the amount and currency of money sent is included as Public Annex G.

[12] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-246, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, 4 May 2005, para. 16.

[13] *Prosecutor v. Taylor*, SCSL-03-01-T-184, Decision on Defence Application for Service of a Disclosure Statement Pursuant to Rule 68, 19 February 2007.

xii) That this allowance stopped when DCT-097 met with the Prosecution for a final time in Senegal in 2006 and the Prosecution told DCT-097 that they were not getting what they needed from him.

11. DCT-097 had previously given a Defence investigator color copies of seventeen MoneyGram receipts showing payments being sent from five different Prosecution employees to DCT-097 in various West African countries, during the period of 8 April 2004 to 9 June 2006, in amounts such as $2000, €1552, 8,989,200 Ghanaian Cedis, and 526,269 CFA Francs.[11]

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[11] MoneyGram Receipts [Confidential Annex F]. A table summarizing the sender's name, the date the money was sent, the country in which DCT-097 received the money, and the amount and currency of money sent is included as Public Annex G.

[12] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-246, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, 4 May 2005, para. 16.

[13] *Prosecutor v. Taylor*, SCSL-03-01-T-184, Decision on Defence Application for Service of a Disclosure Statement Pursuant to Rule 68, 19 February 2007.

materials requested; and

iv) show that the Prosecution has in fact, failed to disclose the targeted exculpatory material.[14]

IV. SUBMISSIONS

Failure to disclose knowledge of the Global Witness Statement, which tends to suggest the innocence of the accused

16. The Trial Chamber should compel the Prosecution to disclose the extent of its knowledge in regard to the Statement DCT-097 gave to Global Witness in 2001 or 2002. The Trial Chamber should also compel disclosure of a copy of the Statement itself or Investigative Notes based on the lead Alex Yearsley gave to Gilbert Morissette in 2004. The Prosecution decided to contact and interview DCT-097 based on the information provided to them by Global Witness. Therefore, the Prosecution must have this Statement within its custody or control. At the very least, it must have been privy to the contents of the statement.

17. Based on information DCT-097 gave to the Defence, the Statement is exculpatory in that it states that Charles Taylor was not connected to the RUF diamond trading in Monrovia. This clearly suggests the innocence of the Accused and has not been disclosed by the Prosecution.

Failure to disclose tens of thousands of dollars of Payments to DCT-097, which may affect the credibility of Prosecution evidence

18. The Trial Chamber should compel the Prosecution to disclose the total amount of money paid to and benefits conferred on DCT-097 during the course of his cooperation with the Prosecution. On the basis of its interview with the witness, the Defence believes this period ranges from 2004 to 2006, but complete disclosure of any payments made or benefits conferred before, during or after this period should be compelled. The Defence has copies of seventeen such payments

[14] *Prosecutor v. Taylor*, SCSL-03-01-T-770, Decision on Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution does not Intend to Call, 30 March 2009, para. 13; *Prosecutor v. Taylor*, SCSL-03-01-T-516, Decision on Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68 of the Rules of Procedure and Evidence, 22 May 2008, p. 4.

in the form of MoneyGram receipts, but based on the information DCT-097 gave to the Defence, this is not a complete collection and additional payments were also made in cash.

19. There are five Prosecution employees listed on the attached MoneyGram receipts as senders of the money to DCT-097: Mustapha Koroma, Aiah Komeh, Miatta Samba, Prince Sannoh and Umaru Kamara. The Defence knows all five of these individuals to be former or current Prosecution employees.[15] This is *prima facie* evidence that the Prosecution has paid money to DCT-097, an accounting of which it has failed to disclose to the Defence, despite being obviously within the Prosecution's custody or control.

20. In a letter to Lead Counsel, former Prosecutor Stephen Rapp has acknowledged that "information about payments made by the WMU [Witness Management Unit] for support of witnesses is evidence that 'may affect the credibility of prosecution evidence' under Rule 68(B)".[16] Former Prosecutor Stephen Rapp further stated that "this information has been and will be disclosed to the Defence".[17]

21. The Defence has indicated its intention to call DCT-097 as a witness. The Prosecution have disclosed several statements taken from DCT-097 by the Prosecution. The fact that Payments were made to DCT-097 during this period of cooperation with the Prosecution necessarily impacts on the credibility and reliability of those statements.

22. The ICTR has ample case law to support the Defence position. In *Prosecutor v. Karemera et al,* the Trial Chamber stated that:

> "Material or information within the Prosecutor's knowledge concerning any benefits paid to and/or promises made to witnesses and victims beyond that which is reasonably required [for the management of witnesses and victims] has a different character and should therefore be disclosed as evidence which may affect the credibility of witnesses under Rule 68".[18]

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[15] Two of the "senders" were still listed on the Special Court for Sierra Leone telephone directory under the Prosecution heading as recently as December 2009. [Confidential Annex H]

[16] See Letter from Stephen Rapp to Courtenay Griffiths, QC, 19 December 2007 [Confidential Annex I] ("**Rapp Letter**").

[17] Confidential Annex I, Rapp Letter.

[18] *Prosecutor v. Karemera, Ngirumpatse, Nzirorera,* ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para. 6. See also, *Prosecutor v. Nzirorera et al,* ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 16; and *Prosecutor v. Bizimungu, Mugeni, Bicamumpaka, and Mugiraneza,* ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006, para. 13.

23. In *Prosecutor v. Zigiranyirazo,* the Trial Chamber determined that the disclosure of the total cost of such payments and benefits should be made in the interests of transparency and justice.[19]

24. Thus, the Defence submits that the exculpatory nature of the Payments to DCT-097 is incontrovertible and in the custody of the Prosecution and must be disclosed.

V. CONCLUSION

25. For the foregoing reasons, the Defence requests the Trial Chamber to compel the Prosecution to fulfil its Rule 68 obligations and order the immediate disclosure of the substance of a statement given by DCT-097 to Global Witness, of which the Prosecution is aware and which pre-dated Prosecution interviews with DCT-097 ("Statement"), and an accounting and explanation of money paid to or benefits conferred on DCT-097 by the Prosecution from 2004 to 2006, or at any time before or after.

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 4th day of August 2010
The Hague, The Netherlands

[19] *Prosecutor v. Zigiranyirazo,* ICTR-01-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006, paras. 20 and 23.

LIST OF AUTHORITIES

SCSL

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-184, Decision on Defence Application for Service of a Disclosure Statement Pursuant to Rule 68, 19 February 2007

Prosecutor v. Taylor, SCSL-03-01-T-516, Decision on Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68 of the Rules of Procedure and Evidence, 22 May 2008

Prosecutor v. Taylor, SCSL-03-01-T-770, Decision on Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution does not Intend to Call, 30 March 2009

Prosecutor v. Taylor, SCSL-03-01-T-782, Decision on Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials, 27 May 2010

Prosecutor v. Taylor, SCSL-03-01-T-957, Defence Rule 73*ter* Filing of Witness Summaries – Version Five, 12 May 2010, Annex C

Prosecutor v. Brima, Kamara, Kanu

Prosecutor v. Brima, Kamara, Kanu, SCSL-04-16-T-246, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, 4 May 2005

ICTR

Prosecutor v. Karemera, Ngirumpatse, Nzirorera, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005
http://www.ictrcaselaw.org/docs/doc67526.pdf

Prosecutor v. Nzirorera et al, ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003
http://69.94.11.53/ENGLISH/cases/Nzirorera/decisions/071003.htm

Prosecutor v. Bizimungu, Mugeni, Bicamumpaka, and Mugiraneza, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006
http://www.ictrcaselaw.org/docs/20080218-dco-9950-01-en.pdf

Prosecutor v. Zigiranyirazo, ICTR-01-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006
http://www.ictrcaselaw.org/docs/doc72800.PDF

LIST OF CONFIDENTIAL ANNEXES

Annex A	Letter from Brenda Hollis to Courtenay Griffiths, QC, 14 June 2010
Annex B	Letter from Courtenay Griffiths, QC, to Brenda Hollis, 19 May 2010
Annex C	Letter from Courtenay Griffiths, QC, to Brenda Hollis, 3 June 2010
Annex D	Letter from Brenda Hollis to Courtenay Griffiths, QC, 10 June 2010
Annex E	Signed Statement by Logan Hambrick, Legal Assistant, 22 July 2010
Annex G	MoneyGram Receipts (seventeen)
Annex H	Special Court for Sierra Leone phone list (page 1)
Annex I	Letter from Stephen Rapp to Courtenay Griffiths, QC, 19 December 2007

LIST OF PUBLIC ANNEXES

Annex F	Table Summarising MoneyGram Payments

SPECIAL COURT FOR SIERRA LEONE
DOKTER VAN DER STAMSTRAAT 1 • 2265 BC LEIDSCHENDAM • THE NETHERLANDS

PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
Case Number: **SCSL-03-01-T**
Document Index Number: **1039**
Document Date: **04 August 2010**
Filing Date: **04 August 2010**
Document Type: **- Confidential Annexes A, B, C, D, E, G, H and I**
Number of Pages: **37** Numbers from: **29642- 29655 and 29658-29680**

☐ Application
☐ Order
☐ Indictment
☐ Response
☒ **Motion**
☐ Correspondence

Document Title:

Public with public Annex F and confidential Annexes A, B, C, D, E,G, H, I Defence motion for disclosure of statement and Prosecution payments made to DCT-097
Name of Officer:

Alhassan Fornah

Signed:

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PUBLIC
ANNEX F

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Table Summarizing MoneyGram Payments to DCT-097

Date	Sender's Name	Receiver's Location	Amount	Currency
04 August 2004	Mustapha Koroma	Nigeria	1,900.00	Dollars
10 November 2004	Aiah Komeh	Togo	720.81	Euros
21 December 2004	Miatta Samba	Nigeria	1400 or 1430	Dollars
28 January 2005	Aiah Komeh	Nigeria	1200	Dollars
10 March 2005	Aiah Komeh	Togo	881.03	Euros
16 March 2005	Prince Sannoh	Nigeria	1000	Dollars
22 March 2005	Miatta Samba	Nigeria	2000	Dollars
20 April 2005	Mustapha Koroma	Nigeria	1000	Dollars
03 May 2005	Mustapha Koroma	Ghana	8,989,200	Cedi
17 May 2005	Aiah Komeh	Togo	1552.48	Euros
27 May 2005	Miatta Samba	Burkina Faso	515.09 or 785.26	CFA Franc
08 June 2005	Miatta Samba	Ghana	8,989,200	Cedi
11 July 2005	Miatta Samba	Nigeria	800	Dollars
09 August 2005	Prince Sannoh	Nigeria	800	Dollars
29 August 2005	Aiah Komeh	Burkina Faso	517,995.67	CFA Franc
26 September 2005	Aiah Komeh	Togo	526,269.23	CFA Franc
19 June 2006	Umaru Kamara	Burkina Faso	???	

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SCSL-03-01-T
(25085-25096)

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SCSL

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before:	Justice Renate Winter, Presiding Judge Justice Jon M. Kamanda Justice George Gelaga King Justice Emmanuel Ayoola
Registrar:	Herman von Hebel
Date:	1 May 2009

SPECIAL COURT FOR SIERRA LEONE
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NAME ALHASSAN FORNAH
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TIME 15:10

PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-2003-01-T)

DECISION ON "DEFENCE NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE MAJORITY DECISION CONCERNING THE PLEADING OF JCE IN THE SECOND AMENDED INDICTMENT"

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Nina Jørgensen
Ms. Ula Nathai-Lutchman

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

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THE APPEALS CHAMBER ("Appeals Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Justice Renate Winter, Presiding Judge, Justice Jon M. Kamanda, Justice George Gelaga King and Justice Emmanuel Ayoola;

SEIZED of the "Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment", dated 26 March 2009 ("Appeal"), as corrected;[1]

CONSIDERING the "Prosecution Response to Defence Appeal Against Majority Decision on the Pleading of Joint Criminal Enterprise in the Second Amended Indictment", dated 3 April 2009 ("Response") and the "Defence Reply to the Prosecution Response to Defence Appeal Against Majority Decision on the Pleading of Joint Criminal Enterprise in the Second Amended Indictment", dated 7 April 2009 ("Reply");

NOTING the "Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE" issued by Trial Chamber II ("Trial Chamber") on 27 February 2009 ("Impugned Decision");

NOTING the "Decision on Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", dated 18 March 2009, in which the Trial Chamber by majority granted the Defence of Charles Ghankay Taylor ("Defence") leave to make the Appeal;

HEREBY DECIDES the Appeal based on the written submissions of the Parties.

I. BACKGROUND

1. The dispute giving rise to the Appeal was initiated by the Defence in an urgent motion filed on 14 December 2007 in which it argued that joint criminal enterprise ("JCE") was defectively pleaded in the Second Amended Indictment.[2] The Prosecution filed its response on 7 January 2008,[3] and a reply was filed on 14 January 2008.[4] In light of the Appeals Chamber's judgment in the case

[1] *Prosecutor v. Taylor*, SCSL-2003-01-T, Corrigendum to Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment, 30 March 2009.
[2] *Prosecutor v. Taylor*, SCSL-2003-01-T, Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, 14 December 2007 ("Original Defence Motion").
[3] *Prosecutor v. Taylor*, SCSL-2003-01-T, Prosecution Response to "Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", 7 January 2008 ("Prosecution Response to Original Defence Motion").
[4] *Prosecutor v. Taylor*, SCSL-2003-01-T, Defence Reply to Prosecution Response to Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, 14 January 2008.

of *Prosecutor v. Brima et al.*,[5] the Trial Chamber, on 6 March 2008, allowed the Parties to file a new round of submissions.[6] These consequential submissions were completed on 15 April 2008.[7] The Trial Chamber dismissed the Defence's motion in an oral decision on 19 February 2009[8] with written reasons following in the Impugned Decision on 27 February 2009. A majority of the Trial Chamber held that the Second Amended Indictment[9] had to be read as a whole. They also held that the Prosecution had adequately fulfilled the pleading requirements of the alleged JCE, and that it had provided sufficient details to put the Defence on notice of the case against him.[10] In his dissent, Justice Lussick opined that the Second Amended Indictment defeetively pleaded JCE as a mode of liability,[11] but that other material provided by the Prosecution nonetheless put the Defence on notice of the alleged JCE.[12]

II. SUBMISSIONS

A. Appeal

2. The Defenee submits that the Majority of the Trial Chamber erred in holding that JCE was properly pleaded in the Second Amended Indictment.[13] The Defence essentially advances four grounds in support of its submission.[14] First, it submits that the Seeond Amended Indictment is defective because it fails to properly plead the "eommon purpose" of the alleged JCE.[15] The Defenee avers that the Majority erroneously discerned the common purpose from paragraphs 5 and 33 of the Seeond Amended Indictment.[16] In its view, paragraph 5 serves solely to particularise

[5] *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, filed on 3 March 2008 ("*Brima et al.* Appeal Judgment").
[6] *Prosecutor v. Taylor*, SCSL-2003-01-T, Scheduling Order in Relation to the Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Seeond Amended Indietment Relating to the Pleading of JCE, 6 Mareh 2008, p. 2.
[7] *Prosecutor v. Taylor*, SCSL-2003-01-T, Consequential Submission in Support of Urgent Defence Motion Regarding a Fatal Defect in the Proseeution's Second Amended Indictment Relating to the Pleading of JCE, 31 March 2008 ("Defence's Consequential Submission"); *Prosecutor v. Taylor*, SCSL-2003-01-T, Prosecution Response to the Defence's Consequential Submission Regarding the Pleading of JCE, 10 April 2008 ("Prosccution Response to Consequential Defence Submission"); *Prosecutor v. Taylor*, SCSL-2003-01-T, Defenee Reply to Prosecutiou Respouse to the Defence's Consequential Submission Regarding the Pleading of JCE, 15 April 2008.
[8] *Taylor* Transcript, 19 February 2009, pp. 24052 ln. 26 – 24053 ln. 3.
[9] *Prosecutor v. Taylor*, SCSL-2003-01-PT, Prosecution's Second Amended Indictment, 29 May 2007 ("Second Ameuded Indictment"), para. 33.
[10] Impugned Decision, para. 76.
[11] *Prosecutor v. Taylor*, SCSL-2003-01-T, Decision on Public Urgent Defenee Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick, 27 February 2009 ("Dissent from the Impugned Decision"), paras 1-15, corrected by *Prosecutor v. Taylor*, SCSL-2003-01-T, Corrigendum, Decision on Public Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE – Dissenting Opinion of Justice Riehard Lussick, 12 March 2009.
[12] Dissent from the Impugned Decision, paras 16-23.
[13] Appeal, paras 7 and 19; Impugned Decision, para. 76.
[14] *See* Appeal, para. 19.
[15] Appeal, paras 8, 20, 21 and 30.
[16] Appeal, paras 8, 23 and 30; Impugned Decision, para. 71.

Count 1 (acts of terrorism)[17] and paragraph 33, assuming it contains an implicit allegation of JCE, does not describe the common purpose.[18] The Defence posits that there is no reason, nor was any advanced in the Impugned Decision, why the two paragraphs should be read together.[19]

3. Second, the Defence submits that the Majority erred in only considering some, but not all, of the factors relevant to whether JCE was adequately pleaded in the Second Amended Indictment.[20] It contends that the factors omitted from adequate consideration include (i) by what means the common objective was contemplated to have been achieved; (ii) the legal effect on Taylor's statutory rights of notice resulting from deletion of the paragraphs describing the JCE in the Amended Indictment[21] and the Second Amended Indictment; and (iii) the "fluid, ever-evolving" description of the common purpose in the Prosecution's "secondary accusatory instruments and/or pronouncements".[22] The Defence also argues that the Majority invariably resolved the factors it did consider in favour of upholding the Second Amended Indictment.[23] These errors, the Defence contends, resulted in shifting the burden of showing the sufficiency of pleading of JCE from the Prosecution to the Appellant.[24]

4. Third, the Defence challenges the Majority's finding that the Prosecution "intended to charge" Taylor with having participated in a JCE, because simply showing the Prosecution's "intention to charge" JCE is legally insufficient to put an accused on adequate notice of the material elements of that mode of liability.[25]

5. Finally, the Defence submits that the Majority erroneously considered that paragraph 34 of the Second Amended Indictment served to partially clarify his alleged participation in the JCE.[26] According to the Defence, paragraph 34 is only concerned with Taylor's alleged responsibility under Article 6(3) of the Statute, whereas JCE liability arises under Article 6(1) of the Statute.[27]

6. The Defence requests the Appeals Chamber to grant the following relief:

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[17] Appeal, para. 24.
[18] Appeal, paras 25-29.
[19] Appeal, para. 30.
[20] Appeal, paras 9, 33 and 34.
[21] *Prosecutor v. Taylor*, SCSL-2003-01-I, Amended Indictment, 17 March 2006 ("Amended Indictment").
[22] Appeal, para. 35.
[23] Appeal, paras 34 and 36.
[24] Appeal, paras 31, 33 and 36.
[25] Appeal, paras 10 and 37 citing Impugned Decision, para. 70; Reply, para. 15.
[26] Appeal, paras 11 and 38 citing Impugned Decision, para. 74.
[27] Appeal, para. 38; Reply, para. 16.

(i) to hear oral arguments on the Appeal;[28]

(ii) to dismiss the Second Amended Indictment and to release Taylor forthwith from custody;[29] and

(iii) alternatively, to sever the allegation of JCE from the Second Amended Indictment.[30]

B. Response

7. The Prosecution opposes the Appeal.[31] It submits that the Majority of the Trial Chamber correctly concluded that, read as a whole, the Second Amended Indictment fulfils the pleading requirements with respect to JCE.[32] The Prosecution submits that JCE was pleaded as a form of liability in this case[33] and that the Second Amended Indictment, in particular paragraphs 5 and 33, sufficiently pleads the "nature and purpose" of the JCE.[34] The Prosecution contends that the requirements for proving a JCE include "the existenee of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute" and that the words "plan" or "design" includes the means by which any objective is to be achieved.[35] According to the Prosecution, the Second Amended Indictment states that all the crimes charged amounted to or were involved in a common plan, design or purpose in which Taylor participated, or were a reasonably foreseeable eonsequence thereof.[36]

8. In response to the Defence's argument that the Majority of the Trial Chamber omitted relevant factors from consideration, the Prosecution submits that the Majority provided a sufficiently reasoned opinion.[37] First, it argues that the Second Amended Indictment makes clear that the means to achieve the common purpose consisted of the campaign of terror, which included the crimes charged, and that there was no need for the Majority to address separately how that campaign would be carried out.[38] Second, the Prosecution submits that, as the Second Amended Indictment was found to have put the Defence on sufficient notice, the Majority did not have to discuss the issue of notice any further, nor did it shift the burden of proof.[39] Third, the Prosecution

[28] Appeal, paras 12(i) and 39(i).
[29] Appeal, paras 12 (ii) and 39(ii).
[30] Appeal, paras 12 (iii) and 39(iii).
[31] Response, para. 2.
[32] Response, paras 2, 7, 9-11 and 15.
[33] Response, paras 17-20.
[34] Response, para. 16. *See* also *ibid.*, para. 24.
[35] Response, paras 22 and 23.
[36] Response, paras 14 and 20.
[37] Response, paras 25 and 26.
[38] Response, paras 27 and 28.
[39] Response, para. 29.

contends that it has consistently alleged that Taylor "participated in a common plan, design or purpose to utilize a campaign of terror, including all the crimes charged in the Indictment, in order to pillage the diamond wealth of Sierra Leone and forcibly control the population and territory of Sierra Leone."[40] The Prosecution refers in this respect to the allegations on JCE in the Original Indictment,[41] the Case Summary accompanying the Amended Indictment,[42] the Prosecution's Pre-Trial Brief,[43] its opening statement, and the Amended Case Summary.[44] Also, assuming *arguendo* that there were changes in its JCE pleadings, the Prosecution argues that the Defence fails to show how it was prejudiced given that the Amended Case Summary was filed five months before the commencement of the presentation of evidence.[45]

9. The Prosecution further submits that the Majority's reference to the Prosecution's "intention" to charge JCE simply indicates that participation in a "JCE" was being charged despite the fact that the Prosecution did not use that exact terminology.[46] It avers that the full Impugned Decision explains in detail how each of the requirements for pleading JCE was satisfied.[47]

10. Lastly, the Prosecution submits that paragraph 34 of the Second Amended Indictment is relevant to the nature of Taylor's alleged participation in the JCE because an accused in a leadership position may contribute to a JCE by consistently failing to take action to prevent crimes or to punish responsible subordinates.[48] It also argues that the Amended Case Summary links Taylor's alleged leadership position with all the modes of liability charged.[49] In any event, the Prosecution posits that "the superior responsibility aspect" can be severed from the Impugned Decision without impacting its outcome and that, therefore any error in this regard does not invalidate the Impugned Decision.[50]

11. The Prosecution opposes the Defence's request for an oral hearing[51] and the relief sought.[52]

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[40] Response, paras 30-33 and 39.
[41] *Prosecutor v. Taylor*, SCSL-2003-01-I, Indictment, 7 March 2003 ("Original Indictment").
[42] *Prosecutor v. Taylor*, SCSL-2003-01-I, Case Summary Accompanying the Amended Indictment, 17 March 2006 ("Case Summary").
[43] *Prosecutor v. Taylor*, SCSL-2003-01-PT, Public Rule 73 *bis* Pre-Trial Conference Materials, Pre-Trial Brief, 4 April 2007 ("Prosecution's Pre-Trial Brief").
[44] Response, paras 34-38.
[45] Response, para. 32.
[46] Response, paras 40-42.
[47] Response, para. 41.
[48] Response, para. 44.
[49] Response, para. 44.
[50] Response, para. 45.
[51] Response, para. 53.
[52] Response, paras 46-54.

C. Reply

12. The Defence replies that, the Prosecution fails to explain why paragraphs 5 and 33 of the Second Amended Indictment should be read together.[53] The Defence further submits that, contrary to the Prosecution's position, the Impugned Decision does not identify the campaign of terror as the means to achieve an objective. In any event, it continues, the majority of the Trial Chamber erred in failing to identify the objective and the means of the JCE as alleged in the Second Amended Indictment.[54]

13. The Defence also replies that the Amended Case Summary eannot substitute for the pleading of material facts, such as the objective and means of the JCE, in the Second Amended Indictment. Citing Judge Lussick's dissenting opinion, the Defence argues that the Prosecution cannot cure a defective indictment by amending a case summary.[55] The Defence argues that the Prosecution has not provided timely, clear and consistent information in sufficient detail regarding the accusation of Taylor's participation in a JCE.[56] According to the Defence, the Prosecution only first mentioned "campaign of terror" in direct assoeiation with JCE liability in the Pre-Trial Brief, and again in its Opening Statement.[57] The Defenee contrasts these statements of the common purpose with allegedly inconsistent statements made by the Prosecution in the Original Indictment, the Amended Case Summary, the Second Amended Indictment, the Second Amended Case Summary and even the Prosecution's Response, which, taken together, the Defence argues have deprived the Defence notice of the nature of the eharges against Taylor.[58]

III. APPLICABLE LAW

14. In order to guarantee a fair trial, the Prosecution is obliged to plead material facts with enough specificity to inform the accused clearly of the charges against him so that he may prepare his defence.[59] In order to determine whether the Prosecution meets this requirement, the Chamber

[53] Reply, paras 5-7.
[54] Reply, para. 9.
[55] Reply, para. 11 *quoting* Dissent from the Impugned Decision, para. 8.
[56] Reply, para. 12.
[57] Reply, para. 12.
[58] Reply, paras 12-14.
[59] *Brima et al.* Appeal Judgment, para. 37; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Judgment, 28 May 2008 ("*Fofana and Kondewa* Appeal Judgment"), para. 363; *Prosecutor v. Simić*, IT-95-9-A, International Criminal Tribunal for the former Yugoslavia, Judgement, 28 November 2006 ("*Simić* Appeal Judgment"), para. 20; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, International Criminal Tribunal for the former Yugoslavia, Appeal Judgement ("*Kupreškić et al.* Appeal Judgment"), para. 88; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, International Criminal Tribunal for Rwanda, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgment"), paras 21 and 22.

will read the indictment as a whole[60] and take into consideration the context of the case, in particular, the form of participation alleged against the accused.[61]

15. Where JCE is alleged, the Prosecution must plead, among other material facts, the nature and purpose of the enterprise and the nature of the accused's participation in the enterprise.[62] As the Appeals Chamber has previously ruled, the "purpose of the enterprise" comprises both the objective of the JCE and the means contemplated to achieve that objective.[63]

16. An indictment is defective if it fails to properly notify an accused of the nature and cause of the charges against him. In some circumstances, the defect in an indictment may be cured by timely, clear and consistent information detailing the factual basis underpinning the charges against the accused[64] so that the accused was in a reasonable position to understand the charges against him.[65]

IV. DELIBERATIONS

A. Request for oral hearing

17. As a preliminary issue, the Appeals Chamber considers the Parties' written submissions sufficient to adjudicate the Appeal,[66] and therefore declines to hear oral arguments from the Parties.

B. Alleged errors in the Impugned Decision

18. The Trial Chamber held that taken together, paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Second Amended Indictment fulfilled the pleading requirements for JCE and put the Defence on notice that the Prosecution intended to charge Taylor with having participated in a JCE.[67] In particular, it found: (i) that paragraphs 5 and 33 of the Second Amended Indictment denoted that the alleged common purpose of the JCE was "a campaign to terrorize the civilian population of the

[60] *Brima et al.* Appeal Judgment, para. 81.
[61] *Brima et al.* Appeal Judgment, paras 37 and 38.
[62] *Brima et al.* Appeal Judgment, fn. 146; *Simić* Appeal Judgment, para. 22; *Ntagerura et al.* Appeal Judgment, para. 24; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, International Criminal Tribunal for the former Yugoslavia, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgment"), para. 28.
[63] *Brima et al.* Appeal Judgment, para. 76 (holding that the ultimate objective of the JCE and the means to achieve that objective constitute the common plan, design or purpose of the JCE).
[64] *Fofana and Kondewa* Appeal Judgment, para. 363.
[65] *Naletilić and Martinović* Appeal Judgment, para. 27; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, International Criminal Tribunal for the former Yugoslavia, Judgement, 17 December 2004, para. 142; *Rutaganda v. Prosecutor*, ICTR-96-3-A, International Criminal Tribunal for Rwanda, Judgement, 26 May 2003, para. 303.
[66] *See* Practice Direction for Certain Appeals Before the Special Court, 30 September 2004, para. 14.
[67] Impugned Decision, para. 70. The Impugned Decision does not explain why the Trial Chamber did not consider paragraphs 6 and 18 in this respect, but as no error is alleged to have arisen from this omission, the Appeals Chamber need not consider it any further.

Republic of Sierra Leone";[68] and (ii) that Taylor's alleged participation in the JCE was identified in paragraphs 33 and 34 as "'planning, instigating, ordering, committing or aiding and abetting the planning, preparation or execution of the alleged crimes; or alternatively, that 'while holding positions of superior responsibility and exercising command and control over [RUF, AFRC, RUF/AFRC Junta and/or Liberian subordinates ...] the Accused is responsible for the acts of his subordinates [...]'".[69] It is these two findings that are the principal subject of the appeal. The Appeals Chamber notes that this appeal pertains only to questions regarding defects in the form of the Second Amended Indictment, and it is without prejudice to any findings regarding the criminal liability of the accused, particularly, in regard to the question whether a joint criminal enterprise has been established or whether the accused participated in such joint criminal enterprise.

19. As a preliminary matter, the Appeals Chamber considers that the Second Amended Indictment charges JCE as a mode of liability. While paragraph 33 of the Second Amended Indictment employs the words "common plan, design or purpose" instead of "joint criminal enterprise", these expressions have been used interchangeably in the practice of both the ICTR and the ICTY. In the present case, paragraph 33 effectively conveyed the concept of joint criminal enterprise to the Appellant, thereby putting him and his Defence on notice that JCE is charged as a mode of liability in this case.[70]

20. Turning to the first impugned finding regarding the alleged common purpose of the JCE, the Appeals Chamber observes that paragraph 5 of the Second Amended Indictment reads as follows:

> 5. Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters), assisted and encouraged by, acting in concert with, under the direction and/or control or, and/or subordinate to the **ACCUSED**, burned civilian property, and committed the crimes set forth below in paragraphs 6 through 31 and charged in Counts 2 through 11, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.

Paragraph 33 of the Second Amended Indictment reads thus:

> 33. The **ACCUSED**, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the **ACCUSED** planned, instigated, ordered, committed, or in whose planning, preparation or execution the **ACCUSED** otherwise aided and abetted, or which crimes amounted to or were involved

[68] Impugned Decision, para. 71.
[69] Impugned Decision, para. 74.
[70] *Cf. Prosecutor v. Sylvestre Gacumbitsi*, ICTR-01-64-A, International Criminal Tribunal for Rwanda, Judgement, 7 July 2006, para. 165, with further references from both the ICTR and the ICTY.

> within a common plan, design or purpose in which the **ACCUSED** participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.[71]

21. Paragraph 33 alleges that Taylor participated in a JCE, the common purpose of which was to commit the crimes referred to in Articles 2, 3 and 4 of the Statute. As evident from paragraph 33 itself, and as further reinforced by the repetition of the words "acting in concert" in relation to each Count of the Second Amended Indictment,[72] the alleged JCE encompasses all the crimes charged in the Second Amended Indictment. The only other place in the Second Amended Indictment where all the Counts are mentioned collectively in relation to an allegation of JCE, is in paragraph 5 under Count 1, wherein it is alleged that Taylor, "acting in concert with" others, committed the crimes charged in Counts 2 through 11 "as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone". Therefore, although paragraph 5 appears under the heading "Particulars" under Count 1, charging acts of terrorism, it is clear from a holistic reading of the Second Amended Indictment that the allegations in paragraph 5 complement the allegations in paragraph 33. The Trial Chamber therefore did not err in finding that paragraphs 5 and 33 of the Second Amended Indictment sufficiently plead the alleged common purpose of the JCE. This part of the Appeal is accordingly dismissed.

22. As to the second impugned finding, paragraph 34 of the Second Amended Indictment reads:

> In addition, or alternatively, pursuant to Article 6.3 of the Statute, the **ACCUSED**, while holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, is individually criminally responsible for the crimes referred to in Article 2, 3 and 4 of the Statute as alleged in this Amended Indictment. The **ACCUSED** is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and the **ACCUSED** failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

23. The Appeals Chamber has considered the Defence submission that, because JCE arises under Article 6(1) of the Statute, the Trial Chamber erred in law in considering that the allegations on his liability under Article 6(3) of the Statute in paragraph 34 of the Second Amended Indictment serve to clarify his alleged participation in the JCE.[73] The law does not preclude acts from forming both the basis for liability under Article 6(3) and, at the same time, constituting participation in a JCE. Indeed, as held by the ICTY Appeals Chamber, it is "sufficient that the accused 'perform acts that in some way are directed to the furthering' of the JCE in the sense that he significantly

[71] Amended Indictment, para. 33.
[72] Second Amended Indictment, paras 5, 9, 14, 18, 22, 23, and 28.
[73] Appeal, para. 38.

contributes to the commission of the crimes involved in the JCE."[74] The Defence's challenge to the Trial Chamber's finding that paragraph 34 clarifies Taylor's participation in the JCE therefore fails.

24. The Appeals Chamber has also considered the Defenee submissions that the Trial Chamber erred in failing to consider (i) by what means the common objective was contemplated to have been achieved; (ii) the legal effect on Taylor's statutory notice rights resulting from deletion of the paragraphs describing the JCE in the Amended Indictment and the Second Amended Indictment; and (iii) the "fluid, cver-evolving" dcscription of the common purpose in the Prosecution's "secondary accusatory instruments and/or pronouncements".[75]

25. The Appeals Chamber reaffirms that the common purpose comprises both the objective of the JCE and the means contemplated to achieve that objective.[76] While the common purpose is a material fact which must be pleaded in the indictment, notice to the accused does not require the objective and the means to be separately plcaded in the indictment as long as the alleged criminality of the enterprise is made clear, as it was in the Second Amended Indictment.

26. The Appeals Chamber also finds no basis for the Defenec's allegations that the Trial Chamber was biased or that it improperly shifted the burden from the Prosecution to the Defence. The Trial Chamber expressly discussed the pleadings and allegations which the Defence suggests it disregarded, therefore the suggestion that these submissions were not considered in relation to the sufficiency of notice to the accused laeks support.[77] Because the Trial Chamber expressly noted in the Impugned Decision the contested pleadings and allegations, there is no indication that the Trial Chamber disregarded them in reaching its deeision.[78]

27. Finally, the Appeals Chamber dismisses the Defence argument that the Trial Chamber examined only whether Prosecution "intended to charge" JCE rather than whether legally sufficient notice had been given to Taylor. The Trial Chamber explicitly stated that "the Prosecution has adequately fulfilled the pleading requirements of the alleged Joint Criminal Enterprise in the

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[74] *Prosecutor v. Krajišnik*, International Criminal Tribunal for the former Yugoslavia, IT-00-39-A, Judgement, 17 March 2009, para. 695, citing *Prosecutor v. Tadić*, International Criminal Tribunal for the former Yugoslavia, IT-94-1-A, Judgement, 15 July 1999, para. 229.
[75] Appeal, para. 35.
[76] *Brima et al.* Appeal Judgment, para. 76.
[77] The Trial Chamber made extensive observations regarding the way in which JCE was pleaded in the Original Indictment, the Amended Indietment and the Second Amended Indictment, and indeed quoted parts of the allegations regarding the "common purpose" provided in the Case Summary, the Proseeution's Pre-Trial Brief, its opening statement, and Amended Case Summary. *See* Impugned Decision, paras 8-12.
[78] *Cf. Kvočka et al.* Appeal Judgment, para. 23.

Indictment, and that it has provided sufficient details to put the Accused on notice of the case against him."[79]

28. For these reasons, the Appeals Chamber finds that the Defence fails to demonstrate an error in the Impugned Decision.

V. DISPOSITION

BASED ON THE FOREGOING REASONS, THE APPEALS CHAMBER

DISMISSES the Appeal in its entirety.

Done this 1st day of May 2009 at Freetown, Sierra Leone.

Justice Renate Winter,
Presiding

Justice Jon M. Kamanda

Justice George Gelaga King

Justice Emmanuel Ayoola

[Seal of the Special Court for Sierra Leone]

[79] Impugned Decision, para. 76.

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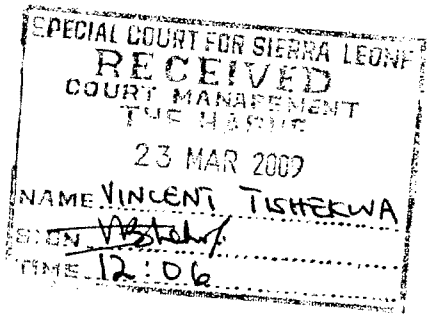
SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Richard Lussick, Presiding Judge Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate Judge
Registrar:	Herman von Hebel
Case No.:	SCSL-03-1-T
Date:	23 March 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

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

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

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

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

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

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

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

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

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

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

I. SUBMISSIONS

1. Defence Motion

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Prosecution Response

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

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

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

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

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

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

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

3. Defence Reply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. APPLICABLE LAW

25. Rule 94 states as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29. The Special Court has further established that

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

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

III. DELIBERATIONS

1. Timing of the Defence Application

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

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

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

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

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

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

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

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

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

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

3. General Considerations

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

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

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

4. Discussion

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

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

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

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

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

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

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

42. Proposed Fact 2 states:

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

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

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

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

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

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

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

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

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

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

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

48. Proposed Fact 4 states:

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

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

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

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

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

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

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

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

53. Proposed Fact 6 states:

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

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

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

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

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

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

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

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

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

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

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

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

61. Proposed Fact 9 states:

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

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

63. Proposed Fact 10 states:

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

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

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

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

65. Proposed Fact 11 states:

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

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

67. Proposed Fact 12 states:

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

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

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

69. Proposed Fact 13 states:

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

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

71. Proposed Fact 14 states:

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

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

73. Proposed Fact 15 states:

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

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

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

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

FOR THE ABOVE REASONS

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

DENIES the remainder of the Motion.

Justice Doherty appends a Separate and partly Dissenting Opinion.

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

Justice Teresa Doherty

Justice Richard Lussick
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

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ANNEX A

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

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

SEPARATE AND PARTLY DISSENTING OPINION OF JUSTICE TERESA DOHERTY

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

A. Centrality of the Issue

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

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

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

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

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

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

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

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

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

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

B. Dissent on Fact 15

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

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

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

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

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

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

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

Doherty T.

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

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752) SCSL-03-01-T (24496-24520) 24496

SPECIAL COURT FOR SIERRA LEONE

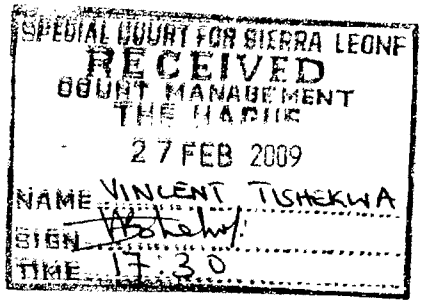
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 27 February 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON URGENT DEFENCE MOTION REGARDING A FATAL DEFECT IN THE PROSECUTION'S SECOND AMENDED INDICTMENT RELATING TO THE PLEADING OF JCE

Office of the Prosecutor:
Brenda J. Hollis
Nick Koumjian

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

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

SEISED of the "Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", filed on 14 December 2007 ("Motion");[1]

NOTING the "Prosecution Response to 'Urgent Defence Motion Regard a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE'", filed on 7 January 2008 ("Response");[2]

NOTING ALSO the "Defence Reply to 'Prosecution Response to Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE'", filed on 14 January 2008 ("Reply");[3]

RECALLING the Chamber's "Scheduling Order in Relation to the Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", filed on 6 March 2008 ("Scheduling Order");[4]

NOTING the "Consequential Submission in Support of Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", filed on 31 March 2008 ("Consequential Motion");[5]

NOTING ALSO the "Prosecution Response to the Defence's Consequential Submissions Regarding the Pleading of JCE", filed on 10 April 2008 ("Consequential Response");[6] and the "Defence Reply to the Prosecution Response to the Defence's Consequential Submission Regarding the Pleading of JCE", filed on 15 April 2008 ("Consequential Reply");[7]

RECALLING the Indictment, dated 7 March 2003 ("Initial Indictment")[8], the Amended Indictment, dated 16 March 2006 ("Amended Indictment"),[9] the Second Amended Indictment, dated 29 May 2007 ("Second Amended Indictment");[10] the Case Summary appended to the Amended Indictment, dated 16 March 2006 ("Case Summary"),[11] the Amended Case Summary, dated 3 August 2007 ("Amended Case Summary");[12] the

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[1] SCSL-03-01-T-378.
[2] SCSL-03-01-T-380.
[3] SCSL-03-01-T-388.
[4] SCSL-03-01-T-434.
[5] SCSL-03-01-T-446.
[6] SCSL-03-01-T 463.
[7] SCSL-03-01-T 473.
[8] SCSL-03-01-PT-001.
[9] SCSL-03-01-PT-75.
[10] SCSL-03-01-PT-263.
[11] SCSL-03-01-PT-75.
[12] SCSL-03-01-PT-327.

Prosecution Pre-Trial Brief, dated 26 April 2007 ("Prosecution Pre-Trial Brief")[13] and the Defence Pre-Trial Brief, dated 26 April 2008 ("Defence Pre-Trial Brief");[14]

RECALLING the Trial Chamber's oral Decision of 19 February 2009 wherein the Chamber dismissed the Motion and stated that a properly reasoned decision would follow:[15]

COGNISANT OF the provisions of the Statute of the Special Court ("Statute") in particular Articles 6 and 17 and Rules 26*bis*, 47(C), 50,26 72(A), 72(B)(ii), 72(C) and 73 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

HEREBY DELIVERS ITS REASONED DECISION AS FOLLOWS, based solely on the written submissions of the parties, pursuant to Rule 73 of the Rules.

I. INTRODUCTION

A. Procedural History

1. The Initial Indictment against the Accused, accompanied by supporting material, was approved on 7 March 2003 and made public on 12 June of the same year.[16] On 16 March 2006, the Prosecutor filed an Amended Indictment and Case Summary. On 25 May 2007, the Trial Chamber granted the Prosecution leave to further amend the Amended Indictment[17] and the Prosecution filed a Second Amended Indictment on 29 May 2007.

2. On 6 June 2006, Mr. Karim Khan the former Defence Counsel of the Accused, notified the Trial Chamber that he would not file any preliminary motions pursuant to Rule 72 of the Rules.[18] However, in the Defence Pre-Trial Brief, he submitted that "a notable feature of the Amended Indictment was the deliberate decision to drop the allegation, present in the original indictment, that Mr Taylor was part of a Joint Criminal Enterprise ("JCE")."[19]

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[13] SCSL-03-01-PT-218.
[14] SCSL-03-01-PT-229.
[15] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript of 19 February 2009, pp 24052 ln. 26-24053, ln.3.
[16] *Prosecutor v. Taylor*, SCSL-03-01-PT-003, "Decision Approving the Indictment and Order for Non-Disclosure", 7 March 2003 and Prosecutor v. Taylor, Order for the Disclosure of the Indictment, the Warrant of Arrest and Order for Transfer and Detention and the Decision Approving the Indictment and Order for Non-Disclosure, 12 June 2003.
[17] *Prosecutor v. Taylor*, SCSL-03-01-PT-255, Decision on the Prosecution Motion Requesting Leave to Amend Indictment, 25 May 2007.
[18] SCSL-03-01-PT-105, Defence Submission on Behalf of Charles Ghankay Taylor in Respect of Preliminary Motions, 6 June 2006.
[19] Defence Pre-Trial Brief, para. 45, submitting that "the doctrine, scope and case law of JCE was well known to the Prosecutor as it has been employed in other cases before the SCSL. It has been judicially considered in a great many cases before the ICTY and ICTR. The decision to drop it from the Amended Indictment in the case of Mr. Taylor cannot be taken to have been accidental".

3. Soon thereafter on the 20 June 2007, the Trial Chamber, in its Judgement in the case of the *Prosecutor v. Brima, Kamara and Kanu* ("AFRC Trial Judgement") [20], held that the Indictment in that case with respect to Joint Criminal Enterprise ("JCE") as a mode of criminal responsibility, had been defectively pleaded since the "common purpose" alleged was not a criminal purpose recognized by the Statute and that the "common purpose" did not constitute a crime under the Special Court's jurisdiction. The Trial Chamber held that arguing the basic and extended forms of JCE in the alternative impeded the ability of the Accused to understand the material facts of the JCE, and that crimes charged within the common purpose could not also be a reasonably foreseeable consequence of that purpose[21] Finally, the Trial Chamber held that the Prosecution is required to know its case before the start of trial; that if the purpose of the JCE changed over time, all new and different purposes must also be pleaded in the Indictment; and that the Prosecution is not permitted to mould its case as the trial progresses.[22]

4. On 3 August 2007, the Prosecution, in consistency with the Trial Chamber's findings on JCE in the AFRC Judgement and "out of an abundance of caution", filed an Amended Case Summary with respect to the present case, amending paragraphs 42-44 of the Case Summary notwithstanding that it disagreed with those findings and would appeal the Judgement.[23] The Prosecution filed an appeal against the AFRC Trial Judgment on 13 September 2007.[24]

5. Although Mr. Karim Khan the former Defence Counsel of the Accused had notified the Trial Chamber that the Defence would not file any preliminary motions pursuant to Rule 72 of the Rules, the new Defence team filed this Motion regarding the defective pleading of the JCE on 14 December 2007, pending the resolution of the Appeal. The AFRC Appeal Judgement was delivered on 22 February 2008.[25]

6. In its AFRC Appeal Judgement, the Appeals Chamber concluded that the Trial Chamber erred in finding that the "common purpose" of the JCE must constitute a crime under international law. The Appeals Chamber held-

> 84....The common purpose of the joint criminal enterprise was not defectively pleaded. Although the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute. The Trial Chamber took an erroneously narrow view by confining its consideration to paragraph 33 and reading that paragraph in isolation. ..
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> 85. Several other issues arose in the context of JCE for which the Appeals Chamber wishes to express itself. The Trial Chamber erred in concluding that the Prosecution could not plead the basic and extended forms of joint criminal enterprise liability in the alternative on the grounds that the

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[20] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-628, Judgement, 20 June 2007, para. 67 ("AFRC Trial Judgement").
[21] AFRC Trial Judgement, para. 71.
[22] AFRC Trial Judgement, para. 80.
[23] Amended Case Summary, para. 6.
[24] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-A, Appeal Brief of the Prosecution, 13 September 2007
[25] *Prosecutor v. Brima, Kamara and Kanu* SCSL-04-16-A-675, Judgement, 22 February 2008 ("AFRC Appeal Judgement").

two forms, as pleaded, logically exclude each other. Pleading the basic and extended forms of JCE in the alternative is now a well-established practice in the international criminal tribunals. The Trial Chamber erred in finding that the Indictment failed to specify the period covered by the JCE. That period is that covered by all of the alleged crimes, which in this case is between 25 May 1997 and January 2000. [26]

7. After the publication of the AFRC Appeal Judgement, the Trial Chamber invited both parties to file Consequential pleadings, taking into consideration the Appeals Chamber's findings[27]. Consequential Submissions were filed by the Parties on the 31 March 2008[28], 10 April 2008[29] and 15 April 2008[30], respectively.

B. Pleading of a Joint Criminal Enterprise in the Indictments and supporting documents

8. In its Initial Indictment, the Prosecution alleged JCE in very similar terms to the Indictment in the AFRC Trial[31]. The Initial Indictment alleged as follows:

> 23. The RUF and the AFRC shared a common, plan purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.
>
> 24. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abduction, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.
>
> 25. The Accused participated in this joint criminal enterprise as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone and to destabilize the government of Sierra Leone.[32]

9. In its Amended Indictment filed on 16 March 2006, the Prosecution amended its pleading regarding JCE by deleting the above paragraphs and alleging instead that:

> 33. The ACCUSED, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the Accused planned, instigated, ordered, committed, or in whose planning, preparation or execution the Accused otherwise aided and abetted, *or which crimes amounted to or were involved within a*

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[26] AFRC Appeal Judgement, paras. 84-85.
[27] Scheduling Order, SCSL-03-01-T-434.
[28] Consequential Motion.
[29] Consequential Response.
[30] Consequential Reply.
[31] Prosecutor v. Brima et al, Case No. SCSL-04-16, Further Amended Consolidated Indictment, SCSL-04-16-PT-147, paras.33-34.
[32] Initial Indictment, paras 23-25.

common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose. [emphasis added][33]

10. The Amended Indictment further alleged under the Particulars at Paragraph 5 that:

> 5. Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters), assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the ACCUSED burned civilian property and committed the crimes set forth below in paragraphs 6 through 31 and charged in Counts 2 through 11, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.

In addition, the Particulars of each count in the Amended Indictment was prefixed with the following words:

> [.....] members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the ACCUSED.... [34]

11. The Second Amended Indictment did not alter these pleadings as far as the pleading of JCE is concerned.[35]

12. The Prosecution has made further submissions regarding the alleged JCE and ~~its~~ "common purpose" in its Case Summary,[36] Pre-Trial Brief,[37] Opening Statement,[38] and Amended Case Summary,[39] In its Prosecution Notification of Filing of Amended Case Summary[40] which was filed subsequent to the Second Amended Indictment and the AFRC Trial Judgement, the Prosecution submitted that although it had provided prior notice concerning "the common plan, design or purpose in the Indictment", never-the-less in order to be "consistent with the AFRC Trial Judgement and out of an abundance of caution, the Prosecution has amended paragraphs 42, 43 and 44 of the Case Summary which accompanies the Indictment, in order to further articulate the common plan, design or purpose which has been alleged in this case."[41] The relevant paragraphs of the Amended Case Summary state as follows:

> **Participation in a common plan, design or purpose**
>
> 42. Between about 1988 and about 18 January 2002, the Accused and others agreed upon and participated in a common plan, design or purpose to carry out a criminal campaign of terror, as

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[33] Amended Indictment, para. 33.
[34] Amended Indictment paras. 9, 14, 18 22, 23, 28.
[35] See Prosecution's Second Amended Indictment, para. 5 and prefix to Particulars.
[36] Case Summary, paras 42-44.
[37] Prosecution Pre-Trial Brief, paras 6-8
[38] Prosecution Opening Statement, 4 June 2007, p. 271, lines 9-20; p. 275, lines 9-12; p. 282, lines 12-29.
[39] Amended Case Summary, paras 42-43.
[40] *Prosecutor v. Taylor*, SCSL-03-01-T-327, Prosecution Notification of Filing of Amended Case Summary, 3 August 2007.
[41] Ibid. paras 4-6.

charged in the Second Amended Indictment, in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone.

43.1 The crimes charged in Counts 1 through 11 of the Second Amended Indictment were within the common plan as it existed from 30 November 1996 through 18 January 2002. the Accused and the other participants in the common plan intended the commission of each of the charged crimes.

43.2 Alternatively, from November 1996 through about January 2002, the following crimes were within the common plan, design or purpose: acts of terror against civilians in Sierra Leone; conscription, enlistment and use in active hostilities of children under the age of 15 years; enslavement of civilians and pillage. The Accused and other participants in the common plan agreed upon and intended the commission of these crimes. The crimes charged in Counts 2, 3, 4, 5, 6, 7, and 8 were foreseeable consequences of the crimes agreed upon in the common plan. The Accused participated in the common plan despite the awareness that these were foreseeable consequences.

44.1 Others participated in the common plan, design or purpose during the various periods including:

(i) Foday Saybana Sankoh, leader of the RUF, who participated between about 1988 and January 2002;

(ii) Other commanders and other leaders of the RUF, from about 1990 until 18 January 2002;

(iii) Other commanders and other leaders of the NPFL from about 1988 until 18 January 2002;

(iv) Commanders and other leaders of Liberian organised armed groups who worked in concert with or under the direction of the Accused and participated from about 1989 until about 18 January 2002;

(v) Commanders, and other leaders of the AFRC who agreed to and commenced participation in the common plan on or about 28 May 1997 through about May 2000;

(vi) After August 1997 when the Accused was sworn-in as President of Liberia, commanders and other leaders of his Liberian government and armed forces, including specialised units, police and military forces who participated through about 18 January 2002;

(vii) Associates of the Accused who worked under his direction or in cooperation with him to further the common plan from about 1988 until about 18 January 2002.

II. SUBMISSIONS

A. Defence Motion

13. The Defence made submissions on the admissibility and merits of the Motion and requests that the Trial Chamber order the severance of JCE as a mode of criminal liability from the Second Amended Indictment.

1. Submissions on the Admissibility of the Motion

14. The Defence acknowledges that the Motion was filed after the 21-day period provided for pursuant to Rule 72(A) and notes that Rule 72(B) details the manner in which motions regarding defects in an indictment are to be filed.[42] It argues, however, that current Counsel were assigned over a year after the expiration of the 21-day period, and submits that the deadlines contemplated in Rule 72(A) are superseded by Article 17 of the Statute and by notions of "natural justice" and fundamental fairness.[43]

2. Submissions on the Merits of the Motion

15. In arguing that the Second Amended Indictment is fatally defective with regards to JCE,[44] the Defence submits that the *actus reus* of JCE liability requires first, that there be a plurality of persons not necessarily organised in a military, political or administrative structure; second, the existence of a common plan, design or purpose amounting to or involving the commission of a crime prohibited in the Statute; and, third, participation by an accused in the common design involving the perpetration of one of the crimes in the Statute.[45] The Defence further points to the four criteria that must appear in any Indictment charging JCE:

> (i) The nature and purpose of the JCE;
>
> (ii) The time at which or the period over which the enterprise is said to have existed;
>
> (iii) The identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group; and
>
> (iv) The nature of the participation of the accused in that enterprise.[46]

16. The Defence argues that the "common purpose" of a JCE must be a crime within the Statute of the Special Court, and that this purpose is a material fact which must be pleaded in the indictment.[47] In support of its position, the Defence attaches an expert opinion of Prof. William Schabas to its Motion.[48] The Defence submits that the Prosecution has not pleaded a crime within the jurisdiction of the Special Court as the "common purpose" of the JCE in the Second Amended Indictment and that this mode

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[42] Motion, para. 5.
[43] Motion, para. 6.
[44] Motion, para. 3. The four criteria are: (i) the nature or purpose of the JCE; (ii) the time at which or the period over which the enterprise is said to have existed; (iii) the identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group; (iv) the nature of the participation by the accused in that enterprise. See *infra* para. 63 and accompanying footnotes.
[45] Motion, para. 21.
[46] Motion, para. 22.
[47] Motion, para. 22.
[48] Motion, Annex I.

of liability is therefore fatally defective and should be severed.[49] The Defence further submits that the Prosecution's attempt to cure the defect in its Amended Case Summary by proposing two alternative and mutually exclusive theories does not cure the defect.[50]

17. The Defence argues that the "common purpose" of the JCE must be criminal in and of itself, regardless of whether or not the means by which the "common purpose" was achieved constituted crimes within the jurisdiction of the Special Court.[51]

18. Further, the Defence submits that the Prosecution's further description of the "common plan, design or purpose" of the JCE in the Amended Case Summary, specifically, "to carry out a criminal campaign of terror [...] in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone,"[52] is "ill-defined at best" and "not legally sufficient to sustain the JCE mode of liability where the 'common plan' or objective is not defined at all, or is ill-defined at best, and where such objective or 'common purpose' is not intrinsically a crime within the jurisdiction of the court."[53] Furthermore, the Defence argues that the Prosecution's use of the word "pillage" in the Amended Case Summary does not suffice as a description of a criminal purpose "where the overall context in which it has been used renders it tantamount to verbs such as usurping, controlling, cultivating, or monopolizing the resources of Sierra Leone vis-à-vis the crime of pillage as recognised under international law."[54]

19. The Defence also argues that the Prosecution provided two alternative and mutually-exclusive theories of the purpose of the JCE in the Amended Case Summary, firstly a "criminal campaign of terror [...] in order to pillage the resources of Sierra Leone," with Counts 1 through 11 of the Second Amended Indictment falling within the common plan,[55] and alternatively, "acts of terror against civilians in Sierra Leone," with seven additional counts charged as "foreseeable consequences of the crimes agreed upon in the common plan."[56] The Defence argues that if the Prosecution alleges that a particular crime is within the "common purpose" of the JCE, it cannot also be a "reasonably foreseeable consequence" of that same purpose.[57] Because the Prosecution has alleged two different forms of JCE disjunctively, the Defence argues that the Accused's ability to understand the case against him has been impeded.[58]

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[49] Motion, para. 23.
[50] Motion, paras 24-27.
[51] Motion, para. 28.
[52] Motion, para. 25.
[53] Motion, para. 26.
[54] Motion, para. 30.
[55] Motion, para. 25.
[56] Motion, para. 31.
[57] Motion, para. 32.
[58] Motion, para. 32.

B. Defence Consequential Motion

20. The Defence reiterates its core positions that the Accused has not been placed on sufficient notice of the case he is to meet and that the Trial Chamber should issue a decision ordering the severance of JCE as a mode of criminal liability from the Second Amended Indictment.[59] The Defence submits that the notice provided by the Prosecution to the Accused of the nature and cause of the charges against him has been legally insufficient due to the constantly changing "common purposes" of the alleged JCE pleaded by the Prosecution in this case. It adds that "the Accused is not to enter into the minds of the Prosecution and [...] divine exactly what the 'common purpose' is that the alleged means pertain to".[60]

21. The Defence submits that the "common purposes" pleaded in the Prosecution's Pre-Trial Brief, Opening Statement, and Amended Case Summary, are tantamount to "gaining or maintaining of political power or control over the territory of Sierra Leone [...] in order to exploit the natural resources of the country."[61] However, according to the Defence, the Prosecution now maintains that the "common purpose" is to "inflict a campaign of terror on the citizens of Sierra Leone."[62] The Defence submits that the AFRC Appeal Judgement has advanced the underlying claim of the Accused that he has not received adequate notice of the pleading of the JCE in this case because the Prosecution has repeatedly modified different theories of the "common purpose", pointing to the various iterations of the "common purpose" in the Case Summary, Pre-Trial Brief, Opening Statement, Second Amended Indictment, Amended Case Summary and more general disclosure.[63]

22. Pointing to findings of the AFRC Appeal Judgement that "the determination of whether the Prosecution properly pleaded a crime must be determined on the basis of whether the Prosecution pleaded all the material facts in the Indictment, not whether it adduced evidence [at trial] to support the allegations", the Defence argues that the Prosecution is required to know its case from the start.[64] On the contrary, the Prosecution has adopted a "fluid and constantly evolving 'common purpose'" which is inconsistent with the spirit of the AFRC Appeal Judgement which contemplated a consistently pleaded "common purpose".[65]

23. The Defence concedes that the "basic" and "extended" forms of JCE may be pleaded disjunctively and this, alone, may not serve to invalidate the notice given to an Accused regarding the case to be met.[66]

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[59] Consequential Motion, Conclusion.
[60] Consequential Motion, para. 26.
[61] Consequential Motion, para. 11.
[62] Consequential Motion, para. 19.
[63] Consequential Motion, para. 18.
[64] Consequential Motion, para. 14.
[65] Consequential Motion, para. 20.
[66] Consequential Motion, para. 15.

C. Prosecution Response

24. The Prosecution opposes the Motion and requests the Trial Chamber to dismiss it.[67]

1. Submission on the Admissibility of the Motion

25. The Prosecution notes that the Defence has conceded that the Motion was filed in violation of Rule 72(A). The Prosecution argues that the current Defence team had over four months available between the filing of the Amended Case Summary and the filing of the Motion, which it notes, was filed on the last day before judicial recess, and concludes that the Motion was not filed in a timely manner.[68]

26. The Prosecution however, acknowledges paragraph 24 of the Trial Chamber's Judgement in the AFRC case in which the Trial Chamber stated that it was "not precluded from reviewing in [a] judgement whether shortcomings in the form of the Indictment [...] resulted in prejudice to the rights of the Accused."[69] Therefore, unless the Trial Chamber's position on the issue has changed, the Prosecution does not oppose a review of the Second Amended Indictment at this stage of the presentation of evidence.[70]

2. Submissions on the Merits of the Motion

27. The Prosecution submits that the Trial Chamber should dismiss the Motion, arguing that the Prosecution provided the Defence with "adequate notice of the alleged common plan, design, or purpose to commit crimes within the jurisdiction of the Special Court".[71] In addition, the Prosecution argues that the Defence position "erroneously focuses JCE liability on the existence of a criminal *purpose* to the exclusion of liability based on the existence of a criminal plan or design." Further, "purpose" should not be defined too narrowly.[72] The Prosecution further argues that Professor William Schabas' opinion as contained in his letter to the Defence did not take into account the Amended Case Summary and should be ignored.[73]

28. The Prosecution argues that the details of the alleged JCE were sufficiently articulated in the Amended Case Summary[74] as a "common plan, design or purpose to inflict a campaign of terror on the citizens of Sierra Leone."[75] The Prosecution further argues that "acts of terrorism", which constitute a violation of Common Article 3 of the Geneva Conventions, is a crime punishable under Article 3(d) of the Statute.[76]

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[67] Response, para. 7.
[68] Response, para. 5.
[69] Response, para. 6, citing AFRC Trial Judgement, paras 24, 25.
[70] Response, para. 6.
[71] Response, para. 7.
[72] Response, paras 7, 13.
[73] Response, para.9.
[74] Amended Case Summary, Annex.
[75] Response, para. 10.
[76] Response para. 10.

29. The Prosecution rejects the Defence's argument that those who enter into an agreement or understanding to commit international crimes such as acts of terrorism have not formed a JCE so long as their ultimate 'purpose' is not in and of itself criminal.[77] The Prosecution argues that "agreements that have criminal ends and those that plan or employ criminal means," are the same, stating that "[t]he harm or danger from such criminal agreements or understandings is equal whether the crime is considered the ultimate objective or the means agreed upon to achieve that objective."[78]

30. The Prosecution submits that even if the ultimate "objective" or "end" of the plan is not criminal, a JCE exists if there is a common state of mind that a crime within the jurisdiction of the Court be committed, be it an agreed criminal plan, purpose or design.[79]

31. In addition, the Prosecution argues that it alleged not only a common intent to employ criminal means, but also that part of the ultimate objective of the joint criminal enterprise was criminal. The Amended Case Summary states that "the campaign of terror in the JCE was used in part 'to pillage the resources of Sierra Leone, in particular the diamonds.'"[80] The Prosecution submits that "pillage" is a crime under Article 3(f) of the Statute and well defined in international law is not used by the Prosecution as a synonym for "cultivating" as the Defence has argued.[81]

32. The Prosecution submits that it has pleaded two different categories of JCE, the "basic" and the "extended" categories, in the alternative[82] and argues that it is well established in international criminal jurisprudence that it may plead different, mutually-exclusive modes of responsibility in the alternative.[83]

D. Consequential Prosecution Response

33. The Prosecution submits that the Defence Motion and Consequential Submissions should be dismissed.[84] The Prosecution notes a change of focus in the Defence submissions on the defective pleadings of the JCE *viz.* that the Accused has not been placed on sufficient notice of the case he is to meet.[85] It responds that its pleadings on JCE have been consistent.[86] However, the Prosecution asserts that even if its pleadings had been inconsistent, "there is no prohibition against evolving theories."[87] Finally, the Prosecution avers that the Defence's arguments on this point are disingenuous considering that the current Defence team was appointed at the time the Second

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[77] Response, para. 11.
[78] Response, paras. 11-14.
[79] Response, para. 15.
[80] Response, para. 16.
[81] Response, para. 16.
[82] Response, paras 17-19.
[83] Response, para. 17.
[84] Consequential Response, para. 26.
[85] Consequential Response, paras 2, 3.
[86] Consequential Response, paras 20, 23.
[87] Consequential Response, para. 23.

Amended Indictment was in place and at about the same time the Amended Case Summary was filed. From the outset the current Defence team had the full pre-trial articulation of the common plan, design or purpose, or JCE, in this case from the outset of their appointment.[88]

34. The Prosecution submits that the "common purpose" of the JCE alleged in this trial has always been "to take any actions necessary to gain and exercise political power and political and physical control over the territory of Sierra Leone, particularly the diamond mining areas."[89] The Prosecution further submits that it has put the Defence on notice that both the objective of the JCE and the means to achieve that objective involve crimes within the jurisdiction of the Special Court even though it is sufficient to prove that either the objective or the means involve a crime or crimes within the jurisdiction of the Court.[90]

35. The Prosecution submits that the Second Amended Indictment, the Amended Case Summary, the Pre-Trial Brief and the Prosecution's Opening Statement provide the Defence with sufficient detail about the alleged JCE.[91] It further reiterates that as it is entitled to amend indictments or case summaries, there cannot be a prohibition on "evolving theories."[92]

E. Defence Reply

1. Submission on Admissibility of Motion

36. In the Defence's view, the fact that the Prosecution does not oppose a review is significant and represents a "tacit acknowledgement of the legal significance and practical implications which are raised by the Motion."[93]

2. Submissions on Merits of Motion

37. With respect to the Prosecution's argument that adequate notice was given to the Defence, the Defence does not dispute that the Prosecution has attempted to advance a JCE theory of liability through a variety of submissions and materials but submits the dispute lies in the legal sufficiency and propriety of the articulated mode of JCE liability, in the specific context of the criminality (rather, the lack thereof) of the alleged "common purpose".[94] The Defence argues that the crux of the matter is the failure of the Prosecution to plead a crime within the jurisdiction of the Court as the "common purpose" of the JCE.[95] It concludes that the Prosecution has not provided adequate

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[88] Consequential Response, para. 24.
[89] Consequential Response, paras 20, 23.
[90] Consequential Response, para. 21.
[91] Consequential Response, para. 22.
[92] Consequential Response, para. 23.
[93] Reply, para. 4.
[94] Reply, para. 7.
[95] Reply, para. 12.

notice of the nature and cause of the charges against the Accused, as it "keeps modifying and advancing different theories" of the alleged "common purpose".[96]

38. Regarding the distinctions between "common purpose", "common plan," "common design," and "means" and "ends", the Defence submits that the Prosecution has placed "legally irrelevant" emphasis on the Defence's preferential use of the phrase "common purpose".[97] The Defence notes that they simply employed language mirroring this Chamber's Judgement in the AFRC case.[98]

39. The Defence reiterates its argument that if the charged crimes are allegedly within the "common purposes", they cannot logically be a reasonably foreseeable consequence of the same purpose.[99] Furthermore, the Defence reiterates that by pleading two forms of JCE disjunctively, the Prosecution has impeded the Accused's ability to understand the material facts of the JCE alleged against him by charging a common purpose that is not inherently criminal.[100]

F. Consequential Defence Reply

40. The Defence submits that it has not shifted its core position; its challenge on the form of the Second Amended Indictment directly impacts the question of adequate notice to the Accused of the case against him and the Prosecution argument erroneously assumes that the question of the manner and form in which an issue is pleaded can be divorced from the question of notice. The Defence submits that the Prosecution's attempt to divorce these two issues is "legal nonsense".[101]

41. The Defence submits that the Second Amended Indictment, as the principal accusatory document, must be written with clarity and sufficient detail, pursuant to Article 17(4)(a) of the Statute.[102] In this vein, the Defence cites the ICTY Appeal Judgement in *Kordic and Cerkez* for the proposition that the nature of the Accused's alleged responsibility must be unambiguous in an indictment.[103] The Defence states that the obligation on the Prosecution is two-fold, and entails the duty to inform the Accused of the *nature and cause* of the charges against him as well as a concise description of the facts underpinning the charges.[104]

42. The Defence specifically contests the Prosecution's assertion that it has pleaded the "common purpose" of the JCE in a consistent manner. The Defence reiterates the allegation made in paragraph 19 of its Consequential Submission that the Prosecution's case has been constantly shifting. This shift is apparent, the Defence submits, in the

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[96] Reply, para. 14.
[97] Reply, para. 16.
[98] Reply, para. 16.
[99] Reply, para. 18.
[100] Reply, para. 18.
[101] Consequential Response, paras 10, 13.
[102] Consequential Reply, para. 11.
[103] Consequential Reply, para. 12.
[104] *Ibid.*

amendments to the Indictment and in other processes outlined in Prosecution Response, paragraphs 4 through 9.[105] The Defence reiterates that the Prosecution's position on the "common purpose" has shifted from "to take and maintain political and physical control over Sierra Leone in order to exploit its natural resources" to "to inflict a campaign of terror on the citizens of Sierra Leone."[106] The Defence acknowledges that the Prosecution is permitted to amend the indictment for clarity's sake, but stresses that the Prosecution may not "mould its case as it goes along."[107]

43. The Defence notes the finding of the AFRC Appeal Judgement which held that the criminal purpose under JCE may derive from the ultimate objective or from the means and that in determining the legal sufficiency of a JCE pleading the means must be viewed in conjunction with the pleaded "common purpose." However, the evolving nature of the pleaded "common purpose" in the present case sets the present Indictment outside this purview.[108]

44. Finally, in response to the Prosecution claim that the Defence was being disingenuous in alleging a lack of proper notice on the question of "common purpose", the Defence submits that notice is provided to the Accused and not to the Defence team and it is in this respect that the issue has been raised.[109]

III. APPLICABLE LAW

45. Article 17 of the Statute of the Special Court relating to "Rights of the Accused" provides:

> 1. All Accused shall be equal before the Special Court.
>
> 2. The Accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
>
> 3. The Accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
>
> 4. In the determination of any charge against the Accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
>
> > a. To be informed promptly and in detail in a language which he or she understands, of the nature and cause of the charge against him or her;
> >
> > b. To have adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her choosing;
> >
> > c. To be tried without undue delay;

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[105] Consequential Reply, para. 14.
[106] Consequential Reply, para. 14.
[107] Consequential Reply, para. 15.
[108] Consequential Reply, para. 17, paraphrasing AFRC Appeal Judgement, para. 80.
[109] Consequential Reply, para. 19.

d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

e. To examine or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

f. To have the Free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

g. Not to be compelled to testify against himself or herself or to confess guilt.

46. Rule 26*bis* relating to "Chambers" provides:

The Trial Chamber and Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the Accused and due regard for the protection of victims and witnesses.

47. Rule 47 relating to "Review of Indictments" provides

A. An Indictment submitted in accordance with the following procedure shall be approved by the designated Judge.

B. [...]

C. The Indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.

D. [...]

E. The designated Judge shall review the Indictment and accompanying material to determine whether the Indictment should be approved. The Judge shall approve the Indictment if he is satisfied that-

(i) the Indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and

(ii) that the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the Indictment.

48. Rule 50 relating to " Amendment of Indictment" provides:

A. The Prosecutor may amend an indictment, without prior leave, at any time before its approval, but thereafter, until the appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it, but in exceptional circumstances, by leave of another Judge. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 52 apply to the amended indictment.

B. If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61:

(i) A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges;

(ii) Within seven days from such appearance, the Prosecutor shall disclose all materials envisaged in Rule 66(A)(i) pertaining to the new charges;

(iii) The accused shall have a further period of ten days from the date of such disclosure by the Prosecutor in which to file preliminary motions pursuant to Rule 72 and relating to the new charges.

49. Rule 72 relating to " Preliminary Motions" provides:

A. Preliminary motions by either party shall be brought within 21 days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i).

B. Preliminary motions by the accused are:

(i) Objections based on lack of jurisdiction;

(ii) Objections based on defects in the form of the indictment;

C. [...]

IV. DELIBERATIONS

A. Preliminary issue: Admissibility of the Defence Motion:

50. In evaluating the timeliness of the Motion presented by the Defence, the Trial Chamber is guided specifically by Rules 72(A) and 72(B)(ii) and more generally by Article 17 of the Statute and the interests of justice.

51. Whilst the Second Amended Indictment was filed on 29 May 2007 and the accompanying Amended Case Summary on 3 August 2007, the Motion challenging the form of Indictment was not filed until 14 December 2007, clearly out of time. Although the Motion is time-barred pursuant to Rule 72(A), the Trial Chamber may in the interest of justice review issues such as the pleading of JCE at any stage of the proceedings, particularly when violations of the rights of the accused are at risk.[110] The Appeals Chamber has emphasised that challenges to the form of an indictment should be made at a relatively early stage of the proceedings and usually at the pre-trial stage pursuant to Rule 72(B)(ii) of the Rules.[111] However, the Appeals Chamber has also held that a failure to challenge the form of an indictment at the pre-trial stage is not an absolute bar to challenges at a later stage.[112]

52. Parties may not misuse such exceptions for tactical purposes. Consequently a party requesting an exception is required to show good cause for its late filing.[113]

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[110] Prosecutor v. Karemera, ICTR-98-44-T, Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, pertaining to, inter alia, Lack of Jurisdiction and Defects in the Form of the Indictment, 25 April 2001, para. 9.
[111] AFRC Appeal Judgement, para. 43.
[112] AFRC Appeal Judgement, para. 43.
[113] See for example Rule 72 of the ICTY and ICTR Rules.

53. The initial Defence team was withdrawn on 4 June 2007 and a new team was not in place until early August 2007. The initial Defence team informed the Trial Chamber that it would be filing no preliminary motions[114] but stated in its Defence Pre-Trial Brief that a "notable feature of the Amended Indictment was the deliberate decision to drop the allegation, present in the original indictment, that Mr. Taylor was part of a Joint Criminal Enterprise".[115]

54. The current Defence team has not addressed the initial Defence team's position, but nevertheless appears to have adopted a different approach in relation to the Prosecution's pleading of JCE.

55. At a status conference held in August 2007, the Trial Chamber granted the Defence five months to prepare its case. Given the complexity of the instant case and the amount of documents and information provided by the Prosecution to the Accused and the Defence,[116] the Trial Chamber finds that the late filing of the Motion was not unreasonable and therefore that the Defence has shown good cause.

56. In addition, the Trial Chamber recalls that an Appeals Chamber may reverse a conviction as a result of a defective indictment[117] and that it is therefore important that any formal defects of an indictment be addressed as early as possible, and if possible before a final trial judgement. We note that the Prosecution, while observing that the Motion was not filed in a timely manner, nevertheless does not oppose a review on the basis of the Trial Chamber's reasoning in the AFRC judgement.[118]. We are of the opinion that it is in the interests of justice to address the issue raised at this stage of the proceedings. The Trial Chamber will therefore entertain the Motion, notwithstanding that it was filed out of time.

B. Pleading Requirements of an Indictment

57. Article 17(4)(a) of the Statute provides that an accused is entitled to be "informed promptly and in detail [...] of the nature and cause of the charge against him or her." Rule 47(C) of the Rules specifies that an "indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence." These provisions constitute an obligation on the part of the Prosecution to

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[114] SCSL-03-01-PT-105.

[115] Defence Pre-Trial Brief, para. 45.

[116] See for example, *Prosecutor v. Taylor*, SCSL-03-01-PT-148, Defence Motion on Adequate Time for the Preparation of Mr. Taylor's Defence, 15 December 2006, in particular para. 17 in which the Defence stated that the initial Prosecution disclosure consisted of 34,000 pages of material and that it had recently received an additional 154 statements and transcripts and a large amount of other information. See also for example, *Prosecutor v. Taylor*, SCSL-03-01-PT-323, Defence Motion for Adjournment to allow the Defence adequate time and facilities to prepare and other ancillary matters, 31 July 2007, in particular para. 13 in which the Defence notes that in addition to that earlier disclosure it had six motions pending including one with close to 2000 pages of evidential material.

[117] *Niyitegeka v. The Prosecutor*, ICTR 96-14-A, Judgement, 9 July 2004 [Niyitegeka Appeal Judgement], para. 195.

[118] Response para. 5.

plead the material facts underpinning the charges with enough detail to inform an accused clearly of the charges against him so that he may prepare a defence, but not the evidence by which such material facts are to be proven.[119] The materiality of a particular fact depends on the nature of the Prosecution case and on the context of the alleged criminal conduct with which an accused is charged.[120]

58. The Trial Chamber recalls that an indictment is the primary accusatory instrument[121] and that any other accusatory instruments cannot add charges or material facts that were not pleaded in the indictment.[122] Any assessment of supporting material provided by the Prosecution by the Trial Chamber is an exceptional measure. To do otherwise would allow the Prosecution to circumvent the procedure set out in Rule 50 of the Rules by including material facts in documents supplementary to the Indictment.

59. The Trial Chamber observes that any lack of precision or specificity in an indictment interferes with judicial economy, as the Prosecutor also benefits from a clear and unambiguous indictment which enables him it to focus his case and hence to allocate his-limited resources reasonably.[123] Therefore, the Trial Chamber stresses that a specific and unambiguous indictment is an essential prerequisite to a fair and expeditious trial.[124]

60. The fact that the case summary, provided for in Rule 47(C) of the Rules, is appended to the Indictment does not suggest that the case summary forms a part of the Indictment. The Appeals Chamber in the *Norman* case stated that:

> The case summary which should accompany the Indictment forms no part of it. The significance of this practice is that once a defendant is arraigned [...] no word or phrase of any count or any particular of a count may be changed without the permission of the court, by an application to amend the Indictment which is made in the presence of the Defence. The Prosecutor's case summary, however, is not a document susceptible to amendment by the court. It accompanies the Indictment in order to give the Accused better details of the charges against him and to enable the designated judge to decide whether to approve the Indictment under Rule 47(E).[125]

61. Therefore, the case summary is primarily a document intended for the confirmation stage of an indictment. In addition the case summary, like the pre-trial brief but in a more concise form, expands on the legal and factual issues the Prosecution intends to develop at trial. Therefore, any material fact that appears only in a case summary cannot substitute for the pleading of that material fact in the Indictment since,

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[119] AFRC Trial Judgement, para. 27.
[120] AFRC Trial Judgement, para. 29.
[121] *Prosecutor v. Blaskic*, IT-95-14-A, Judgement, 29 July 2004 ["Blaskic Appeal Judgement"], para. 220; Kupreskic Apppeal Judgement, para. 114; Cyangugu Appeal Judgement, para. 114.
[122] *Prosecutor v. Rasevic*, IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 April 2004.
[123] *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended indictment, 15 July 2004, para. 28.
[124] *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended indictment, 15 July 2004, para. 28.
[125] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-397, Decision on Amendment of the Consolidated Indictment, 16 May 2005, paras 51-52.

as the Appeals Chamber has concluded, the case summary "is not a document susceptible to amendment by the court".[126] The material facts of the case must be pleaded in an indictment and may only be amended with leave of the Trial Chamber pursuant to Rule 50(A).

62. The Appeals Chamber held that:

> In order to guarantee a fair trial the Prosecution is obliged to plead material facts with a sufficient degree of specificity. The question whether material facts are pleaded with the required degree of specificity depends on the context of the particular case.[127]

63. The Appeals Chamber also held that in order to determine whether the Prosecution properly pleaded a joint criminal enterprise, the Indictment should be read as a whole.[128]

64. The pleading of a JCE is a material fact and its elements must be pleaded in the indictment with sufficient specificity.[129] In its Case Summary, Prosecution Pre-Trial Brief and the Opening Statement of the Prosecutor on 4 June 2007 the Prosecution indicates that it intends to rely on JCE liability in this case.

65. The Trial Chamber will therefore consider whether the JCE was adequately pleaded in the Second Amended Indictment.

C. Pleading Requirements for Joint Criminal Enterprise

66. With regards to modes of liability in general, there is ample jurisprudence asserting that nature of the alleged responsibility of an accused must be unambiguous in an indictment.[130]

67. As for pleadings regarding JCE liability, the Trial Chamber recalls that the *actus reus* of JCE liability comprises three elements:

(i) A plurality of persons;

(ii) The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;

(iii) Participation of the Accused in the common plan, design or purpose involving the perpetration of one of the crimes provided for in the Statute.[131]

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[126] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T, Decision on Amendment of the Consolidated Indictment, 16 May 2005, paras 51-52.
[127] AFRC Appeal Judgement, para. 37 [footnotes omitted].
[128] AFRC Appeal Judgement, para. 138.
[129] See for example, *Prosecutor v. Furundzija*, IT-95-17/1-A, 21 July 2000, Judgement, 21 July 2001, para. 147; *Blaskic* Appeal Judgement, para. 215; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, 17 December 2004, para. 129; *Gacumbitsi*, para. 167; *Ntagerura* Appeal Judgement, para. 23.
[130] See for example, *Prosecutor v. Furundzija*, IT-95-17/1-A, 21 July 2000, para. 147; Blaskic Appeal Judgement, para. 215; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, 17 December 2004, para. 129. *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, para. 303.

68. The Appeals Chamber has found that following four categories of facts must be pleaded in any indictment charging an accused with JCE liability:[132]

(i) The nature or purpose of the JCE;[133]

(ii) The time at which or the period over which the enterprise is said to have existed;[134]

(iii) The identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group;[135]

(iv) The nature of the participation by the accused in that enterprise.[136]

D. Pleading of the JCE in the Second Amended Indictment

69. Bearing in mind the Appeals Chamber's finding that an Indictment must be read as a whole,[137] the Trial Chamber considers the following paragraphs of the Second Amended Indictment, namely:

a) **Para. 5** which states that:

> *Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters)*, assisted and encouraged by, *acting in concert with*, under the direction and/or control of, and/or subordinate to the ACCUSED, burned civilian property, and committed the crimes set forth below in paragraphs 6 through 31 and charged in Counts 2 through 11, *as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.*[138] [Emphasis added]

b) **Para. 33**, which states that:

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[131] *Prosecutor v. Tadic*, IT-94-1-A, Judgement, 15July 1999 ["Tadic Appeal Judgement"], para. 227.
[132] AFRC Appeal Judgement, footnote 146. See also AFRC Trial Judgement, para. 64.
[133] *Prosecutor v. Kvocka et al.*, IT-98-30/1-A, 28 February 2005, ["Kvocka Appeal Judgement"], para. 28; *Niyitegeka* Appeal Judgement, para. 194; *Kupreskic* Appeal Judgement, paras 88, 114; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A ["Gacumbitsi Appeal Judgement"], para. 162; Prosecutor v. Krnojelac, IT-97-25-PT, Decision on the Form of the Second Amended Indictment, 11 May 2000 ["Krnojelac Decision"], para. 16; *Prosecutor v. Milutinovic, Sainovic, Odjanic*, IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Sainovic, 27 March 2003 ["Milutinovic Decision"], p. 4.
[134] *Krnojelac* Decision, para. 16; Milutinovic Decision, p. 4.
[135] *Kvocka* Appeal Judgement, para. 28; *Niyitegeka* Appeal Judgement, para. 194; *Kupreskic* Appeal Judgement, paras 88, 114; *Gacumbitsi* Appeal Judgement, para. 162; *Krnojelac* Decision, para. 16; *Milutinovic* Decision, p. 4.
[136] *Kvocka* Appeal Judgement, para. 28; *Niyitegeka* Appeal Judgement, para. 194; *Kupreskic* Appeal Judgement, paras 88, 114; *Gacumbitsi* Appeal Judgement, para. 162; *Krnojelac* Decision, para. 16; *Milutinovic* Decision, p. 4.
[137] AFRC Appeal Judgement, para. 138.
[138] Second Amended Indictment, para. 5 [emphasis added].

> The ACCUSED, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the Accused planned, instigated, ordered, committed, or in whose planning, preparation or execution the Accused otherwise aided and abetted, *or which crimes amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.*[139] [Emphasis added]

c) **Para. 34,** which states,

> In addition, or alternatively, pursuant to Article 6.3 of the Statute, *the Accused, while holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, RUF/AFRC Junta or alliance, and/or Liberian fighters,* is individually criminally responsible for the crimes referred to in Articles 2.3 and 4 of the Statute as alleged in this Amended Indictment. The Accused is responsible for the criminal acts of his subordinates in that he knew or had cause to know that the subordinate was about to commit such acts or had done so and the Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. [Emphasis added]

d) **Paras 9, 14, 22, 23, 28,** under the heading of the particulars of each count of the Indictment, which are prefixed with the following words:

> [...] *Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters [...] acting in concert [...] with the ACCUSED.*"[140] [Emphasis added]

70. The Trial Chamber by a Majority opines that taken together, these paragraphs fulfil the requirements for pleading JCE and serve to put the Defence on notice that the Prosecution intended to charge the Accused with having participated in a Joint Criminal Enterprise.

> *(i) The existence of a common plan, design or purpose amounting to or involving a crime under the Statute:*

71. With regards to the common purpose, design or plan, paragraph 5 of the Indictment provides that the Accused together with others took part in "a campaign to terrorize the civilian population of the Republic of Sierra Leone." According to paragraphs 5 and 33 of the Indictment, the crimes charged in Counts 2 through 11 were part of the "campaign of terror" or were a reasonably foreseeable consequence thereof.

(ii)The time or period of the alleged criminal enterprise:

72. Following the direction of the Appeals Chamber that the Indictment must be read as a whole, it is clear that the JCE is alleged to have existed between 30 November 1996 and 18 January 2002.[141]

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[139] Second Amended Indictment, para. 33 [emphasis added].
[140] Second Amended Indictment, paras 9, 14, 22, 23, 28 [emphasis added].

(iii) A plurality of participants in the criminal enterprise:

73. The Indictment states that, the alleged participants in the criminal enterprise included "members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters."[142] The specific groups alleged to have participated have been clearly identified, and thus the Accused has been provided with adequate notice of the material fact of those engaged in the enterprise.

(iv) The nature of the Accused's participation in the criminal enterprise:

74. The Indictment alleges that the Accused participated in the criminal enterprise by "planning, instigating, ordering, committing or aiding and abetting the planning, preparation or execution of"[143] the alleged crimes; or alternatively, that "while holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, the Accused is responsible for the acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit the crimes or had done so but failed to take the necessary and reasonable measures to prevent the crimes or to punish the perpetrators."[144] This clearly identifies the nature of the Accused's participation in the enterprise

75. Finally the fact that the Prosecution has not used the words "Joint Criminal Enterprise" in the indictment does not, in and of itself, indicate a defect. It is possible that other phrasings might effectively convey the same concept. The question is not whether particular words have been used but whether an accused has been meaningfully informed of the nature of the charges so as to be able to prepare an effective defence.[145] To rely on JCE, an indictment need not plead the doctrine *ipsissima verba* if the intention is clear.[146]

76. Reading the Indictment as a whole the Trial Chamber is satisfied that the Prosecution has adequately fulfilled the pleading requirements of the alleged Joint Criminal Enterprise in the Indictment, and that it has provided sufficient details to put the Accused on notice of the case against him.

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[141] See for example, Indictment paras. 6, 9, 14, 18, 22, 28. See also AFRC Appeals Judgement, para. 86 and in particular footnote 147 in which the Appeals Chamber noted that paras 33 to 35 of the AFRC Indictment did not provide a time frame for the alleged JCE, but held that these paragraphs should be read together with paragraph 32 which alleged that "[a]t all times relevant to this Indictment" the accused participated in the JCE.

[142] Second Amended Indictment, paras. 5, 6, 9, 14, 18, 22, 34.

[143] Ibid. para.33.

[144] Ibid. para.34.

[145] *Gacumbitsi v. Prosecutor* ICTR-2001-64-A 7July 2006 para. 165.

[146] Ibid. Separate Opinion of Judge Shahabuddeen para. 29.

V. DISPOSITION

FOR THE ABOVE REASONS by a majority

DISMISSES the Defence Motion

Justice Richard Lussick appends a Dissenting Opinion.

Done at The Hague, The Netherlands, this 27th day of February 2009.

Justice Teresa Doherty

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

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SCSL-03-01-T
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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 27 February 2009

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC URGENT DEFENCE MOTION REGARDING A FATAL DEFECT IN THE PROSECUTION'S SECOND AMENDED INDICTMENT RELATING TO THE PLEADING OF JCE - DISSENTING OPINION OF JUSTICE RICHARD LUSSICK

Office of the Prosecutor:
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Nicholas Koumjian

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

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DISSENTING OPINION OF JUSTICE RICHARD LUSSICK

Introduction

1. I have had the opportunity of reading the Majority Decision of my learned colleagues and have to say that I agree with their finding that the Defence has shown good cause for the late filing of the Motion. I dissent, however, from their finding that the joint criminal enterprise responsibility of the Accused has been properly pleaded in the Indictment.

2. I agree with the views expressed in the Majority Decision regarding the applicable law on the pleading requirements for indictments generally and for joint criminal enterprise specifically. Such views are well founded in the international jurisprudence of the *ad hoc* tribunals. Nevertheless, a proper application of those pleading principles leads to the conclusion, in my opinion, that the Indictment has been defectively pleaded with respect to joint criminal enterprise.

Defective Pleading of Joint Criminal Enterprise

3. The initial Indictment in this case was filed on 7 March 2003[1]. An Amended Indictment was filed with leave on 17 March 2006. In that indictment, joint criminal enterprise is pleaded in the following terms:

> The ACCUSED, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the Accused planned, instigated, ordered, committed, or in whose planning, preparation or execution the Accused otherwise aided and abetted, *or which crimes amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.*[2]

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[1] Pleading of joint criminal enterprise in the initial Indictment is mentioned *infra* in the "Remedy" section.

[2] Amended Indictment dated 16 March 2006, filed on 17 March 2006, para. 33 [emphasis added].

4. A Second Amended Indictment - which did not alter the wording of the pleading of joint criminal enterprise contained in the Amended Indictment - was filed on 29 May 2007[3]. (Hereinafter, unless otherwise indicated, a reference to "Indictment" will be a reference to the Second Amended Indictment, which is the current indictment.)

5. It is notable that the Indictment fails to identify any specific common purpose in respect of which the Accused is alleged to be criminally responsible. Hence, in my view, the Indictment is not sufficiently specific to clearly inform the Accused of the case he is required to meet in relation to joint criminal enterprise and is thus defective.

6. It is well established in international law that an indictment alleging the participation of the accused in a joint criminal enterprise must plead the nature of the common purpose of the joint criminal enterprise as a material fact, otherwise the indictment is defective[4]. The Appeals Chamber has found that "[e]stablished case law on the pleading of joint criminal enterprise requires that an indictment must allege the nature of the enterprise, the time period, the persons involved, and the nature of the accused's participation in the joint criminal enterprise."[5] The Appeals Chamber has also found that "determination of whether the Prosecution properly pleaded a crime must be determined on the basis of whether the Prosecution pleaded all the material facts in the Indictment".[6]

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[3] Second Amended Indictment, para 33.

[4] *Kupreskic* Appeal Judgement, paras 88, 114; *Blaskic* (AC) Judgement, 29 July 2004, para 220; *Kronjelac* (AC) Judgement, 17 September 2003, para 116; Ntagerura (AC) Judgement, 7 July 2006, para 24; *Prosecutor v. Kvocka et al.*, IT-98-30/1-A, 28 February 2005, ["Kvocka Appeal Judgement"], paras 28, 42; *Niyitegeka* Appeal Judgement, para. 194; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A ["Gacumbitsi Appeal Judgement"], para. 162; Prosecutor v. Krnojelac, IT-97-25-PT, Decision on the Form of the Second Amended Indictment, 11 May 2000 ["Krnojelac Decision"], para. 16; *Prosecutor v. Milutinovic, Sainovic, Odjanic*, IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Sainovic, 27 March 2003 ["Milutinovic Decision"], p. 4; *Prosecutor v. Hadzihasanovic et al*; Case No. IT-01-47-PT, Decision of Form of Indictment, 7 December 2001, para 10; *Gacumbitsi* Appeal Judgement, para. 167; Prosecutor v. Brdanin & Talic, Case No. IT-99-36-PT, Decision on Objections by Radoslav Brdanin to the Form of the Amended Indictment, 23 February 2001, para 13; *Prosecutor v. Furundzija*, IT-95-17/1-A, 21 July 2000, Judgement, 21 July 2001, para. 147; *Blaskic* Appeal Judgement, para. 215; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, 17 December 2004, para. 129; Cyangugu Appeal Judgement, para. 23.

[5] *AFRC Appeal Judgement*, footnote 164.

[6] *AFRC Appeal Judgement*, para 84.

7. On 3 August 2007 the Prosecution filed an Amended Case Summary, no doubt with the intention compensating for the deficiencies of the Indictment. The Prosecution claims that by virtue of this Amended Case Summary it cannot be said that "the Prosecution has failed to allege a common purpose to commit a crime within the Statute[7]." The Amended Case Summary provided (*inter alia*) the following details of the alleged common purpose:

> Between about 1988 and about 18 January 2002, the Accused and others agreed upon and participated in a common plan, design or purpose to carry out a criminal campaign of terror, as charged in the Second Amended Indictment, in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone.[8]

8. The specific objective of the joint criminal enterprise detailed in the Amended Case Summary is obviously a material fact which should have been pleaded in the Indictment. The Amended Case Summary purports to change the count against the Accused by substituting a common purpose which was not charged in the Indictment. In my opinion, this cannot cure the defect in the Indictment. Material facts must be pleaded in an indictment - not in a case summary - and can only be amended by leave of the Trial Chamber under Rule 50. Since the indictment is the primary accusatory instrument, it is not possible for the Prosecution to cure a defective indictment by amending a case summary[9].

9. I disagree with the Majority Decision that "[r]eading the Indictment as a whole, (....) the Prosecution has adequately fulfilled the pleading requirements of the alleged Joint Criminal Enterprise in the Indictment." One cannot argue with the proposition that the Indictment should be read as a whole, but I do not agree that in the present case, reading together paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Indictment is sufficient to fulfil the requirements for pleading joint criminal enterprise.

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[7] Response, para. 10.
[8] Case Summary Accompanying the Second Amended Indictment ("Amended Case Summary"), para 42.
[9] *Prosecutor v. Hadzihasanovic et al*; Case No. IT-01-47-PT, Decision of Form of Indictment, 7 December 2001, para 12; *Prosecutor v. Rasevic*, IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 April 2004.

10. (i) Para. 5 of the Indictment states that:

> *Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters),* assisted and encouraged by, *acting in concert with,* under the direction and/or control of, and/or subordinate to the ACCUSED, burned civilian property, and committed the crimes set forth below in paragraphs 6 through 31 and charged in Counts 2 through 11, *as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.*[10]

(ii) Paras 9, 14, 22, 23, 28, under the heading of the particulars of each count of the Indictment, make reference to "members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the ACCUSED."[11]

(iii) Para. 33 of the Indictment states that:

> The ACCUSED, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the Accused planned, instigated, ordered, committed, or in whose planning, preparation or execution the Accused otherwise aided and abetted, *or which crimes amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.*[12]

11. The plain language of those paragraphs does not, in my opinion, support the Majority finding that paragraph 5 provides that the common plan, design or purpose of the joint criminal enterprise was "to terrorize the civilian population of the Republic of Sierra Leone." Not only does paragraph 5 fail to specify any purpose for the joint criminal enterprise, it does not mention joint criminal enterprise at all. That is because paragraph 5 is not concerned with joint criminal

[10] Second Amended Indictment, para. 5 [emphasis added].
[11] Second Amended Indictment, paras 9, 14, 22, 23, 28 [emphasis added].
[12] Second Amended Indictment, para. 33 [emphasis added].

enterprise but is a count charging acts of terrorism, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II. Bearing in mind that the Amended Case Summary, which particularises "a common, plan, design or purpose to carry out a criminal campaign of terror" was not in existence when the Indictment was filed, there is no more reason for reading paragraph 33 together with paragraph 5 than there is for reading paragraph 33 together with any other paragraph of the Indictment.

12. Furthermore, paragraph 5, when read with paragraph 33, does not clearly identify a common purpose. The campaign "to terrorize the civilian population of the Republic of Sierra Leone" would more likely be the means of achieving a common purpose rather than an end in itself. Indeed, the Amended Case Summary relied upon by the Prosecution alleges an objective different from paragraph 5, namely that the Accused participated in the "criminal campaign of terror, as charged in the Second Amended Indictment *in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone*"[13].

13. Moreover, in view of the difference between the objective stated in paragraph 5 of the Indictment and the objective stated in the Amended Case Summary, it follows that not even the Prosecution would agree with the Majority theory of a common purpose.

14. I do not interpret the Appeals Chamber Decisions in *Norman* and in the *AFRC Appeal Judgement* as meaning that the Appeals Chamber has adopted pleading principles which are any less stringent than those of other international courts nor, in particular, that it has departed from well established pleading principles by deciding that the common purpose of a joint criminal enterprise need not be clearly specified in an Indictment. Such an interpretation would obviously be an infringement of the statutory right of the Accused to be informed clearly of the charges against him so that he may prepare a defence.

15. My final point is that the Accused should not be required to undergo the brain-twisting exercise of reading together paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Indictment in order to fathom what liability facts are most likely to form the

[13] See Amended Case Summary, para 42; see also Motion, para 27.

basis for his alleged joint criminal enterprise. An indictment which requires an accused to do so is obviously defective in that it fails to clearly inform the accused of the case he is required to meet[14].

Remedy

16. Having found the Indictment to be defective in respect of its pleading of joint criminal enterprise, it is nonetheless clear that the Accused was given ample notice by the Prosecution in its various supporting documents, initial indictment and opening statement that he was to be charged with participation in a joint criminal enterprise, even though the objective of that enterprise was not always expressed in the same way.

17. The initial Indictment, filed on 7 March 2003, stated that "the common plan, purpose or design (joint criminal enterprise)" was "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise."[15]

18. The Amended Indictment filed on 17 March 2006, and the Second Amended Indictment filed on 29 May 2007, charged the Accused with being criminally responsible for crimes which "amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose"[16], but no common plan, design or purpose was specified.

19. The initial Case Summary filed on 7 March 2006 provided the following details of the common plan, design or purpose:

> 42. This shared common plan, design or purpose was to take any actions necessary to gain and exercise political power and political and physical control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra

[14] *Kupreskic* Appeal Judgement, paras 88,114; *Kvocka* Appeal Judgement, para 28; *Ntakirutimana* Appeal Judgement, para 470; *Niyitegeka* Appeal Judgement, para 195; *Ntagerura* Appeal Judgement, para 22.
[15] Indictment, filed on 7 March 2003, para 23.
[16] See paragraph 33 of both documents.

Leone, in particular the diamonds, were to be provided primarily to the ACCUSED and other persons outside Sierra Leone.

43. The Common plan, design or purpose included taking any actions necessary to gain and exercise physical and political control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to those persons engaged in achieving the objectives of the common plan, design or purpose. This common plan, design or purpose amounted to, or involved the commission of, the crimes alleged in the Amended Indictment. The alleged crimes, amounting to or involved within the common plan, design or purpose, were either intended by the ACCUSED, or were a foreseeable consequence of the common plan, design or purpose.

44. The ACCUSED participated in this common plan, design or purpose as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone, in particular diamonds, to destabilize the Government of Sierra Leone in order to facilitate access to such mineral wealth, and to install a government in Sierra Leone that would be well disposed toward, and supportive of, the ACCUSED's interests and objectives in Liberia and the region.

20. The Prosecution's Pre-Trial Brief, filed on 4 April 2007, set out the alleged joint criminal enterprise responsibility of the Accused at some length. The common plan, design or purpose was particularised as follows:

> The Emergence of the Common Plan, Design or Purpose (Common Plan)
>
> Prior to the commencement of the armed conflict in Sierra Leone, and throughout the armed conflict, the Accused participated in a common plan, design or purpose to gain and maintain political power and physical control over the territory of Sierra Leone, in particular the diamond mining areas, in order to exploit the natural resources of the country. Implementation of this common plan included overthrowing the government of Sierra Leone in order to facilitate access to its natural resources and to install a government that would be well disposed toward, and supportive of, the Accused's interests and objectives in Liberia and the region.[17]

[17] Exs. 1.011; 1.018.

This common plan amounted to or involved the commission of the crimes alleged in the Amended Indictment (Indictment). From its inception, the Accused and the other participants in the common plan used criminal means to achieve and hold political power and physical control over the civilian population of Sierra Leone. These criminal means involved the campaign of terror waged against the civilian population of Sierra Leone, including widespread and continuing killings, rapes, beatings and mutilations, enslavement of the civilian population for use as fighters, "bush wives" and forced labour, looting and burning of civilian property. Children were used to carry out this criminal campaign and in active hostilities.[18]

The Accused, as leader of the NPFL was instrumental in the creation of this common plan. The Accused and Foday Sankoh, the leader of the RUF (Revolutionary United Front), made common cause to assist each other in their respective countries to achieve the common plan. From the outset, the Accused and his forces worked virtually as one with Sankoh and his RUF forces, and with the organised armed groups and forces that later evolved. To that end, Sankoh and his RUF forces assisted the Accused during the Liberian armed conflict which commenced in 1989.[19]

21. The Amended Case Summary, filed on 3 August 2007, alleged joint criminal enterprise in the following terms:

42. Between about 1988 and about 18 January 2002, the Accused and others agreed upon and participated in a common plan, design or purpose to carry out a criminal campaign of terror, as charged in the Second Amended Indictment, in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone.

43.1 The crimes charged in Counts 1 through 11 of the Second Amended Indictment were within the common plan as it existed from 30 November 1996 through 18 January 2002. The Accused and the other participants in the common plan intended the commission of each of the charged crimes.

43.2 Alternatively, from 30 November 1996 through about 18 January 2002, the following crimes were within the common plan, design or purpose: acts of terror

[18] Wits. TF1-020; 071; 139; 227; 334; 336; 366; 532; Ellis. Exs. 1.020; 1.021; 1.067; 1.082; 1.095; 1.152; 1.155; 1.156; 1.157; 1.159; 1.169; 1.170; 1.177; 1.178; 1.184; 1.295.
[19] Wits. TF1-168; 274; 275; 515; 532; 542; Ellis. Exs. 1.058; 1.138; 1.141; 1.157; 1.232; 1.254; 1.261; 1.269.

against civilians in Sierra Leone; conscription, enlistment and use in active hostilities of children under the age of 15 years; enslavement; and pillage. The Accused and other participants in the common plan agreed upon and intended the commission of these crimes. The crimes charged in Counts 2, 3, 4, 5, 6, 7 and 8 were foreseeable consequences of the crimes agreed upon in the common plan. The Accused participated in the common plan despite his awareness that these were foreseeable consequences.

22. The Prosecutor, in his opening statement on 4 June 2007, addressed joint criminal enterprise in this way:

> The accused is responsible the development and execution of a plan that caused the death and destruction in Sierra Leone. That plan, formulated by the accused and others, was to take political and physical control of Sierra Leone, in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to facilitate that exploitation....within that overall plan there were, of course, sub-plans and strategies and operations, and the execution of that plan, of course, changed and varied in its tactics due to the unfolding events and the resistance that it faced.[20]

Further on in his opening statement, the Prosecutor asserted that "the evidence will show that the accused's plan to control territory in Sierra Leone through a campaign of terror began at least in 1991..."[21]

Later in his address, the Prosecutor reiterated that

> A plan was there formulated by the Accused and others to take over political and physical control of Sierra Leone in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to permit—to facilitate this exploitation. This was part of a larger strategy that included helping other militarily in their respective revolutions to take over their respective countries, and the first one was to be Liberia...The agreement made by the accused and Sankoh was to begin...in Liberia with the help of Sankoh's forces, and Liberia would then be used as a base from which to move into Sierra Leone with the help of the forces of the accused...access to

[20] Prosecution Opening Statement, 4 June 2007, p. 30, lines 9-20.
[21] [21] Prosecution Opening Statement, 4 June 2007, p. 34, lines 9-12.

Sierra Leone's abundant resources was a primary objective, but Sierra Leone would also be a source of manpower.[22]

23. Thus, notwithstanding the defective indictment, an appraisal of the above material leaves no doubt that the Accused was put on notice at a very early stage in the case that he was going to have to answer an allegation of participating in a joint criminal enterprise. Although there are some obvious differences in the way the various materials describe the common purpose, such divergences are not so diffuse as to deprive the Accused of a fair opportunity to prepare his defence. Accordingly, I believe the justice of the case would be met by ordering the Prosecution to amend the indictment.[23]

Disposition

24. For the foregoing reasons, I would have determined as follows:

(i) The claim of the Defence that joint criminal enterprise is defectively pleaded in the Second Amended Indictment is upheld.

(ii) The Defence prayer for severance is denied.

(iii) The Prosecution is ordered to file within 14 days a further amended indictment which pleads clearly and unambiguously as a material fact the common plan, design or purpose of the joint criminal enterprise in which the Accused is alleged to have participated.

Justice Richard Lussick

[Seal of the Special Court for Sierra Leone]

[22] Prosecution's Opening Statement, 4 June 2007, p. 41, lines 12-29.
[23] Kvocka Appeal Judgement, para 32.

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SCSL-03-01-T
(12828-12838)

12828

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Julia Sebutinde, Presiding Judge Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate Judge
Registrar:	Herman von Hebel
Case No.:	SCSL-03-1-T
Date:	7 December 2007

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
THE HAGUE
07 DEC 2007
NAME RACHEL IRURA
SIGN
TIME 15:00

PROSECUTOR

Against

CHARLES GHANKAY TAYLOR

DECISION ON THE PROSECUTION MOTION FOR JUDICIAL NOTICE

Office of the Prosecutor:
Brenda Hollis
Ann Sutherland

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

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

SEISED of the "Prosecution's Motion for Judicial Notice", filed on 14 May 2007 ("Motion")[1];

NOTING the "Defence Response to Prosecution's Motion for Judicial Notice", filed on 10 September 2007 ("Response")[2];

NOTING the "Prosecution Reply to Defence Response to Prosecution's Motion for Judicial Notice", filed on 17 September 2007 ("Reply")[3];

COGNISANT OF Rules 89, 92*bis* and 94 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

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

I. SUBMISSIONS

Motion

1. The Prosecution requests the Trial Chamber to take judicial notice of the facts set out in Annex A to the Motion pursuant to Rules 89 and 94(A), which facts the Prosecution submits, are of "common knowledge".

2. The Prosecution submits that facts of common knowledge under Rule 94(A) of the Rules have been considered to encompass common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature, as well as those facts that are generally known within a Court's territorial jurisdiction and facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be called into question.[4] In addition the Prosecution sets out four criteria approved by the Appeals Chamber.[5]

3. The Prosecution submits that judicial notice of facts of common knowledge is mandatory once a Trial Chamber has determined that a fact is of common knowledge.[6] It argues that there is no exception to this even where a fact proposed for judicial notice amounts to a "legal qualification" or constitutes an element of an offence[7] and that once judicially noticed, such facts cannot be challenged at trial.[8]

4. In the alternative, the Prosecution requests that the Trial Chamber admit into evidence pursuant to Rules 89(C) and 92*bis* the corresponding documentary extracts set out in Annex B of the Motion.[9]

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[1] Document SCSL-03-01-PT 236.
[2] Document SCSL-03-01-T 338.
[3] Document SCSL-03-01-T 342.
[4] Motion, para. 3.
[5] Motion, para. 4, see criteria set out in para. 13 *infra*.
[6] Motion, para. 6.
[7] Motion, para. 6.
[8] Motion, para. 8.
[9] Motion, paras 13-14.

Response

5. The Defence in its Response to the Motion "generally" accepts the statement of law by the Prosecution but argues that it would be improper for the Trial Chamber to take judicial notice of facts that are subject to reasonable dispute such as purported alliances between groups which allegedly include the Accused or any specific position held by the Accused where this could attest to the criminal responsibility of the Accused.[10] The Defence also argues that facts such as the launching of military operations or the specific nature of atrocities committed against civilians are disputable and that the Trial Chamber should not take judicial notice of them.[11]

6. The Defence accepts that judicial notice should be taken of *(a)* twelve of the proposed facts[12]; *(b)* parts of six of the proposed facts[13]; *(c)* 18 of the proposed facts subject to proposed amendments[14] and requests the Trial Chamber to deny the motion with regard to the remaining facts as they do not satisfy the criteria for "facts of common knowledge" and/or "attest to the criminal responsibility of the Accused".[15]

7. The Defence submits that the Trial Chamber should reject the Prosecution's alternative request to admit into evidence the corresponding documentary extracts pursuant to Rules 89(C) and 92*bis*, arguing that the Prosecution failed to follow the established practice of indicating the relevant passages or parts of each document which it seeks to tender into evidence.[16] Furthermore, the Defence requests that the Trial Chamber rely on Rule 92*bis* as amended on 14 May 2007 when considering the Prosecution Motion, submitting that the rule imposes a limitation on documents which relate to the acts and conduct of the Accused.[17]

Reply

8. The Prosecution submits that all facts in a criminal trial must be relevant to the issue of an Accused's criminal responsibility in order to be admissible and that therefore the phrase "attests to the criminal responsibility of the Accused" should be given a narrow interpretation. The Prosecution refers to the *Karemera* Appeals Decision stating that a fact which is "sufficient of itself" or "central" to establishing the criminal responsibility of the Accused should not be judicially noticed.[18]

9. Regarding the admission of documents pursuant to Rules 89(C) and 92*bis* the Prosecution submits that a textual interpretation of the amended Rule 92*bis* clearly suggest that the limitation on proof of acts and conduct of the Accused applies only to statements and transcripts and not to the other forms of admissible information.[19]

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[10] Response, paras 6 and 14.
[11] Response, para. 15.
[12] Response, para. 17 and Annex A - Facts 1-3, 8, 19, 25, 27, 29, 30, 33, 101, 102.
[13] Response, para. 17 and Annex A - Facts 93(d), 94(c), 98(a), 99(a), 100(a), 107(d) and 107(f).
[14] Response, para. 17 and Annex A - Facts 4, 5, 13, 14, 15, 16, 17, 18, 22, 23, 24, 26, 31, 35, 36, 38, 39, and 49.
[15] Response, para. 17 and Annex A - Facts 6, 7, 9-12, 20, 21, 28, 32, 34, 37, 40-48, 50-100, 103-107.
[16] Response, paras 9-10, 18 (b).
[17] Response, para. 8.
[18] Reply, para. 7 citing *Prosecution v. Karemera et al.*, ICTR-98-44 AR73(C), Appeals Chamber, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ["*Karemera Appeal Decision*"].
[19] Reply, para. 11.

II. DELIBERATIONS

(a) Rule 94(A)

10. In evaluating the facts presented by the Prosecution for judicial notice, the Chamber is guided generally by Rule 89 and specifically by Rule 94(A) which directs the Chamber in regard to judicial notice of facts of common knowledge.

11. Rule 94(A) states:

> A Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

12. The Trial Chamber adopts the definition of "facts of common knowledge" set out in *Prosecutor v. Semanza*, namely, "those facts which are not subject to reasonable dispute including common or universally known facts, such as general facts of history, generally known geographical facts and the law of nature" and "those facts that are generally known within a tribunal's territorial jurisdiction".[20] This definition was endorsed by the Appeals Chamber in *Prosecutor v. Norman et al.*[21] The Trial Chamber therefore accepts that "[u]nder the rubric of matters of common knowledge, a court may generally take judicial notice of matters so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary".[22]

13. The criteria for facts of common knowledge, also endorsed by the Appeals Chamber in *Prosecutor v. Norman et al*, are as follows:

a) the facts are relevant to the case of the Accused person;

b) the facts are not subject to reasonable dispute;

c) the facts do not include legal findings;

d) the facts do not attest to the criminal responsibility of the Accused.[23]

14. Facts of common knowledge under Rule 94(A) cannot be challenged during trial and legal conclusions as well as facts which constitute legal findings cannot be judicially noticed.[24]

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[20] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54, 3 November 2000 at para. 23 ["Semanza Decision on Judicial Notice"].

[21] *Prosecutor v. Norman et al*, SCSL-2004-14-AR73-398, "Fofana - Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 16 May 2005, at para 21 ["Fofana Appeals Decision on Judicial Notice"]; The Trial Chamber also accepted this definition in *Prosecutor v. Brima et al*, Case No. SCSL-04-10-T, "Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence", 25 October 2005 at para. 18 ["AFRC Judicial Notice Decision"].

[22] *Semanza Decision on Judicial Notice* ibid at para. 25; *Fofana Appeals Decision on Judicial Notice* ibid; *AFRC Judicial Notice Decision* ibid.

[23] *Fofana Appeals Decision on Judicial Notice* supra at para. 28; *AFRC Judicial Notice Decision* supra at para. 19.

[24] Fofana Appeals Decision on Judicial Notice, paras 30-32; AFRC Judicial Notice Decision, para. 20.

(b) Rule 92bis

15. The Appeals Chamber has held that "[a] party which fails in an application to have a fact judicially noticed under Rule 94(A) may nonetheless be able to introduce into evidence the sources upon which it has relied under 92*bis* and at the end of the trial the court may well conclude that the fact has been proved beyond reasonable doubt.[25]

16. The Trial Chamber notes the various submission made by the parties relating to the admission of materials pursuant to Rule 92*bis*.[26] The Trial Chamber addresses these submissions in a separate Decision.[27]

(c) Judicial Notice of Proposed Facts

(i) Facts agreed between the parties

17. The Trial Chamber concurs with the parties that Facts 1-3, 8, 19, 25, 27, 29, 30, 33, 101 and 102 are uncontroversial geographical or historical facts of which it is appropriate to take judicial notice.

18. The Defence proposed, and the Prosecution accepted, amendments to eighteen facts. The Trial Chamber concurs with the parties that Facts 4-5, 13-18, 22-24, 26, 31, 35-36, 38-39 and 49 in their amended form are facts of common knowledge not open to reasonable dispute. Accordingly, judicial notice is taken of them.

19. The Defence does not object to judicial notice being taken of parts of eight proposed facts: Facts 93(d), 94(c), 98(a), 99(a), 99(c), 100(a), 107(d) and 107(f). These facts consist of observations or conclusions contained in reports by various reputable non-governmental organisations and the Trial Chamber considers it also appropriate to take judicial notice of them.

(i) Facts objected to by the Defence

20. The Trial Chamber does not take judicial notice of Facts 6, 7, 9-12, 28, 32, 34, 37, 42, 43, 47, 50-100, 103, 104 and 107, with the exception of those parts accepted by the Defence, discussed above, because they are open to reasonable dispute and therefore are not appropriate for judicial notice.

21. The Defence objects that Facts 20, 21, 40, 41, 44-46, 48, 105 and 106 indirectly attest to the criminal responsibility of the Accused. The Trial Chamber upholds this objection and holds that these are not appropriate for judicial notice.

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[25] *Fofana Appeals Decision on Judicial Notice* supra at para. 28; *AFRC Judicial Notice Decision* supra at para. 27.

[26] See *Prosecution's Motion for Judicial Notice; Defence Response to Prosecution's Motion for Judicial Notice; Prosecution Reply;* "Prosecution Motion for Admission of Material Pursuant to Rules 89(C) and 92*bis*" filed 17 May 2007, Document No. SCSL-0301-PT 241; "Defence Response to Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and 92*bis*" filed 10 September 2007, Document No. SCSL-03-01-T 337; "Prosecution Reply to Defence Response to Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and 92*bis*" filed 24 September 2007, Document No. SCSL-03-01-T 346.

[27] See *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, Decision on Prosecution Motion for Admission of Materials Pursuant to Rules 89(C) and 92*bis*, 7 December 2007

III. DISPOSITION

FOR THE FOREGOING REASONS THE TRIAL CHAMBER

PARTIALLY GRANTS the Motion; and

ORDERS that judicial notice is taken of the Facts set out in Annex A to this Decision;

DISMISSES the motion with regard to the remainder of the proposed facts.

Done at The Hague, The Netherlands this 7th day of December 2007.

Justice Richard Lussick

Justice Julia Sebutinde
Presiding Judge

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

ANNEX A

This Annex sets out in full the facts of which judicial notice is taken, listed in sequential order for the purposes of future reference during the proceedings.

JUDICIALLY NOTICED FACTS

Fact A: The city of Freetown, the Western area and the following districts are located in the country of Sierra Leone: Port Loko, Bombali, Koinadugu, Kono, Kailahun, Kenema and Bo.

(Proposed Fact 1)

Fact B: Sierra Leone declared itself to be a party to the Geneva Conventions with effect from 27 April 1961 and acceded to the Additional Protocol II to the Geneva Conventions on 21 October 1986.

(Proposed Fact 2)

Fact C: There was an armed conflict in Sierra Leone from about March 1991 until about 18 January 2002.

(Proposed Fact 3)

Fact D: The AFRC was founded by members of the Armed Forces of Sierra Leone. Soldiers of the Sierra Leone Army (SLA) comprised the majority of the AFRC membership.

(Proposed Fact 8)

Fact E: President Kabbah's government returned to power in Sierra Leone in March 1998.

(Proposed Fact 19)

Fact F: The *Lomé Peace Agreement* committed the parties to promoting full respect for human rights and humanitarian law.

(Proposed Fact 25)

Fact G: Part Five of the *Lomé Peace Agreement* recognized the importance of upholding, promoting and protecting the human rights of every Sierra Leonean, as well as the enforcement of humanitarian law.

(Proposed Fact 27)

Fact H: On 10 November 2000, the Government of Sierra Leone and the RUF signed a Ceasefire Agreement in Abuja, Nigeria, to declare and observe a ceasefire and halt hostilities, effective from 10 November 2000.

(Proposed Fact 29)

Fact I: In 1975, 15 West African States signed the treaty creating an Economic Community of West Africa (ECOWAS).

(Proposed Fact 30)

Fact J: On 10 December 1999, ECOWAS member states signed a protocol that subsumed the Protocol Relating to Mutual Assistance on Defence (PMAD) and established the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security.

(Proposed Fact 33)

Fact K: The following counties are in the Republic of Liberia: Bomi, Bong, Gbarpolu, Grand Bassa, Grand Cape Mount, Grand Gedeh, Grand Kru, Lofa, Margibi, Maryland, Montserrado, Nimba, Rivercess, River Gee and Sinoe.

(Proposed Fact 101)

Fact L: There was an armed conflict in Liberia from about 24 December 1989 until about 17 August 1996.

(Proposed Fact 102)

Fact M: Armed groups who participated in the armed conflict in Sierra Leone included:

a) The Revolutionary United Front (RUF);

b) The Armed Forces Revolutionary Council (AFRC); and

c) The Civil Defence Forces (CDF).

(Proposed Fact 4, amended)

Fact N: The Revolutionary United Front (RUF) began armed operations in Sierra Leone in March 1991.

(Proposed Fact 5, amended)

Fact O: On 30 November 1996, Foday Saybana Sankoh and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a Peace Agreement in Abidjan, Ivory Coast.

(Proposed Fact 13, amended)

Fact P: The 30 November 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) required that the "two foes" ensure [that] a total cessation of hostilities is observed forthwith.

(Proposed Fact 14, amended)

Fact Q: The 20 November 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) stated that The Executive Outcomes shall be withdrawn five weeks after the deployment of the Neutral Monitoring Group (NMG).

(Proposed Fact 15, amended)

Fact R: The 30 November 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) stated that:

"The parties agree that the basic civil and political liberties which are recognised by the Sierra Leone legal system and are contained in Declarations and Principles on Human Rights adopted by the UN and the OAU, especially the Universal Declaration of Human Rights and the African Charter on Human and People's Rights, shall be fully guaranteed and promoted within Sierra Leone society.

These include the right to life and liberty, freedom from torture; the right to a fair trial, freedom of conscience [...]."

(Proposed Fact 16, amended)

Fact S: The 30 November 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) stated that:

"The parties undertake to respect the principles and rules of international humanitarian law."

(Proposed Fact 17, amended)

Fact T: Active hostilities recommenced in Sierra Leone following a temporary lull in fighting after the signing of the 30 November 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL).

(Proposed Fact 18, amended)

Fact U: In July 1998, Foday Sankoh was transferred from the custody of the Nigerian Government to the custody of the Sierra Leonean Government.

(Proposed Fact 22, amended)

Fact V: In October 1998, Foday Sankoh was found guilty of treason and sentenced to death in the High Court of Sierra Leone.

(Proposed Fact 23, amended)

Fact W: On 7 July 1999, the Government of Sierra Leone signed a peace agreement with the RUF in Lomé, Togo ("*Lomé Peace Agreement*").

(Proposed Fact 24, amended)

Fact X: The parties to the Lomé Peace Agreement recognised the imperative that the children of Sierra Leone were entitled to special care and protection of their inherent right to life, survival and development, in accordance with the provisions of the International Convention on the Rights of the Child."

(Proposed Fact 26, amended)

Fact Y: In 1981, ECOWAS member states signed a Protocol Relating to Mutual Assistance on Defence (PMAD).

(Proposed Fact 31, amended)

Fact Z: On 29 August 1997, ECOWAS extended the mandate of ECOMOG troops in Liberia to include Sierra Leone.

(Proposed Fact 35, amended)

Fact AA: The ECOWAS Cease-fire Monitoring Group is also known as ECOMOG.

(Proposed Fact 36, amended)

Fact AB: ECOWAS issued a Final Communiqué at the conclusion of its 28-29 August 1997 summit in Abuja, Nigeria.

(Proposed Fact 38, amended)

Fact AC: ECOWAS issued a Final Communiqué at the conclusion of its 28-29 August 1997 summit in which it mandated ECOMOG to specifically monitor the ceasefire, enforce sanctions and embargo and secure the peace in Sierra Leone.

(Proposed Fact 39, amended)

Fact AD: ECOMOG ousted the AFRC/RUF junta from power on or about 14 February 1998.

(Proposed Fact 49, amended)

Fact AE: In the press release, *Sierra Leone Rebels Forcefully Recruit Child Soldiers*, dated 31 May 2000, Human Rights Watch stated or noted:

the executive director of the Africa Division of Human Rights Watch called on all parties to the conflict in Sierra Leone to immediately stop the use of child soldiers and to release all abducted children and people under the age of eighteen.

(Proposed Fact 93(d))

Fact AF: In its press release, *New Testimony of Rape Committed by Sierra Leone Rebels – RUF fighters rape women and children in Makeni and other towns*, dated 5 June 2000, Human Rights Watch:

called upon the members of the U.N. Security Council to provide UNAMSIL with the mandate and the means to protect civilians in Sierra Leone from atrocities.

(Proposed Fact 94(c))

Fact AG: In *Taylor-made: The Pivotal Role of Liberia's Forests and Flag of Convenience in Regional Conflict*, dated September 2001, Global Witness stated or noted that:

The UN Security Council should immediately impose a total embargo on the exportation and transportation of Liberian timber, and its importation into other countries. Such an embargo should remain in place until it can be demonstrated that the trade does not contribute to the RUF in Sierra Leone and armed militias in Liberia, and that it is carried out in a transparent manner.

(Proposed Fact 98(a))

Fact AH: In its press release *IMC Plastic Surgeons Remove the Scars of War in Sierra Leone*, dated 4 September 2001, the International Medical Corps stated or noted:

> For hundreds of children and child soldiers in Sierra Leone, the 10-year civil war left scars that could only be healed with the help of IMC's plastic surgery program.
>
> Without plastic surgery, the child victims might never be able to return to their communities and reintegrate into society. The torment of the scars was so great that some children tried to burn them off with caustic soda, which only made them worse.

(Proposed Fact 99(a) and (c))

Fact AI: Sierra Leone's decade-long conflict was marked by an extraordinary level of brutal human rights abuses, including abductions, beatings, killings, sexual assault of women and men, being "captured" for less than 24 hours, torture, forced labour, serious injuries and amputations.

(Proposed Fact 100(a))

Fact AJ: Amnesty International Report 2001, which covered the period January to December 2000, set out that:

> A UN panel of experts, established in August [2000] to investigate the link between the diamond trade and the conflict in Sierra Leone, published its report in December.
>
> The panel made recommendations, including for an embargo on diamonds from Liberia and a travel ban on Liberian officials by UN members states.

(Proposed Fact 107(d) and (f))

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SCSL-03-01-T
(11303 – 11322)

11303

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

Before:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate Judge
Acting Registrar:	Mr. Herman von Hebel
Date filed:	3 August 2007

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION NOTIFICATION OF FILING OF AMENDED CASE SUMMARY

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Ann Sutherland

Counsel for the Accused:
Mr. Courtenay Griffiths
Mr. Andrew Cayley
Mr. Terry Munyard

SPECIAL COURT FOR SIERRA LEONE
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I. INTRODUCTION

1. The Defence in this case took a decision not to file a preliminary motion on the form of the indictment pursuant to Rule 72(A) of the Rules of Procedure of and Evidence, (Rule) stating that "challenges to the **sufficiency of the evidence** to support the allegations made in the Indictment ... are properly matters for trial".[1] However, in its pre-trial brief, the defence raised deficiencies in the pleading of common plan, design or purpose as a mode of liability.[2]

2. On 20 June 2007, Trial Chamber II delivered its judgement in *Prosecutor v. Brima et al* ("AFRC") case.[3] In the AFRC Judgement, Trial Chamber II found that, among other things, that:

> "with respect to Joint Criminal Enterprise ["JCE"] as a mode of criminal responsibility, the Indictment has been defectively pleaded. Therefore, the Trial Chamber will not consider JCE as a mode of criminal responsibility in this case."[4]

In its discussion of this issue, the Trial Chamber listed four categories of supporting facts that must be provided:

(a) the nature or purpose of the JCE;

(b) the time at which or the period over which the enterprise is said to have existed;

(c) the identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group; and

(d) the nature of the participation of the accused in that enterprise.[5]

3. The Office of the Prosecutor respectfully disagrees with that finding in the AFRC Judgement and shall appeal it.

4. The Prosecution has provided notice concerning the common plan, design or purpose in the indictment.[6] Further, by pleading: (i) the words "which crimes amounted to or were involved within a common plan, design or purpose in which the Accused participated" in paragraph 33 of the Second Amended Indictment, the Prosecution pleaded what is commonly referred to as the "basic form" of liability

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[1] *Prosecutor v. Taylor*, SCSL-03-01-PT-105, Public Defence Submission on behalf of Charles Ghankay Taylor in respect of Preliminary Motions, 6 June 2006, para. 3 [emphasis added].
[2] Defence PTB, paras 45 – 56, in particular, 49, 53 – 56.
[3] *Prosecutor v. Brima et al.*, SCSL-04-16-T-613, Judgement, 20 June 2007 ("AFRC Judgement").
[4] AFRC Judgement, para. 85.
[5] *Ibid*, para. 65. .
[6] Second Amended Indictment, paras. 1, 5, 6, 9, 11, 14, 18, 22, 23, 28, 31, 32 and 39.

for participation in the alleged common plan; and (ii) by pleading the words "which crimes ... were a reasonably foreseeable consequence of such common plan, design or purpose" in paragraph 33, the Prosecution pleaded the "extended form" of liability for participation in the alleged common plan.

5. The Prosecution has also provided notice regarding common plan, design or purpose as a mode of liability in the case summary which accompanied the indictment[7], the pre-trial brief[8], the opening statement[9] and the pre-trial disclosure.

6. However, consistent with the AFRC Judgement and out of an abundance of caution, the Prosecution has amended paragraphs 42, 43 and 44 of the case summary which accompanies the indictment in order to further articulate the common plan, design or purpose which has been alleged in this case. The Prosecution hereby files an Amended Case Summary in these proceedings reflecting the changes to those paragraphs. The Case Summary remains unchanged except for the aforementioned amendments to paragraphs 42 to 44, and the following amendments for consistency with the Second Amended Indictment:

   (a) The words "Port Loko" has been inserted in paragraph 21.

   (b) The word "Second" [Amended Indictment] has been inserted in the title and paragraphs 5-6, 18-21, 31-32, 34-37, 39, 41, and 45-48.

II. FILING OF THE AMENDED CASE SUMMARY

7. Rule 47(C) of the SCSL Rules of Procedure and Evidence requires the Prosecution to prepare a cases summary which shall accompany the indictment in each case. This is in contrast to Rules 47(C) at the ICTY and ICTR which require the Prosecution to include a "concise statement of facts" in the indictment itself. The case summary filed herein sets out many of the particulars required in the body of ICTY and ICTR indictments. In a 16 May 2005 decision in the *Norman et al* case, the Appeals Chamber can be said to have chastised the Prosecution for slavishly following the practice of the *ad hoc* Tribunals by including in the indictment more particulars than it was required to provide.[10]

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[7] Case Summary, paras. 1, 6, 11, 31, 32, 39, 42, 43 and 44.
[8] Prosecution's Pre-Trial Brief, paras. 6, 7, 9, 12, 13–36, 142-150.
[9] *Prosecutor v. Taylor*, SCSL-03-01, Trial Transcript, 4 June 2007 pages 32, 34, 37, 41, 73 and 76.
[10] *Prosecutor v. Norman et al.*, SCSL-04-14-AR73-397, Decision on Amendment of the Consolidated Indictment, 16 May 2005 ("*Norman* Decision"), paras. 46, 53.

8. In the *Norman* Decision, the Appeals Chamber set forth the required contents of both the indictment and the case summary.[11] The Appeals Chamber stated that the indictment will include particulars of personal identification and a statement of each specific offence of which the accused is charged, commonly known as the count of the indictment. The Appeals Chamber further stated that the count encapsulates the **offence** with which the accused is charged, that is, the law which the accused has allegedly broken. The count should then be followed by a "short description" of the particulars of the offence.[12] The Appeals Chamber restated the required contents of an indictment to be a list of **counts**, with each **count** followed by brief particulars.[13]

9. The Appeals Chamber stated that the Prosecution case summary should set out the allegations the Prosecution proposes to prove; that the case summary is the vehicle by which the Prosecution provides the Accused better details of the charges against him.[14] The Appeals Chamber stated that the case summary may be amended without seeking leave to amend.[15]

10. On 6 March 2006, when the Prosecution submitted its "Motion for Leave to Amend the Indictment and for Approval and Non-disclosure of the Amended Indictment"[16], in addition to the amended indictment ("Amended Indictment") it also provided a case summary ("Case Summary"). The Amended Indictment and Case Summary were filed in accordance with the *Norman* Decision. The modes of individual criminal liability upon which the Prosecution relies in this case were included in the Amended Indictment; and the further particulars relating to those modes of liability, including participation in a common plan, design or purpose, were included in the Case Summary. This is consistent with SCSL Rule 47(C) and the *Norman* Appeals Decision, however, even if it were decided that these particulars should be included in the body of the Indictment, this Trial Chamber has held that such a defect can be cured by "timely, clear, and consistent

[11] *Norman*, paras. 51 and 52.
[12] *Ibid.* Emphasis added.
[13] *Ibid*, para. 52. Emphasis added.
[14] *Norman* Decision, paras. 51 and 52.
[15] *Norman* Decision, para. 52.
[16] *Prosecutor v. Taylor*, SCSL-03-01-PT-72, Motion for Leave to amend the Indictment and for approval and non-disclosure of the Amended Indictment, 6 March 2006. The Amended Indictment was approved on 17 March 2006.

information."[17] Accordingly, this further articulation of those particulars relating to common plan, design or purpose as a mode of liability are set out in the Amended Case Summary, which is annexed to this filing.

11. The Prosecution notifies the Trial Chamber, the Accused and the Defence that the Case Summary filed with the Amended Indictment should, as of the date of this filing, be replaced by the Amended Case Summary.

Filed in Freetown
3 August 2007
For the Prosecution

Brenda J. Hollis
Senior Trial Attorney

[17] AFRC Judgement, para. 82.

LIST OF AUTHORITIES

SCSL

***Prosecutor v. Taylor*, SCSL-03-01**

Prosecutor v. Taylor, SCSL-03-01-PT-72, Motion for Leave to amend the Indictment and for approval and non-disclosure of the Amended Indictment, 6 March 2006

Prosecutor v. Taylor, SCSL-03-01-PT-105, Public Defence Submission on behalf of Charles Ghankay Taylor in respect of Preliminary Motions, 6 June 2006

Prosecutor v. Taylor, SCSL-03-01-PT-218, Public Rule 73*bis* Pre-Trial Conference Materials, 4 April 2007

Prosecutor v. Taylor, SCSL-03-01-PT-229, Rule 73*bis* Taylor Defence Pre-trial Brief, 26 April 2007

Prosecutor v. Taylor, SCSL-03-01-PT-263, Prosecution's Second Amended Indictment, 29 May 2007

Prosecutor v. Taylor, SCSL-03-01, Trial Transcript, 4 June 2007

***Prosecutor v. Norman et al.*, SCSL-04-14**

Prosecutor v. Norman et al., SCSL-04-14-AR73-397, Decision on Amendment of the Consolidated Indictment, 16 May 2005

***Prosecutor v. Brima et al.*, SCSL-04-16**

Prosecutor v. Brima et al., SCSL-04-16-T-469, Decision on Defence Motions for Judgement of Acquittal under Rule 98, 31 March 2006

Prosecutor v. Brima et al., SCSL-04-16-T-613, Judgement, 20 June 2007

ANNEX

AMENDED CASE SUMMARY

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL–2003–01–T

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as
DANKPANNAH CHARLES GHANKAY TAYLOR also known as
DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR

CASE SUMMARY ACCOMPANYING THE SECOND AMENDED INDICTMENT

The Prosecution evidence, including expert witnesses, witnesses of fact and documentary evidence, will prove the following allegations:

THE ACCUSED

1. In the late 1980's the **ACCUSED** received military training in Libya from representatives of the Government of MU'AMMAR AL-QADHAFI. While in Libya the **ACCUSED** met FODAY SAYBANA SANKOH. The two made common cause to assist each other in taking power in their respective countries.

2. While in Libya, the **ACCUSED** formed or joined the National Patriotic Front of Liberia (NPFL), and became the leader or head of that organized armed group.

3. In December 1989 the NPFL, led by the **ACCUSED**, began conducting organized armed attacks in Liberia. The **ACCUSED** and the NPFL were assisted in these attacks by FODAY SAYBANA SANKOH and his followers.

CHARGES

Contextual Elements

4. Paragraphs 1 through 3 are incorporated by reference herein.

5. All offences alleged within the Second Amended Indictment were committed within the territory of Sierra Leone after 30 November 1996.

6. Between 30 November 1996 and about 18 January 2002, a state of armed conflict existed within Sierra Leone. For the purposes of the Second Amended Indictment, organized armed factions involved in this conflict included the Civil Defence Forces (CDF), the Revolutionary United Front (RUF), and the Armed Forces Revolutionary Council (AFRC). From the beginning of, and throughout the conflict, Liberian fighters, including members and ex-members of the NPFL (Liberian fighters), under the **ACCUSED**'s control and/or operating in Sierra Leone with the **ACCUSED's** approval and assistance, also participated in this conflict, fighting as part of or alongside members of the RUF, and, later, the AFRC, AFRC/RUF Junta or alliance.

7. The CDF was comprised of Sierra Leonean traditional hunters, including the Kamajors, Gbethis, Kapras, Tamaboros and Donsos. The CDF fought against the RUF and, later, against the AFRC.

8. The organized armed group that became known as the RUF, led by FODAY SAYBANA SANKOH aka POPAY aka PAPA aka PA, was founded about 1988 or 1989 in Libya. The RUF, under the leadership of FODAY SAYBANA SANKOH, and with the assistance of Liberian fighters, began organized armed operations in Sierra Leone in March 1991. During the ensuing armed conflict, the RUF forces were also referred to as "RUF", "rebels" and "People's Army". Initially the RUF fought against the Republic of Sierra Leone Military Forces, commonly known as the Sierra Leone Army or SLA.

9. Although a peace accord was signed on 30 November 1996, in Abidjan, Ivory Coast, between FODAY SAYBANA SANKOH and President Kabbah, active hostilities recommenced after a temporary lull in the fighting.

10. The armed group known as the AFRC was created via a coup d'etat by members of the SLA on 25 May 1997. On that date the members of the coup seized power from the elected government of the Republic of Sierra Leone. JOHNNY PAUL KOROMA aka JPK became the leader and Chairman of the AFRC. Soldiers of the SLA comprised the majority of the AFRC membership. The AFRC forces were also referred to as "Junta", "soldiers", "SLA", and "ex-SLA".

11. Shortly after the AFRC seized power, at the invitation of JOHNNY PAUL KOROMA, and upon the order of FODAY SAYBANA SANKOH, the RUF joined with the AFRC. The AFRC and the RUF acted together thereafter. The AFRC/RUF Junta forces (Junta) were also referred to as "Junta", "rebels", "soldiers", "SLA", "ex-SLA" and "People's Army". The two armed factions now fought together against the CDF, SLAs loyal to the elected government, and any other force that fought against the AFRC/RUF Junta or alliance.

12. After the 25 May 1997 coup d'état, a governing body called the Supreme Council was created within the Junta. The governing body included leaders of both the AFRC and the RUF.

13. The Junta was forced from power by forces acting on behalf of the ousted government of President Kabbah about 14 February 1998. President Kabbah's government returned in March 1998. After the Junta was removed from power the AFRC/RUF alliance continued.

14. On 7 July 1999, in Lomé, Togo, FODAY SAYBANA SANKOH and President Kabbah signed a peace agreement. However, active hostilities continued.

15. The **ACCUSED** and all members of the organized armed factions engaged in fighting within Sierra Leone, including the Liberian fighters, were required to abide by International Humanitarian Law and the laws and customs governing the conduct of

armed conflicts, including the Geneva Conventions of 12 August 1949, to which the Republic of Sierra Leone succeeded on 10 June 1965, and the Republic of Liberia acceded on 29 March 1954 and Additional Protocol II to the Geneva Conventions, to which the Republic of Sierra Leone acceded on 21 October 1986, and the Republic of Liberia acceded on 30 June 1988.

16. The armed conflict continued within the territory of Sierra Leone until about 18 January 2002, when Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, announced an end to the hostilities.

17. A nexus existed between the armed conflict and all acts or omissions charged herein as Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and as Other Serious Violations of International Humanitarian Law.

18. All acts and omissions charged in the Second Amended Indictment as Crimes Against Humanity were committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone.

19. The victims of the crimes alleged in the Second Amended Indictment were civilians. In the Second Amended Indictment, the words "civilian(s)" or "civilian population" refer to persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities.

Enumerated crimes and serious violations

20. The Prosecution relies primarily on the particulars set forth in the Second Amended Indictment in respect of the alleged enumerated crimes and serious violations set forth therein.

21. Between about 30 November 1996 and about 18 January 2002, members of the RUF, AFRC, Junta and/or the AFRC/RUF alliance, and Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and control of, and/or subordinate to the **ACCUSED**, committed the crimes alleged in the Second Amended Indictment. During that time period, members of these organized armed groups

conducted widespread or systematic armed attacks throughout the territory of the Republic of Sierra Leone, including Kono, Kenema, Bombali, Port Loko and Kailahun Districts, Freetown and the Western area. The attacks were directed against the civilian population, and the victims of the armed attacks were civilian men, women and children.

Acts of Terror

22. The primary objective of the attacks was to terrorize the civilian population of Sierra Leone. Acts of terror included large scale burning of civilian homes and other civilian property, unlawful killings, sexual and physical violence, use of child soldiers and widescale looting. Many civilians saw these crimes committed; others returned to their homes or places of refuge to find the results of these crimes – dead bodies, savaged or mutilated victims and looted and burned property.

23. Also as part of the campaign of terror, members of the civilian population were routinely captured and abducted. These captives were typically subjected to sexual and physical violence; most, if not all, who survived capture were used as forced labor. Many males, and some females, were forced to become fighters in the armed groups to which their captors belonged. Men and boys who were abducted were also used as forced labour.

Unlawful Killings

24. Members of the RUF, AFRC, AFRC/RUF Junta or alliance and Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and control of, and/or subordinate to the **ACCUSED**, engaged in widescale unlawful killing of civilians throughout Sierra Leone. Civilians were shot, burned in their homes, hacked to death, and killed either while trying to escape from attacks on their homes, or from their captors. Some victims died as a result of the sexual or physical violence to which they were subjected, while others died in the performance of forced labor.

Sexual Violence

25. Women and girls were subjected to widespread acts of sexual violence. Such violence included brutal rapes, often by multiple rapists. Captured women and girls were routinely raped; many of them were held for years, and forced to provide sexual gratification to their captors in addition to being forced to perform domestic duties and other manual labor.

Physical Violence

26. Physical violence was widespread and often carried out in public places. Civilians were forced to watch as others were violently attacked and mutilated; many of those forced spectators were then similarly attacked and mutilated. Civilians, in particular young men who tried to escape from their RUF, AFRC, AFRC Junta or alliance, or Liberian captors, were often mutilated by having "RUF" and "AFRC" carved on their bodies.

Child Soldiers

27. The conflict in Sierra Leone was marked at all stages by the presence of children, especially young boys, under the age of 15 in the ranks of the RUF, AFRC, AFRC Junta or alliance and Liberian fighters. Such children were enlisted or conscripted and forced to participate actively in hostilities. These children had generally been seized from their families and were unable or too frightened to escape from their captors. Military training was often given to these children and they were taught to handle and fire weapons, to lay ambushes and evade detection. Such was the prevalence of child soldiers during the conflict that some units were specifically designated for young boys such as the Small Boys Unit or "SBU".

Abductions and Forced Labor

28. Throughout Sierra Leone civilians were routinely abducted and forced to perform a variety of forced labor, including carrying goods, ammunition and weapons, performing domestic work, going on food-finding missions, performing agricultural

duties and mining for diamonds. They did so under threat of physical harm or death, and often at gun point. Those forced to work were often physically abused, or in some instances killed, if they were unable to carry out the duties assigned them. The conditions of life for those forced to carry out this labor were often very difficult, and such individuals were generally deprived of adequate food, shelter and medical care. Civilians who attempted escape were punished, often brutally, or killed. In some cases, civilians were held for years.

Looting

29. Widespread looting formed a key element of the hostile activities engaged in by members of the RUF, the AFRC and the AFRC Junta or alliance and Liberian fighters. Civilian properties were routinely looted for items such as jewellery and other valuables, money and clothes.

INDIVIDUAL CRIMINAL RESPONSIBILITY

30. From the beginning of, and throughout, the conflict in Sierra Leone, the **ACCUSED** provided the RUF with assistance, encouragement and direction. Prior to the initial attacks into Sierra Leone, the **ACCUSED** provided military training, financial support, arms and ammunition, and safe havens to FODAY SAYBANA SANKOH and his organized group. The **ACCUSED** provided personnel for the initial attacks into Sierra Leone which began the armed conflict in that country.

31. Throughout the armed conflict in Sierra Leone, the **ACCUSED**'s positions as leader or head of the NPFL and President of Liberia, combined with his close association with FODAY SAYBANA SANKOH and other senior leaders of the RUF and AFRC, AFRC/RUF Junta or alliance, provided the **ACCUSED** with the authority and the means to participate in the crimes alleged in the Second Amended Indictment.

32. The **ACCUSED**'s participation in the crimes alleged in the Second Amended Indictment took a variety of forms – planning, instigating, ordering, committing, otherwise aiding and abetting in the commission of the alleged crimes, and participating in a common plan, design or purpose.

33. In addition, or in the alternative, the **ACCUSED** incurs criminal responsibility for the alleged crimes because, as the superior of the perpetrators, he failed to take the necessary and reasonable measures to prevent or punish the crimes of which he had actual knowledge or of which he had reason to know.

Planning

34. The **ACCUSED,** individually, or participating with his direct subordinates and/or high level leaders of the RUF, AFRC and AFRC/RUF Junta or alliance, planned armed operations in Sierra Leone which were themselves crimes or involved the commission of crimes alleged in the Second Amended Indictment.

Instigating

35. Throughout the armed conflict, the **ACCUSED** encouraged the actions of the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters, thereby prompting the perpetrators to commit the crimes alleged in the Second Amended Indictment.

Ordering

36. Through his positions set out in paragraph 31 above, and his close association with FODAY SAYBANA SANKOH and other senior leaders of RUF and AFRC, AFRC/RUF Junta or alliance, the **ACCUSED**, individually, or in concert with those senior leaders, exercised *de jure* and/or *de facto* control over the perpetrators of the crimes alleged in the Second Amended Indictment. He exercised *de facto* control, individually, or in concert with FODAY SAYBANA SANKOH and other high level superiors in the RUF, AFRC and AFRC/RUF Junta or alliance, through those senior leaders and/or intermediate level superiors within those armed groups. The **ACCUSED** exercised de jure and/or de facto control directly over Liberian fighters, or through intermediate superiors of those fighters.

37 The **ACCUSED** provided instruction, direction and guidance involving the commission of crimes alleged in the Second Amended Indictment directly to, and through, senior and/or intermediate level commanders within the RUF, AFRC,

AFRC/RUF Junta or alliance, and directly to, or through intermediate level superiors of Liberian fighters.

38. Senior level RUF leaders to whom and through whom the **ACCUSED** gave instruction, direction and guidance included FODAY SAYBANA SANKOH, SAM BOCKARIE aka MOSQUITO aka MASKITA and ISSA HASSAN SESAY. The **ACCUSED** provided such instruction guidance and direction to the AFRC through the shared AFRC/RUF leadership, which included the high level RUF commanders named above, and TAMBA ALEX BRIMA aka GULLIT and BRIMA BAZZY KAMARA aka BAZZY.

Committing

39. The **ACCUSED** committed the crimes alleged in the Second Amended Indictment in the sense of being a co-perpetrator of those crimes, in that, while not physically perpetrating the crimes, the **ACCUSED** shared the intent to commit the crimes and participated in the common plan, design or purpose which amounted to or involved commission of those crimes.

Aiding and abetting

40. Between about 30 November 1996 and about 18 January 2002, the **ACCUSED** assisted in the commission of the alleged crimes by providing various forms of support. Such support included the provision of: military training, both in Liberia and Sierra Leone; facilities in Liberia; safe havens in Liberia; personnel drawn from the NPFL, other organized armed groups within Liberia and from the Liberian population in general; arms and associated materiel such as ammunition; communications equipment including satellite phones; and other supplies such as food, uniforms and petrol. To ensure the timely and safe delivery of this support to the RUF, AFRC, AFRC/RUF Junta or alliance and to the Liberian fighters in Sierra Leone, the **ACCUSED** also provided Liberian escorts and vehicles.

41. The essential support set out above provided practical assistance, encouragement and/or moral support to the RUF, AFRC, AFRC/RUF Junta or alliance and Liberian

fighters in carrying out the crimes alleged in the Second Amended Indictment, and had a substantial effect on the commission of those crimes, and/or furthered the common plan, design or purpose in which the participants included the leadership and members of the RUF, AFRC, AFRC/RUF Junta or alliance and Liberian fighters.

Participation in a common plan, design or purpose

42. Between about 1988 and about 18 January 2002, the Accused and others agreed upon and participated in a common plan, design or purpose to carry out a criminal campaign of terror, as charged in the Second Amended Indictment, in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone.

43.1 The crimes charged in Counts 1 through 11 of the Second Amended Indictment were within the common plan as it existed from 30 November 1996 through 18 January 2002. The Accused and the other participants in the common plan intended the commission of each of the charged crimes.

43.2 Alternatively, from 30 November 1996 through about 18 January 2002, the following crimes were within the common plan, design or purpose: acts of terror against civilians in Sierra Leone; conscription, enlistment and use in active hostilities of children under the age of 15 years; enslavement of civilians; and pillage. The Accused and other participants in the common plan agreed upon and intended the commission of these crimes. The crimes charged in Counts 2, 3, 4, 5, 6, 7 and 8 were foreseeable consequences of the crimes agreed upon in the common plan. The Accused participated in the common plan despite his awareness that these were foreseeable consequences.

44.1 Others participated in the common plan, design or purpose during various periods, including:

(a) Foday Saybana Sankoh, leader of the RUF, who participated between about 1988 and January 2002;

(b) Other commanders and other leaders of the RUF, from about 1990 until about 18 January 2002;

(c) Other commanders and leaders of the NPFL from about 1988 until about 18 January 2002;

(d) Commanders and other leaders of Liberian organized armed groups who worked in concert with or under the direction of the Accused and participated from about 1989 until about 18 January 2002;

(e) Commanders, and other leaders of the AFRC who agreed to and commenced participation in the common plan on about 28 May 1997 through about May 2000;

(f) After August 1997 when the Accused was sworn-in as President of Liberia, commanders and other leaders of his Liberian government and armed forces, including specialized units, police and military forces who participated through about 18 January 2002.

(g) Associates of the Accused who worked under his direction or in cooperation with him to further the common plan from about 1988 until about 18 January 2002.

44.2 Members of the above named groups were either participants in the common plan or were used by the Accused and the other leaders and commanders as tools to implement and achieve the agreed common plan, design or purpose as described above.

44.3 At times during the armed conflict there were lulls in active hostilities. However, from its inception until the end of the armed conflict in Sierra Leone on about 18 January 2002, the common plan, as described in paragraphs 42 and 43 above, remained the same.

44.4 The **ACCUSED**'s positions as leader or head of the NPFL and President of Liberia, combined with his close association with FODAY SAYBANA SANKOH and other senior leaders of the RUF and AFRC, AFRC/RUF Junta or alliance, as

described in paragraphs 31, 36, 37 and 38 above, provided the **ACCUSED** with the authority and the means to participate in the common plan. The Accused's participation in the common plan is described in paragraphs 30 – 41 above, in paragraphs 33 and 34 of the Second Amended Indictment and in the Prosecution pre-trial brief and opening statement. The Accused's participation by providing financial support began prior to 30 November 1996 and continued through 18 January 2002. The Accused further participated in the common plan, design or purpose through his failure to fulfill his duty to instruct the forces described in paragraphs 44.2 and 44.3 above to cease ongoing crimes.

Intent and knowledge

45. The **ACCUSED** intended the commission of the crimes alleged in the Second Amended Indictment, or acted with reckless indifference toward the possibility that such crimes would be committed, and/or had knowledge of the commission of these crimes or the likelihood that such crimes would be committed.

46. The **ACCUSED** had knowledge of the crimes committed, or the probability that such crimes would be committed, through a variety of sources – communications via radios, satellite phones, personal visits from leaders of RUF, AFRC, AFRC/RUF Junta or alliance, contacts between the **ACCUSED's** representatives and RUF, AFRC, AFRC/RUF Junta or alliance leaders, reports from his agents in Sierra Leone, documentary evidence of the commission of crimes alleged in the Second Amended Indictment from the media and international organizations and through representations made to the **ACCUSED** by representatives of the UN and of national governments. The **ACCUSED** also had this knowledge by virtue of the fact that many of these crimes paralleled the crimes committed against civilians in Liberia and Sierra Leone by members of his own organization, the NPFL, members and former members of which were fighting with or alongside the RUF, AFRC, AFRC/RUF Junta or alliance, under the direction of, or with the approval and support of, the **ACCUSED**.

47. For the above reasons, the **ACCUSED** knew or had reason to know the crimes alleged in the Second Amended Indictment had been committed or were about to be committed by persons subordinate to him. The **ACCUSED** did not take steps to prevent or punish these crimes.

Superior Authority

48. As alleged in paragraphs 33, 36, 46 – 47 above, the **ACCUSED**, individually or in concert with leaders of the RUF, AFRC, AFRC/RUF Junta or alliance and intermediate leaders of the Liberian fighters, exercised *de jure* and/or *de facto* control over the participants of the perpetrators of the crimes alleged in this Second Amended Indictment. The **ACCUSED** knew or had reason to know these subordinates were about to commit these continuing crimes, or had done so, and failed to take reasonable and necessary steps to prevent or punish the perpetrators.

Dated this 3rd day of August 2007
Freetown, Sierra Leone

263)

SCSL-03-01-PT
(9566-9575)

9566

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
29 MAY 2007
NAME Adica Haima-K.
SIGN
TIME 13:30

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

Before:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate Judge
Acting Registrar:	Mr. Herman von Hebel
Date filed:	29 May 2007

THE PROSECUTOR **Against** **Charles Taylor**

Case No. SCSL-03-01-PT

PUBLIC

PROSECUTION'S SECOND AMENDED INDICTMENT

Office of the Prosecutor:

Mr. Stephen Rapp

Defence Counsel for Charles Taylor:

Mr. Karim A. A. Khan
Mr. Roger Sahota

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL– 2003– 01– PT

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as
DANKPANNAH CHARLES GHANKAY TAYLOR also known as
DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR

SECOND AMENDED INDICTMENT

The Prosecutor, Special Court for Sierra Leone, under Article 15 of the Statute of the Special Court for Sierra Leone (the Statute) charges:

CHARLES GHANKAY TAYLOR also known as
(aka) DANKPANNAH CHARLES GHANKAY TAYLOR
aka DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR

with **CRIMES AGAINST HUMANITY, VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II and OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, in violation of Articles 2, 3 and 4 of the Statute** as set forth below:

THE ACCUSED

1. **CHARLES GHANKAY TAYLOR aka DANKPANNAH CHARLES GHANKAY TAYLOR aka DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR** (the **ACCUSED**) was born on 27 or 28 January 1948 at Arthington in the Republic of Liberia.

2. From the late 1980's the **ACCUSED** was the Leader or Head of the National Patriotic Front of Liberia (NPFL), an organized armed group.

3. From 2 August 1997 until about 11 August 2003, the **ACCUSED** was the President of the Republic of Liberia.

4. Paragraphs 1 through 3 are incorporated by reference in CHARGES below.

CHARGES

By his acts or omissions in relation to the below described events, the **ACCUSED**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, is individually criminally responsible for the crimes alleged below:

TERRORIZING THE CIVILIAN POPULATION

COUNT 1: Acts of Terrorism, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.d. of the Statute.

PARTICULARS

5. Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters), assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, burned civilian property, and committed the crimes set forth below in paragraphs 6 through 31 and charged in Counts 2 through 11, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.

Burning

6. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or

subordinate to the **ACCUSED**, engaged in widespread destruction of civilian property by burning, including the following:

Kono District

7. Between about 1 February 1998 and about 31 December 1998, in various locations, including Koidu, Tombodu or Tumbodu, Sewafe or Njaima Sewafe, Wendedu and Bumpe;

Freetown and Western Area

8. Between about 21 December 1998 and about 28 February 1999, in locations throughout Freetown, including Kissy and eastern Freetown and the Fourah Bay, Upgun, State House, Calaba Town, Kingtom and Pademba Road areas of the city, and Hastings, Goderich, Kent, Grafton, Wellington, Tumbo, Waterloo and Benguema in the Western Area.

UNLAWFUL KILLINGS

COUNT 2: Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 2.a. of the Statute;

In addition, or in the alternative:

COUNT 3: Violence to life, health and physical or mental well-being of persons, in particular murder, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute.

PARTICULARS

9. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, throughout Sierra Leone, unlawfully killed an unknown number of civilians, including the following:

Kenema District

10. Between about 25 May 1997 and about 31 March 1998, in various locations, including Kenema town and the Tongo Fields area;

Kono District

11. Between about 1 February 1998 and about 31 January 2000, in various locations, including Koidu, Tombodu or Tumbodu, Koidu Geiya or Koidu Gieya, Koidu Buma, Yengema, Paema or Peyima, Bomboa fuidu, Bumpe, Nimikoro or Njaima Nimikoro and Mortema;

Kailahun District

12. Between about 1 February 1998 and about 30 June 1998, in various locations, including Kailahun town;

Freetown and Western Area

13. Between about 21 December 1998 and 28 February 1999, in locations throughout Freetown, including the State House, Kissy, Fourah Bay, Upgun, Calaba Town, Allen Town and Tower Hill areas of the city, and Hastings, Wellington, Tumbo, Waterloo and Benguema in the Western Area.

SEXUAL VIOLENCE

COUNT 4: Rape, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

And:

COUNT 5: Sexual slavery, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

In addition, or in the alternative:

COUNT 6: Outrages upon personal dignity, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.e. of the Statute.

PARTICULARS

14. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, committed widespread acts of sexual violence against civilian women and girls, including the following:

Kono District

15. Between about 1 February 1998 and about 31 December 1998, raped an unknown number of women and girls in various locations, including Koidu, Tombodu or Tumbodu, Wondedu and AFRC and/or RUF camps such as "Superman Ground", "Guinea Highway" and "PC Ground"; abducted an unknown number of women and girls from various locations within the District, or brought them from locations outside the District, and used them as sex slaves;

Kailahun District

16. Between about 30 November 1996 and about 18 January 2002, raped an unknown number of women and girls in locations throughout Kailahun District; abducted many victims from other areas of the Republic of Sierra Leone, brought them to locations throughout the District, and used them as sex slaves;

Freetown and Western Area

17. Between about 21 December 1998 and about 28 February 1999, raped an unknown number of women and girls throughout Freetown and the Western area, and abducted an unknown number of women and girls and used them as sex slaves.

PHYSICAL VIOLENCE

COUNT 7: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute;

In addition, or in the alternative:

COUNT 8: Other inhumane acts, a **CRIME AGAINST HUMANITY**, punishable under Article 2.i. of the Statute.

PARTICULARS

18. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, committed widespread acts of physical violence against civilians, including the following:

Kono District

19. Between about 1 February 1998 and about 31 December 1998, mutilated and beat an unknown number of civilians in various locations, including Tombodu or Tumbodu, Kaima or Kayima and Wondedu. The mutilations included cutting off limbs and other body parts and carving "AFRC" and "RUF" on the bodies of the civilians;

Kailahun District

20. Between about 30 November 1996 and about 18 January 2002, beat an unknown number of civilians in locations throughout the District;

Freetown and Western Area

21. Between about 21 December 1998 and about 28 February 1999, mutilated and beat an unknown number of civilians in various areas of Freetown, including the northern and eastern areas of the city, the Kissy area around the State House, Fourah Bay, Upgun and the Kissy mental hospital, and Hastings, Wellington, Tumbo, Waterloo and Benguema in the Western Area. The mutilations included cutting off limbs.

CHILD SOLDIERS

COUNT 9: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an **OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW**, punishable under Article 4.c. of the Statute.

PARTICULARS

22. Between about 30 November 1996 and about 18 January 2002, throughout the Republic of Sierra Leone, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC and/or RUF camps in various locations throughout the country, and thereafter used as fighters.

ABDUCTIONS AND FORCED LABOUR

COUNT 10: Enslavement, a **CRIME AGAINST HUMANITY**, punishable under Article 2.c. of the Statute.

PARTICULARS

23. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, engaged in widespread and large scale abductions of civilians and use of civilians as forced labour, including the following:

Kenema District

24. Between about 1 July 1997 and about 28 February 1998, used an unknown number of civilians living in the District as forced labor in various locations such as the Tongo Fields area;

Kono District

25. Between about 1 February 1998 and about 18 January 2002, abducted an unknown number of civilians, and took them to various locations outside the District, or to locations within the District such as AFRC and/or RUF camps, Tombodu or Tumbodu, Koidu and Wondedu, and used them as forced labour;

Kailahun District

26. Between about 30 November 1996 and about 18 January 2002, brought abducted civilian men, women and children to various locations within the District and used them and residents of the District as forced labour;

Freetown and Western Area

27. Between about 21 December 1998 and about 28 February 1999, abducted an unknown number of civilians, including a large number of children, from locations throughout Freetown and the Western Area, and used them as forced labour.

LOOTING

COUNT 11: Pillage, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.f. of the Statute.

PARTICULARS

28. Between about 30 November 1996 and about 18 January 2002, members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the **ACCUSED**, engaged in widespread unlawful taking of civilian property, including the following:

Kono District

29. Between about 1 February 1998 and about 31 December 1998, in various locations, including Koidu, Tombodu or Tumbodu and Bumpe;

Bombali District

30. Between about 1 February 1998 and about 30 April 1998, in various locations, including Makeni;

Port Loko District

30A. Between about 1 February 1998 and about 30 April 1998, in various locations, including Masiaka;

Freetown and Western Area

31. Between about 21 December 1998 and about 28 February 1999, throughout Freetown and the Western Area.

32. Paragraphs 4 through 31 are incorporated by reference in INDIVIDUAL CRIMINAL RESPONSIBILITY below.

INDIVIDUAL CRIMINAL RESPONSIBILITY

33. The **ACCUSED**, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the **ACCUSED** planned, instigated, ordered, committed, or in whose planning, preparation or execution the **ACCUSED** otherwise aided and abetted, or which crimes amounted to or were involved within a common plan, design or purpose in which the **ACCUSED** participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.

34. In addition, or alternatively, pursuant to Article 6.3. of the Statute, the **ACCUSED**, while holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, is individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment. The **ACCUSED** is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and the **ACCUSED** failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Dated 29 May 2007,
Freetown, Sierra Leone,

Stephen Rapp
The Prosecutor

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SCSL-03-01-PT
(9408-9410)

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SPECIAL COURT FOR SIERRA LEONE

SPECIAL COURT FOR SIERRA LEONE
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22 MAY 2007
NAME Adiza Nsiima K
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TIME 12:45

TRIAL CHAMBER II

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

Registrar: Mr. Herman von Hebel, Acting Registrar

Case No.: SCSL-03-1-PT

Date: 22 May 2007

PROSECUTOR

Against

CHARLES GHANKAY TAYLOR

DECISION ON DEFENCE APPLICATION FOR LEAVE TO APPEAL THE 25 APRIL 2007 "DECISION ON DEFENCE MOTION REQUESTING RECONSIDERATION OF 'JOINT DEFENCE MOTIONS ON ADEQUATE FACILITIES AND ADEQUATE TIME FOR THE PREPARATION OF MR. TAYLOR'S DEFENCE,' DATED 23 JANUARY"

Office of the Prosecutor:
Brenda Hollis
Ann Sutherland

Defence Counsel for Charles G. Taylor:
Karim A.A. Khan
Roger Sahota

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TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"); 9409

SEISED of the Defence Application for Leave to Appeal the 25 April 2007 "Decision on Defence Motion Requesting Reconsideration of 'Joint Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence,' Dated 23 January", filed on 30 April 2007 ("Motion"), on the grounds that

(i) "exceptional circumstances" exist, in that the course of justice would be interfered with if the Trial Chamber does not give any compensation for the three and a half months during which the Defence legal consultations were hampered by the "chilling effect" of a video surveillance camera[1]; and

(ii) "irreparable prejudice" will be caused to the Defence if it is denied immediate relief and adequate time to prepare, since the only remedy would be an order for retrial[2];

NOTING the "Prosecution Response to Defence Application for Leave to Appeal Filed on 30 April 2007", filed on 8 May 2007,("Response"), wherein the Prosecution relies on its responses filed in respect of two previous Defence motions[3], conceding that the Defence had shown good cause for an additional delay in the commencement of the trial;

NOTING that the Defence has not filed a reply to the Response;

RECALLING the Trial Chamber's "Decision on Defence Motion Requesting Reconsideration of 'Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence', dated 23 January 2007", filed on 25 April 2007 ("Impugned Decision") in which the Trial Chamber granted the said motion in part by allowing an adjournment of 18 calendar days after the Prosecution opens its case on 4 June 2007;

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

NOTING that Rule 73(B) of the Rules provides that:

> Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders;

NOTING therefore that Rule 73(B) does not confer a general right of appeal, but that leave to appeal may be granted by the Trial Chamber only in cases where the conjunctive conditions of exceptional circumstances and irreparable prejudice to a party are both satisfied;

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[1] Motion, paras. 2, 3, 6-9.
[2] Motion, para. 10.
[3] Response, para. 5; see also Prosecution Response to "Defence Application for Leave to Appeal 'Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence' Dated 23 January 2007", filed on 5 February 2007, and Prosecution's Response to "Defence Motion Requesting Reconsideration of 'Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence', dated 23 January 2007", filed on 20 April 2007.

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CONSIDERING that the overriding legal consideration in respect of an application of this nature is that the applicant's case must reach a level nothing short of exceptional circumstances and irreparable prejudice, having regard to the restrictive nature of Rule 73(B) and the rationale that criminal trials must not be heavily encumbered and, consequently, unduly delayed by interlocutory appeals;[4]

CONSIDERING also that the Appeals Chamber has ruled that:

> "In this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgement will be corrected in due course by this Chamber on appeal";[5]

HOLDING that, upon a reading of the Impugned Decision, the argument by the Defence that the Trial Chamber failed to give proper regard to the three and a half months that the Defence legal consultations took place under the "chilling effect" of the video surveillance camera[6] is fallacious and cannot be maintained;

RECALLING, in relation to the claim by the Defence of irreparable prejudice, the ruling of the Trial Chamber in its "Decision on Defence Application for Leave to Appeal 'Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence' Dated 23 January 2007", dated 15 February 2007, at paragraph 18;

FINDING that the Defence has not met the criteria of exceptional circumstances and irreparable prejudice prescribed by Rule 73(B);

DISMISSES THE MOTION.

Done at Freetown, Sierra Leone, this 22nd day of May 2007.

Justice Richard Lussick

Justice Julia Sebutinde
Presiding Judge

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

[4] See *Prosecutor v. Sesay et al.*, SCSL-2004-14-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 February 2004.
[5] See *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.
[6] See Motion, para. 2.

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SCSL-03-01-PT
(8345 – 8346)

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SPECIAL COURT FOR SIERRA LEONE

SPECIAL COURT FOR SIERRA LEONE
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18 MAY 2007
NAME THOMAS GEORGE
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TIME 09:20

TRIAL CHAMBER II

Before:	Justice Julia Sebutinde, Presiding Judge Justice Richard Lussick Justice Teresa Doherty
Registrar:	Herman von Hebel, Acting Registrar
Case No.:	SCSL-03-1-PT
Date:	18 May 2007

PROSECUTOR

Against

CHARLES GHANKAY TAYLOR

ORDER DESIGNATING ALTERNATE JUDGE

Office of the Prosecutor:
Stephen Rapp
Brenda Hollis

Defence Counsel for Charles G. Taylor:
Karim A.A. Khan
Roger Sahota

I, Justice Julia Sebutinde, Presiding Judge of Trial Chamber II of the Special Court for Sierra Leone ("Special Court");

RECALLING that in accordance with Article 2 of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, ("Agreement")[1] and Article 12 of the Statute of the Special Court ("Statute") H. E. Ban Ki-Moon, Secretary General of the United Nations did in his letter dated 25 April 2007 appoint the Honourable Justice El Hadji Malick Sow as an alternate judge of Trial Chamber II of the Special Court for a period of three years commencing on 10 May 2007;

NOTING the provisions of Article 2.5 of the Agreement and of Article 12.4 of the Statute that-

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

NOTING also the provisions of Rules 16 and 16*bis* of the Rules of Procedure and Evidence;

PURSUANT to Article 12.4 of the Statute;

HEREBY DESIGNATES Justice El Hadji Malick Sow, to be present at each stage of the trial of the Accused Charles Ghankay Taylor[2] and to replace a judge if that judge is unable to continue sitting.

Done at Freetown, Sierra Leone, this 18th day of May 2007.

Justice Julia Sebutinde
Presiding Judge

[Seal of the Special Court for Sierra Leone]

[1] Agreement of 16 January 2002
[2] *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-PT.

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SCSL-03-01-PT
(4869 — 5385)

PUBLIC

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

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

Acting Registrar: Mr. Herman von Hebel

Date filed: 4 April 2007

SPECIAL COURT FOR SIERRA LEONE
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04 APR 2007
NAME Adwoa Ngina K.
SIGN Ngina K
TIME 15:50

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-PT

PUBLIC
RULE 73 *bis*

PRE-TRIAL CONFERENCE MATERIALS

PRE-TRIAL BRIEF

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Ann Sutherland

Defence Counsel for Charles Ghankay Taylor
Mr. Karim A. A. Khan
Mr. Roger Sahota

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The Emergence of the Common Plan, Design or Purpose (Common Plan)

6. Prior to the commencement of the armed conflict in Sierra Leone, and throughout the armed conflict, the Accused participated in a common plan, design or purpose to gain and maintain political power and physical control over the territory of Sierra Leone, in particular the diamond mining areas, in order to exploit the natural resources of the country. Implementation of this common plan included overthrowing the government of Sierra Leone in order to facilitate access to its natural resources and to install a government that would be well disposed toward, and supportive of, the Accused's interests and objectives in Liberia and the region.[4]

7. This common plan amounted to or involved the commission of the crimes alleged in the Amended Indictment (Indictment). From its inception, the Accused and the other participants in the common plan used criminal means to achieve and hold political power and physical control over the civilian population of Sierra Leone. These criminal means involved the campaign of terror waged against the civilian population of Sierra Leone, including widespread and continuing killings, rapes, beatings and mutilations, enslavement of the civilian population for use as fighters, "bush wives" and forced labour, looting and burning of civilian property. Children were used to carry out this criminal campaign and in active hostilities.[5]

8. The Accused, as leader of the NPFL was instrumental in the creation of this common plan. The Accused and Foday Sankoh, the leader of the RUF (Revolutionary United Front), made common cause to assist each other in their respective countries to achieve the common plan. From the outset, the Accused and his forces worked virtually as one with Sankoh and his RUF forces, and with the organised armed groups and forces that later evolved. To that end, Sankoh and his RUF forces assisted the Accused during the Liberian armed conflict which commenced in 1989.[6]

9. The Accused assumed and maintained the overall leadership role in the implementation of the common plan. Liberian subordinates of the Accused, including Benjamin Yeaten, also known as (aka) "50" or "General 50", Musa Sesay aka Musa Cisse, Grace Minor, Joe Tuah, Roland Duoh, Christopher Varmoh aka "Liberian Mosquito", Momoh Gibba, Duopo Makerzon, Sampson Weah, and Zig Zag Marzah

[4] Exs. 1.011; 1.018.
[5] Wits. TF1-020; 071; 139; 227; 334; 336; 366; 532; Ellis. Exs. 1.020; 1.021; 1.067; 1.082; 1.095; 1.152; 1.155; 1.156; 1.157; 1.159; 1.169; 1.170; 1.177; 1.178; 1.184; 1.295.
[6] Wits. TF1-168; 274; 275; 515; 532; 542; Ellis. Exs. 1.058; 1.138; 1.141; 1.157; 1.232; 1.254; 1.261; 1.269.

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SCSL-03-01-I
(3160-3180)

3160

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL-2003-01-I

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as
DANKPANNAH CHARLES GHANKAY TAYLOR also known as
DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR

AMENDED INDICTMENT

The Prosecutor, Special Court for Sierra Leone, under Article 15 of the Statute of the Special Court for Sierra Leone (the Statute) charges:

CHARLES GHANKAY TAYLOR also known as
(aka) DANKPANNAH CHARLES GHANKAY TAYLOR
aka DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR

with **CRIMES AGAINST HUMANITY, VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II and OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, in violation of Articles 2, 3 and 4 of the Statute** as set forth below:

THE ACCUSED

1. **CHARLES GHANKAY TAYLOR aka DANKPANNAH CHARLES GHANKAY TAYLOR aka DANKPANNAH CHARLES GHANKAY MACARTHUR TAYLOR** (the **ACCUSED**) was born on 27 or 28 January 1948 at Arthington in the Republic of Liberia.

SPECIAL COURT FOR SIERRA LEONE
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NAME MAUREEN EDMONDS
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fighters in carrying out the crimes alleged in the Amended Indictment, and had a substantial effect on the commission of those crimes, and/or furthered the common plan, design or purpose in which the participants included the leadership and members of the RUF, AFRC, AFRC/RUF Junta or alliance and Liberian fighters.

Participation in a common plan, design or purpose

42. This shared common plan, design or purpose was to take any actions necessary to gain and exercise political power and political and physical control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided primarily to the **ACCUSED** and other persons outside Sierra Leone.

43. The common plan, design or purpose included taking any actions necessary to gain and exercise physical and political control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to those persons engaged in achieving the objectives of the common plan, design or purpose. This common plan, design or purpose amounted to, or involved the commission of, the crimes alleged in the Amended Indictment. The alleged crimes, amounting to or involved within the common plan, design or purpose, were either intended by the **ACCUSED**, or were a reasonably foreseeable consequence of the common plan, design or purpose.

44. The **ACCUSED** participated in this common plan, design or purpose as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone, in particular diamonds, to destabilize the Government of Sierra Leone in order to facilitate access to such mineral wealth and to install a government in Sierra Leone that would be well disposed toward, and supportive of, the **ACCUSED's** interests and objectives in Liberia and the region.

Intent and knowledge

45. The **ACCUSED** intended the commission of the crimes alleged in the Amended Indictment, or acted with reckless indifference toward the possibility that such crimes

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SCSL-2003-01-I
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17 MAR 2003

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL – 03 – – I

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as
CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR

INDICTMENT

The Prosecutor, Special Court for Sierra Leone, under Article 15 of the Statute of the Special Court for Sierra Leone (the Statute) charges:

CHARLES GHANKAY TAYLOR also known as
(aka) CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR

with **CRIMES AGAINST HUMANITY, VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II and OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, in violation of Articles 2, 3 and 4 of the Statute** as set forth below:

THE ACCUSED

1. **CHARLES GHANKAY TAYLOR aka CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR** (the **ACCUSED**) was born on or about 28 January 1948 at Arthington in the Republic of Liberia.

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23. The RUF and the AFRC shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

24. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.

25. The **ACCUSED** participated in this joint criminal enterprise as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone and to destabilize the Government of Sierra Leone.

26. **CHARLES GHANKAY TAYLOR**, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Indictment, which crimes the **ACCUSED** planned, instigated, ordered, committed or in whose planning, preparation or execution the **ACCUSED** otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which the **ACCUSED** participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which the **ACCUSED** participated.

27. In addition, or alternatively, pursuant to Article 6.3. of the Statute, **CHARLES GHANKAY TAYLOR**, while holding positions of superior responsibility and exercising command and control over his subordinates, is individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute. The **ACCUSED** is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

Wednesday, 16 May 2012
09.30 a.m
SENTENCING HEARING

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde
For Chambers:	Ms Doreen Kiggundu Ms Diana Goff Ms Helen Worsnop Ms Yael Rothschild Ms Elizabeth Budnitz Ms Rebecca Browning
For the Registry:	Ms Fidelma Donlon Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Ms Brenda J Hollis Mr James C Johnson Mr Nicholas Koumjian Mr Mohamed A Bangura Ms Nina Tavakoli Ms Ruth Mary Hackler Ms Leigh Lawrie Mr Christopher Santora Ms Kathryn Howarth Ms Ula Nathai-Lutchman Mr James Pace Mr Cóman Kenny Ms Danielle Fritz
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths, QC Mr Terry Munyard Mr Morris Anyah Ms Logan Hambrick Ms Alexandra Popov Mr Michael Herz Ms Szilvia Csevar Ms Habibatou Gani Ms Carly Lenhoff Mr James Kamara
Office of the Principal Defender:	Ms Claire Carlton-Hanciles

does not have any say in decisions of the Trial Chamber. He is obliged to be present during deliberations off the Trial Chamber, but he is not entitled a vote thereat. See Rule 16 bis (C). It follows that it was wrong for the Alternate Judge, who has not been designated to replace a sitting Judge, to offer an opinion, whether dissenting or concurring, on a judgement of Trial Chamber.

09:37:15

The behaviour of Judge Sow was referred by the Council of Judges to a plenary meeting of the Judges of the Special Court. We three Trial Chamber Judges abstained from voting at that plenary.

09:37:34

I will now read onto the record the resolution of the plenary.

Resolution on complaint by Trial Chamber II against Justice Malick Sow. The Judges of the Special Court for Sierra Leone sitting on the 7th and 10th of May, 2012, in the 17th plenary of Judges, pursuant to Rule 15 bis (B) of the Rules of Procedure of Evidence of the Special Court which mandates the Council of Judges who refer an allegation of unfitness of a Judge to sit to the plenary if it determines that, one, the allegation is of a serious nature, and two, that there appears to be a substantial basis for same.

09:37:57

09:38:27

Pursuant also to Rule 24(iii) of the Rules, which provides that the Judges shall meet in plenary to decide upon matters relating to the internal functioning of the Chambers and the Special Court, seized of the complaint by the Judges of Trial Chamber II, dated 26th of April, 2012, against Justice Malick Sow, Alternate Judge, considering the response of Justice Malick Sow, dated the 1st of May, 2012, to the complaint, having also

09:38:53

considered the views and recommendations of the Judges on the matter and the response of Justice Malick Sow to those views pursuant to Rule 15 bis (C) have reached the following conclusions:

09:39:39 1. The plenary declares that Justice Malick Sow's behaviour in court on the 26th of April, 2012, amounts to misconduct rendering him unfit to sit as an Alternate Judge of the Special Court.

2. The plenary recommends to the appointing authority 09:40:03 pursuant to Rule 15 bis (B) to decide upon the further status of Justice Malick Sow.

3. Pursuant to Rule 24(iii), the plenary directs Justice Malick Sow to refrain from further sitting in the proceedings pending a decision from the appointing authority.

09:40:28 Done in Freetown, Sierra Leone, this 10th day of May, 2012, for and on behalf of the plenary, signed by the President Justice Jon Kamanda.

Now, Ms Hollis, you have one hour to address the Court and that will start from now which will bring you up to 20 to 11.00 09:41:05 you must complete your address.

MS HOLLIS: Thank you, Mr President. May it please the Court. In arriving at a sentence --

PRESIDING JUDGE: I'm sorry. I didn't see you standing there.

09:41:13 MR GRIFFITHS: I apologise to my learned friend. Your Honour, can I ask -- raise two matters, preliminary matters, regarding the timing of the proceedings today. I don't know whether Your Honours were considering have a mid-morning break at some stage, but it would perhaps assist us if that were to be

Case No. SCSL-2003-01-T

**THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR**

Thursday, 26 April 2012
11.00 a.m
JUDGEMENT

TRIAL CHAMBER II

Before the Judges:

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

For Chambers:

Ms Jessica Neuwirth
Ms Doreen Kiggundu
Ms Diana Goff
Mr Johann Soufi
Ms Helen Worsnop
Ms Alice Lam
Ms Elizabeth Budnitz
Ms Lauren Turner
Mr Lachezar Yanev

For the Registry:

Ms Fidelma Donlon
Ms Elaine Bola-Clarkson
Ms Rachel Irura
Mr Alhassan Fornah
Ms Zainab Fofanah

For the Prosecution:

Ms Brenda J Hollis
Mr Nicholas Koumjian
Mr Mohamed A Bangura
Ms Nina Tavakoli
Ms Ruth Mary Hackler
Ms Ula Nathai-Lutchman
Mr James Pace
Mr Cóman Kenny

For the accused Charles Ghankay Taylor:

Mr Courtenay Griffiths, QC
Mr Terry Munyard
Mr Morris Anyah
Mr Silas Chekera
Ms Logan Hambrick

Office of the Principal Defender:

Ms Claire Carlton-Hanciles

Thursday, 26 April 2012
[Judgement]
[Open session]
[In the presence of the accused]
11:00:48 [Upon commencing at 11.00 a.m.]

THE REGISTRAR: The Special Court for Sierra Leone is sitting in an open session for judgement in the case of the Prosecutor versus Charles Ghankay Taylor, Justice Richard Lussick presiding.

11:01:30 PRESIDING JUDGE: We're just pausing momentarily while some photographs are taken.

We will take appearances, please.

MS HOLLIS: Good morning, Mr President, Your Honours, opposing counsel. This morning for the Prosecution, 11:02:17 Brenda J. Hollis, Nicholas Koumjian, Mohamed A. Bangura, Nina Tavakoli, Ruth Mary Hackler, Ula Nathai-Lutchman, James Pace, Leigh Lawrie, Desmond de Silva, Christopher Santora, Cóman Kenny, our interns Rosemelle Mutoka, Charlotte Kyakwera, Danielle Fritz, and Lena Sokolic.

11:02:44 PRESIDING JUDGE: Yes, Mr Griffiths.

MR GRIFFITHS: Good morning, Mr President, Your Honours. For the Defence today, myself, Courtenay Griffiths, Queen's Counsel, with me as co-counsel Mr Terry Munyard, Mr Morris Anyah, Mr Silas Chekera, and Ms Logan Hambrick. We are pleased to have 11:03:10 join us our Case Manager Salla Moilanen and also our legal assistants Fatiah Balfas, Michael Herz, Kathryn Hovington, and Szilvia Csevar.

And we're also joined by James Kamara, our office administrator, and of course, last, but surely not least, the

principal defender Claire Carlton-Hanciles.

PRESIDING JUDGE: Thank you. Trial Chamber I, composed of Justice Richard Lussick, presiding, Justice Teresa Doherty, Justice Julia Sebutinde, with alternate Judge
11:04:08 Justice El Hadji Malick Sow, today delivers its judgement in the case of the Prosecutor against Charles Ghankay Taylor. For the purposes of this hearing, the Chamber will briefly summarise its findings. This a summary only. The written judgement which is the only authoritative version will be made available
11:04:20 subsequently.

Now, by way of introduction, Charles Ghankay Taylor was elected president of Liberia and took office on the 2nd of August, 1997. On 4 June 2003, his indictment by the Special Court and warrant of arrest were unsealed, and on 11th of August,
11:04:44 2003, he stepped down from the Presidency and went into exile in Nigeria. In 2003, the accused applied to the Special Court to quash his indictment and set aside the warrant of arrest on the grounds that he was immune from any exercise of the jurisdiction of this court by virtue of the fact that at the time the
11:05:06 indictment and warrant of arrest were issued, he was a sitting head of state. This application was denied by the Trial Chamber and its decision was upheld by the Appeals Chamber on 31 May 2004 on the ground that the sovereign equality of states does not prevent a head of state from being prosecuted before an
11:05:29 international criminal tribunal or court.

Accordingly, the Appeals Chamber held that the official position of Charles Taylor as an incumbent head of state at the time when these criminal proceedings were initiated against him was not a bar to his prosecution by this court.

On 29 March 2006, the accused was arrested in Nigeria by Nigerian authorities following a request by Liberian President Johnson-Sirleaf that he be surrendered to the Special Court pursuant to the warrant of arrest.

11:06:07 Shortly thereafter, he was transferred into the custody Of the Special court in Freetown, Sierra Leone, and was formally arraigned on 3 April 2006, when he pleaded not guilty to all counts in the indictment.

Because of security concerns, the accused was transferred 11:06:28 to The Hague on 20 June 2006. The armed conflict in Sierra Leone started in March 1991, when armed fighters known as the Revolutionary United Front, RUF, led by Foday Sankoh, attacked Sierra Leone from Liberia. The RUF continued their insurgency against the government despite the Abidjan Peace Accord in 11:06:55 November 1996.

In a coup on 25 May 1997, members of the Sierra Leone Army overthrew the democratically elected government of Ahmad Tejan Kabbah and invited the RUF to join its Junta government called the Armed Forces Revolutionary Council, AFRC.

11:07:19 As leader of the NPFL, National Patriotic Front of Liberia and later as president of Liberia, the accused is alleged to have acted in concert with members of the RUF, AFRC, AFRC/RUF Junta or alliance and all Liberian fighters, members and ex-members of the NPFL. Specifically in that capacity, the accused is alleged to 11:07:52 have assisted, encouraged, directed, and or controlled the above-mentioned warring factions in conducting armed attacks in the territory of Sierra Leone from 30 November 1996 to 18 January 2002, which is the indictment period. The attacks included terrorising the civilian population including burning of

civilian homes, murder, sexual violence, physical violence, illegal recruitment of child soldiers, abduction, and forced labour and looting.

Procedural background.

11:08:35 The Prosecution case commenced on 4 June 2007 and closed on 27 February 2009. During the Defence case, the Prosecution was granted leave to re-open its case to call three additional witnesses who testified on 5th, 9th and 10th of August, 2010. In sum, 94 witnesses testified for the Prosecution including three

11:09:03 expert witnesses. A total of 782 Prosecution exhibits were admitted into evidence including five expert reports.

The Defence opened its case on 13 July 2009 and closed on 12 November 2010, having called 21 witnesses, including the accused, who testified for seven months from 14 July 2009 until

11:09:34 18 February 2010. A total of 740 Defence exhibits were admitted into evidence. Prosecution closing arguments were heard on 8th and 9 of February, 2011. Defence closing arguments were heard on 9th and 10th of March, 2011. Oral responses by both parties were heard on 11th of March, 2011.

11:10:06 After 420 trial days over the course of three years and ten months, the case was formally closed on 11 March 2011. A total of 115 witnesses testified, 1.522 exhibits were admitted into evidence, 49.622 pages of trial records were transcribed, and 281 written interlocutory decisions were issued by the

11:10:34 Trial Chamber.

Summary of the charges.

The accused is charged with 11 counts under the indictment. Five of these counts charge the accused with crimes against humanity punishable under Article 2 of the Statute, in

particular: Murder, count 2; rape, count 4; sexual slavery, count 5; other inhumane acts, count 8; and enslavement, count 10. Five additional counts charge the accused with violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3 of the Statute, in particular: acts of terrorism, count 1; violence to life, health, and physical or mental well-being of persons, in particular murder, count 3; outrages upon personal dignity, count 6; violence to life, health, and physical or mental well-being of persons, in particular cruel treatment, count 7; and pillage, count 11. The remaining count charges the accused with conscripting or enlisting children under the age of 15 into armed forces or groups, or using them to participate actively in hostilities, count 9, a serious violation of international humanitarian law punishable under Article 4 of the Statute.

The indictment charges that the accused is individually criminally responsible under Articles 6(1) and 6(3) of the Statute for the crimes referred to above.

The accused pleaded not guilty to each of the counts charged in the indictment.

Summary of the Defence case.

The Defence accepts that crimes against humanity and war crimes were committed during the indictment period in the course of the armed conflict in Sierra Leone, but denies that the accused is responsible. The Defence admits that the burden of proof is upon the Prosecution to prove beyond reasonable doubt that, (i) the crimes were actually committed; (ii) that the crimes fulfil all the legal requirements of Articles 2, 3, and 4 of the Statute; and (iii) that there is a nexus between the

alleged crimes and the accused.

As part of its case, the Defence maintained that the accused, through his diplomatic efforts, played a substantial role in fostering peace and security in Sierra Leone, that his
11:13:23 contribution to the peace process was significant, and that his prosecution has from the outset been "selective and vindictive in nature ... on the basis of political motives and interests." The Defence also challenged the credibility of the Prosecution evidence. The Trial Chamber has considered a number of
11:13:46 preliminary issues in its written judgement, including the issue of selective prosecution and a number of fair trial issues raised by the Defence. With regard to the issue of selective prosecution, the Trial Chamber finds that the accused was not singled out for selective prosecution.

11:14:05 Summary of the findings on crimes committed.

The Trial Chamber finds that the chapeau requirements in respect of the crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law
11:14:31 charged in the indictment, have been proved by the Prosecution beyond reasonable doubt.

The Trial Chamber has examined the evidence presented in relation to the crimes that members of the RUF, AFRC, and AFRC/RUF Junta or alliance, and/or Liberian fighters allegedly
11:14:56 committed in Sierra Leone between 30 November 1996 and about 18 January 2002. The Trial Chamber finds that the crimes charged in counts 1 to 11 were committed. The findings on each of these crimes will be summarised in turn.

Murder, a crime against humanity, punishable under

Article 2(a) of the Statute, count 2; and/or violence to life, health, and physical or mental well-being of persons, and in particular, murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, count 3.

The Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters murdered civilians in various locations in the following districts of Sierra Leone:

In Kenema District between 25th of May, 1997, and about 31 March 1998.

In Kono District between about 1 February 1998 and about 31 January 2000.

In Freetown and the Western Area between about 21 December 1998 and 28 February 1999.

In Kailahun District between about 1 February 1998 and about 30 June 1998.

Rape, a crime against humanity, punishable under Article 2(g) of the Statute count 4.

The Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that members of the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters committed widespread acts of rape against women and girls in various locations in the following districts of Sierra Leone:

In Kono District between about 1 February and about 31 December 1998.

In Freetown and the Western Area between 21 December 1998 and about 28 February 1999.

In Kailahun District in 1998 and 1999, women and girls were

raped in various locations which were not charged in the indictment. The Trial Chamber makes no finding of guilt for these crimes for reasons fully set out in the written judgement.

Sexual slavery, a crime against humanity, punishable under Article 2(g) of the Statute, count 5.

11:17:52

The Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that between about 30 November 1996 and about 18 January 2002, members of the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters committed widespread acts of sexual slavery against civilian women and girls in Sierra Leone in various locations in the following districts of Sierra Leone:

11:18:14

In Kono District between about 1 February 1998 and about 31 December 1998.

In Kailahun District in 1998 and 1999.

In Freetown and the Western Area between about 21 December 1998 and about 28 February 1999.

11:18:35

Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(e) of the Statute. Count 6.

The Trial Chamber finds that the Prosecution has proved beyond a reasonable doubt that members of the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters committed widespread acts of outrages upon the personal dignity of civilian women and girls by acts such as forcing them to undress in public and by raping them and committing other acts of sexual abuse sometimes in full view of the public, and in full view of family members, in various locations in the following districts of Sierra Leone:

11:19:06

11:19:26

In Kono District between about 1 February 1998 and about 31 December 1998.

In Freetown and the Western Area between about 21 December 1998 and about 28 February 1999.

In Kailahun District in 1998 and 1999, outrages upon personal dignity were committed against women and girls in various locations not charged in the indictment. The Trial Chamber makes no finding of guilt for these crimes for reasons fully set out in the written judgement.

Violence to life, health, and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, count 7; and/or other inhumane acts, a crime against humanity, punishable under Article 2(i) of the Statute, count 8.

The Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that members of the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters committed widespread acts of physical violence against civilians in various locations in the following districts of Sierra Leone:

In Kono District between about 1 February 1998 and about 31 December 1998, civilians were forced to endure cruel treatment including having words carved into their bodies and amputations of limbs.

In Kailahun District crimes of physical violence were committed -- crimes of physical violence were committed not -- in areas not charged in the indictment. The Trial Chamber makes no finding of guilt for these crimes for reasons fully set out in the written judgement.

In Freetown and the Western Area between about 21 December and about 28 February 1999 civilians were subjected

to cruel treatment, including amputations of limbs.

Conscripting or enlisting child soldiers into the armed forces or using them in hostilities and other serious violations of international humanitarian law, punishable under Article 4(c) of the Statute, count 9.

11:22:16

The Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that between about 30 November 1996 and about 18 January 2002, members of the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters conscripted and enlisted children under the age of 15 into their armed groups and used them to participate actively in the hostilities in the following districts of Sierra Leone:

11:22:41

In Tonkolili District, children under the age of 15 were abducted and conscripted into the RUF at Kangari Hills from early 1996 until May 1997. Between 500 and 1.000 children had the letters "RUF" carved into their forehead or back to prevent escape.

11:23:03

In Kailahun District, children under the age of 15 were conscripted into the RUF throughout 1998 and 1999 and underwent military training at Bunumbu training base, also known as Camp Lion, and at Buedu field.

11:23:28

In Kono District during the indictment period, children under the age of 15 were conscripted into the RUF and AFRC at various locations and were used to participate actively in hostilities and to amputate limbs, guard diamond mines, go on food-finding missions, as bodyguards to man check-points and in armed combat.

11:23:51

In Bombali District, children under the age of 15 were conscripted into the RUF and AFRC between 1998 and 2000, and

underwent military training at various locations and also participated actively in hostilities.

In Port Loko District between January 1999 and April/May 1999, a child under the age of 15 was abducted, conscripted into the AFRC and used for active participation in hostilities in Masiaka.

In Kenema District between the -- during the Junta period, children under the age of 15 were used as armed guards for mining sites.

In Koinadugu District between March and May 1998, children under the age of 15 were used to participate actively in hostilities, and at least one child under the age of 15 was used to fight against the Kamajors.

In Freetown and the Western Area, children under the age of 15 were used to participate actively in hostilities in Benguema from the end of January until March 1999 and during the Freetown attack in January 1999.

Enslavement, a crime against humanity, punishable under Article 2(c) of the Statute, count 10.

The Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that between 30 November 1996 and about 18 January 2002, members of the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters intentionally exercised powers of ownership over civilians by depriving them of their freedom and forcing them to work, thus committing the crime of enslavement in the various locations in the following district of Sierra Leone:

In Kenema District between about 1 July 1997 and about 28 February 1998, civilians were abducted and forced to mine for diamonds.

In Kono District throughout 1998 and 1999, civilians were abducted and used as forced labour to carry loads, perform domestic chores, go on food-finding missions, undergo military training, and work in diamond mines.

11:26:40 In Kailahun District between 30 November 1996 and July 2000, civilians were abducted and used as forced labour to carry loads, collect arms and ammunition, construct the Buedu airstrip, undergo military training, farm, fish, perform domestic chores, and go on food-finding missions.

11:27:08 In Freetown and Western Area between 21 December 1998 and about 28 February 1999, civilians were abducted and used as forced labour to carry loads, perform domestic chores, and destroy a bridge.

Pillage, a violation of Article 3 common to the
11:27:29 Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute, count 11.

The Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that members of the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters engaged in widespread
11:27:51 and unlawful taking of civilian property in various locations in the following districts of Sierra Leone:

In Kono District between about 1 February 1998 and about 31 December 1998, civilian goods were looted, money and diamonds were looted from a bank, and as part of Operation Pay Yourself,
11:28:16 civilian homes and shops were looted.

In Bombali District, numerous instances of looting of civilian property occurred between 1 February 1998 and 30 April 1998. Money from a bank was also looted.

In Port Loko District between 1 February 1998 and

30 April 1998 there were numerous instances of looting of civilian property as part of Operation Pay Yourself.

In Freetown and Western Area between 21 December 1998 and about 28 February 1999, widespread looting of civilian property from residences and businesses occurred.

11:29:10

Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(d) of the Statute, count 1.

The Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that members of the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters committed acts of terrorism by committing the crimes described in counts 2 to 8 as part of a campaign to terrorise the civilian population of Sierra Leone.

11:29:24

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There was evidence in the crimes described in counts 2 to 8 of public executions and amputations; people were beheaded and their heads displayed on check-points; during Operation No Living Thing during the Junta period in Kenema town, a civilian was killed in full public view and then his body was disemboweled and his intestines stretched across the road to make a check-point; women and girls were raped in public; people were burned alive in their homes. The Trial Chamber finds beyond reasonable doubt that the purpose of these atrocities charged in counts 2 to 8 was to instill terror in the civilian population.

11:30:13

11:30:34

However, some acts of violence even when committed in a campaign whose primary purpose was to terrorise the civilian population may not have been committed in furtherance of such a campaign. The Trial Chamber finds that this is the case with the acts of violence underlying the crimes of child soldiers,

count 9; enslavement, count 10; and pillage, count 11. The Trial Chamber therefore finds that the crime of acts of terrorism has not been established for these counts.

The Trial Chamber also finds that the Prosecution has proved beyond reasonable doubt that acts of terrorism were committed by the widespread burning of civilian property with the primary purpose of terrorising the civilian population in various locations in Kono District between about 1 February 1998 and about 31 December 1998, and in various locations in Freetown and the Western Area between about 21 December 1998 and February 1999.

Summary of findings on the role of the accused.

The Trial Chamber will now summarise its factual findings on the role of the accused.

The role of the accused before 1996.

The Trial Chamber has considered evidence prior to the indictment period only for the purposes of clarifying the context or establishing by inference the elements of criminal conduct that occurred during the material period, or demonstrating a consistent pattern of conduct.

Evidence before the Trial Chamber establishes the following: At the end of the 1980s, a number of West African revolutionaries were trained in Libya, including Charles Taylor from Liberia; Ali Kabbah and Foday Sankoh from Sierra Leone; and Kukoi Samba Sanyang, also known as Dr Manneh, from the Gambia. The accused met Sankoh in Libya, although the exact circumstances of their meeting are not known. Contrary to the Prosecution's submissions, the evidence did not establish that prior to 1996 Taylor, Sankoh, and Dr Manneh participated in any common plan

involving the crimes alleged in the indictment, nor in fact that the three men even met together. Furthermore, the evidence was that during the pre-indictment period, Sankoh operated independently of the accused and that while he relied at times on
11:33:28 Taylor's guidance and support, Sankoh did not take orders from the accused.

During the pre-indictment period, the accused provided the RUF with a training camp in Liberia, instructors, recruits and material support including food and other supplies. However,
11:33:51 again contrary to the Prosecution's submissions, the evidence did not establish that the RUF were under the superior authority of the accused or the NPFL chain of command or that they were instructed in NPFL terror tactics.

The accused supported the invasion of Sierra Leone in
11:34:10 March 1991. NPFL troops actively participated in the invasion, but the Prosecution failed to prove that the accused participated in the planning of the invasion. The Prosecution also failed to prove that the support of the accused for the invasion of Sierra Leone was undertaken pursuant to a common purpose to
11:34:31 terrorise the civilian population of Sierra Leone. Rather, the evidence shows that the accused and Sankoh had a common interest in fighting common enemies, namely ULIMO, a Liberian insurgency group in Sierra Leone and the Sierra Leonean government forces which supported ULIMO.

11:34:57 The accused withdrew his NPFL troops from Sierra Leone after the fallout between NPFL and RUF troops in 1992, culminating in Operations Top 20, Top 40, and Top Final. While the Defence maintains that the accused had no further contact or co-operation with Sankoh, the leader of the RUF, after 1992

following Top Final, the Trial Chamber finds otherwise. Although the Liberia-Sierra Leone border was closed by ULIMO and the Sierra Leone government forces, it remained porous, enabling the flow of arms, ammunition and other supplies from Liberia into Sierra Leone during the remainder of the pre-indictment period. For example, there was evidence that the accused provided arms and ammunition to Sankoh for an attack on Kono in November 1992, and he advised Sankoh prior to and following the attack on Sierra Rutile. The accused also asked Sankoh to send troops in 1993 to help him fight the ULIMO.

The role of the accused during the indictment period. Military operations.

In February 1998, ECOMOG forces intervened in Sierra Leone and expelled the RUF/AFRC Junta from Freetown reinstating Tejan Kabbah's SLPP government to power in March 1998. Although ECOMOG initially forced RUF and AFRC forces to withdraw from Kono under the orders AFRC leader Johnny Paul Koroma, these forces managed to recapture Koidu Town in late February-early March 1998. A few weeks later, ECOMOG forces regained control of Koidu Town. In mid-June 1998, forces under the ultimate direction of Sam Bockarie, who had by then assumed leadership of the renegade RUF/AFRC Junta forces, made another attempt to retake Koidu Town, code named Operation Fitti-Fatta. The Fitti-Fatta attack was unsuccessful and in late November, early December 1998, after a trip by Bockarie to Liberia where he met with the accused, a meeting was held at Waterworks in which Bockarie ordered RUF/AFRC troops under his command to carry out a two-pronged attack on Kono and Kenema, with Freetown as the ultimate target. The attacks on Kenema and Kono were launched in

mid-December 1998. While the former was unsuccessful, the latter attack succeeded and the RUF/AFRC troops continued towards Freetown. On 6 January 1999, a group of predominantly AFRC troops led by Alex Tamba Brima, also known as Gullit, launched an assault on Freetown.

11:38:16

The Trial Chamber will now summarise its findings on the assistance provided by the accused in these military operations.

From the time of the ECOMOG intervention, the accused and his subordinates communicated to the AFRC/RUF forces the imperative to maintain control over Kono, a diamondiferous area. When the AFRC/RUF forces were pulling out of Kono during the intervention the radio station of Benjamin Yeaten, director of the accused's Special Security Service, intercepted a radio transmission between AFRC/RUF radio stations about the withdrawal and intervened to ask why the forces were withdrawing. Then, in several satellite phone conversations with Johnny Paul Koroma, who was trying to make arrangements to get to Liberia by helicopter, the accused told Koroma to capture Kono. After a first failed attempt, the accused gave instructions for a second attack which led to the ultimate recapture of Koidu Town in Kono District in late February, early March 1998. Once Kono had been recaptured, the accused told Bockarie to be sure to maintain control of Kono for the purpose of trading diamonds with him for arms and ammunition.

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11:39:28

The accused advised Bockarie to recapture Kono following its loss to ECOMOG, again so that the diamonds could be used to purchase arms and ammunition. Such advice was transmitted to RUF commanders both through Bockarie and Liberian emissaries Daniel Tamba, also known as Jungle, and/or Ibrahim Bah, and

11:39:51

resulted in the Fitti-Fatta attack in mid-June 1998.

In addition to urging the RUF and AFRC to capture and hold Kono, the accused supplied arms and ammunition for the operations in the Kono District in early 1998 and for Operation Fitti-Fatta.

11:40:39 In November and December 1998, when Bockarie met with the accused in Monrovia, the accused jointly designed with Bockarie a two-pronged attack on Kono, Kenema, and Freetown, outlined by Bockarie to his commanders in a meeting at Waterworks on his return to Sierra Leone. Although the idea to advance towards

11:41:01 Freetown was already in discussion when Bockarie went to Monrovia, the accused emphasised to Bockarie the need to first attack Kono District and told Bockarie to make the operation "fearful" in order to pressure the government of Sierra Leone into negotiations on the release of Foday Sankoh from prison, as

11:41:23 well as to use "all means" to get to Freetown. Subsequently, Bockarie named the operation Operation No Living Thing, implying that anything that stood in their way should be eliminated.

At this time there were two plans to attack Freetown; one made by Bockarie with the accused and one made by breakaway AFRC

11:41:50 commander Solomon Anthony Joseph Musa, also known as SAJ Musa, whose troops had started an advance towards Freetown at the end of June, beginning of July 1998. Consistent with his discussions with the accused, Bockarie invited SAJ Musa after the Waterworks meeting to join his efforts to attack Freetown but Musa refused.

11:42:16 However, with SAJ Musa's death in or around 23rd of December, 1998, when Gullit took over the leadership of the troops at Benguema and resumed contact with Bockarie, Bockarie and Gullit co-ordinated in their efforts to capture Freetown. From that point onwards, SAJ Musa's original plan was abandoned and Gullit

followed the Bockarie/Taylor plan as had been contemplated by Bockarie and the accused.

During the operation, Bockarie exercised effective command and control over Gullit, issuing a number of instructions to Gullit, including the order to use terror tactics against the civilian population on the retreat from Freetown. The Trial Chamber did not make a finding as to how SAJ Musa was killed but noted that the possibility of his death had been mentioned by Bockarie at the time of the Waterworks meeting.

11:43:22 The accused gave advice to Bockarie and received updates in relation to the progress of the operations in Kono and Freetown in the implementation of their plan. Bockarie was in frequent contact via radio or satellite phone with the accused in December 1998 and January 1999, either directly or through

11:43:44 Benjamin Yeaten. Yeaten also travelled to Sierra Leone to meet with Bockarie in Buedu during this period. However, it is not clear that the accused had any level of control over the conduct of these operations. Of the instructions allegedly given to Bockarie by the accused during this period, only one was proved

11:44:08 beyond reasonable doubt, that being that the accused instructed Bockarie to transfer some of the Pademba Road prisoners to Buedu. This finding is insufficient to establish, as the Prosecution has alleged, that the accused directed or had control over the Kono and Freetown operations in December 1998 and January 1999.

11:44:36 In addition to planning and advising on the Kono-Freetown operation, the accused also provided military and other support. He facilitated the purchase and transport of a large shipment of arms and ammunition from Burkina Faso in around November 1998 which was used in the attacks on Kono and Kenema in December

1998, where further arms and ammunition were captured. These arms and ammunition were in turn sent to the troops in Freetown in January 1999 and also used by the RUF and AFRC in joint attacks on the outskirts of Freetown. The accused also sent
11:45:18 personnel in the form of at least four former Sierra Leone Army, SLA, fighters who participated in the attack on Kono, as well as 20 former NPFL fighters who were part of the forces under the command of Gullit that entered Freetown, and a group of 150 fighters with Abu Keita, a former ULIMO member, known as the
11:45:46 Scorpion Unit, who participated in the attack on Kenema.

During the Freetown operation, the accused's subordinates in Liberia also transmitted "448 messages" to RUF forces to warn them of impending ECOMOG jet attacks. These messages originated in both Sierra Leone and Liberia.

11:46:14 Operational support.

In addition to support for specific military operations, the accused provided to the RUF and the RUF/FRC alliance communications support, financial support, military training, technical support, and other operational support. Of these,
11:46:35 communications support, facilitation and transport of materiel and personnel, and the provision of a guesthouse to the RUF were sustained and significant.

Concerning communications assistance, following the invasion of Sierra Leone in 1991, the NPFL provided radio
11:46:57 operators and equipment to the RUF with the knowledge of the accused. NPFL radio operators were sent to Sierra Leone and trained RUF fighters in radio communications. Some of these radio operators stayed in Sierra Leone following the break with the NPFL in Operation Top Final, and the RUF continued to benefit

from the training and equipment provided by the NPFL throughout the conflict in Sierra Leone and during the indictment period.

The accused gave Sam Bockarie a satellite phone in October 1998. Bockarie also received "top-up cards" for phone credit from Benjamin Yeaten. The accused also gave a satellite phone to Issa Sesay in 2000, albeit with the full knowledge of the ECOWAS leaders. The supply of such satellite phones enhanced the communications possibility of both Bockarie and Sesay which they used in furtherance of RUF and RUF/AFRC military activities. Sesay, for example, used a satellite phone to report to Bockarie that Kono was under RUF control. While Foday Sankoh was also given a satellite phone, the Prosecution failed to prove that the phone came from the accused.

In addition to providing communications training and equipment to the RUF, the accused and his subordinates facilitated communications for the RUF through their own communications network. The RUF/AFRC was provided access to radio communications equipment in Liberia by the accused or by his subordinates. This equipment was used by RUF radio operators to communicate with the RUF, in one instance concerning supplies of military equipment, and in another to update Bockarie on events in Sierra Leone when he was in Liberia. A radio was provided by the accused to Johnny Paul Koroma. However, this radio was used specifically for the purpose of enabling Koroma to communicate with the West Side Boys about the UN peacekeepers that they had taken hostage. The evidence did not establish that the accused and Yeaten received updates during the Freetown invasion from an RUF operator stationed in Liberia.

Although the establishment of the infrastructure and

training of RUF radio operators occurred prior to the indictment period, the ongoing support from the accused and his subordinates through the provision of satellite phones, the use of the NPFL communications infrastructure and the transmission of "448 messages" alerting the RUF to imminent ECOMOG attack collectively enhanced the communications capacity of the RUF/AFRC during the indictment period and its capacity to carry out military operations in which crimes were committed.

11:49:58

In relation to the guesthouse, the Trial Chamber finds that from 1998 to 2001, the accused provided a base for the RUF in Monrovia, equipped with a long-range radio and telephone, RUF radio operators, SSS security supervised by Benjamin Yeaten, cooks and a caretaker. Although the guesthouse was used by RUF members partly for matters relevant to the peace process or for diplomatic purposes, it was also used to facilitate the transfer of arms, ammunition and funds directly from the accused to the RUF, and the delivery of diamonds from the RUF directly to the accused, belying his testimony that he was entirely unaware of what occurred at the guesthouse. The RUF guesthouse provided a base for the RUF in Monrovia which facilitated the regular transfers of arms and ammunition from the accused to the RUF, as well as diamonds from the RUF to the accused, transactions which played a vital role in the military operations of the RUF in which crimes were committed.

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The Trial Chamber further fiends that during the indictment period, the accused provided much needed road and air transportation to the RUF of arms and ammunition into RUF territory. Materiel was also escorted across military check-points by security personnel working for the accused,

11:51:42

including Daniel Tamba, also known as Jungle; Joseph Marzah, also known as Zigzag; and Sampson Weah. This facilitation of road and air transportation of materiel as well as security escorts played a vital role of the operations of the RUF/AFRC during a period when an international arms embargo was in force.

The accused also provided financial support, military training, technical support, and other operational support to the RUF, including medical support. In most instances in which the accused provided financial support, the funds given by the accused to various individuals were for unspecified or personal use. The evidence failed to establish that the 10 million CFA francs given by the accused to the RUF in Cote d'Ivoire, or the $15.000 US given by him to Sesay to support the RUF, were used to facilitate arms and diamond deals. However, the accused did give funds to Bockarie in the tens of thousands of dollars to buy arms and ammunition from ULIMO. The RUF received financial support for arms and ammunition from sources other than the accused as well.

Similarly, while the accused provided other forms of support to the RUF, including medical support, and he acknowledged that he permitted injured RUF fighters to get treatment in Liberia, it is not clear how continuous or substantial the provision of medical care was throughout the indictment period. In preparation for the Fitti-Fatta mission in mid 1998, the accused sent "herbalists" who marked fighters in Buedu and in Kono in order to bolster their confidence for the mission to recapture Kono. Other support included provision of goods such as food, clothing, cigarettes, alcohol and other supplies to the RUF by the accused. The evidence is insufficient

to enable the Trial Chamber to judge the quantity of supplies provided. Other supplies for the RUF came from Liberia through channels unrelated to the accused.

With regard to military training and technical support, the 11:54:36 accused introduced -- instructed Bockarie in 1998 to open a training base in Bunumbu, Kailahun District, and told him also in 1998 that the RUF should construct or re-prepare an airfield in Buedu. However, the Prosecution failed to prove that the accused sent Martina Johnson, a former NPFL artillery commander, to Buedu 11:55:08 to train RUF fighters to use a 40-barrel missile gun.

The accused provided safe haven to RUF fighters, including Mike Lamin, when they crossed into Liberia after the retreat from Zogoda in 1996, but the accused was not found to have ordered the RUF combatants to cross into Liberia. He had not yet taken 11:55:32 office as president at that time, however, and the Prosecution failed to prove that he facilitated documentation to enable Lamin to travel to Cote d'Ivoire.

Arms and ammunition.

Turning to the allegations of the Prosecution relating to 11:55:55 the role of the accused in providing military support to the RUF/AFRC, the Trial Chamber first considered two preliminary issues raised by the Defence one related to the status of the border between Sierra Leone and Liberia and the other relating to disarmament in Liberia. The Trial Chamber finds that at no 11:56:22 relevant time in the indictment period was the ECOMOG presence on the Liberia-Sierra Leone border or the official closure of the border by the Liberian government sufficient to prevent the cross-border movement of arms and ammunition. With regard to the claim that as a result of disarmament and the destruction of

arms, as well as the arms embargo, Liberia had insufficient arms and ammunition to supply Sierra Leone, the Trial Chamber finds that despite these measures, the accused was able to obtain arms and had the capacity to supply arms and ammunition from Liberia to the rebel groups in Sierra Leone. Moreover, he had the capacity to facilitate larger arms shipments through third countries. Of the arms shipments to the RUF and AFRC linked to accused during the indictment period, the largest arrived not from Liberia but through Liberia from third-party states, including Burkina Faso.

11:57:04
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The accused directly supplied arms and ammunition to the RUF/AFRC as well as facilitating the supply of arms and ammunition to the RUF/AFRC from outside Liberia. During the Junta period, the accused sent ammunition to Bockarie via Daniel Tamba in 1997. The accused was the source of the materiel delivered by Tamba, Joseph Marzah and Sampson Weah, among others, to Sierra Leone throughout 1998 and 1999, such supplies consisting of both arms and ammunition. Bockarie himself made trips to Liberia in 1998 and 1999 during which he obtained arms and ammunition from the accused. During Issa Sesay's leadership of the RUF, the accused continued to deliver arms and ammunition to the RUF in 2000 and 2001 via Tamba, Marzah, Weah and others. Sesay himself made trips to Liberia, including a trip in May 2000 and at least two trips in the second half of 2000 and early 2001 during which he obtained arms and ammunition from the accused.

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Although the materiel delivered through, inter alia, Tamba, Weah, and Marzah was limited in quantity, certain shipments provided by the accused on Bockarie's trips to Liberia in 1998 and 1999 did contain sizable amounts of materiel.

After 14 February 1998, the accused sent Varmuyan Sherif to open a corridor between Lofa County and the RUF-held territories to facilitate the trade of arms and ammunition between the RUF/AFRC and ULIMO. As a result, members of ULIMO who were supposed to disarm and surrender their arms to the United Nations, instead sold or bartered them to the RUF. The accused also provided financial support to the RUF/AFRC in order to facilitate their purchases of arms and ammunition from ex-ULIMO combatants. However, the evidence was insufficient to establish that the accused attempted to help the RUF purchase arms and ammunition from ECOMOG and ULIMO prior to the Junta period.

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The accused facilitated two large shipments of ammunition. The first occurred in late 1997. In around September 1997, the accused sent Ibrahim Bah to Freetown to meet with Sam Bockarie and Johnny Paul Koroma to make arrangements for the procurement of arms and ammunition. Bah was given 90 carats of diamonds and $90.000 US to pay for the shipment. This shipment of arms and ammunition was delivered by plane to Magburaka in Sierra Leone sometime between September and December 1997 and was distributed amongst members of the AFRC/RUF Junta. Materiel from this shipment was used by the AFRC/RUF forces in fighting ECOMOG and SLPP forces in Freetown before, during, and after the intervention, in the Junta mining operations at Tongo fields prior to the ECOMOG intervention, in Operation Pay Yourself and subsequent offensives on Kono, as well as in the commission of crimes during these operations.

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The accused also facilitated a shipment of materiel around November 1998 from Burkina Faso. Ibrahim Bah and Musa Cisse,

Charles Taylor's chief of protocol, accompanied a delegation led by Bockarie to Burkina Faso where a shipment of arms and ammunition was arranged and brought back by plane to Liberia and then transported by trucks provided by the accused to Sierra Leone. The Trial Chamber finds that the accused was instrumental in procuring and transporting this large quantity of arms and ammunition for the RUF, that he was paid for it with diamonds, and that he kept some of the shipment for his own purposes. The shipment from Burkina Faso was unprecedented in volume and, as previously noted, was critical in the December 1998 and January 1999 offensives.

The Trial Chamber considered the Defence submission that other sources of military equipment for the RUF and AFRC far outweighed supplies allegedly provided by the accused. In addition to receiving arms and ammunition from the accused, the RUF and the AFRC also obtained supplies from the existing stockpiles of the former government when they took over power in May 1997, by capturing them from ECOMOG and UN peacekeepers, and through trade with ULIMO, AFL, and ECOMOG commanders. However, these sources of materiel were of minor importance in comparison to those supplied or facilitated by the accused. Significantly, the RUF/AFRC in fact heavily and frequently relied on the materiel supplied and facilitated by the accused. The accused's support often satisfied a need or request for materiel at a particular time, and shipments of materiel supplied by or facilitated by the accused often contributed to and were causally linked to the capture of further supplies by the RUF and AFRC. Although there were instances in which the materiel that the accused gave to the RUF/AFRC was more limited in quantity, on a

number of occasions the arms and ammunition which he supplied or facilitated were indispensable for the RUF/AFRC military offensives. The materiel provided or facilitated by the accused was critical in enabling the operational strategy of the RUF and the AFRC during the indictment period.

12:04:37

On the basis of its findings, more detailed in the written judgement, the Trial Chamber rejects the Defence argument that Benjamin Yeaten, the director of the accused's special security service, to whom the arms couriers reported, was engaged in the trade of arms and ammunition for the RUF independently and without the knowledge of the accused.

12:05:01

Military personnel.

As previously noted, approximately 20 former NPFL fighters who had been integrated into the armed forces of Liberia formed part of a group of approximately 200 fighters led by O-Five, who attacked and committed crimes in Karina and Kamalo in Bombali District on or about August/September 1998. Subsequently, this group of 20 fighters was incorporated into the Red Lion Battalion which was comprised of 200 fighters and was part of a larger group of approximately 11.000 fighters who attacked and committed crimes in Waterloo, Fisher Lane, Hastings, Freetown Eastern Police, Pademba Road Prison, Kingtom, Fourah Bay, and Upgun in Freetown and the Western Area, on or about December 1998, January 1999. These 20 fighters were sent by the accused from Liberia to Sierra Leone where they joined the RUF/AFRC forces in Sierra Leone and participated in attacks in which crimes were committed.

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The Trial Chamber find that Abu Keita and the reinforcements known as the Scorpion Unit were sent by the

accused to Sierra Leone and participated in the attack on Kenema in which Abu Keita committed crimes. The Kenema attack was part of the attack on Kono and Freetown. Although the evidence did not establish beyond reasonable doubt that the Scorpion Unit was
12:06:48 sent for the purpose of fighting in the Kono and Freetown military operations, which included Kenema, Daniel Tamba, on behalf of the accused, approved Bockarie's decision to integrate the Scorpion Unit under his command.

The accused sent former SLA soldiers to the Bunumbu
12:07:17 training camp soon after the intervention, although their subsequent deployment was not established. The accused later sent a group of former SLA soldiers from Liberia back to Sierra Leone to support the attack on Freetown. These men arrived in Kailahun in or around late November 1998, and they
12:07:35 participated in the attack on Kono in December 1998, although they were unable to reach Freetown and did not participate in the Freetown attack.

The Liberian government authorities and AFRC/RUF members recruited and forced Sierra Leonean refugees residing in Liberia
12:07:59 to return to Sierra Leone to fight. However, the evidence did not establish that these civilian refugees participated in attacks in Sierra Leone.

The Trial Chamber considered the allegation by the Prosecution that the accused assisted the AFRC/RUF by capturing
12:08:21 and returning AFRC/RUF deserters to Sierra Leone. The Trial Chamber finds that the Liberian police authorities detained two RUF/AFRC members, Fonti Kanu and Dauda Aruna Fornie, and handed them over to RUF personnel in late 1998 and late 1999 respectively. In evidence about his own arrest and torture in

Sierra Leone, Mohammed Kabbah described as common knowledge the co-operation of Liberian authorities and the RUF on the return of warranted Sierra Leoneans who escaped to Liberia.

Diamonds.

12:09:12 The Trial Chamber finds that there was a continuous supply by the AFRC/RUF of diamonds mined from areas in Sierra Leone to the accused, often in exchange for arms and ammunition.

During the period May 1997 to February 1998, diamonds mined in Kono and Tongo fields were delivered from the AFRC/RUF to the 12:09:37 accused by Daniel Tamba, also known as Jungle, in exchange for arms and ammunition.

Following the ECOMOG intervention from February 1998 to July 1999, the diamonds delivered to the accused by Sam Bockarie directly, as well as indirectly through intermediaries such as 12:10:05 Eddie Kanneh and Daniel Tamba, were given to him in order to get arms and ammunition from him or sometimes for "safekeeping" on behalf of the RUF.

From February 1998 to July 1999, diamonds were delivered to the accused by Sam Bockarie directly. These diamonds were 12:10:29 delivered to the accused for the purpose of obtaining arms and ammunition from him. During this period, diamonds were also delivered through intermediaries such as Eddie Kanneh and Daniel Tamba.

The RUF also traded diamonds with entities and individuals 12:10:48 other than the accused or his government. Testimonial evidence of specific involvement of the accused in the trade of diamonds supported the findings of a United Nations report of a panel of experts that diamond smuggling in Sierra Leone to Liberia was "the bulk of the RUF trade in diamonds," and while difficult to

quantify was nevertheless the "primary source of income to the RUF." This report concluded that the trade of diamonds between Liberia and Sierra Leone could not be conducted in Liberia "without the permission and the involvement of government officials at the highest level."

12:11:39

From July 1999 to May 2000, Foday Sankoh delivered diamonds to the accused and diamonds were delivered to the accused on his behalf in or before 1999 while he was in detention. In March 2000, Foday Sankoh visited South Africa and travelled through Monrovia on his way back to Sierra Leone, meeting with the accused in Monrovia. According to one witness, among the diamonds delivered to the accused during this meeting was a 45 carat diamond and two 25 carat diamonds.

12:12:07

From June 2000 until the end of the hostilities in 2002, Issa Sesay delivered to the accused, including on one occasion a 36 carat diamond. Eddie Kanneh also delivered diamonds to the accused on Sesay's behalf. Sometimes the diamonds were delivered to the accused supposedly for "safekeeping" until Sankoh's release from detention and, at other times, in exchange for supplies and/or arms and ammunition. During this period, diamond trading between the RUF and persons other than the accused also took place.

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As detailed in documentary evidence before the Trial Chamber, Liberian diamonds are generally known to be of a significantly lower quality than diamonds from Sierra Leone, refuting the claim made by the accused that he would have had no reason to trade in diamonds from Sierra Leone because Liberia had its own diamonds. Moreover, the documentary evidence indicates that export of diamonds from Liberia was far greater than

12:13:15

Liberian diamond production, attributing the difference to diamonds from Sierra Leone smuggled through Liberia.

The Trial Chamber finds that the accused also facilitated a relationship between RUF and a Belgian known as Alpha Bravo for the purpose of diamond transactions. However, there was insufficient evidence to establish that the accused facilitated a relationship between the RUF and other diamond dealers.

The accused also provided diesel fuel for the Caterpillars at the diamond mining sites in Sierra Leone and equipment for use in mining diamonds to the RUF on at least one occasion between 1998 and 2002. While there may have been multiple sources of mining equipment and fuel entering Sierra Leone during the indictment period, the accused was among them. The Trial Chamber has also found that men sent by the accused visited at least one mining site and assessed mining operations.

While there was evidence of occasional inquiries from Benjamin Yeaten and reports to him about the activity in the mining sites in Sierra Leone, the evidence did not establish that regular updates were sent to the accused about mining activity.

The peace process.

The Trial Chamber will now summarise its findings relating to the role of the accused in the peace process and the Defence contention that his involvement with the RUF/AFRC was solely for the purpose of promoting peace.

During a radio conversation with Foday Sankoh following the attack on Sierra Rutile in 1994, the accused advised the RUF leader to send an external delegation to Cote d'Ivoire. In Cote d'Ivoire, the delegates met Musa Cisse, an NPFL representative who allowed them to use his radio for

communications with Sankoh. The accused, through contact with Musa Cisse, invited members of the external delegation to Liberia where he met them twice in 1995. In December 1995, the accused met members of the External Delegation in Cote d'Ivoire on the occasion of the publication of "Footpaths to democracy," at which time he gave them 10 million CFA francs for their maintenance.

12:16:22

The accused instructed Foday Sankoh to participate in the Abidjan peace talks from March to November 1996 in order to obtain ammunition and materiel for the RUF. The evidence established that while in Abidjan, Sankoh obtained arms and ammunition for the RUF using funds from Libya. However, the evidence was insufficient to establish that Sankoh used contacts of the accused to obtain arms and ammunition in Abidjan.

12:16:53

The accused played an active role in the Lome peace negotiations, which role the Prosecution alleged to be subversive, suggesting that the accused improperly assisted and advised the RUF delegation before and during the negotiations so as to procure the most favourable outcome for the RUF/AFRC and himself.

12:17:19

The Trial Chamber did not find this to be the case in the absence of evidence that the accused controlled the RUF delegation or dictated the outcome of the negotiations. However, the evidence established that the accused was engaged in arms transactions at the same time that he was involved in the peace negotiations in Lome, publicly promoting peace at the Lome negotiations while privately providing arms and ammunitions to the RUF.

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Following the Lome Peace Accord, the so-called West Side Boys, discontent with the apparent exclusion of the

AFRC from the peace process, kidnapped UN peacekeepers and others in Sierra Leone and demanded to talk to, and then see, Johnny Paul Koroma, their leader. The accused officially and publicly made arrangements to bring Koroma to Monrovia, including
12:18:47 negotiating a waiver of the UN travel ban and facilitating several meetings thereby playing a central role in bringing Koroma and Sankoh together and achieving a reduction in the tension between the RUF and the AFRC. The evidence establishes, as the accused contends, that the UN and ECOWAS heads of state
12:19:12 knew about his public role in the negotiations. Taylor's influence with both Koroma and Sankoh evidently made him a significant actor in the process and helped to facilitate the release of the UN peacekeepers and others who had been taken captive by the West Side Boys.

12:19:32 The Trial Chamber accepts that as president of Liberia, as a member of the ECOWAS committee of five, later committee of six, the accused wielded considerable influence over the warring factions in Sierra Leone and that the ECOWAS heads of state played a substantial role in the Sierra Leone peace process.
12:19:52 However, there is strong evidence showing that while publicly participating in regional efforts to broker peace in Sierra Leone, the accused was secretly fuelling hostilities between the AFRC/RUF and the democratically elected authorities in Sierra Leone. This clandestine undermining of the peace
12:20:15 process by the accused occurred even when he knew that an arms embargo by the UN and ECOWAS was in force in the region.

In late April or early May 2000, the RUF forcibly disarmed and detained a group of approximately 500 UNAMSIL peacekeepers in Sierra Leone. The accused was asked by ECOWAS to become involved

in negotiations for the release of these hostages and his mandate was endorsed by the United Nations. Thereafter, the accused invited Issa Sesay, RUF interim leader, to Monrovia to discuss the matter of their release. After this meeting, from about the middle to the end of May 2000, the RUF released the captured UNAMSIL peacekeepers into Liberian territory in stages. The Trial Chamber found that the accused had significant influence over the RUF decision to release the UN peacekeepers and that in his meeting with Issa Sesay, Taylor promised him assistance "in the struggle." While the Trial Chamber found that Issa Sesay made a trip to Liberia in May 2000 in which he obtained arms and ammunition from the accused, the evidence was insufficient to establish that this material was provided in exchanges for Issa Sesay agreeing to release the UNAMSIL peacekeepers.

In July 2000, a meeting was convened in Monrovia to discuss the selection of new leadership for the RUF following Sankoh's imprisonment. The meeting was attended by all of the ECOWAS heads of state and an RUF delegation led by Sesay, where it was proposed that Sesay take over as interim leader of the RUF. In another meeting late that night, the accused privately advised Sesay to say that he would disarm but "not do it in reality." At that time, the accused was supplying Sesay with arms and ammunition, and also calling on the RUF to send forces to help him fight his own enemies together with the AFL in Liberia and in Guinea.

The Trial Chamber accordingly finds that while the accused publicly played a substantial role in the Sierra Leone peace process, including as a member of the ECOWAS committee of five, later committee of six, secretly he was fuelling hostilities

between the AFRC/RUF and the democratically elected authorities in Sierra Leone, by urging the former not to disarm and actively providing them with arms and ammunition, acting, as the Prosecution described, as "a two-headed Janus."

12:23:23 Leadership and command structure.

The Trial Chamber has considered the leadership and command structure of the RUF and the role of the accused, if any, in relation to that structure. The Trial Chamber has found that Foday Sankoh and the accused met in Libya in the early 1990s and 12:23:45 pursued parallel goals and aspirations, but not in a chain of command. Following Operation Top Final in 1992 and the withdrawal of NPFL forces from Sierra Leone, contacts and co-operation between the accused and Sankoh continued but to a lesser extent. The accused asked Sankoh to send troops in 1993 12:24:10 to help him fight ULIMO. He advised Sankoh prior to and following the RUF attack on Sierra Rutile, and he advised Sankoh to send an external delegation to Cote d'Ivoire.

When Foday Sankoh was arrested in Nigeria in March 1997, he instructed Sam Bockarie to take orders from the accused. While 12:24:35 much evidence was adduced relating to the trade of arms and diamonds between Sam Bockarie and the accused, the evidence did not establish that Bockarie took orders from the accused. The instructions given to Bockarie by the accused were given with the inherent authority the accused had by virtue of his position. 12:25:01 Bockarie was deferential to the accused and generally followed his instruction. However, the Trial Chamber considers that the role Sankoh envisioned for the accused while he was in detention was that he would guide Bockarie and that Bockarie should look to his guidance, not that the accused should take over Sankoh's

rule -- role as leader of the RUF with effective control over its actions.

Sometime around March 1998, Sam Bockarie was promoted. The Prosecution allege that this promotion was made by the accused directly, or through a joint decision between himself and Johnny Paul Koroma. Bockarie had just returned from Monrovia. The Trial Chamber finds that the accused may well have been consulted by Koroma or talked directly with Bockarie about the promotion while he was in Monrovia, but not that Bockarie was promoted by the accused. Like Sankoh, Koroma turned to the accused for advice and support, and the Trial Chamber accepts that he would have consulted the accused. Nevertheless, the accused was not part of the command structure.

12:25:40 12:26:04 12:26:25 12:26:52 12:27:12

In December 1999, Sam Bockarie left Sierra Leone and went to Liberia amidst violent clashes between RUF fighters loyal to Foday Sankoh and RUF fighters loyal to him. He was told to leave Sierra Leone by the accused, but the Trial Chamber finds that in summoning Bockarie to Liberia, the accused relied on the authority of ECOWAS and sought the help of President Obasanjo, organising a meeting at Roberts International Airport between Foday Sankoh, Sam Bockarie, President Obasanjo, and himself, as a result of which a decision was made that Bockarie would not return to Sierra Leone until the disarmament process had been completed.

On 26th of July, 2000, a meeting took place at the executive mansion in Monrovia between the heads of state of ECOWAS and an RUF delegation led by Issa Sesay, where the suggestion was made that Issa Sesay should become the interim leader of the RUF. Sesay would not accept the appointment

without it first being approved by the RUF and Foday Sankoh. A meeting of RUF commanders was held, and a letter was also delivered to Foday Sankoh by President Obasanjo seeking Sankoh's consent to the appointment. At a follow-up meeting in August 2000, Sesay was confirmed as the RUF interim leader. Presidents Obasanjo and Konare both met with Sankoh in Freetown without the accused present, and the Trial Chamber finds that this process was undertaken by ECOWAS heads of state collectively, rather than the accused unilaterally.

The accused called on the AFRC/RUF to assist him in fighting outside Sierra Leone. In 1999, the accused ordered Bockarie to send AFRC/RUF forces to assist him in his fight against Mosquito Spray and the LURD forces that had attacked his forces.

In 2000 and 2001, the accused instructed Sesay to send RUF forces. The RUF forces sent in response to these requests fought alongside AFL forces in Liberia and Guinea under the command of the accused's subordinates. The evidence was insufficient to establish that in 2001, Bockarie left Liberia to fight for Taylor's allies in Cote d'Ivoire as alleged by the Prosecution.

Knowledge of the accused of crimes committed in Sierra Leone.

The accused testified that prior to becoming president, he was not following whether crimes were committed by the RUF in Sierra Leone. The Trial Chamber found that the relationship of the accused with the RUF from 1989 until he became president was much closer than he admitted. The accused knew that during the early war years in Sierra Leone, RUF soldiers, under the command of NPFL officers, abducted civilians, including children, forcing

them to fight within the NPFL/RUF forces against the Sierra Leonean forces and ULIMO. Moreover, the accused was aware that the RUF captured civilians and looted money during the attack on Sierra Rutile, and he advised Sankoh on the use of the hostages and the money.

12:30:18

The accused testified that upon becoming president, he received a daily briefing from his national security advisor which would include press and intelligence reports. Also, following his election, the accused joined the ECOWAS Committee of Five and would therefore have received and read ECOWAS reports. The numerous reports prepared in 1997 by ECOWAS and the United Nations agencies established that as early as May 1997, the crimes committed by the Junta were significantly reported by these international organisations.

12:30:39

In a report of June 1997, the United Nations Department of Humanitarian Affairs reported killings of civilians, amputations, and looting in Sierra Leone. An ECOWAS report of the Committee of Four on the situation in Sierra Leone in August 1997 described the massive looting of property, murder and rapes, following the coup on 25 May 1997. The final report of the 16th meeting of ECOWAS chiefs of state in Abuja, Nigeria, in August 1997, a meeting in which the Liberian representative participated, also described "a very bloody coup, followed by massive looting and vandalisation of public and private properties and the opening of prisons by the Junta." In a speech to the nation on 18 June 1997, the RUF forces themselves apologised for the atrocities they had committed in Sierra Leone, including killings and rapes.

12:31:03

12:31:30

12:32:03

Following a coup on 29 August 1997, ECOWAS decided to place a total embargo on all supplies of petroleum products, arms and

military equipment to Sierra Leone. Similarly on 8 October 1997, the United Nations Security Council decided to impose an embargo on arms and ammunition to Sierra Leone. These embargoes clearly indicate that at the very least by August 1997, the Junta was
12:32:51 perceived by the international community as a threat to peace and it was reorganised -- and it was recognised that military support could facilitate the commission of the crimes described above.

The accused was evasive in his testimony as to what and when he knew about the crimes being committed in Sierra Leone.
12:33:16 In light of these contemporary reports and considering the fact that the accused received daily briefings from his national security advisor about the international situation and was a member of the ECOWAS committee of five, the Trial Chamber finds that as early as 1997, Charles Taylor was informed in detail of
12:33:39 the crimes committed during the Junta period, including murder, abduction of civilians including children, rape, amputation, and looting.

After 1997, the media coverage of the AFRC/RUF's crimes and terror campaign against the Sierra Leonean civilian population
12:34:01 increased. Many reports and articles by international organisations, non-governmental organisations and newspapers admitted into evidence described the atrocities committed by the AFRC/RUF troops after the ECOMOG intervention and the end of the Junta government. These public reports demonstrate that at that
12:34:28 time, it was public knowledge that the AFRC/RUF forces committed the following crimes: Unlawful killings, sexual violence, physical violence, looting, conscriptions and use of child soldiers, abduction, terrorism, and other atrocities.

The accused himself admitted that by April 1998, if

"someone was providing support to the AFRC/RUF," he "would be supporting a group engaged in a campaign of atrocities against the civilian population of Sierra Leone." At that time, as the accused testified, there were news reports of a horrific campaign being waged against the civilian population in Sierra Leone. In a statement dated July 1998, the accused "strongly condemned the continuing rebel activities in Sierra Leone, as well as the horrendous atrocities that had been committed there."

Based on this evidence and the testimony of the accused himself, the Trial Chamber finds that the accused was aware of the crimes committed by RUF/AFRC forces against civilians, including murder, abduction of civilians including children, rape, amputations, and looting, as early as August 1997 when he became president of Liberia.

Summary of legal findings.

The indictment charges the accused with individual criminal responsibility pursuant to Article 6(1) of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute alleged in the indictment. The Trial Chamber has found that the crimes charged under counts 1 to 11 of the indictment were committed and now turns to the responsibility of the accused for these crimes.

Responsibility pursuant to Article 6(3) of the Statute.

The indictment charges that the accused is individually criminally responsible for the crimes referred to in Articles 2, 3, and 4 of the Statute as alleged in the indictment by virtue of holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters. It is alleged that the accused is responsible for the criminal acts of

his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so, and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

12:37:43 The accused denies criminal responsibility based on superior/subordinate relationship with the perpetrators of the crimes.

Article 6(3) holds a superior criminally responsible if the superior knew or had reason to know that his or her subordinate

12:38:03 was about to commit crimes prohibited by the Statute or had done so, and the superior failed to take the necessary and reasonable measures to prevent or punish the perpetrators. It must thus be demonstrated that the superior had effective command and control over his subordinates, that is, the material ability to prevent

12:38:29 or punish the commission of the offence.

The Trial Chamber is of the view that the accused had substantial influence over the leadership of the RUF, and to a lesser extent that of the AFRC. However, that substantial influence over the conduct of others fell short of effective

12:38:51 command and control as demonstrated by the evidence.

The evidence establishes that from 1990 to March 1997, Sankoh was the sole leader of the RUF and that he did not take orders from the accused. When Sankoh was arrested in March 1997, he appointed Bockarie to lead the RUF and instructed him to take

12:39:15 direction from the accused.

The Trial Chamber finds that the accused gave guidance, advice, and direction to Bockarie and to his successor Issa Sesay, but that the evidence does not establish that either of them was a subordinate of the accused, nor that the accused had

effective command and control over the RUF during their respective tenures. Similarly, the Trial Chamber finds that the accused gave guidance, advice, and direction to Johnny Paul Koroma when he was leader of the AFRC/RUF Junta, but the evidence does not establish that he was a subordinate of the accused, nor that the accused had effective command and control over the AFRC/RUF Junta.

12:39:54

With regard to Liberian fighters who were found to have participated in the commission of crimes, the Trial Chamber finds that even if they were sent to Sierra Leone by the accused, there is insufficient evidence to find beyond a reasonable doubt that they remained under the effective command and control of the accused once in Sierra Leone.

12:40:11

The Trial Chamber accordingly finds that the Prosecution failed to prove beyond a reasonable doubt that the accused is individually criminally responsible under Article 6(3) for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in the indictment.

12:40:31

Joint criminal enterprise.

The indictment charges the accused with the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in the indictment, which crimes amounted to or were involved within a common plan, design or purpose in which the accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.

12:40:50

12:41:18

As discussed earlier, the Trial Chamber found that the Prosecution failed to prove that any of the three alleged meetings in Libya, Burkina Faso, and Voinjama, where the common plan was said to have been established, took place. Furthermore,

while the Trial Chamber found that the accused provided significant operational and military support to the RUF, particularly after he became president of Liberia, the evidence does not establish that this support was provided pursuant a common plan in the context of a joint criminal enterprise.

Accordingly, the Trial Chamber finds that the Prosecution has failed to prove beyond a reasonable doubt that the accused is criminally responsible by virtue of having participated in a common plan, design or purpose to commit the crimes alleged in the indictment.

Responsibility under 6(1) for aiding and abetting.

The indictment charges that the accused, by his acts or omissions, is individually criminally responsible pursuant to Article 6(1) of the Statute for, inter alia, aiding and abetting the planning, preparation, or execution of the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in the indictment.

The Prosecution submits that in providing practical assistance, encouragement, or moral support, the accused's acts had a substantial effect on the perpetration of the crimes charged in the indictment and that he had a clear intent to act in support of those crimes.

The Defence denies that the accused is responsible for aiding and abetting the commission of any of the crimes charged in the indictment.

Aiding and abetting requires that the accused gave practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of a crime.

The Trial Chamber finds beyond reasonable doubt that the

accused provided arms and ammunition, military personnel, operational support, moral support and ongoing guidance to the RUF, AFRC, AFRC/RUF Junta or alliance and Liberian fighters for military operations during the indictment period.

12:43:51 Before turning to -- the heading is: Commission of crimes intrinsic to the RUF/AFRC's war strategy.

Before turning to the various forms of assistance provided by the accused, the Trial Chamber considered the RUF/AFRC's war strategy. Throughout the indictment period, the operational 12:44:16 strategy of the RUF and AFRC was characterized by a campaign of crimes against the Sierra Leonean civilian population, including murders, rapes, sexual slavery, looting, abductions, forced labour, conscription of child soldiers, amputations, and other forms of physical violence and acts of terror. These crimes were 12:44:46 inextricably linked to how the RUF and the AFRC achieved their political and military objectives. In particular, under the leadership of Sam Bockarie, the RUF and AFRC pursued a policy of committing crimes in order to achieve military gains at any civilian cost, and also politically in order to attract the 12:45:10 attention of the international community and to heighten their negotiating stance with the Sierra Leonean government. That their operations were given titles such as Operation No Living Thing, and Operation Spare No Soul made explicit the intent of the RUF and AFRC to wage a campaign of terror against civilians 12:45:39 as part of their war strategy.

The findings of the Trial Chamber as to the various forms of assistance provided by the accused are as follows:

Arms and ammunition.

During the indictment period, the accused directly or

through intermediaries supplied or facilitated the supply of arms and ammunition to the RUF/AFRC. The accused sent small but regular supplies of arms and ammunition and other supplies to the RUF from late 1997 to 1998 via his subordinates and substantial
12:46:24 amounts of arms and ammunition to the AFRC/RUF from 1998 to 2001. The accused facilitated much larger shipments of arms and ammunition from third-party states to the AFRC/RUF, including the Magburaka shipment of October 1997 and the Burkina Faso shipment of November/December 1998.

12:46:50 Also during the indictment period, these arms and ammunition were used by the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters in military operations including the Junta mining operations at Tongo Fields prior to the ECOMOG intervention, Operation Pay Yourself, and subsequent offensives
12:47:17 in Kono District in 1998, and in the Freetown invasion in January 1999, and attacks on the outskirts of Freetown and the Western Area in late January to early February 1999. These operations involved widespread or systematic attacks on the civilian population and the commission of crimes. The
12:47:38 Trial Chamber finds that the provision and facilitation of these arms and ammunition constituted practical assistance which had a substantial effect on the perpetration of crimes by the RUF and the RUF/AFRC during the indictment period.

Military personnel.

12:47:58 The accused also provided military personnel to the RUF/AFRC. The accused provided a group of 20 ex-NPFL fighters who had been integrated into the AFL. These fighters fought in Karina and Kamalo in Bombali District in August/September 1998 as part of a group of 200 fighters. These 20 fighters were later

incorporated into the Red Lion Battalion which was comprised of 200 fighters. The Red Lion Battalion was part of a group of 1.000 fighters who participated in the invasion of Freetown and committed crimes during the course of military operations in
12:48:45 December 1998/January 1999.

The accused reorganised, armed, and sent former SLA fighters and Sierra Leonean civilians who had retreated to Liberia back to Sierra Leone to fight in the Kono and Freetown operation, and these men fought in the Kono operation in
12:49:04 December 1998.

Moreover, the accused sent Abu Keita and 150 fighters as reinforcements known as the Scorpion Unit who participated in the attack on Kono and Kenema Districts in late 1998/early 1999.

The Trial Chamber finds that the practical assistance
12:49:26 provided by these military personnel sent by the accused had a substantial effect on the commission of crimes by the RUF/AFRC during the course of military operations.

Operational support.

In the pre-indictment period, NPFL radio operators and
12:49:47 equipment were sent to Sierra Leone, and RUF fighters trained by the NPFL radio -- and RUF fighters were trained by the NPFL radio operators in radio communications with the knowledge of the accused. The RUF continued to benefit into the indictment period from the enhanced communications capacity that resulted from this
12:50:13 assistance. However, as the acts of the accused took place prior to the indictment period, the Trial Chamber has not taken them into account in determining criminal responsibility.

The Trial Chamber found that the accused also provided operational support to the RUF/AFRC during the indictment period,

including giving Sam Bockarie and Issa Sesay satellite phones and facilitating communications for the RUF through the NPFL's own communications network, providing the RUF/AFRC access to radio communications equipment in Liberia, allowing the use of the radio station at Benjamin Yeaten's home for communications with Bockarie and later Sesay, and the transmission of "448 messages" to RUF forces warning them of impending ECOMOG jet attacks which the accused must have known about. This communications support provided practical assistance to the RUF/AFRC for the crimes committed during the course of their military operations throughout the indictment period.

The accused also provided financial support to the RUF/AFRC, including funds to Bockarie of $10.000 to $20.000 at a time, on multiple occasions for the purchase of arms from ULIMO. The accused also kept diamonds and money in safekeeping for the RUF/AFRC.

The accused also provided a guesthouse to the RUF in Monrovia which was used by the RUF to facilitate the transfer of arms and ammunition -- of arms and funds from the accused to the RUF and the delivery of diamonds from the RUF to the accused. The Trial Chamber considers that the provision of the RUF guesthouse by the accused, as a base of operation for procurement and a way station for the transport of arms and ammunition, provided practical assistance to the RUF/AFRC for the commission of crimes committed during the course of military operations. The accused provided other forms of support to the RUF/AFRC, including the provision of security escorts, facilitation of access through check-points, assistance with transport of arms and ammunition by road and by air, safe haven and medical support

for treatment of wounded RUF fighters in Liberia, as well as provisions of goods such as food, clothing, cigarettes, alcohol, and other supplies to the RUF. The accused also sent "herbalists" who marked fighters in Buedu and Kono to protect them against bullets and bolster their confidence. Liberian forces also assisted the RUF/AFRC with the capture and return of deserters to Sierra Leone.

The provision of such support in addition to the military support provided constituted practical assistance to the RUF/AFRC, which had a substantial effect on the commission of crimes committed during the course of military operations.

Encouragement and moral support.

The Trial Chamber has considered the ongoing communications and consultation between the accused and the RUF/AFRC leadership, and the ongoing advice and encouragement that the accused provided to the RUF/AFRC. He advised Sankoh to participate in the Abidjan peace talks in 1996 in order to obtain arms and ammunition for the RUF. He instructed the RUF to open a training base in Bunumbu in 1998 and to construct an airfield in Buedu. He instructed the AFRC/RUF to capture Kono and subsequently advised them to hold and recapture it, as a source of revenue through diamonds that could be used to secure arms and ammunition. The Trial Chamber has taken into account the position of authority of the accused as an elder statesman and as president of Liberia, the deference that was accorded to him by the RUF/AFRC leadership and their reliance on his guidance, and the fact that his advice was generally heeded by them.

Taken accumulatively and having regard to the military support provided by the accused to the RUF/AFRC, the

Trial Chamber finds that the practical assistance, encouragement, and moral support provided by the accused had a substantial effect on the commission of crimes by the RUF/AFRC during the course of military operations in Sierra Leone.

12:55:24 The accused.

The essential mental element required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the

12:55:45 commission of a crime by the perpetrator. In cases of specific intent crimes such as acts of terrorism, the accused must be aware of the specific intent of the perpetrator.

As discussed earlier, the Trial Chamber is satisfied that as of August 1997, the accused knew of the atrocities committed

12:56:11 against civilians in Sierra Leone by the RUF/AFRC forces and of their propensity to commit crimes. Notwithstanding such knowledge, the accused continued to provide support to the RUF and RUF/AFRC forces during the period that crimes were being committed in Sierra Leone. The Trial Chamber therefore finds

12:56:36 beyond reasonable doubt that the accused knew that his support to the RUF/AFRC would provide practical assistance, encouragement or moral support to them in the commission of crimes during the course of their military operations in Sierra Leone.

For the foregoing reasons, the Trial Chamber finds beyond

12:56:59 reasonable doubt that the accused is criminally responsible pursuant to Article 6(1) of the Statute for aiding and abetting the commission of the crimes set forth in counts 1 to 11 of the indictment.

Planning.

The accused is charged with individual criminal responsibility pursuant to Article 6(1) of the Statute for, inter alia, planning the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in the indictment.

12:57:32 The Prosecution submits that the accused, acting jointly with RUF, AFRC and Liberian subordinates, designed or organised the commission of crimes at both the preparatory and execution phases by designing a strategy for the AFRC Junta, the RUF and AFRC forces, including selecting strategic areas to attack and

12:57:58 control, such as Kono and the capital Freetown, and organising the delivery of arms and ammunition needed to carry out the attacks.

The Defence submits that the evidence put forward by the Prosecution does not show that the accused planned the commission

12:58:14 of crimes or was aware of the substantial likelihood of crimes as charged in the indictment as part of the January 6 invasion of Freetown, asserting that it was the AFRC, not the RUF, who executed and planned the attack.

Criminal responsibility requires that the accused, alone or

12:58:39 with others, intentionally planned the criminal conduct constituting the crimes charged, with the intent that a crime be committed in the execution of that plan, or with the awareness of the substantial likelihood that a crime would be committed in the execution of that plan.

12:58:55 The Trial Chamber found that in November 1998, Sam Bockarie and the accused designed a two-pronged attack on Kono and Kenema, with Freetown as the ultimate destination. This plan was conveyed to RUF and AFRC commanders in December 1998 at Waterworks in Kailahun District.

The plan designed by Bockarie and the accused led to the attacks on Kono and Makeni. In the course of the implementation of this plan, a small contingent of troops led by Idrissa Kamara, also known as Rambo Red Goat, reached Freetown and Bockarie's
12:59:39 forces got to the outskirts of Freetown, where they met up with the forces led by Gullit. During the course of the implementation of this plan, these forces committed the crimes committed in the indictment. These crimes resulted directly from the plan made by Bockarie and the accused in Monrovia. There was
12:59:58 evidence that while in Monrovia, the accused instructed Bockarie to make the operation fearful in order to pressure the government of Sierra Leone into negotiations. Moreover, following the Waterworks meeting, the accused told Bockarie during a satellite phone conversation to use "all means" to get to Freetown.

13:00:42 The Trial Chamber found that following the Waterworks meeting, Bockarie told SAJ Musa to attack Freetown, but that SAJ Musa refused to take orders from Bockarie and continued on his own advance pursuant to a separate plan.

I will need to interrupt what I'm saying, unfortunately the
13:01:10 tape has run out and needs to be changed. I think that will be a matter of a few minutes. We won't adjourn. We will wait for it to be changed.

The Trial Chamber found that Gullit took over the leadership of the troops at Benguema following the death of
13:06:46 SAJ Musa. Bockarie then assumed effective control over Gullit and SAJ Musa's plan was abandoned for the Bockarie/Taylor plan, as conveyed by Bockarie at Waterworks. Further execution of the plan was carried out with close co-ordination between Bockarie and Gullit, with Gullit in frequent communication with Bockarie

and with Gullit taking orders from Bockarie. In these circumstances, the Trial Chamber finds that the Bockarie/Taylor plan substantially contributed to the commission of the crimes committed by Gullit's forces while Gullit was operating under Bockarie's command.

13:07:34

The accused, having drawn up the plan with Bockarie, and having followed its implementation closely via daily communications with Bockarie, either directly or through Yeaten, was aware of its continuing evolution.

13:07:50

As mentioned previously, the accused was well aware of the crimes committed by the AFRC/RUF forces in the course of their military operations and that their war strategy was explicitly based on a widespread or systematic campaign of crimes against civilians. Moreover, by his instruction to make the operation

13:08:10

fearful, which was repeated many times by Bockarie during the course of the Freetown invasion and by his instruction to use all means, the accused demonstrated his awareness of the substantial likelihood that crimes would be committed in the execution of the plan.

13:08:27

For foregoing reasons, the Trial Chamber finds beyond reasonable doubt that the accused is criminally responsible pursuant to Article 6(1) for planning the crimes committed by members of the RUF, AFRC, AFRC/RUF Junta or alliance, and Liberian fighters in the attacks on Kono and Makeni, in the

13:08:55

invasion of Freetown and during the retreat from Freetown.

Ordering.

The Trial Chamber has found that while the accused held a position of authority amongst the RUF and RUF/AFRC, the instructions and guidance which he gave to the RUF and RUF/AFRC

were generally of an advisory nature and at times were, in fact, not followed by the RUF/AFRC leadership. For these reasons, the Trial Chamber finds that the accused cannot be held responsible for ordering the commission of crimes.

13:09:34 Instigating.

The Trial Chamber, having already found that the accused is criminally responsible for aiding and abetting the commission of the crimes in counts 1 to 11 of the indictment, does not find that the accused also instigated those crimes.

13:09:54 This brings me to the verdict. I will ask the accused, Mr Taylor, will you please stand for the verdict of the Trial Chamber.

Having considered all the evidence and the arguments of the parties, the Statute and the Rules, and based upon the findings

13:10:19 as determined by the Trial Chamber in its judgement, the Trial Chamber unanimously finds you guilty of aiding and abetting the commission of the following crimes pursuant to Article 6(1) of the Statute during the indictment period, and planning the commission of the following crimes in the attacks on Kono and

13:10:38 Makeni in December 1998, and in the invasion of and retreat from Freetown between December 1998 and February 1999:

Count 1: Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(d) of the Statute.

13:11:11 Count 2: Murder, a crime against humanity pursuant to Article 2(a) of the Statute.

Count 3: Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of

Additional Protocol II pursuant to Article 3(a) of the Statute.

Count 4: Rape, a crime against humanity, punishable under Article 2(g) of the Statute.

Count 5: Sexual slavery, a crime against humanity, punishable under Article 2(g) of the Statute.

Count 6: Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(e) of the Statute.

Count 7: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(a) of the Statute.

Count 8: Other inhumane acts, a crime against humanity, pursuant to Article 2(i) of the Statute.

Count 9: Conscripting or enlisting children under the age of 15 years into the armed forces or groups, and using them to participate actively in hostilities, another serious violation of international humanitarian law pursuant to Article 4(c) of the Statute.

Count 10: Enslavement, a crime against humanity pursuant to Article 2(c) of the Statute.

Count 11: Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(f) of the Statute.

Thank you, Mr Taylor, you can sit down now.

Now, we come to the sentencing process.

Firstly, I remind the parties of their obligation under Rule 100, which provides for the submission of information relevant to sentencing by the Prosecution no more than seven days

after conviction and by the Defence no more than seven days after the Prosecution's filing. This seven-day period runs from the date of conviction, which is today. By the Trial Chamber's calculation, in order to comply with Rule 100, the Prosecution's
13:14:14 filing under Rule 100 must be made by close of business Thursday, 3rd of May. The Defence filing under Rule 100 on the Prosecution -- on the Trial Chamber's calculation must be no more than seven days after that, which would be by close of business Thursday, 10th of May.

13:14:40 Under Rule 100, the parties can provide information relating to factors that affect sentencing, which would include written submissions and testimonials, if any. The extensive judgement summary that is being delivered today will suffice for this purpose, since it is a reasoned opinion of the Trial Chamber
13:15:03 which sets out comprehensively the grounds for convicting Mr Taylor.

Now, secondly, the Trial Chamber considers that this is an appropriate case to fix a sentencing hearing, and fixes such hearing, which will be for additional oral arguments only, for
13:15:27 Wednesday, 16th of May, at 9.30 a.m. At the sentencing hearing, the Prosecution shall limit the length of its sentencing submissions to a time not exceeding one hour. The Defence shall limit the length of its sentencing submissions to a time not exceeding one hour.

13:15:56 If Mr Taylor wishes to address the Court prior to being sentenced, then this will be his opportunity to do so, and he shall limit the length of his address, if any, to a time not exceeding 30 minutes.

Thirdly, a sentencing judgement will be pronounced on

Wednesday, 30th of May, at 11.00 a.m.

Lastly, the accused is remanded until Wednesday, 16th of May, at 9.30 a.m., for a sentencing hearing.

The Court is hereby adjourned to that date.

13:17:33 [Whereupon the Judgement adjourned at 1.17 p.m.]

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 11 MARCH 2011
9.00 A.M.
HEARING

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Erica Bussey
For the Registry:	Ms Fidelma Donlon Ms Rachel Irura Mr Alhassan Fornah
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Mr Mohamed A Bangura Ms Ruth Mary Hackler Ms Ula Nathai-Lutchman Mr Nathan Quick Ms Maja Dimitrova
For the Accused Charles Ghankay Taylor:	Mr Courtenay Griffiths, QC Mr Terry Munyard Mr Morris Anyah Mr Silas Chekera Ms Logan Hambrick Ms Salla Moilanen

staff, for whatever organ of the Court they belong to, and also thank those opposite for their endeavours ensuring that this trial has proceeded smoothly, and it has been a personal honour for me to have been involved in this trial. Thank you very much.

13:31:23 PRESIDING JUDGE: Mr Griffiths, I would like, on behalf of myself and my learned colleagues, to first deal with the matter that you raised personally concerning the apology and your willingness to give that and to draw a line. And we will proceed in that way and we will hear you out.

13:32:35 MR GRIFFITHS: Well, I do apologise to the Court.

PRESIDING JUDGE: Thank you. That will draw a line under that matter and bring it to an end.

As there are no other matters from the parties, I therefore, in accordance with the provisions of rule 87(A) of

13:32:56 the rules of procedure and evidence declare the hearing closed and that the Trial Chamber shall now deliberate in private.

The parties will accordingly be notified when a judgment is to be delivered.

I, too, take the opportunity, on behalf of my learned

13:33:15 colleagues and myself, to thank counsel, the court management service, our own Trial Chamber staff, the interpreters, transcribers and the many others who have worked throughout this trial, for their dedication and their contribution.

The Court will be adjourned to a date to be fixed.

13:33:38 Please adjourn the court.

[Whereupon the hearing adjourned at 1.34 p.m.]

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 25 FEBRUARY 2011
9.30 A.M.
HEARING

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Erica Bussey Ms Doreen Kiggundu
For the Registry:	Ms Fidelma Donlon Ms Rachel Irura Mr Alhassan Fornah
For the Prosecution:	No Appearances
For the Accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah Ms Logan Hambrick
For Courtenay Griffiths:	Mr Peter Robinson

Friday, 25 February 2011

[Open session]

[In the presence of the Accused]

[Upon commencing at 9.47 a.m.]

09:48:36 PRESIDING JUDGE: Good morning. I will open the Court by noting that Justice Sebutinde is not here with us. I have her authorisation to read a notification, which I received this morning from Justice Sebutinde, and I will read it out verbatim:

"This is to notify you that in view of the recent 09:49:09 developments in the Trial Chamber, and consistent with my earlier views and opinion on this matter, both in Chamber and on the Bench wherein I dissented from the directive to lead counsel, I will on principle, not attend Friday's hearing."

I will therefore, first, invite appearances, and secondly - 09:49:38 I haven't added the words end of quote.

In the light of this, I will first invite appearances and, secondly, I will ask counsel if there is any matters which he wishes to make before proceeding.

MR MUNYARD: Good morning, Madam President, your Honours, 09:50:03 and Ms Donlon, who is the Deputy Registrar, who's here in court, that's the first appearance that I note.

Madam President, on the Defence bench is Courtenay Griffiths QC, Morris Anyah, Logan Hambrick, myself, Terry Munyard, and beside me is counsel Mr Peter Robinson, who is 09:50:31 here to represent Mr Griffiths this morning, following your order granting Mr Griffiths right of representation of two weeks ago.

Unless there is anything further you wish to hear from me, I propose now to hand over, first of all, to Mr Robinson.

PRESIDING JUDGE: Thank you, Mr Munyard.

MR ROBINSON: Thank you, Madam President. It's a privilege to appear before your Court and a real honour to represent Courtenay Griffiths. I'd like to speak to you for a few minutes, if you don't mind, about the issue of sanctions under rule 46 that were mentioned.

09:51:07

PRESIDING JUDGE: Prior to you proceeding, Mr Robinson, on that, I did invite comments, first, on the question of the constitution of the Court, in the light of the matter I have just read, and in the light of Justice Sebutinde's absence. I must dispose of that first, prior to hearing any submissions on the issue before us.

09:51:30

MR ROBINSON: Very well, Madam President, since we hadn't had any notice of that, would you mind giving us a few minutes to consult among ourselves before we address that issue?

PRESIDING JUDGE: Please do so.

09:51:45

MR ROBINSON: Thank you.

[Defence counsel confer]

MR ROBINSON: Yes, thank you, Madam President, we would like to invite the Chamber to invite Justice Sow to participate, so the Bench is constituted of three regularly constituted judges.

09:52:25

JUDGE SOW: Let me make this very clear: This Bench is regularly composed with three judges sitting, as it shows. Two judges cannot sign decisions. When the Bench is sitting, it's sitting with three judges, not two judges, and I don't know what. I'm not here for decoration. I am a judge. This Bench is regularly composed, as everybody can see. I don't know how people can think that two judges - I don't know where in this world you will see two judges sitting. It's not possible. This

09:52:41

Bench is regularly composed with three judges. This is my comment. No matter how parties will look at it, it shows and it's apparent that this Bench is composed with three judges. We are three judges sitting.

09:53:34 PRESIDING JUDGE: The Articles governing the composition of this Court and the Trial Chamber mandate that it is to be composed of three judges. This is not a situation where rule 16 applies. Accordingly, in our view, this Trial Chamber is not properly constituted and we consider we have no alternative but

09:53:59 to adjourn this hearing today. The matter is adjourned for a date to be fixed.

Please adjourn the Court.

[Proceedings adjourned at 9.54 a.m.]

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 31 AUGUST 2010
9.00 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Mr Mohamed A Bangura Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah Mr Simon Chapman

responded to a message in connection to Issa or in connection to the transfer of material, either to the RUF or to Issa.

Q. May we go, please, to the next day's transcript, 10 April 2008, page 7185, starting at line 1. Mr Witness, listen to this. There was a question posed:

16:11:26

"Q. Now, the name Ebony, what was it? This same person called Samuel Lamboi was called Ebony. Ebony was what? What kind of name was that?

A. It was just a nickname.

16:11:46

Q. Do you now how he got that name?

A. Before I joined the signal unit, Ebony was already on the radio operating, that is across the Moa River."

Mr Witness, you remember telling us about the code name Ebony that you heard?

16:12:06

A. Yes.

Q. How about this name Samuel Lamboi? Did you ever hear this name while you were at Base 1?

A. No, never.

Q. And then, starting at line 11, there is the question:

16:12:24

"Q. Do you recall the name Senegalese?

A. Yes, sir.

Q. Who was that person?

A. Senegalese at one time was a member of the RUF. That was the time ECOMOG intervention took place. I think he

16:12:40

met me in Sengema and he was to travel to Kono. He was once a member of the ULIMO fighters. According to report we gathered when RUF joined their forces with AFRC was that that Senegalese was one of the soldiers who were fighting alongside the government forces, the SLAs. So when ECOMOG

intervention took place, he also retreated to Buedu. So he was commanded by Sam Bockarie to move to Kono on assignment."

Now, did you ever hear of someone by the name Senegalese while you were at Base 1?

A. I heard of Senegalese. And there were a lot of people in Liberia who were referred to as Senegalese as a nickname. That is like Mosquito, like I explained. Those who were tall and slim bodily could be referred to as Senegalese because, in Liberia, they say the Senegalese are tall people. So a lot of people were called Senegalese. Even one of my friends was called Senegalese because he was tall and slim. But I don't know the Senegalese he is talking about. But the Senegalese that I knew was a Liberian Senegalese.

Q. Thank you, Mr Witness. Let's just go over to the next page because I see something that should be on the record as well. This is at page 7186. The witness, TF1-516, sought to make a clarification and the Presiding Judge allowed it, and the witness was asked the question:

"Q. Yes, what is it you wish to clarify?"

And the witness went on to say at line 7:

"A. I was asked a question to state the number of times I went to the mansion and I spoke of handing over a code chart to operator Sky 1. Operator Sky 1 was not assigned at Base 1. He was at 020 and it was at 020 that I gave him the code chart. I gave the code chart to Sunlight at Base 1, and if that is the case, then the number of times I went to the Executive Mansion Ground is supposed to be two, but not one."

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 18 AUGUST 2010
9.00 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Erica Bussey
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Mr Nicholas Koumjian Mr Mohamed A Bangura Ms Kathryn Howarth Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Ms Silas Chekera Ms Logan Hambrick Mr Tor Krever

A. Well, it - communication is important in war because when you communicate you'd be able to know the position of the other group and the other groups also would know the positions of the others and you'd be able to know about events that are going on.

14:50:44 Q. It's critical, isn't it, to be able to communicate among your own units?

A. Yes, it was important.

Q. Without radios and communications it would be like going into a boxing match blindfolded, you don't know what's going on,

14:51:08 isn't that true?

A. Yes, when you don't have communication you will not be able to know what the other groups are doing at the other locations. Because it happened during the early days of the war when we had the Pujehun group and the Kailahun group, we did not know what

14:51:28 they were doing on the other side.

Q. And when - by the way, Bockarie sent Alfred Brown, he sent King Perry and he sent others also to the north. Isn't that correct?

A. Yes.

14:51:42 Q. Who were these others?

A. Well, I knew about King Perry, Alfred Brown. They also had their own securities.

Q. Liberians were sent by Sam Bockarie to reinforce the north. Isn't that true?

14:52:06 A. No. I did not know about Liberians who were sent to reinforce the north. The person that I know that Sam Bockarie sent was Senegalese whom he sent to Superman in Kono to request for the ammunition that Superman captured. When Senegalese went to Kono he and few RUFs, Superman did not allow them to return,

so he took all of them to the north.
Q. This Senegalese that you're speaking about, let's just briefly talk about him. He was a Liberian, correct?
A. Yes, he was a Liberian ULIMO-K.
14:52:51 Q. Because the name Senegalese, the nickname Senegalese, quite a few people had that name, sort of like Rambo. Isn't that true?
A. Yes.
Q. The Senegalese that you're talking about, was he killed by the AFRC in the October 1999 infight at Makeni with the RUF?
14:53:19 A. Well, he was not in Makeni. He was not killed in Makeni Town. After the infighting between Superman's group and Isaac and against the AFRC, one of the AFRC men, Savage, when he retreated from Makeni, he met Senegalese in Kamabai, that was where he killed him. It was in Kamabai that he killed
14:53:50 Senegalese. That was Savage.
Q. So that was the October 1999 infighting where it was AFRC against RUF, correct?
A. Yes. The AFRC and part of the RUF, because it was not all of us that took part in the infight.
14:54:11 Q. Well, you were the battle group commander at the time, correct?
A. I was the battle group. But the people who chased me in Makeni who killed my bodyguards were the same people whom I had met in Makeni. They started the fighting and I had no control
14:54:30 over them, like Isaac, Superman, and Gibril, including their followers like Nya.
Q. They were ordered by Foday Sankoh to expel the AFRC from Makeni in October 1999, correct?
A. Yes, that was it. Because Superman came from

I N D E X

WITNESSES FOR THE DEFENCE:

DCT-172 46535

CROSS-EXAMINATION BY MR KOUMJIAN 46535

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 2 AUGUST 2010
9.00 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Mr Joseph F Kamara Mr Nicholas Koumjian Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Ms Silas Chekera Ms Kathryn Hovington

Q. Likewise, a similar fate befell members of the RUF in Pujehun District; is that right?
A. Yes. From Zogoda, when they were going to Pujehun.
Q. And is it not right that during the course of their retreat from Pujehun, Zino, unfortunately, lost his life?
09:13:54
MR GRIFFITHS: Objection, counsel is leading the witness.
PRESIDING JUDGE: Yes, Mr Griffiths, I think you are.
MR GRIFFITHS: But, Madam President, with respect, these are well-established facts now. Why do we really need to waste
09:14:18
time having to go over the same ground over and over again when they are clearly established on the record?
PRESIDING JUDGE: Not with this witness, they're not.
MR GRIFFITHS: Very well.
Q. Who is Zino?
09:14:36
A. Zino is Mohamed Tarawalli.
Q. Is Mohamed Tarawalli still alive?
A. No. Mohamed Tarawalli died during the retreat from Zogoda to Kailahun. That was where the Kamajors killed him around Bunumbu.
09:14:57
Q. Well, given that you haven't given any evidence about this, Mr Sesay, take your time, please, and explain to us how Mohamed Tarawalli, AKA Zino, came to take his life. Take your time.
A. Well, during the peace accord between Tejan Kabbah and Mr Sankoh - former President Kabbah and Mr Sankoh, there was a
09:15:30
ceasefire but the Kamajors and the army, that is the SLPP government, they violated the ceasefire, they attacked the RUF bases.
Q. Remember, take your time, Mr Sesay, because the interpreters need to follow. Go on.

I N D E X

WITNESSES FOR THE DEFENCE:

DCT-172 45176

EXAMINATION-IN-CHIEF BY MR GRIFFITHS 45176

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 9 JULY 2010
9.04 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Mr Nicholas Koumjian Ms Ruth Mary Hackler
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Ms Logan Hambrick Ms Fatiah Balfas

A. Yes, Senegalese, yes.
Q. What was that link?
A. Well, Senegalese was at the Mano River with the ULIMO-K forces, the time the RUF crossed around that November 1996, when
11:54:41 Mike Lamin and others surrendered to the ULIMO. That was the first time Senegalese had a contact with the RUF. So in 1997, when Mike Lamin left Liberia to come, he came along with Senegalese to Sierra Leone. From that time, Senegalese was in Kenema with Sam Bockarie during the AFRC period. And when the
11:55:09 intervention happened, Senegalese withdrew with Sam Bockarie to Kailahun, and he was in Kailahun before we arrived there. If you see in that report that Sam Bockarie wrote to Mr Sankoh, that salute report, he said he had sent people to Superman to receive ammunition that he captured during the Fitti-Fatta attack, and
11:55:40 Superman seized the people. Senegalese was among that group. He was in that group, and he went to Superman. He was with Superman until December. Senegalese came to Makeni with Superman, and I was in Makeni when Superman went to Lunsar. So Senegalese was in Sierra Leone from 1997, before this invasion in Freetown which
11:56:12 occurred in 1999, January.
Q. The second question: Have you heard of a Red Goat Battalion?
A. Yes. That battalion operated with the Mani group in Koinadugu. I heard about that name in December 1998 when we met
11:56:47 at Makeni.
Q. Who made up that Red Goat Battalion?
A. They were the RUF soldiers.
Q. Were they Liberians?
A. No.

I N D E X

WITNESSES FOR THE DEFENCE:

DCT-172 44119

EXAMINATION-IN-CHIEF BY MR GRIFFITHS 44119

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 23 APRIL 2010
9.34 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Mr Nicholas Koumjian Mr Mohamed A Bangura Ms Kathryn Howarth Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

people crossed into Kailahun for defensive purposes.
Q. Those that crossed to Kailahun, was it the case that they were led by CO Mohamed?
A. That was the time we lost CO Mohamed. That was the time he
09:48:29 got missing, and up to this moment we don't know his whereabouts. He never reached Kailahun. He was captured by enemies and he was killed. That was how Foday Sankoh gave the command structure to Sam Bockarie.
Q. When you went to the Northern Jungle, you said together
09:48:48 with Manawai and a few men, who was the commander of your group?
A. The commander we met there was Superman. Superman was on the ground. Isaac Mongor was there and some other officers.
PRESIDING JUDGE: Mr Anyah, it would be helpful to have some time frames for some of these movements as you go along.
09:49:19 MR ANYAH: Yes, Madam President:
Q. Mr George, what year was Zogoda overrun by the enemy?
A. In 1996.
Q. In what year did you, Manawai, and others go to the Northern Jungle?
09:49:40 A. It was in that same 1996, because Manawai and I were assigned together. We were assigned on the same operation.
Q. Was it the early part of the year, the middle part, or the later part of the year?
A. It was the middle part. It was the middle part.
09:50:01 Q. Where was Foday Sankoh at the time Zogoda was overrun?
A. At that time Foday Sankoh went on the peace talks in Abidjan.
Q. So you are now at the Northern Jungle with Dennis Mingo, Isaac Mongor, Manawai and others. What happened to those of you

I N D E X

WITNESSES FOR THE DEFENCE:

DCT-062 39744

EXAMINATION-IN-CHIEF BY MR ANYAH 39744

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 23 MARCH 2010
9.00 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Erica Bussey
For the Registry:	Ms Rachel Irura Ms Zainab Fofanah
For the Prosecution:	Ms Brenda J Hollis Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Silas Chekera

A. Kamajors, 1996.
Q. Where did the Kamajors first attack the RUF after the signing of the ceasefire?
A. At the Koribundu Jungle. It was dissolved.
10:33:27 Q. What happened to the fighters who had been at the Koribundu Jungle?
A. Some ran to International Boko and some came to us at Zogoda.
Q. And were the RUF able to hold on to the base at
10:33:52 International Boko?
A. Yes. Our brothers were still there, 1996.
Q. Now, you've told us that you had gone with CO Mohamed to Zogoda. Can you give us any rough estimation of when it was you arrived in Zogoda?
10:34:19 A. It was after the departure of Foday Sankoh. The month he left, it was that same month that we entered Zogoda and he took over as the RUF leader, the second leader. I can't recall the exact month, but it was that same month that Pa Sankoh departed for Ivory Coast that we went there and he took over.
10:34:45 Q. [Microphone not activated] that?
A. 1996.
Q. Thank you. And did you remain at Zogoda?
A. We used to trip to Bandawor, areas like Zundumi [phon], all the areas that were around us, we used to patrol those areas. We
10:35:13 would go to Bandawor, Zundumi. Zogoda was a very big place, a big place that Pa Sankoh had established. Yes.
Q. How long did you stay based at Zogoda?
A. I cannot guess the month that we entered Zogoda, but I can tell you the exact day that we left Zogoda, after the Kamajors

had finally pushed us. It was on November 12, 1996. November 12, 1996. That was the time we finally left Zogoda.

Q. And although you've already mentioned it, just tell us what happened to cause you to leave Zogoda on that date.

10:36:17 A. It was as a result of the persistent attacks from the Kamajors and we were on ceasefire. We were not ready to attack, and it was as a result of the attacks that we decided to leave. We had arms, but we did not have enough ammunition. In fact, we had run short of ammunitions. We had weapons with us, but no

10:36:37 ammunition.

Q. Who was in charge of the Kamajors, as far as you were aware?

A. Well, according to news that was filtering in --

THE INTERPRETER: Your Honours, could the witness be asked

10:36:53 to repeat that name.

PRESIDING JUDGE: Can you please repeat the name you just gave and continue your evidence.

THE WITNESS: Chief Hinga Norman.

MR MUNYARD:

10:37:05 Q. And what was his position in Sierra Leone at that time?

A. Well, we heard at that time that he was the Deputy Defence Minister under the President Kabbah government.

Q. Now, what was Foday Sankoh doing on November 12, 1996, and where was he?

10:37:35 A. He was still in the Ivory Coast.

Q. Doing what?

A. He was still on the same peace mission. He was trying to bring Pa Kabbah on board so that they will respect the ceasefire and then they will stop attacking our positions, that is, the

Kamajors.

Q. You say that you left Zogoda on that day. Did anybody remain behind in Zogoda, or was the RUF base then completely emptied?

10:38:18 A. On 12 November, that particular base was finally deserted and it was deserted by the Kamajors November 1996.

Q. Where did you go to from Zogoda?

A. After we had crossed the highway and we jumped over the roads to the other side, we passed the night in a small bush on

10:38:54 our way to Kailahun District. That should be around the Kenema District. And we went to a small bush, that was on the 12th, and we passed the night there. And 13 November, that was the following morning, we went to Basala and Basala was a small village.

10:39:20 Q. Pause there for a moment. B-A-S-A-L-A. Why were you going to Kailahun District?

A. Zogoda had fallen, so we have nowhere else to go to but to go back to Kailahun so that we'll decide what to do next, because we did not have anything to fight with. We never had ammunition,

10:39:57 so we were all trying to move out off from the streets.

Q. Who was in Kailahun?

A. At that time Sam Bockarie was the commander in Kailahun alias Mosquito, 1996.

Q. Was Zino with you when you left Zogoda on 12 November?

10:40:23 A. Yes, my Lord.

Q. Was he going with you to Kailahun where Sam Bockarie was the commander?

A. That was what we expected to do, for us all to go to Kailahun. But unfortunately for us, it was at Basala that Zino

I N D E X

WITNESSES FOR THE DEFENCE:

DCT-146 37806

EXAMINATION-IN-CHIEF BY MR MUNYARD 37807

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 26 NOVEMBER 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Mr Nicholas Koumjian Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard

President, there is a government, the RUF is a part of that government. That's what I know.

Q. At this meeting in November with Sam Bockarie did you give him shopping money?

12:19:19 A. No, Mr Koumjian, I did not give him shopping money.

Q. Why is it that you were giving him shopping money and then you stopped doing that?

A. Mr Koumjian, the issue of giving him shopping money in previous times in 1998 that you referred to was a matter that

12:19:47 leaders do all of the time. By the time Sam Bockarie comes to Liberia at the time you are talking about Sam Bockarie doesn't appear to need any little help from me. He is well attired and all that. I mean I could have very well given him money but I didn't. I mean, I didn't see the necessity at that time. It

12:20:06 depends on how the leader feels at that time when someone at that subordinate level visits him.

Q. So I gather from your answer that it was apparent to you that between what you say is your first meeting with Sam Bockarie in September 1998 and this meeting in November, a little over a

12:20:30 year later, Sam Bockarie had enriched himself; he was better off?

A. No, Mr Koumjian, I would not use that word. I would disagree. I have not even alluded to enrichment. I said that I saw no need to give him money. Now that's not my testimony that he had enriched himself.

12:20:54 Q. Was there a reason why you saw a need to give him money before and then you said he came back, he is well attired and all that. You said, "Sam Bockarie doesn't appear to need any little help from me." So was that because he looked richer to you?

A. Well, he looked a little better. He looked better taken

care of. The matter of giving gifts to individuals is really - it's really a judgmental matter. From time to time people come different places to visit you. You know, I guess for some of us it's a tradition. I don't know about other parts of Africa.
12:21:36 It's a tradition in West Africa to - and may I just almost say most parts of Africa. You come from - especially in dealing with these kinds of things. You do little gifts to people. They come, give them a little money, go buy a gift or something. For me it's mostly traditional, Mr Koumjian.
12:21:59 Q. When Sam Bockarie came to stay, I believe you said that was in December 1999, and we understand by "stay" he is not there forever, you understand what I mean, when he came in December '99 and was given a house, he was also given a salary?
A. Yes.
12:22:17 Q. $1,000 a month. Is that right?
A. That is correct.
Q. What was the salary of an AFL soldier at that time?
A. An AFL soldier was making far less. He could have been making about maybe as much as 1 ,000 to 1,500 Liberian dollars
12:22:37 which would be maybe $300, $400.
Q. In fact, Mr Taylor, that would have been the salary of SSS or ATU but that was not the salary of regular AFL soldiers, was it?
A. What was not the salary of regular AFL soldiers?
12:22:49 Q. $300 a month?
A. No, that was not the - yes, certain officers at that particular time, depending on the rank, could have been making about 1,000, like I said, to 1,500 Liberian dollars, yes.
Q. An enlisted man in Liberia at that time in the Liberian

army, the AFL, would make about $5 a month. Isn't that right?
A. No, Mr Koumjian, that is not correct.
Q. $5 US a month?
A. No, that is not correct.
12:23:27 Q. How much would they make, according to you?
A. I would put it to around maybe 4 to 500 Liberian dollars a month.
Q. There was 50 Liberian dollars to the US dollar at that time?
12:23:39 A. No. During my administration it was $40.
JUDGE SEBUTINDE: Mr Koumjian, Bockarie's $1,000, was that US or Liberian dollars?
THE WITNESS: US dollars.
JUDGE SEBUTINDE: US dollars?
12:23:51 THE WITNESS: That is correct.
MR KOUMJIAN:
Q. In the trips that he had made before he came, you said you didn't give him any gifts on the fifth and sixth trips. In total how much had you given him on the earlier trips?
12:24:06 A. Well, again, Mr Koumjian, you have just - I have to be very careful with these records. You and I have not discussed the sixth trip yet. We've discussed only the fifth. You've added the sixth. You're asking me specifically about the November visit, that's what I have responded to and I'm calculating that
12:24:27 to be the fifth. You've not asked me about the sixth.
Q. Sir, I'm sure, as I made a mistake this morning, I think you are miscounting and just to make it easier for you let's review them. There were three trips in 1998?
A. Yes.

Q. You have told us September, October and November. And we've talked about April '99, we talked about September '99 and now we're on the sixth trip, November '99?
A. Well, you asked me about the November trip and I say - because that's the trip that he and Foday Sankoh are there.
Q. No, okay. Now my question, sir, is on the six trips in total how much had you given Sam Bockarie?
A. It could have been as much as $4,000 maybe $5,000.
Q. Sir, what was the condition of the average Liberian at that time? Do you have an idea? What was the, let's say, gross national product per capita? Do you know what that was in Liberia at that time?
A. No, I don't remember the figure but the condition in Liberia were not very good, but people were fairly comfortable. I mean not rich. They were suffering but fairly comfortable.
Q. Mr Taylor, isn't it true that about 80 per cent of the population was living on less than $2 a day?
A. Well, those statistics, I am not sure if it's $2. That sounds like a reasonable amount. But, again, because of the way you're going, we have to answer you. I can even agree to less than $2 a day. But then we are talking about different - well, okay, I'll wait for you. Go ahead.
Q. I'm enjoying you're elaboration. Do you have anything else to add to that?
A. Because, you know, you say less than $2 a day, I say I agree. I will see where you are going then I will respond.
Q. Did Sam Bockarie in all the time that you knew him give you gifts back as is common in the African tradition and others when you visit a host?

A. No, Sam Bockarie did not give me any gifts.
Q. All that you did for Sam Bockarie and he didn't give you a single gift in return?
A. Sam Bockarie never gave me any gifts. Never.
12:26:57 Q. For how many months did you pay Sam Bockarie this $1,000 a month salary?
A. Sam Bockarie received that money up until his departure in late 2000.
Q. Sam Bockarie during all this time you knew had been the
12:27:11 leader of the RUF, correct? He had been the leader of the RUF up until he left Sierra Leone, correct, the military leader?
A. Okay. He had been the military commander.
Q. Thank you. That's a better word. Thank you.
JUDGE SEBUTINDE: Mr Koumjian, if I may seek clarification
12:27:29 from the witness. Did you say you were paying Sam Bockarie a salary because he was working as what?
THE WITNESS: No, I was not paying Sam Bockarie a salary because he was working as something. Sam Bockarie was given a subsistence by the Government of Liberia which for us was a
12:27:46 contribution to the peace process for being in Liberia. He was not working for the Liberian government. It was a subsistence given for he and his family because he had been invited by the government.
JUDGE SEBUTINDE: So it was subsistence, not salary?
12:28:02 THE WITNESS: It was subsistence, not salary. He was been asking me about the amounts, your Honour, and I have been really verifying that. He didn't work. He didn't do any work at all for the Government of Liberia.
MR KOUMJIAN:

I N D E X

WITNESSES FOR THE DEFENCE:

DANKPANNAH DR CHARLES GHANKAY TAYLOR	32513
CROSS-EXAMINATION BY MR KOUMJIAN	32513

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 25 NOVEMBER 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Mr Nicholas Koumjian Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Mr Terry Munyard

amputations, correct?
A. It depends on when. You've been switching me between '99 and '98. February, the intervention - you've been switching me between the intervention and the 6 January invasion and so it
11:14:23 depends on now - by the intervention time, if you read the Secretary-General's report - because I know of that report. We've presented copies here. Following the intervention - most of the issues that came up following the intervention that Liberia was concerned with was the presence of Liberians and
11:14:47 that's what we were seized with at that time. So I'm not aware of the details. Following the 6 January '99 situation, yes, that's a different story. We begin to get more details based on even what - if you read the Secretary-General's report, what we all received, that's what I'm talking about.
11:15:09 Q. So in your role as a contact person with the parties to the conflict - do you accept that word? I'll use whatever you choose. Point man. Which word would you like me to choose, Mr Taylor?
A. Yeah, I would like to say the point President, yeah,
11:15:26 responsible.
Q. Point President?
A. Yeah.
Q. Sir, as the point President in the negotiations, wouldn't it be important to understand who you're dealing with on the
11:16:05 various sides?
A. Yes, it would be very important.
Q. So did you read up about what the RUF - who they were and what they were doing?
A. Yes. Whatever reports came I read the reports from ECOMOG,

Q. Did you read the United Nations reports about atrocities committed in Sierra Leone?
A. Yes, the Secretary-General's report, I read them, yes.
Q. Did you read reports or get summaries of reports of the
11:19:51 international human rights community, people like Amnesty, Human Rights Watch, and their reports that of the atrocities that were being carried out by the RUF and its allies in Sierra Leone?
A. No, no, I did not. I only read the Secretary-General's reports.
11:20:09 Q. Did you read the reports in Liberian newspapers about the atrocities being committed against the civilians in their neighbouring country, Sierra Leone?
A. Well, I received briefings on the reports. I did not very rarely grab up a whole bunch of papers to read. I had people
11:20:25 that would summarise the important issues. But I received reports of what was reported in the papers as being reported in the international media, yes.
Q. Let's look a little bit at that situation after the intervention. The RUF was on the run, isn't that right?
11:20:47 A. When you say "on the run" --
Q. Thank you. That's a fair question. I'll try to clarify it. The RUF is militarily weakened?
A. Well, I would say I don't know. The intervention was against the junta and if you want to ask me if the junta - well,
11:21:09 your question was the RUF. I don't really know, Mr Koumjian, if they were weakened or not.
Q. Was the junta weakened?
A. Well, I would say yes, they were destroyed.
Q. They were destroyed. In fact, the AFRC and the RUF, the

allies, had lost most of their heavy weapons that were in Freetown during the intervention. You knew that, didn't you?
A. No, I did not know.
Q. As the point person on peace, wasn't it important to understand the strategic situation?
A. Well, one could say that. But if your question is did I ask how many guns, how many pieces of artillery did they lose, I didn't get into that. For ECOWAS, driving the junta out of power was something that was agreed upon by ECOWAS. So for me strategically I did not ask for the military and intricacies of loss of equipment. I didn't really get into that.
Q. You understand strategically the junta, the RUF and its AFRC allies, were retreating and weakened, correct?
A. Definitely. We received reports on that, yes.
Q. Sir, let me ask you this: At this point - let's even get a date so it will be clear to you. Let's say by April 1998, was it clear to you that anyone who continued to provide support to the RUF and the AFRC would be supporting a group engaged in a campaign against the civilian population of Sierra Leone?
A. Well, I would say no because I was not aware that - I was not aware of anyone that was giving - as you put the question, giving support to be aware that anyone that would continue. So I really don't know how to answer this question. To the best of my knowledge from reports that reached to the Heads of State, we did not get an indication that they were receiving support from outside.
Q. Sir, my question is: Would anyone who gave support to the RUF be giving support to a force that was carrying out a campaign of atrocities against civilians as of April 1998?

A. That never - you're talking about strategically thinking about it. No, it didn't - what I was hoping was that nobody would support the RUF. So I was not thinking in that particular direction, no.

11:23:27 Q. What did you do to make sure that no one would support the RUF?

A. Well, like I said, I was not aware that anyone was supporting the RUF in the first place to begin to plan that no one would do so. But what I did know at the particular time was

11:23:43 that ECOWAS had taken a decision that the junta would not be in power. That had been accomplished. All of us took part in that by, you know, in making sure that they were removed. I provided bases for that. So as far as I'm concerned, the strategic interest of ECOWAS had been served and the international

11:24:06 community.

Q. Let's go back to my question because I don't believe you've answered it. The question is not whether you were aware of people providing support. The question is: If someone was providing support to the RUF/AFRC as of April 1998, they would be

11:24:23 supporting a group engaged in a campaign of atrocities against the civilian population of Sierra Leone. Do you agree?

A. Well, to an extent you could say yes, anybody that would supply would be doing it against the civilians, yes.

Q. Now, what did you do to assist ECOMOG to weaken the RUF?

11:24:46 A. Well, it was not what I had to do. Nothing. I did absolutely nothing outside of - we're not operating by me or you. What did I do? Absolutely what was within the purview of ECOWAS to work to bring peace. That's what I did; work for peace.

Q. Mr Taylor, did it occur to you that the best solution for

the people of Sierra Leone would have been the defeat of the RUF and the AFRC?

A. Quite frankly, no. Personally, my views were part of a concerted view of many other individuals. My own personal view was that the return to peace and the recognition of the Kabbah government was the proper way to go. That was my personal thought.

Q. So because of that personal belief, did you refrain from doing anything that would weaken the RUF?

11:25:52 A. Well, I had nothing personal to do. Again I'm not going to get into personal, because the situation was not personal. So there was nothing - I did nothing personally. Absolutely nothing personally.

Q. Liberia was a member of ECOWAS at this time, of course?

11:26:14 A. It is, yes.

Q. And Liberia - in fact, what was your relationship to ECOMOG at that time?

A. Depending. We had - what time are you speaking about now?

Q. I'm talking about after the intervention. Just for

11:26:31 precision's sake we'll call it, say, April 1998?

A. We had a bittersweet relationship.

Q. Did you do anything to assist or to hinder ECOMOG in the fight against the RUF in Sierra Leone?

A. That's two questions, Mr Koumjian. I've answered the first

11:26:47 one. Did I do anything to assist them? Yes. Did I do anything to oppose them? No.

Q. What did you do to assist ECOMOG in the fight against the RUF?

A. We provided the use of Liberian territory, Roberts

atrocity?

A. Terrible, terrible atrocity, Mr Koumjian.

Q. Did you receive reports about that occurring in Koidu by the junta forces by the RUF and the AFRC?

12:33:59 A. There were reports, yes. I did not receive them, but I got to know of these reports, yes.

Excuse, Mr President, just for the Court, you see, I am trying not to waste time. I am interpreting Mr Koumjian's question, "Did you receive as point President" ECOMOG coming to

12:34:26 mean and saying, "Mr Point President, here is what is going on". So that's what I am responding to. So when you say, "Did you receive", it is as if there is a subordinate out there bringing you specific reports. So that's what I am responding to.

Now, did I read reports of such through United Nations

12:34:48 agencies? Yes. So I don't want to be told later on: Well, you say you didn't know. That's not what I am saying. I am just saying for the Bench when you asked me, "Did you receive", that's how I am interpreting reception.

Q. So after reading these reports from the United Nations and

12:35:04 other sources, what was your opinion of the leadership of the RUF?

A. Obviously, any - and, again, these reports were by the junta and all of them. Anyone that was involved in atrocities anywhere, I would give them a very, very low score that they were

12:35:27 not acting properly.

Q. Did you believe that they were war criminals?

A. Well, I didn't get into the legal part of it, and we are talking about at this particular time, and a lot of people that - no, I did not get into that legalistic side. Never evaluated it

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Leone because, like I said, after the intervention in February, they did not have total cessation of hostilities. He showed interest in what I had to say and said that one of the things on his mind - or the RUF - was the release of their leader. So I
13:02:26 said, well, fine, that is an issue that I would discuss with other colleagues in ECOWAS. But what we were interested in was making sure that we had peace and a return to the 1996 agreement that had been signed in la Cote d'Ivoire. That was my conversation with him.

13:02:45 Q. Thank you. So it was clear at that time to you that Sam Bockarie still recognised Foday Sankoh as a leader of the RUF?

A. Well, I tell you what, I can only say what he said to me; that they wanted Foday Sankoh released. That was one of the conditions he said.

13:03:07 Q. Well, in fact, the words you used were: "He showed interest in what I had to say and said that one of those things in his mind were the RUF was the release of their leader." So did you understand him to be saying that the RUF still recognised Foday Sankoh as their leader?

13:03:30 A. Well, I would say - I could say subjectively yes. I mean, he said that they wanted, you know, their leader released. That's how he put it, yes. I would say yes.

Q. Did you then try to contact Foday Sankoh in Nigeria?

A. No.

13:03:47 Q. Excuse me, because I may be misleading. He was brought - around that time he was brought to Sierra Leone. Is that correct?

A. I know he was transferred, what, about --

Q. I think it was August.

I N D E X

WITNESSES FOR THE DEFENCE:

DANKPANNAH DR CHARLES GHANKAY TAYLOR	32334
CROSS-EXAMINATION BY MR KOUMJIAN	32335

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 22 SEPTEMBER 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Mr Terry Munyard Mr Silas Chekera

miles away. And the men are supposed to be in training camp being trained by a Monica Pearson.

Q. Now, Mr Taylor, perhaps you can help me. On line 14 on page 2020 the witness said this: "He shot and said we were coming around the State House" - this is Bockarie in conversation with Robin White - "but we were in Buedu." What do you understand by that?

A. You say he shot and said?

Q. This is Bockarie shot and said we were coming around the State House but we were in fact in Buedu. What do you understand by that?

A. These boys are playing games like cowboys. I mean Sam Bockarie is supposed to be letting maybe Robin White hear the sound of gunfire as an impression that Sam Bockarie is in the Freetown area where the fighting is going on. They are really taking the heat - they are taking this thing for fun.

Q. And the witness continues, Mr Taylor, page 2020 line 21:

"Q. Did Sam Bockarie maintain any communications with people in Freetown?

A. Yes, in Freetown.

Q. In and around Freetown?

A. He was talking to the various commanders over the Yaesu radios. He also communicated with Benjamin Yeaten and Joe Tuah over his satellite phone at night."

Then he goes on over the page, page 2021 line 11.

"Q. You mentioned that Bockarie was on the satellite phone with Benjamin Yeaten and Joe Tuah?

A. Those are the names I recall.

Q. Did you hear him talking to Benjamin Yeaten and Joe

Tuah during the Freetown fighting?

A. Yes.

Q. Do you know when the Freetown fighting occurred?

A. It started in January. It was on 6 January that they called from the State House saying they were in control of the State House.

Q. What year?

A. That was in 1999, sir."

Now, Mr Taylor, you understand the implication of that, don't you? That senior members of your regime were in contact with Bockarie during the Freetown invasion. Is that true or false.

A. I would say totally false, because they would have no reason to be in touch with Sam Bockarie during the Freetown invasion. None whatsoever. I would say it's false.

Q. But he continues. Page 2022:

"Q. What did Bockarie tell you? What did you hear him say to Benjamin Yeaten?

A. I heard Bockarie and Benjamin Yeaten conversing about the progressive move that RUF has made. I didn't hear any instruction from Benjamin Yeaten to Bockarie to say do this or do that at the time.

Q. During the fighting in Freetown in the January offensive did you play any part in that? What was your assignment?

A. I told you I was assigned to Segbwema, Bunumbu just in case any wounded soldier came. I will take that wounded soldier to Buedu where he could be treated at the rear. Even Mano, I made civilians to make a hammock so they can

I N D E X

WITNESSES FOR THE DEFENCE:

DANKPANNAH DR CHARLES GHANKAY TAYLOR 29286

EXAMINATION-IN-CHIEF BY MR GRIFFITHS 29286

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 17 SEPTEMBER 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Ruth Mary Hackler
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah

who led the troops that entered Freetown?

Q. So who was at the transmitting station with you? Who else was there on this day, 6 January?

A. I met all the operators - in fact almost all the operators by then were in the transmitting station. Like Seibatu, Tiger, Tourist. Almost all the operators were in the station on that particular day.

Q. Now, on that particular day what stations was the transmitting station in Buedu in contact with?"

15:44:03 Now, pausing there. Mr Taylor, at the time - this is back in January 1999 - were you aware of an AFRC commander called Gullit?

A. No. No.

Q. Were you aware back then that the invasion of Freetown had been led by that individual?

15:44:37 A. No, I didn't know.

Q. Let's move on. Page 21581, line 1:

"Actually, there had been some minor problems that had been existing between us and Gullit. That is, RUF and AFRC. That was Sam's concern. That was the only time that he was grumbling. Even before they entered Freetown and even when he received the message in the morning, that was when Sam was saying that. He said maybe Gullit and others would want to - maybe they would change this time around to cooperate if at all they didn't go there to seize power, they wouldn't want to be greedy and take power on their own. And Sam Bockarie assured Gullit that Rambo was very close to him on his way to join him in the city - and that Rambo was on his way to join him in the city and that time

Liberia. Momoh does not leave that part of the world until Johnny Paul Koroma is released from there in August 1999. So Momoh is up there in the bush suffering. I understand he was sick for many months. So why would I order or be in control of an operation in Freetown where the former President, who is friend of mine, would come out and I have such control that I cannot ask - or not even ask. That's the wrong word. That I cannot instruct, "Have Momoh brought to me", that he would be at least comfortable in Liberia. I have nothing to do.

16:00:10

16:00:26

But there is - I am not too sure about this and I don't want to jump the gun, because there is a name - there are names floating in this section here that I see a link in the lie and the construction of this lie, and I don't know if I can associate a particular name here, but I don't know the status, so I will just leave it for now.

16:00:48

Q. Well, hold on a second. Yes. Hold on a second. Now, you notice, page 21586, yes? Note the route of communication. It is Mosquito to Yeaten. Yeaten calls back and tells him there is this instruction from Mr Taylor. Do you see it? Page 21586.

16:01:35

A. Uh-huh.

Q. And Mosquito told the operator in charge - that was one Mohamed Kabbah, yes?

A. Uh-huh.

Q. Remember we looked at Mohamed Kabbah yesterday?

16:01:46

A. That's what I was saying just now. I don't know the status, that's why I didn't want to mention any names.

Q. Let's just remind ourselves. Mohamed Kabbah, who we looked at yesterday, page 16173, 15 September 2008, line 7:

"Sam Bockarie communicated with Benjamin Yeaten, and he

used to communicate as well as with Charles Taylor. But for the communication with Charles Taylor, that one he used a satellite phone. And the capture of Freetown, that was not even a hidden thing that he would go to a corner and discuss like he used to do. That one he did in the open place when he was trying to inform Charles Taylor that our men were in Freetown. He did that in the open because the RUF was happy. That was a joy to the RUF. They had entered Freetown."

You see that?

16:02:45 A. Yes, but that's the name I was talking about. I didn't know as to what - when I said I didn't know the status, I didn't know his status, because I remember what he had said. I didn't know his status.

Q. Right. So help us, Mr Taylor, which is right? Did 16:03:00 Mosquito speak to you directly, or did he speak to you through Benjamin Yeaten? Help us.

A. Neither of them. Neither of them. That's what makes it so confusing. I picked it up right away and said I didn't want to mention his status, because two different stories about the same 16:03:18 situation.

Q. But Mohamed Kabbah, according to this witness, is the operator in charge. He is supposed to know. So help us, what's going on here, Mr Taylor?

A. Absolutely - from what I know, there is none of this kind 16:03:35 of thing. There is no contact with Sam Bockarie. I don't speak to Sam Bockarie on the 6th and so on. So this is why I am explaining you have this radio operator saying one thing here, Mohamed Kabbah saying a different thing about the same thing and dealing with the same person. This shows you maybe it's almost

like a script. Maybe they forgot their lines.

Q. And this witness - let's go back to the one we've been dealing with today.

"And Mosquito told the operator in charge, that was one Mohamed Kabbah I can recall, and on that very day he was the one on duty and he sent the massage. I was there when Mohamed Kabbah encoded the message and sent it to Gullit and others for them to send back these people to the rear for safety.

16:04:44 Q. How did you know Mosquito was speaking to Benjamin Yeaten?

A. After he called Benjamin, and I was sitting at the other extreme edge of the corner, he said, 'Is this Five-Zero?' And he said yes. He explained to him the development at the frontlines, and when he was talking to him he used to respond, 'Yes, sir.' When they were discussing, he would respond to him directly 'Yes, sir. Okay, okay, I will do that.' And when Mosquito finished, he told the operator directly that he had had instructions from Benjamin from above; that is, Charles Taylor through Benjamin" - note: Not directly - "that Benjamin had told him that the Pa had said that they should make sure that those people who had been released from Pademba Road should come to Buedu."

16:05:57 And then he confirms at line 25, page 21587:

"It was Benjamin who came back on the line - on the telephone line and called Mosquito. Benjamin called Mosquito back on the sat phone. It was Benjamin who sent the instruction to Mosquito for Mosquito to call for the

people who had been released by Gullit and others from the Pademba Road Prison to send all of them to Buedu, including ex-President Missouri. He told Gullit and others to dispatch all those big names that he had mention?

16:06:44 Q. What do you mean when you say 'all those big names'?

A. Yes, all the big names. You know, like, there was one Steve Bio among them. Steve Bio, Osho-Williams - Osho-Williams, Victor Foh. You know, really I cannot recall all of the names now - all of the names of the

16:07:06 people who were released from Pademba that were named, but there were about 20 prominent people in Sierra Leone who were among the list."

Then he is asked this question at page 21588, line 20:

"Q. Then you said, 'He said that was the instruction from

16:07:38 Taylor.' Who said that?

A. It was Mosquito who said that. That was the instruction.

Q. Who did he say that to?

A. It was the operator to whom he was explaining.

16:07:55 Mosquito was now explaining to the operator about his conversation with Mr Benjamin Yeaten.

Q. Now, then you said that Mohamed Kabbah, who was the operator, sent this message to Gullit. Is that correct?

A. Yes, yes.

16:08:19 Q. Now, just in terms of timing here, what date is this that we are referring to?

A. It was around 7 January, I'm sure. It's supposed to be something like that, 7 January in the morning. That was after the Freetown invasion, the following day.

Q. Now, do you know if this message was received?
A. Yes.
Q. How do you know that?
A. Gullit and others received the message and acted on the
16:08:57 message."
Now for completeness, line 11, page 21589.
"Q. Now, I am going to ask you to just describe generally the frequency of the communications between Sam Bockarie and Gullit during the course of this Freetown operation?
16:09:30 A. I can say there was frequent communication at that time. Frequent communication was there. There was a free flow of communication.
Q. What do you mean by that?
A. That it did not take up to an hour when one of the
16:09:51 stations in Freetown did not call to Buedu directly, or Mosquito's station in Buedu did not call one of the stations in Freetown directly to get an update from there. It was constant communication that existed."
Now, I am going to leave that. Mr Taylor, late on a
16:10:22 Thursday afternoon, simple question: Did you have a hand in that orgy of violence which was the 6 January invasion of Freetown?
A. No, never did. Did not know of it. Had nothing to do with it. Absolutely nothing.
Q. Before the event, did you find - did you provide materiel
16:10:55 to either the AFRC or the RUF to facilitate that invasion?
A. No.
Q. Did you have any prior knowledge that it was to take place?
A. No prior knowledge whatsoever, no.
Q. Did you instruct, at any stage prior to 6 January, anyone

I N D E X

WITNESSES FOR THE DEFENCE:

DANKPANNAH DR CHARLES GHANKAY TAYLOR 29141

EXAMINATION-IN-CHIEF BY MR GRIFFITHS 29141

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 16 SEPTEMBER 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah

Q. Being radio operators, they are the eyes and ears of the organisation, and this man, this radio operator, is saying that through that role he learned that you were the hidden hand behind all of this. Now, what do you say to that allegation, Mr Taylor?
10:22:26 A. That is totally untrue. I was not the hidden hand. And that's why some of these radio operators and [indiscernible], he talked about a lot of this being in log books. From the log books presented before this Court probably it would be good to go through to see. I don't know as to whether they have all of
10:22:45 their log books to see if some of these major allegations, he said that they were recorded, he learned some from log books. I don't know if we can probably go through those log books to see if this is true.

But this is one of the problems that you have with some of
10:23:01 these kinds of situations. Here is a radio operator someplace, not knowing what's going on, Sam Bockarie goes to Liberia. Now I am telling you, and everybody else, during the period that I mediated for ECOWAS in dealing with the RUF I tell this Court if I had given Sam Bockarie rice it would have been within my right
10:23:35 to do so. In fact, I would have felt that it was a good thing to do. And there would be nothing about that to hide from this Court, that I gave Sam Bockarie rice.

That period I did not give Sam Bockarie rice. I have even testified before this Court that during the very tough period I
10:23:57 permitted RUF injured persons to take treatment in Liberia, okay. So what would be rice? Of course, non-lethal thing as rice if I give it to them why would I say I didn't?

Sam Bockarie then came to Monrovia, they did a lot of shopping. They did a lot of shopping. They came to Monrovia,

Q. Hardly any communication?
A. Hardly any communication.
Q. Right. Let's go to 1999 now.
A. Yes.
14:50:45 Q. You say there's a period of quite a bit of activity leading up to Lome?
A. That is correct.
Q. Try and time that for us, please?
A. I would put that to April - mostly in the month of April of
14:51:00 1999.
Q. And does Bockarie come to Liberia in that period?
A. Bockarie does come to Liberia in that particular period, yes, he does.
Q. How many times?
14:51:12 A. Once. He comes to Liberia once while the delegates are being put together. Once.
Q. Right. So that's the fourth trip?
A. That is correct.
Q. Just to be clear, had he been to Liberia earlier in the
14:51:24 year of 1999?
A. No, not to my recollection, no. Between January and April, no. Not to my recollection, no.
Q. Right. Before I move on we're up to the fourth trip now?
A. Yes.
14:51:36 Q. I just want to pause briefly and deal with radio communications. In the aftermath of the Freetown invasion - because you remember that's the beginning of 1999, the year we're talking about?
A. That is correct.

Q. Was there a great deal of radio traffic between you and Bockarie and the RUF in that period?
A. By "you" - not personally, but there was communication. Not by me now.
14:52:01 Q. Not by you, I understand that. Was there communication between the Government of Liberia and Bockarie in that period?
A. Yes. In January of 1999 there was communication I would say immediately after the Freetown invasion and into the negotiation for the ceasefire which occurred, I would say, around
14:52:23 the middle of January. Yes, there were communications.
Q. So during that period there's communication going on?
A. Yes.
Q. But no visit?
A. No visits, no. Strictly communication.
14:52:33 Q. So then we come down to April, and there's a lot of activity and a visit by Bockarie?
A. Yes.
Q. Yes?
A. Yes.
14:52:40 Q. Then we have June, July: Lome?
A. Yes.
Q. August, Johnny Paul Koroma comes to Monrovia?
A. That is correct.
Q. Then we know Sankoh comes to Monrovia in September?
14:53:00 A. That is correct.
Q. Bockarie comes then, you tell us?
A. In September. He does come, yes.
Q. That's number five?
A. Yes.

communication with anyone outside of Sierra Leone you've discussed some conversations with Benjamin Yeaten and you also said that Sam Bockarie was in communication on a satellite phone with Charles Taylor. How do you know that?

15:08:16 A. That was not any hidden thing, particularly with regards to communication, that was not hidden to me particularly because I was in charge. Once when Sam Bockarie went to Liberia he brought a satellite phone, just like a handset that people use, that security guards use.

15:08:34 That was what he communicated with always whenever he wanted to talk to Charles Taylor. When he would want to talk to Charles Taylor he would tell like me or the operator who would be on duty to tell Sunlight because Sunlight was the one who worked at Charles Taylor's radio

15:08:51 station, the Mansion Ground."

Now, that clearly suggests, Mr Taylor, that if not you, then at least your director of the SSS, Benjamin Yeaten, had a controlling influence over the Freetown invasion. Is that true?

A. That is not true. That is not true at all. No official in

15:09:22 my government had anything to do with any invasion in Freetown. No, that's not true.

Q. Now, Mr Taylor, the witness goes on and he's quite specific that Yeaten told Bockarie to send reinforcements to Freetown when Gullit was coming under suppression. What do you know about

15:09:50 that?

A. Nothing. I doubt if Benjamin Yeaten would have had to tell an experienced person like - if the RUF was involved in an invasion of Freetown, it would take somebody from Liberia to call Sam Bockarie to say send reinforcement? Sam Bockarie as a

general would know what he's supposed to do if he's involved. He would know.

Q. Now, it goes on on this same topic, page 16176 - no, I should pick it up at the bottom of page 16175:

15:10:47 "He would say, 'Tell Sunlight that I want to talk to Father', because we used to call him Father or Pa. So he would say, 'I want to talk to Pa or Father.' So Sunlight would tell Charles Taylor that Sam wants to talk to you, and he would switch on the phone and call. At that time
15:11:02 Sam Bockarie would be on the stand-by. It was not any secret. It was not hidden or that the satellite phone was not there. No, he had it. He used to hang it on his pants walking around with it. It was not hidden. And for communications it was - I would either be present or not,
15:11:20 but I will know?

Q. At the time of the Freetown invasion, how do you know he was - Sam Bockarie was in communication with a satellite phone with Charles Taylor?

A. All along communication on the VHF went all other
15:11:44 commanders, but the satellite phone communication went on directly to Charles Taylor. The night that the dialogue took place - that was at the MP headquarters in Buedu - the operator who was on duty, Tiger, Sam Bockarie told him to tell Sunlight to tell his Pa that he wanted to talk to him,
15:12:03 and that is Charles Taylor, and that very night Tiger passed a message to Sunlight. And where the satellite would receive call radios up at the MP and Sam Bockarie went into the vehicle and they went. Sam Bockarie, I said he went into his vehicle that was having the mobile radio.

I N D E X

WITNESSES FOR THE DEFENCE:

DANKPANNAH DR CHARLES GHANKAY TAYLOR 28989

EXAMINATION-IN-CHIEF BY MR GRIFFITHS 28989

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 8 SEPTEMBER 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah

Sierra Leone by the Revolutionary United Front and the deposed military junta. Our ambassador in Freetown and State Department officials have visited survivors and heard stories of entire villages being slaughtered or mutilated by rebel forces. The RUF calls its cam bane 'Operation No Living Thing'. Hundreds of people are being treat in hospitals after rebels chopped their arms, legs and/or ears with machetes. Thousands more have died before they were able to reach medical help. Many women and children have been raped. This unspeakable cruelty is a gross violation of every tenet of human rights and International Humanitarian Law.

The United States strongly condemns the rebels' horrific actions and urges rebel leadership to order an immediate end to the senseless slaughter, mutilation, and torture of the rural civilian population in Sierra Leone.

There are distressing rumours that RUF and ex-junta forces are being assisted in their campaign of terror by other governments. Although we cannot confirm these rumours, it should be clear that any government or other party which is found to be helping the rebels to prolong the tragedy in Sierra Leone will face the strongest condemnation of the United States and the international community. "

Now, first of all, the date, May, at that time, Mr Taylor, were you aware that there was this horrific campaign being waged against the civilian population in Sierra Leone?

A. May of 1998, yes, there were news reports of that, yes.

Q. Were you aware that the campaign had been given the name Operation No Living Thing?

A. No, I was not aware of any operation by the name of that,

I N D E X

WITNESSES FOR THE DEFENCE:

DANKPANNAH DR CHARLES GHANKAY TAYLOR	28264
EXAMINATION-IN-CHIEF BY MR GRIFFITHS	28264

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 5 AUGUST 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Mr Silas Chekera

A. Yes.
Q. -- did you plan with Bockarie the Freetown invasion?
A. Never. Never. But let's not forget even this Court - even this very court - has found that RUF was not involved in the
12:36:48 Freetown invasion. And besides, if I push you forward to that invasion I can tell you something: On the morning that that report reached to me that Freetown had been hit, the first - I mean, I was so amazed and shocked. We sought to find out what happened. And the report that got to me - the initial report
12:37:19 that got to me - was that Sam Bockarie did not know anything about it. The first report that came to me was that "Well, Sam Bockarie says he does not know anything about what is going on".
Q. Pause there. Who provided that first report?
12:37:34 A. Oh, my government. I had the minister of national security immediately contact Bockarie to find out - excuse me, "What is the hell is going on?"
Q. Pause there. Contact him how?
A. By telephone. By telephone.
12:37:50 Q. We will come back to the details of that when we get to January, but I ask again: Did you plan with Bockarie in November 1998 to invade Freetown?
A. No, I did not. I never knew about it.
Q. Did you order Bockarie to capture Kono?
12:38:15 A. Why would I? No.
Q. Why? Because, it is said, of the strategic diamond resources in Kono. Did you tell him to do that?
A. I did not tell him to do that, and I did not even know. What do I know about what strategic areas there are in Sierra

Leone that contain diamonds? I know what is strategic as far as diamond goes in Liberia. I have no knowledge of the strategic nature of resources in Sierra Leone. It is not my business, and I don't want to know. So why? It is only with such a knowledge
12:38:52 that one would say "Go and take this place" or "Go and take that place". I don't know.

Q. Very well, Mr Taylor. Now, whilst we are on that topic, do you recall that we mentioned on Monday various high profile trials which were taking place in Sierra Leone during the autumn
12:39:45 of 1998?

A. Uh-huh.

Q. Do you recall that, Mr Taylor?

A. Yes.

Q. Including the trial of Foday Sankoh?

12:39:54 A. That is correct.

Q. Who was eventually, in October, convicted of treason and sentenced to death?

A. Yes.

Q. Likewise, others put on trial by the Kabbah government --

12:40:08 A. Yes.

Q. -- had been found guilty in court-martials and likewise sentenced to death, yes?

A. Uh-huh. Uh-huh.

Q. Were those, or any of those, sentences carried out?

12:40:25 A. To the best of my knowledge, I think some of them were carried out, and one in particular I remember because I was outraged by this particular situation, and it could be that same group. There was a Victor King who was - and I am not certain which group this is, but there was a group of 24 killed and I

I N D E X

WITNESSES FOR THE DEFENCE:

DANKPANNAH DR CHARLES GHANKAY TAYLOR 25980

EXAMINATION-IN-CHIEF BY MR GRIFFITHS 25982

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 14 JULY 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Mr Gregory Townsend Ms Advera Nsiima Kamuzora Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Mr Stephen Rapp Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Mr Terry Munyard Mr James Supuwood Ms Salla Moilanen
For the Office of the Principal Defender:	Ms Claire Carlton-Hanciles

Q. Was he happy to adopt the role of leader?
A. Well, I'll tell you, Issa was one - he's a very careful person. I say this because in answer to your question, subsequent to this meeting when I convened a Heads of State
10:13:35 meeting in Monrovia later on in July of 2000 to try, along with my colleagues, several presidents of West Africa had convened a meeting to deal with the Sierra Leonean problem - we then posed the issue of leadership to Issa Sesay. He was a little reluctant and did not really accept unless he told us he got the permission
10:14:02 from Foday Sankoh, where both Obasanjo and Alfa Konare, Obasanjo the former President of Nigeria, and Alpha Konare, the former President of Mali that was chairman of ECOWAS that left that meeting to go to Freetown to meet Tejan Kabbah to get Foday Sankoh's approval. So if I may say, your Honours, I think he was
10:14:27 one of those reluctant leaders at the time.
Q. Did you, Charles Taylor, appoint him as leader of the RUF?
A. No, I never did. Never could have. If anyone did I would say ECOWAS did. Because at that meeting in 2000 I just mentioned that I convened a Heads of State meeting in Monrovia. At that
10:14:49 meeting were the President of The Gambia, President Yahya AJJ Jammeh.
Q. Can you help us with some spellings, please?
A. I think it's on the record. I wouldn't like to mislead the Court. I think it's on the record, please. I think these are
10:15:07 names. I will just ask for some help from the Court. Present at that meeting also was the chairman of ECOWAS, President Alpha Konare, he attended that meeting. Also present at that meeting is the late President of Togo, Gnassingbe Eyadema. Also present at that meeting was the former President of Nigeria, Obasanjo was

present. I convened this meeting to discuss with them this problem that they had placed in my lap about Sierra Leone and the question came up: What do we do? Foday Sankoh is imprisoned, the July 1999 peace accord is in trouble, there's no one to talk
10:16:07 to, what do we do? So we met and at that meeting all of the Heads of State present agreed that the probable thing to do was to ask Issa Sesay to take over the leadership. Issa at that meeting said: Well, I have to go and contact my people back behind me in Sierra Leone, but even more particularly I need the
10:16:31 approval of the leader of the RUF, and so Presidents Obasanjo and Konare flew to Freetown. Tejan Kabbah brought Foday Sankoh to them. The message was delivered to Sankoh. He approved it. Obasanjo and Konare left; went to their respective countries. Issa Sesay returned to his post. Two weeks later Obasanjo and
10:17:08 Alpha Konare flew back to Liberia, and at the Roberts International Airport Issa Sesay was appointed leader of the RUF.

Q. Mr Taylor, did you ever deal in diamonds with the RUF in return for arms?

A. Never. There is not one human who believes in the truth
10:17:40 can say that I, Charles Ghankay Taylor, dealt with the RUF or anyone in the RUF taking diamonds for arms or taking diamonds for anything. None.

Q. I'll ask you very directly, Mr Taylor: Based on the evidence called by the Prosecution, and I'm speaking louder
10:18:00 because I'm told that my voice was very faint, were you regularly receiving mayonnaise jars full of diamonds from the RUF?

A. Never ever did I receive, whether it is mayonnaise or coffee or whatever jar, never receive any diamonds from the RUF. It's a lie, it's a diabolical lie. Never.

I N D E X

WITNESSES FOR THE PROSECUTION:

DANKPANNAH DR CHARLES GHANKAY TAYLOR 24324

EXAMINATION-IN-CHIEF BY MR GRIFFITHS 24324

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 11 DECEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Carolyn Buff
For the Registry:	Ms Rachel Irura Mr Momodu Tarawallie
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Ruth Mary Hackler
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Ms Amina Graham
For the Office of the Principal Defender:	Mr Silas Chekera

Sankoh was getting at when he talked about commit to start negotiations in good faith, or don't you know?

A. To the best of my knowledge, that was to show goodwill. To show goodwill towards the negotiations.

10:23:08 Q. Right. So are you aware of bad faith on the part of the Sierra Leone government in past peace negotiations?

A. I did not get you clear.

Q. Well, you remember I asked you questions about what was actually going on on the ground in Sierra Leone during the

10:23:39 Abidjan peace talks in 1996. Do you remember that?

A. Yes.

Q. And you agreed that while the SLPP government was talking peace in Abidjan it was acting in bad faith in invading Zogoda. Do you remember?

10:23:58 A. Yes.

Q. Thank you. Over the page, please:

"Not later than 25 May 1999 in Lome - Togo.

4. Guarantee safe and unhindered access by humanitarian organisations to all people in need, establish safe corridors for

10:24:21 the provision of food and medical supplies to ECOMOG soldiers behind RUF lines and to RUF combatants behind ECOMOG lines."

Pausing there. It's right, isn't it, that the RUF did have a medical system - a healthcare system - in place in its own liberated zones? I think we have already dealt with that, but I

10:24:50 want to ask you: Dr Williams, was he in charge of the RUF health provision system?

A. Dr Williams? Come up again. Which Williams are you referring to?

Q. Are you aware of a Dr Williams being involved in running

5. Do not harass any civilians or take anything from them as it is against our code of conduct."

Pausing there. Foday Sankoh had always been very anxious that the RUF did not harass and harm civilians, hadn't he?

10:29:59 A. Yes.

Q. And he punished people who were caught harassing and harming civilians, didn't he?

A. Well, those that he saw, those that he heard about.

Q. Yes, thank you.

10:30:20 A. Not all. The cases that he heard about, he punished them.

Q. And indeed you told the Prosecution that in one of your many interviews, didn't you?

A. Yes.

Q. Thank you:

10:30:36 "6. Any attempts by the enemy to infiltrate our positions as they did in 1996 is seriously liable to repel and pursue to the point of origin."

What is that reference there to 1996 and repelling people back to their point of origin?

10:31:07 A. Like in 1996 whilst the peace talks were going on in Abidjan, the government had put the Kamajors - I mean the CDF together to attack our various positions. So this time around Foday Sankoh said we shouldn't compromise. He said Mosquito and others shouldn't compromise at all, because by then he was still

10:31:29 talking to us that we should be patient. We should be patient. But this time around during the Lome Peace Accord he did stress that Mosquito and others should not compromise at all, he said, if there was any attempt from the enemy side.

Q. Because the RUF had, to use an English expression, got

so many interviews it would hardly be likely you could remember any one from another, let alone journeys in between, but if we look at the first box on this page, Monday 14 August 2006, in order to review your protective measures you were paid 10,000 leones for the transport costs involved. Can you remember --

14:52:44

A. Yes.

Q. I emphasise that tell us if you can't, but can you remember going to see them somewhere three days before you were interviewed by them in Bo? Just tell us if you can't.

14:53:15

A. Well I received money from them on different occasions for transport and some other things, or sometimes lost wages, but I do not recall the dates. I do not recall the dates.

Q. Very well. The next box, Monday 6 November 2006, you get 115,000 leones for transport, lost wages and meals for going to a meeting at the Special Court with the Office of the Prosecutors. Do you recall - and it may help you if you look at the two dates below, boxes 3 and 4, of 7 and 9 November. Do you remember at the end of 2006 having a number of dealings with the Prosecution then?

14:53:40

14:54:08

A. I recall that I had a number of dealings with them, but the dates - I do not recall the exact date, but indeed I had different dealings with them.

Q. Thank you. Go over the page, please. Box 5, Monday 20 November, top-up card, 60,000 leones. Can you recall now how much - did you get one top-up card that was worth 60,000 leones?

14:54:37

A. Yes, I recall there was a time I got a top-up card up to 60,000 leones.

Q. And then there's a meeting on Tuesday 21 November 2006 and you're paid 35,000 leones in transport. Again, that was a

meeting at the Special Court. Would I be right in assuming you don't remember that specific date?

A. Well, of course, because I received transport from the investigators on different occasions at any time I went for an interview.

Q. Yes. Well the reason I mention that one, Tuesday 21 November 2006, is you're not interviewed - according to the records we've got, you're not interviewed between 9 November 2006 and 18 January 2007 and yet you get a communications top-up card the day before, you go to a meeting with them on 21 November and your transport is paid and the box below, 13 December, for information, lost wages, transportation and meals you get 150,000 leones. Do you see that?

A. I've seen it.

Q. Can you remember now what information you were being paid for in December of 2006?

A. I have told you that I do not recall every bit of activities, but indeed at various times I received money from the investigators.

Q. Yes. And if you gave them information, is that something they would write down when you were telling them?

A. Well, information, most of the information I gave them they wrote them down. Those were some of them that you have been playing with in here.

Q. That I've been what?

PRESIDING JUDGE: I heard "playing" and I note that's what on the record.

MR MUNYARD: Very well:

Q. It's your words that I have been looking at in these

to them whether I have seen the person, or not.
Q. Let us move on to box 14, curiously the same date of 9 February 2007, another top-up card for 15,000 leones, and so in two days you get 60,000 leones' worth of top-up cards. Are you
15:05:30 saying that you used all of those top-up cards on OTP business?
A. They used to give me the top-up card to use that to talk to them - the OTP - directly. That was all on OTP business.
Q. I'm not suggesting they didn't give you the - I'm not disagreeing that you were given a top-up card to communicate with
15:06:00 them and possibly other people, but it was to your advantage that they were paying your top-up cards, wasn't it?
A. Of course I had an advantage in that, because I must have used some on my personal business. That one is very common.
Q. Yes, quite. Of course. And did you think you were
15:06:23 extremely lucky that time, the day before, 8 February, to be given 130,000 just for giving them information and then between that gift and the following day getting 60,000 worth of top-up cards on top? Did you think you were doing rather well out of the Prosecution at that stage?
15:06:53 A. Well, if that is what you have said.
Q. Are you agreeing with me that you were doing rather well out of them on 8 and 9 February last year?
A. I do not call that more.
Q. Box 15, please. A week later on 16 February - and we might
15:07:20 as well go to box 16 as well - and four days after that on the 20th you get two more 30,000 top-up cards, yes? Yes?
A. I received top-up cards, but I do not recall the dates. I do not recall the dates.
Q. No, I make no criticism of you for not recalling the dates

and I'm not troubled by that. I just want you to tell us this. Can you remember a time in February last year when you were on the phone an awful lot; phones paid for by the Office of the Prosecutor?

15:08:08 A. On several occasions I got top-up cards from the Prosecution at different times, that is what I'm trying to say, and I do not recall all of those times.

Q. Right. Can you remember were you just ringing the Prosecution on those occasions, or were you ringing other people

15:08:26 on behalf of the Prosecution?

A. Well, I communicated more with them. It was meant for communication with them more.

Q. All right. You weren't by any chance on the phone to Gibril Massaquoi, or CO Nya, or Colonel Isaac using these top-up

15:08:53 cards, were you?

A. No.

Q. You see, you weren't interviewed after 18 January 2007 until late April 2007 from what we can see. Over the page, box 17, 22 February 2007, 50,000 leones for medical assistance, then

15:09:31 five days later in box 18, 27 February, 67,000 leones for medication and then two days after that, 1 March 2007, box 19, 65,000 for medical treatment for you. Now, it's true that that one says "transport/lost wages". Just help us with this, if you can. In February of 2007, were you getting medical treatment as

15:10:05 well as getting medicines - medication? Were you going into a hospital, or clinic, or doctor's to get medical treatment in February of last year?

A. Yes.

Q. Would you have been able to afford that treatment had the

Office of the Prosecutor not been paying for it?
A. Yes.
Q. Right, so it would have come out of your pocket had they not paid for it?
15:10:43 A. Even if they had not paid for that, I would have had some other means by which I could have paid for it.
Q. 182,000 leones' worth of medical treatment that you would have had to pay for yourself and would have paid for yourself if the Office of the Prosecutor had not kindly stepped in and met
15:11:07 the bill, is that right?
A. I had been undergoing treatment more than that even before I met them.
Q. No-one is suggesting otherwise. Box 20, please, 6 March 2007, another top-up card for 30,000. Over the page, same date,
15:11:33 same reason, same amount of money. Can you explain, just taking that one by way of example, why it is that on the same day you get two different top-up card amounts rather than just being given an amount big enough to cater for all your telephone calls? Do you go back to them saying, "I need another one now", even
15:12:00 though they've given you one that very same day? Can you recall anything like that?
A. On different occasions I received top-up cards from the Prosecution, from the investigators. I have told you that. I am not disagreeing with most of the things that are here. I'm not
15:12:23 disagreeing with them, but only that the times the events took place, or which event or on what occasions, I do not recall them, but actually I recall that I used to receive such monies from the Prosecution, or these top-ups from the investigators.
Q. Well if you're using them mainly for contact with the

Prosecution, you're in contact with them an awful lot in February and March of 2007 but not interviewed by them, correct?

A. I do not recall the dates on which I was interviewed. You have asked me that question persistently and I continue to give you my response. I have told you I do not recall the dates on which I was interviewed.

Q. That is why I assisted you by pointing out that you weren't interviewed between 18 January and late April of 2007. Those were the - in that period in between you get an awful lot of top-up cards and medical treatment and you're in what appears to be very frequent communication with the Prosecution, do you agree?

A. I had frequent communication with the Prosecution, of course, but the dates you are insisting on are what I do not recall.

Q. No, no-one is expecting you to. I've got the records and that's why I'm telling you those dates. So don't worry, no-one is criticising you for not remembering the dates.

A. Okay.

Q. Box 22, Saturday 17 March - St Patrick's Day - 2007, another top-up card for 30,000 leones. Box 23, three days later, "Medical/communication", another top-up card and medical treatment paid for you 110,000 leones. Pausing at that one, you must have been very pleased to be able to get all this money for your medical treatment from the Office of the Prosecutor, correct?

A. Well I appreciated because, if I was sick and somebody saw that indeed this man is sick and indeed he deserved such an assistance and someone came to me to help me with my medical

treatment, I should appreciate that.
Q. And is all the medical treatment in connection with your arm that was injured in the accident?
A. Yes.
15:15:13 Q. Thank you. 22 March, box 24, "Transport", 35,000 leones. Can you remember in the early part of last year having to spend money on transport even though it appears on the face of it you weren't interviewed at that time because you're not interviewed until 24 April? Can you remember anything like that? Do say if
15:15:42 you can't.
A. Well it was once that I recall that I went to Freetown, when they invited me to go to Freetown, and when I went they said the person who was supposed to interview me was not in Freetown. So at that time I returned to Bo, but that was just once.
15:16:02 Q. Right, that's fine. And would it cost 35,000 to go to Freetown and back again to Bo, or would it cost more than that?
A. Well, that particular trip I recall that there was a team in the provinces in Bo and it was that team that facilitated my movement to go to Freetown.
15:16:30 Q. All right. Over the page to box 25 - and there must, I suspect, be a mistake here - Tuesday 10 April 2007, "Meeting with the OTP: Lost wages", 10 leones. There's obviously a zero been missed off there. It looks as though it's 10,000 leones. Would that be about right, that you might have lost 10,000 leones in
15:17:00 wages on a particular day when you went to meet the OTP, but not for an interview because you're not interviewed on that date according to our documents?
A. Well I do not recall the date, but I had so many meetings with the OTP really.

Q. Now, boxes 26, 27 and 28 are all to do with getting you a passport and a birth certificate: passport photographs, affidavit for the birth certificate and birth certificate itself. Was this because you believed that you were likely to be
15:17:37 travelling quite soon to The Hague, April last year?
A. That was the time they said it was likely --
Q. Thank you.
A. -- only if the lawyers saw that my statement or my testimony was relevant.
15:18:00 Q. Yes, all right. Over the page, please. Box 29, 4 May 2007, another top-up card, and then on to box 30, 25 May 2007, "Witness hospitalisation and follow up medical care". Now, that's 425,000 leones. Were you in for some kind of operation then? I don't need you to go into any personal details, but I
15:18:34 just would like to know - that's a sizable amount of money and it suggests that you were actually in hospital.
A. Yes, I was admitted and I went through an X-ray, some other laboratory tests, admission fees. Everything is in there. Medicines, everything.
15:19:06 Q. And would you have been able to find that amount of money yourself had the Prosecution not kindly met the bill for you?
A. I would have got some other ways. Even if they had not done that, I would have got some other way.
Q. Do you mean you would have to had to borrow it from
15:19:30 someone?
A. It's not a matter of borrowing from someone. That apart, I had my own means by which I would move around to sustain myself and to meet my immediate needs.
Q. Next box, box 31, 11 June 2007, you have a meeting with the

Office of the Prosecutor and you get paid 65,000 for lost wages, but again this is nowhere near the time of the next interview which is 30 July 2007. This is 11 June. Can you remember did you give the Prosecution information every time you met with them?

15:20:19

A. I gave the Prosecution information so many times, so many times.

Q. And as you've told us they usually wrote down what you were telling them, yes? If you lost wages of 65,000 leones on that date, does that suggest that you spent most of the day with them? I'm not expecting you to remember the specific date, but would a loss of wages of 65,000 suggest that you spent a good part of the working day with the Prosecution?

15:20:40

A. There were times that I spent more than one day with them, in fact.

15:21:09

Q. We know that. I'm asking you to try and work out from the figure that you were given for lost wages does that suggest to you that about 18 months ago, when you met with the Prosecution, that you probably met with them for a good part of the day? Just think about it for a moment and let us know your answer.

15:21:31

A. I do not recall this particular incident that you are talking about.

Q. No, Mr Fornie, I'm not asking you to try and remember the particular incident. Just listen to me carefully. If you have been paid by the Prosecution 65,000 leones for lost wages, does that suggest to you in your mind that you probably spent quite a lot of time with them on that day? We're not worrying about which day it was, but the day for which you were paid that amount of lost wages?

15:21:47

A. Well, that is what I am telling you. I have told you that on different days and at different times they used to hold on me sometimes for the whole day. On different occasions they used to hold on me.

15:22:23 Q. Right. We don't, of course, have any record of interview on or around 11 June 2007. Tuesday 3 July, box 32, another top-up card. Box 33, 4 July, 176,000 in medical expenses. We're now - if my rough calculations are right we're now in the region of 700,000-odd in medical expenses paid for you by the

15:23:03 Prosecution, aren't we, roughly? I emphasise that it is a rough figure. In fact it might be more than that, but do you agree that by July of last year you'd been paid easily 700,000 leones for medical expenses by the Prosecution?

A. Do you mean a bulk 700,000 leones?

15:23:36 Q. No, I mean in total. They have paid medical bills for you amounting to 700,000-odd. If I do the mathematics I might turn out to be making a conservative estimate, but we'll work on 700,000-odd. Do you agree?

A. When if you calculate them on different phases, maybe it

15:23:59 would go up to that amount on different occasions.

Q. All right. Box 34, 19 July, 80,000 for transport and meal costs - meal and transportation costs to the SCSL. Presumably another meeting with them to give information, is that correct, although nobody is expecting you to remember the date itself?

15:24:24 Would you agree that you wouldn't have got both meals and transportation costs if you hadn't been going to see them to give them information, would you?

A. I did not understand your question.

Q. I don't want to spend long on it. Look at box 34.

anything else you told them on 24 or 25 or 28 September in prepping. Move on, box 44.

A. Well --

Q. Sorry, I didn't mean to stop you.

15:33:43 A. Well, I recall the time I took those interview notes. I recall that I was purposefully in Freetown to take those cassettes along. I was logging cassettes at that time.

Q. Right. There's nothing at all about logging cassettes in any notes that we have got relating to 24, 25 or 28 September

15:34:17 last year. Let's move on. Box 44 is another 30,000 top-up card, 17 October, and then 1 November last year, "Housing assistance/one year's rent: Relocation", 480,000 leones. Now I don't want to know where you were relocated to, but I just want to understand this. Were the Prosecution paying you in November

15:34:44 last year for the next year's rent? In other words, did they give you the money to pay for the future year's rent? I ask this question for a reason.

A. It was for one year.

Q. Yes, we know that. Was it the year following the day that

15:35:07 they gave it you, or was it a year's worth of rent that you'd already paid for the previous year? Do you see the point that I'm making?

A. It was for a year. It was for this one year that I received money from the Prosecution for rent that I recall.

15:35:34 PRESIDING JUDGE: Yes, Mr Witness, but the question is it paid in advance, or paid in arrears?

THE WITNESS: Well, it was not in arrears.

MR MUNYARD: Right, thank you:

Q. So it's to cover November 2007 to November 2008, yes?

A. Yes.
Q. Who had been paying your rent from November 2006 to November 2007?
A. I was paying.
15:36:08 Q. You were paying, right. Now, I don't want to spend any more time than is necessary on the next few boxes. It's top-up cards in November 2006. On 6 November when you get a top-up card you also get transport and lost wages for going to the Special Court, although no notes of interview around 6 November. The
15:36:46 next interview actually is 15 November of last year. We go over the page to 22 November, "Assistance to investigations", 135,000 leones for transport. Can you remember what that was about? Just about a year ago "Assistance to investigations" for which you were paid 135,000?
15:37:18 A. Well, I recall that I had different assistance in terms of investigations.
Q. I'm afraid that doesn't help us at all as to what it was that you assisted them with as a result of which you were paid 135,000 leones.
15:37:51 A. Well I have told you that most of these monies you're talking about, even like in the case of this money I would not disagree with it on the different times. I cannot actually tell you that it was at this time or that time that I received it, but I do not disagree with the fact that I received this money - this
15:38:13 type of money.
Q. We understand that. I was just wondering if you could remember now roughly a year ago why it was you were paid on 22 November 135,000 leones for "Assistance to investigations" and two boxes down on 28 November two days later 375,000 for

"Communication/lost wages/transport Assistance to Investigations"? Do you have any recollection of what it was that was involved in that? I make it quite clear that you were interviewed on 26 November 2007.

15:38:58 A. Well, on different occasions I have told you that I gave help to Prosecution. I helped the Prosecution. I gave them map on locations regarding call signs during various years, those things, and I recall that I gave them different other assistance. We drew the Sierra Leone map, I showed them different locations

15:39:26 where radio stations where - where they were, when and at what time within Sierra Leone - and I spent sometimes two days or three days on those things. From there the other time they called me again to go for some verification, so --

Q. And they - sorry, I didn't mean to interrupt you. And they

15:39:48 presumably wrote down where you were showing them on these occasions when you were showing them where radio stations were and so on? They'd have to make a note of it, wouldn't they, otherwise they might forget because it wasn't them who had identified them, it was you, do you agree?

15:40:09 A. Well, that is not my own side of it.

Q. And so we'd expect to see a note, "Mr Fornie took us out to this place and that place and identified this radio station and that radio station", wouldn't we?

A. Well, I have told you that it is not my own side of it to

15:40:33 answer to that question.

Q. Well all I can say, Mr Fornie, is we have had no such disclosure of you going round and showing them locations. I'm not disputing that you did. One thing I should make clear is that where it says on 28 November "Communications", it clearly

can't refer to the provision of a mobile phone because if you look at the previous box only six days earlier you're paid or you're given a replacement phone worth 120,000 leones. Do you agree that you were given --

15:41:15 A. No --

Q. No, do you agree that you were given a replacement phone about a year ago?

A. Yes, I agree with that, that they gave me a replacement phone, but in the case of the radio stations I did not tell you

15:41:30 that they took me right round. I was seated in an office space. I was seated in a specific place and I indicated all those places to them on the map. We did not move from one place to another.

Q. Ah, very well. I misunderstood. So we could expect to see a reference to all the various radio stations on a map recorded

15:41:52 around late November last year, yes?

A. Well, that is not my own side of the question please.

Q. I'm going to skip over any more top-up cards. We move over the page to boxes 53 to 56. At 54 there's another "Assistance to investigations", 34,000, more top-up cards and more payments for

15:42:23 lost wages and meals. The last page of this tab, which only takes us up to 28 August, two more top-up cards and some meals en route to the Special Court. Then I'd like you, please, to turn over to the last tab. Now, this is a memo - this is a document from another organisation that's been either paying you money or

15:42:59 spending money on your behalf from the Special Court. This is from the Witness and Victims Section?

PRESIDING JUDGE: Yes, Mr Witness, you have your hand up.

THE WITNESS: Yes, my Lord. Can I please use the restroom?

PRESIDING JUDGE: Please assist the witness.

please. This, as I've said, is a document from another department of the Court called the Witness and Victims Section with whom you're very familiar, aren't you?

A. Yes.

15:49:29 Q. They've been looking after you since 6 November 2006, haven't they?

A. Yes.

Q. And we have a document here from them telling us how much they've spent on you up to 4 November this year, that's to say

15:49:50 the day before you came to The Hague, and you see where there are two numbered paragraphs 1 and 2? Can you see that section in the middle of the page?

A. Yes.

Q. They've paid you something called witness attendance

15:50:10 allowance of 2,154,000 leones - we may come back to that - transportation of 1,720,000 leones and then for medical just short of 700,000 leones. So as well as getting 700,000-odd, if my maths are correct, from the Prosecution since some time in 2006, you've also got much the same amount from the Witness and

15:50:51 Victims Section, haven't you?

A. Well, WVS had taken care of me on different occasions. I do not know the exact amount of money, because I do not know how they spent the money. I would just go for the treatment and then after all I did not know how they did the disbursement, but I am

15:51:20 sure that they had been taking care of me - of my health.

Q. Yes, well we have got the exact amount of money from them, or at least this is what they're saying they've spent on you, 695,000 leones for medical expenses. So you've had the better part of one and a half million leones spent on you by the

Prosecution and the Witness and Victims Section in the past two years, do you agree?

A. Well, it is around that. It could be around that.

Q. Yes. All money that you would have had to have found out of your own pocket otherwise, do you agree?

A. Say again.

Q. You would have had to have found that money out of your own pocket, or gone without the medical treatment, if it hadn't been for these two departments of the Court paying for it. Do you agree?

A. Well, I would have still had other means to foot my medical bills. I had been spending more than this on my arms. I have been spending more than eight to ten millions, so this is just a very small amount of money in respect of this. I actually appreciate it so much, but making a comparison to say I wouldn't have been able to get 695,000 leones for my medical, that is not it.

Q. No, I'm not saying you wouldn't have been able to get it. I'm saying you would have had to spend it, or go without the treatment, had they not paid. That's all I'm saying and I think that you're agreeing. Next category, please. Look at the word below "Medical". What does that read?

A. Are you asking me?

Q. I am.

A. I see "Accommodation" under "Medical".

Q. Yes, and how much have Witness and Victims Section spent on your accommodation according to this letter from them?

A. Well, I don't know.

Q. Look across the page to the figures column.

A. It's 345,000 leones that is there.
Q. Yes. When did they spend that on you?
A. Well I don't know exactly, because since the time WVS starting dealing with me --
15:54:08 Q. Yes. Well have they spent that money on you this year, over the last 12 months?
A. I said I do not know the exact time that this amount of money was spent on me.
Q. Well we want you to help us with it, because you're the
15:54:26 only person who can tell us what this 345,000 leones' worth of accommodation costs relate to?
A. Well, when WVS pays they did not come and tell me that, "This is what we're spending on your behalf. This is the amount". They would only spend and they were the ones who wrote
15:54:57 it. I do not know when exactly the time frame when all of these disbursements or this calculation was done.
Q. But we saw when we looked at the previous document that following your relocation in November last year you were paid 480,000 leones, or payment to that amount was made on your
15:55:24 behalf, for a year's rent following your relocation.
A. Well --
Q. Hold on a minute. Hold on a minute. Now it follows, therefore, that you were given that money by the Prosecution because you'd had to relocate. What money was paid by somebody
15:55:48 else, either to you or on your behalf, for accommodation in the sum of 345,000 leones? What does that relate to?
A. Like that money that is over there, I don't know if it's the same amount of money that reflects here. I don't know if it's the same amount of money that reflects here, but it was only

once that I recall I received money for accommodation really. So - but I don't know, but I know that I have been with the WVS for a long period of time and I'm conscious that they were footing bills on my behalf.

15:56:32 Q. Right. So let us assume in your favour that on 1 November, when the Prosecution handed out or paid on your behalf 480,000 for a year's rent, that the 345 relates to the previous year's rent before you were relocated. Do you think that might be what the WVS paid for?

15:57:01 A. No.

Q. There's no particular reason why an organ of the Court such as the WVS would just be paying your rent prior to relocation, is there?

A. Well, I don't know about the organs that you are talking

15:57:24 about.

Q. What rent was being paid on your behalf by any department of the Court? We know a year's rent in advance last November - sorry, November of last year. Was anybody paying your rent before that?

15:57:49 A. No, that is the rent that I recall that they told WVS about. The Prosecution told WVS about it and they were the ones who footed that bill. Yes, the Prosecution told them.

Q. Right, let us move on. "Miscellaneous", under "Accommodation", 1,548,850 leones. Now "Miscellaneous, that sum

15:58:18 at the bottom, and "Witness Attendance Allowance" at the top, 2,154,000, we have no idea what those payments are for. Do you have any idea what those payments are for?

A. Well, I have told you that I recall on different occasions I received monies in bits and so I wouldn't tell if those - they

have calculated everything together and put it here. The only thing I know is that I received monies that have been analysed on the paper.

Q. And you have received in total 3.9 million from the Prosecution over just over two years and nearly 6.5 million from Witness and Victims Section over two years. That is over 10 million leones in just over two years, including what appears to be two lots of rent for the same - on the face of it the same period of time. Are you able to help us at all with what else was paid apart from rent and transportation and medical costs; what these other millions were spent on?

A. I have told you that the WVS, like the time I used to go there, most times they footed my bill. When I went the Prosecution would sometimes just tell them, "Oh, give this man some amount", and they would always try and track how many days I would be there for, I would stay there for, even in the case of transport, so I don't know whether all of those things are what they have calculated that they have it here. So I do not actually understand what you are trying to talk about. Which one actually are you talking about here?

Q. What I'm trying to talk about is that you've made an awful lot of money out of cooperating with the Prosecution in this case, haven't you?

A. Well I made money, but it's not a lot of money as you are trying to express it. I received monies, they used to give me monies in bits, but it's not too much of money as you are trying to express it.

Q. 1,588,000 leones' worth of medical expenses you no longer had to pay for yourself; a sum in the region - a sum for rent in

I N D E X

WITNESSES FOR THE PROSECUTION:

DAUDA ARUNA FORNIE	22130
CROSS-EXAMINATION BY MR MUNYARD	22130
RE-EXAMINATION BY MR SANTORA	22253

EXHIBITS:

Exhibit P-261 admitted	22261
Exhibit P-262 admitted	22261
Exhibit P-263 admitted	22261
Exhibit P-264 admitted	22262
Exhibits P-265A and P-265B admitted	22262
Exhibit P-266A and P-266B admitted	22262
Exhibit D-76 admitted	22263
Exhibit D-77 admitted	22264
Exhibit D-78 admitted	22265
Exhibit D-79 admitted	22265

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 10 DECEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Ms Sidney Thompson Ms Carolyn Buff
For the Registry:	Ms Rachel Irura Mr Momodu Tarawallie
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Ms Amina Graham
For the Office of the Principal Defender:	Mr Silas Chekera

discuss with him.
Q. Right. They didn't show you any photographs of where they stayed?
A. I do not recall. I did not see.
13:22:28 Q. Did no-one ever show you a photograph of a nice hotel with a swimming pool that they stayed in when they were in Burkina Faso?
A. I have told you I do not recall that.
Q. All right. But you had a conversation with Sam Bockarie at
13:22:43 least when they came back and he told you what they had done, did he, while they were in Burkina Faso?
A. Sam Bockarie told me about what they went for, that is the ammunition they went to collect and they brought it. He told me about that.
13:23:08 Q. Yes. Can I just be clear about one thing before we go into a bit more detail. When you got to Monrovia before they ever go off to Burkina Faso, is that where they were expecting to go?
A. Well, when we initially moved from Buedu that was actually not the plan that we had, or let me say that was not the plan
13:23:39 that Mosquito had, because initially - in fact two days before we left he told me that I should prepare that I was going to travel with him to go to Monrovia. He said I was going to accompany him to Monrovia and he said he will leave me in Monrovia and he would travel to Libya to receive ammunition, but when we arrived in
13:24:02 Monrovia, that was when I understood - that was the time he told me that, "Oh, Daf, we have decided to divert the trip to Burkina Faso".
Q. Yes. And so once you got to Monrovia there was no more talk of Libya, was there?

A. Well, that is what I have told you. I said it was Burkina Faso. He initially spoke about Libya and what he said about Libya was that he said the Libyan trip had been cancelled. He said then they were now going to stop in Burkina.

13:24:39 Q. Right. Can you remember telling the Prosecution at any time that Sam Bockarie and others on this particular occasion went to Libya to get arms and ammunition?

A. I do not recall that.

Q. Are you sure you were on that trip to Monrovia when

13:25:17 Sam Bockarie and others went to a foreign country, a country other than Sierra Leone or Liberia?

A. Yes.

Q. Was it something --

A. I was the only operator who went with him.

13:25:34 Q. Well, even on your account he only calls you three times, doesn't he, during the time they are away in Ouagadougou?

PRESIDING JUDGE: Was it two or three, Mr Munyard?

MR MUNYARD: Maybe it is only two.

MR SANTORA: It was three. It was three in direct and --

13:25:54 THE WITNESS: I think --

MR MUNYARD: If Mr Santora and I agree then I think that is a pretty good indication that what I put was correct.

PRESIDING JUDGE: Indeed.

MR MUNYARD:

13:26:07 Q. He only calls you three times. Are you sure you weren't back in Buedu getting those calls?

A. No, because when I was in Buedu I did not have access to telephone in fact.

Q. Well, he could have called you on the radio, couldn't he;

I N D E X

WITNESSES FOR THE PROSECUTION:

DAUDA ARUNA FORNIE 22001

CROSS-EXAMINATION BY MR MUNYARD 22001

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 4 DECEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Ms Sidney Thompson Ms Carolyn Buff
For the Registry:	Ms Rachel Irura Mr Momodu Tarawallie
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Ms Amina Graham

3577

message that Tiger monitored, which I read. Then later Superman and SAJ were there in the town.
Q. I see, all right. Who was the commander in Colonel Eddie Town when it was first seized?
13:11:14 A. Initially I said here that I don't recall the commander who led.
Q. Right. Are you able to help us with when it was that SAJ Musa goes to Colonel Eddie Town with Superman?
A. The time that they were there was around '98 - 1998.
13:11:46 Q. Well, we know that. We are talking about 1998. When in 1998 did SAJ Musa and Superman go to Colonel Eddie Town?
A. It was late 1998; I don't recall the exact month.
Q. Well try to give us a bit more precision than that, if you can?
13:12:16 A. There are too many events that occurred. I cannot recall every little bit of event that occurred. I cannot be that precise. Don't push me to lie before this Court that such an incident happened on this date. I don't want to create a false impression, please.
13:12:37 PRESIDING JUDGE: Mr Witness, if you don't know you should just say so.
THE WITNESS: I don't know.
PRESIDING JUDGE: Very well. Please proceed, Mr Munyard.
MR MUNYARD:
13:12:46 Q. Now, when SAJ Musa was in Colonel Eddie Town, he made plain his disenchantment with the RUF, didn't he?
A. Apart from Colonel Eddie Town; SAJ Musa's problem with the RUF, he had made it clear ever since.
Q. Yes, and he stressed that it was vital that his troops -

Q. And although he was killed in Benguema, the objective - his objective and that of the SLA was that they would be the ones who took Freetown not the RUF as a body, do you agree?
A. Yes.
13:15:57 Q. Now, do you remember hearing Sam Bockarie at some point on the BBC revealing the position of the AFRC, the SLA troops as they were approaching Freetown, and claiming that these were actually RUF troops?
A. Please make it clearer.
13:16:35 Q. I will put it in this way: Do you recall hearing on the BBC an interview with Sam Bockarie in which he revealed the position of the fighting forces, but said that it was RUF troops who were there approaching Freetown? And when I say said it was RUF troops I mean said wrongly that it was RUF troops. Did you
13:17:03 hear him say that on the BBC?
A. I recall in different broadcasts when Mosquito commented about the attack on Freetown on the BBC and other radio stations and he directly claimed that the RUF and the AFRC were the ones which entered Freetown.
13:17:33 Q. No, Mr Fornie, I am talking about a time before SAJ Musa is killed at Benguema, but when his troops are close to Freetown. Do you remember - indeed did you record - Sam Bockarie being interviewed by the BBC in which he said it was RUF troops and gave away the location of those troops advancing on Freetown?
13:18:00 Did you either hear that or record it?
A. Well, I used to record many broadcasts. In fact, at that time I used to record almost regularly so I don't recall now if that particular broadcast was recorded by me.
Q. Let me try and jog your memory.

I N D E X

WITNESSES FOR THE PROSECUTION:

DAUDA ARUNA FORNIE 21651

CROSS-EXAMINATION BY MR MUNYARD 21651

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 3 DECEMBER 2008
9.33 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Carolyn Buff
For the Registry:	Ms Rachel Irura Mr Momodu Tarawallie
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Mr Nicholas Koumjian Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Ms Amina Graham

the 6 January invasion of Freetown, and you said you went approximately you thought early December and you went with Mosquito, Rashid, Pa Rogers and Eddie Kanneh amongst the crew that went on this trip. Do you recall starting to tell the Court about that yesterday?

09:57:43

A. Yes.

Q. I'd like you to go ahead now and slowly - I'm going to ask you to slowly describe this trip for the Court. Again I'm going to emphasise to you that you take your time when you explain this, okay?

09:57:59

A. Yes. I do recall sometime in early December myself, Sam Bockarie, the late SYB Rogers who was the People's War Council chairman, Rashid, Eddie Kanneh, among others, among other people, those of us who travelled to Monrovia. The trip that we made to Monrovia was to escort Sam Bockarie because he, Sam Bockarie, was supposed to travel to Libya, initially what he told us. He, Sam Bockarie, what he told us, he said according to the discussion he had had with Benjamin that he was to go and receive some materials, I mean ammunition. But when we arrived in Liberia the course changed and that particular movement was diverted to Ouagadougou, Burkina Faso. Sam Bockarie, Eddie Kanneh and Pa Rogers went to Burkina Faso, to the best of my knowledge.

09:58:50

09:59:25

Q. I'm just going to intervene one moment, Mr Witness. You said that initially you were told by Sam Bockarie that he was supposed to travel to Libya, that he had had a discussion with Benjamin and that he was going to receive some materials and he was supposed to travel to Libya. Is that correct?

10:00:04

A. Yes.

Q. Where did you learn this? Where were you when you learned

this from Sam Bockarie?
A. It was in Buedu. I was in Buedu right behind Sam Bockarie's house where his satellite phone was installed, where he used to install his satellite phone, and I met him there. He
10:00:52 was sitting by his phone together with some of his bodyguards who were around him and some other people.
Q. Now you said then that when we arrived in Liberia the course changed and that particular movement was diverted to Ouagadougou. What do you mean when you say when you arrived in
10:01:13 Liberia the course changed?
A. Well, instead of Sam Bockarie going to Libya he said the Papay had told him that the ammunition had been brought to Burkina Faso, so he was now to go and receive the ammunition from Burkina Faso.
10:01:41 Q. When you say in this context the Papay, who are you referring to?
A. CIC Taylor.
Q. And just describe sequentially what happened. You said that when you arrived the course changed but then you said, of
10:02:09 Sam Bockarie, "He said the Papay had told him that the ammunition had been brought to Burkina Faso." Do you know when this happened?
A. Well, it was in December. December 19 --
Q. Let me rephrase the question. Do you know when the Papay
10:02:29 told Sam Bockarie that the ammunition had been brought to Burkina Faso? When did it happen in terms of the course of your trip?
A. It was only after we had reached in Monrovia. That was when I knew about that, that everything --
Q. How did you learn about that?

where more specifically?
A. Well, I did not see where they were. I just saw them and --
THE INTERPRETER: Your Honours, can the witness repeat this.
10:21:22
PRESIDING JUDGE: Mr Witness, the interpreter is not able to keep up with you. Please speak slowly and just pick up where you said, "I saw them". Continue from there.
THE WITNESS: Myself, Sam Bockarie and others met the
10:21:47 trucks while we were going on the road. That is at the outskirts of Monrovia towards Kakata. Then while we were going, while we were in the vehicle, Sam and others were discussing, and even before that at the time we were moving that was the time Sam Bockarie told me that the trucks were loaded at RIA. That is
10:22:21 before we took off from Benjamin's house. I asked him, I said, "Master, where is the material that you went for?", and he said, "They are on the way. They were loaded from the airport". That was what he explained to me, that the trucks were loaded at the Roberts International Airfield, and we continued our journey.
10:22:47
MR SANTORA:
Q. Now you said you met them with these two trucks, so is it correct that you had four vehicles total? Is that correct? Two vehicles that you left with and then two trucks?
A. Yes.
10:23:02 Q. Now you went then - where did you go after you met up with the trucks?
A. It was in Buedu. We went to Buedu directly.
Q. Did Sam Bockarie discuss anything else? Well, first of all where exactly were you within this convoy? Who were you with?

PRESIDING JUDGE: Have we actually determined that they went in convoy? For all I know, their jeep could have passed the trucks.

MR SANTORA: Okay:

10:23:33 Q. How did you proceed from - from the moment when you met up with the trucks, how did you proceed to Buedu?

A. I have said it. I said all of us went together. We went in a convoy. All of us went together.

Q. Where were you within this convoy?

10:23:51 A. Initially from the house at Benjamin Yeaten's I was in the same vehicle as Sam Bockarie, but when we got to where the trucks were I transferred into one of the other vehicles and Zigzag Marzah transferred to Sam Bockarie and they were all in the same vehicle and we continued the journey.

10:24:26 Q. Now during the course of your journey from Benjamin Yeaten's house to meet the trucks, did Sam Bockarie discuss anything else?

A. You know, I cannot remember everything that we discussed, but one important thing that we discussed in the vehicle was

10:24:50 about the ammunition that he had gone for that all of us were expecting. That is what I asked him about. I said, "Master" - that is Mosquito. That was another name that we referred to him casually, "Master". And he told me - he, Mosquito, told me - that the ammunition was on the way. They had loaded them at the

10:25:12 Roberts International Airport.

Q. Okay. Now, what happened when you arrived back in Buedu?

A. When we arrived in Buedu, the commanders that Mosquito had sent a message for we arrived together with some of them almost at the same time. Issa came - no, Issa came after Mosquito had

information, he had information already at hand. Actually there had been some minor problems that had been existing between us and Gullit, that is RUF and the AFRC. That was Sam's concern. That was the only time that he was grumbling. Even before they entered Freetown and even when he received the message in the morning, that was when Sam was saying that. He said maybe Gullit and others would want to - maybe they would change this time around to cooperate if at all they didn't go there to seize power, they wouldn't want to be greedy and take power on their own.

And Sam Bockarie assured Gullit that Rambo was very close to him on his way to join him in the city and that Rambo was on his way to join him in the city and at that time late Rambo and others were around the Masiaka area, going towards Freetown.

Q. On that broadcast there was an individual named TAB Yaya, former PLO-2. Do you know who that is?

A. No, I don't know him in person and I don't know much about him.

Q. Now, there is a reference to Pademba Road prisoners. What do you know about Pademba Road prisoners during the 6 January invasion?

A. After Gullit and others had captured Freetown, it was the following morning that he sent a message and it was King Perry who transmitted the message that they had released many people from the prisons and that they had released many of the political detainees who were held prisoners, together with some other people. But when they got to Pademba Road they could not see Pa Sankoh, but that they were able to release some other people but they did not see Pa Sankoh. The message was sent to Mosquito.

After Mosquito received the message he told Five-Zero, I mean Benjamin, that the men had entered the city but they could not see the Pa, I mean Pa Sankoh, and that they did not know where Pa Sankoh had been taken to. Among the people who were
12:16:24 released were like the late ex-President Momoh, Victor Foh and others among other renown Sierra Leone politicians who were in the prisons.

And Mosquito informed Benjamin about the people who had been released and he also informed him that they could not see Pa
12:17:00 Sankoh in the prisons and he requested for more ammunition so that they will be able to defend the city. He was asking Benjamin to send ammunition for us.

Q. Now, you said that Gullit sent a message through King Perry to Sam Bockarie - sent to Mosquito - about the prisoners from
12:17:32 Pademba Road. Is that correct?

A. Through King Perry. I mean that King Perry was the one who transmitted the message as a radio operator.

Q. Then you said that after Mosquito received the message he told Five-Zero, meaning Benjamin, that the men had entered the
12:17:54 city but they couldn't see the Pa, meaning Pa Sankoh. About how much time transpired between the time Bockarie received the message from Gullit through King Perry to the time he contacted Benjamin? How much time transpired between?

A. It was that very morning just when Sam Bockarie got the
12:18:20 message, because at that time, while the 6 January operation was going on, we moved a bit from Sam Bockarie's house. We were no longer seated at Sam Bockarie's house where we used to sit, opposite that house. We went down towards Dawa Road. There was a barri, an old barri, where we used to sit because of air raid

because there was frequently air raid by the Alpha Jet. The Alpha Jet used to raid Buedu and other areas.

PRESIDING JUDGE: Mr Witness, did you listen to the question? The question was about time.

12:19:08 MR SANTORA:

Q. Again I will ask you to further describe things as necessary, but just this question here, I am just asking you the time that passed - the time that elapsed from the moment Mosquito received the message from Gullit through King Perry to the time

12:19:26 he contacted Benjamin. You said, "It was that very morning just when Sam Bockarie got the message because at that time" and then you started talking about something else. How much time transpired?

A. It was not up to one hour. It was not up to one hour.

12:19:48 Q. And how in this particular instance did Sam Bockarie make contact with Benjamin?

A. It was through the sat phone.

Q. How do you know that?

A. All of us were sitting together in the barri where we

12:20:10 operated in the radio room.

Q. And you have described what he said - some of the things he had said to Benjamin. How do you know some of the things that he said?

A. He was sitting in the chair that was not far. If you can

12:20:29 allow me I can estimate the size of the barri. It's like from where I am sitting here to the exit at the back of the Prosecution lawyers. That was the size of the barri where he was sitting. The sat phone was - the sat phone was at one edge, one corner of the barri. And we were, that is the radio set was in

the other corner of the barri.

PRESIDING JUDGE: Counsel has seen the witness's indication. Mr Munyard, have you seen the witness indicate from where he is sitting to the door behind Mr Koumjian?

12:21:12 MR MUNYARD: I didn't, but I heard him say it so I am quite happy with that.

MR SANTORA: If we can stipulate a distance, that's fine. I just don't know if we have measured this before. I would be happy to stipulate an estimate.

12:21:27 PRESIDING JUDGE: Mr Witness, can you estimate the distance you have just referred to?

THE WITNESS: Estimate by what means? What do you mean? I don't think I have any professional means to estimate that besides the approximation that I have made, the visual example

12:21:45 that I have set.

MR SANTORA: It could either stand on the record or we could ask for a stipulation of perhaps 20 metres.

PRESIDING JUDGE: I don't think so.

MR MUNYARD: Can I, who also has no sense of distance - can

12:22:06 I make a suggestion that at some point somebody probably from Court staff using the tape measure just measures the distances between the witness box and various points in the courtroom so that we will have an accurate record for the future of what these distances are and that will save - apart from anything else it

12:22:27 will save the Court staff wandering up and down with the tape measure every time it is done. Then we can use it as a template for the future.

PRESIDING JUDGE: We will implement that, Mr Munyard, but in the meantime --

JUDGE LUSSICK: In the meantime, Mr Santora, for what it's worth I would estimate the distance to be about ten metres, but I would also point out that it's not very helpful evidence of how big that barri was because theoretically it may be ten metres in
12:23:00 that direction and it might be 50 metres wide. We just don't know, so really that particular distance from the witness to the door doesn't tell us anything about the size of the barri. It just tells us perhaps the width or the length of the barri.

MR SANTORA:

12:23:20 Q. Can you just describe the barri that you're referring to, describe it in terms of the dimensions?

A. The barri is in a square form, almost the same length and width. The length and the width are almost the same, like the distance I gave to you.

12:23:43 JUDGE SEBUTINDE: If I understood the evidence properly, the witness is estimating the distance between where he was sitting at the radio --

THE WITNESS: I am sitting here.

JUDGE SEBUTINDE: -- and where the satellite phone was on
12:23:54 which Bockarie was speaking in order for us to understand how he heard the conversation on the sat phone. That's what he is trying to do, I think.

MR SANTORA:

Q. How far away were you from where Sam Bockarie was using the
12:24:11 satellite phone?

A. I was sitting near the radio and he was using the satellite phone. Like after where the last chair is, at the back of the last chair at the edge of this hall. Like where I am sitting now, that is where I was and he was sitting on the other end like

at the back of the last chair at the end of this hall.
Q. You mean the empty chair at the back?
A. Yes, yes, the empty chair at the back. And how I knew also was after he had spoken to Benjamin they spoke for some time.
12:25:01 After some time Benjamin came back to Mosquito and called him on the sat phone and he gave him instructions to make sure that he told Gullit and others to dispatch all those big names that he had mentioned, to call for them to be with him in Buedu at the headquarters, that they should not be at the front line. He said
12:25:29 that was the instructions from Mr Taylor. And Mosquito told the operator in charge - that was one Mohamed Kabbah, I can recall, and on that very day he was the one on duty and he sent the message. I was there when Mohamed Kabbah encoded the message and sent it to Gullit and others for them to send back those people
12:25:56 to the rear for safety.
Q. Mr Witness, before I go on - and this goes with Mr Munyard's suggestion - that dimension will be - at some future moment there will be given a distance to the dimension, but for the record he pointed from his seat to the empty seat in the back
12:26:11 corner of the Prosecution side of the courtroom.
MR MUNYARD: Just to be completely accurate he said, "The back of the chair at the rear of the courtroom".
MR SANTORA:
Q. Mr Witness, just to be - you said that - first of all, how
12:26:32 did you know he was speaking to Benjamin Yeaten? How did you know Mosquito was speaking to Benjamin Yeaten?
A. After he called Benjamin and I was sitting at the other extreme edge of the corner, he asked, "Is this Five-Zero?", and he said, "Yes". He explained to him the development at the front

lines and when he was talking to him he used to respond, "Yes, sir". When they were discussing, he would respond to him directly, "Yes, sir. Okay, okay, I will do that". And when Mosquito finished he told the operator directly that he had had
12:27:24 instructions from Benjamin from above, that is Charles Taylor through Benjamin, that Benjamin had told him that the Pa had said that they should make sure that those people who had been released from Pademba Road should come to Buedu.

Q. Mr Witness, when you were giving your last answer you said
12:27:47 the following. You said, "After some time Benjamin came back to Mosquito and called him on the sat phone and he gave him instructions to make sure that he told Gullit and others to dispatch all those big names that he had mentioned to call for them to be with him in Buedu". I am going to take that down,
12:28:14 because you used a lot of words without calling out names there, okay? First of all, starting with, "After some time Benjamin came back to Mosquito and called him", meaning who?

A. And called Benjamin. It was Benjamin who came back on the line, on the telephone line, and called Mosquito. Benjamin
12:28:40 called Mosquito back on the sat phone.

Q. Then you said, "He gave him instructions to make sure that he told Gullit and others to dispatch all those big names that he had mentioned". When you say, "He gave him instructions", who are you talking about?

12:29:01 A. It was Benjamin who sent the instruction to Mosquito for Mosquito to call for the people who had been released by Gullit and others from the Pademba Road Prisons to send all of them to Buedu, including ex-President Momoh.

Q. "He told Gullit and others to dispatch all those big names

that he had mentioned". What do you mean when you say "all those big names"?

A. Yes, all the big names. You know, like there was one Steve Bio among them. Steve Bio, Osho-Williams - Osho-Williams, Victor Foh. You know, really I cannot recall all of the names now, all of the names of the people who were released from Pademba that were named, but there were about 20 prominent people in Sierra Leone who were among the list.

Q. And then you said, "To call for them to be with him in Buedu and that they should not be at the front line". Who are you referring to when you say "to call for them"?

A. That is the detainees who Gullit and others had released from Pademba.

Q. "To be with him in Buedu". Who do you mean "him"?

A. To be with Mosquito in Buedu.

Q. "That they should not be at the front line". Who is "they"?

A. That the released detainees from Pademba Road should not be at the front line.

Q. Then you said, "He said that was the instructions from Mr Taylor". Who said that?

A. It was Mosquito who said that that was the instruction.

Q. Who did he say that to?

A. It was the operator to whom he was explaining. Mosquito was now explaining to the operator about his conversation with Mr Benjamin Yeaten.

Q. Now then you said that Mohamed Kabbah, who was the operator, sent this message to Gullit. Is that correct?

A. Yes, yes.

communication with the ECOMOG about Pa Sankoh, about Pa Sankoh, that Foday Sankoh said he would like to talk to us, the RUF, everybody.

Q. Before I ask you about this communication related to Sankoh, just to clarify. You said that a communication you remembered was:

"It was a communication that Gullit and others should wait for Rambo and others to join them in order to re-attack Freetown and Gullit suggested that some men should stay there, some troops should stay at the rear - I mean the front, so that everybody should not desert the rear, the combat camp, so that the AFRC/RUF should not retreat together. Mosquito did not accept that. Mosquito accepted that."

I am going to ask you to clarify this because you said - let's start from the beginning. What did you mean when you said that Gullit suggested that some men should stay there?

A. Gullit suggested that some fighters should stay in Freetown. That everybody should not retreat so that he, Rambo, would have a designated area where they would meet. They should agree on a point, on a meeting point, where Gullit and Rambo would meet and reorganise to re-attack Freetown, and Sam Bockarie accepted Gullit's suggestion.

Q. Do you know - do you have any information which men were left? Do you know?

A. Yes. The men who stayed were there until even when Gullit and Rambo met and, in fact, some of the men who were going with Rambo, as they were going, Rambo sent some of them - some of them went up to the Calaba Town area, really. While they were trying to re-attack Freetown, they were not able. They were not able to

January invasion?
A. At that time SAJ Musa had died. He died before 6 January.
Q. How do you know that?
A. It was a direct message from King Perry to Mosquito.
13:28:31 Q. Were you present when this message came, if you can recall?
A. No, I cannot remember, but I read the message directly. I read it.
Q. Now, Mr Witness, you also - and I am a little bit loathe to do this because it's a completely new area, but I can just start
13:29:12 and then we can see how far we get.

PRESIDING JUDGE: Very well, Mr Santora. We have about two minutes left.

MR SANTORA:

Q. Mr Witness, you said - well aside during the course of the
13:29:24 January operation, you've talked about some of the communications that Sam Bockarie had within Sierra Leone. Was he in communication with anyone outside of Sierra Leone?
A. Yes.
Q. Who?
13:29:42 A. Mosquito was in constant contact with Benjamin Yeaten in Liberia.
Q. When you say "constant contact", what do you mean?
A. It did not take up to more than six hours without the two people talking. At least they used to talk - they used to talk
13:30:16 for at least two to three times a day through the sat phone. They used to talk at least two to three times a day through the sat phone most often.
Q. How do you know that?
A. Sometimes, most times in fact, I - we would be together in

the same room sitting together, because at that time Mosquito used to spend most of his time in the radio room. That was where he was with his sat phone. Then when - even when his battery is out, if it is not charged, he will switch it off so when Benjamin
13:31:06 wanted to talk to him sometimes he will tell Sunlight to contact Bravo Zulu 4 so that Bravo Zulu 4 will tell Mosquito to switch on his sat phone so that they can talk. Then sometimes, inversely, Mosquito would tell Benjamin Yeaten to call him on the sat phone to discuss whatever they wanted to discuss.

13:31:31 PRESIDING JUDGE: Mr Santora, that takes up to the lunch break.

MR SANTORA: Understood.

PRESIDING JUDGE: In fact, I think slightly beyond it. Mr Witness, we are now going to take the lunch break. We will be
13:31:43 resuming court at 2.30. Please adjourn court until 2.30.

[Lunch break taken at 1.30 p.m.]

[Upon resuming at 2.30 p.m.]

PRESIDING JUDGE: Mr Santora, I note a change of appearance.

14:30:56 MR SANTORA: Yes, Nicholas Koumjian has left the Prosecution bench.

PRESIDING JUDGE: Thank you. Please proceed.

MR SANTORA: Thank you, Madam President:

Q. Good afternoon, Mr Witness.

14:31:07 A. Good afternoon.

Q. Again just a quick reminder please, please, try to speak slowly when you are explaining something and to address the judges when you are speaking, okay?

A. I will try to keep up with that.

I N D E X

WITNESSES FOR THE PROSECUTION:

DAUDA ARUNA FORNIE	21532
EXAMINATION-IN-CHIEF BY MR SANTORA	21532
CROSS-EXAMINATION BY MR MUNYARD	21642

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 2 DECEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Carolyn Buff
For the Registry:	Ms Rachel Irura Mr Momodu Tarawallie
For the Prosecution:	Mr Nicholas Koumjian Mr Christopher Santora Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Ms Amina Graham

communicated. It was unlike us, the RUF, wherein each and every station assembled at the same national frequency.

Q. Okay. Now, when you arrived in Kenema, what were your day-to-day duties? What were your duties in Kenema?

10:21:39 A. My duties in Kenema were to transmit messages for Mosquito, or any other commander who will be there, and also to receive messages from the various stations.

Q. Who were you in communication with while you were in Kenema?

10:22:07 A. Almost each and every station within the AFRC/RUF were within reach.

Q. And what were the content of these communications?

A. Let me come back to something that just struck my mind in respect of whom I communicated with in Kenema. We also operated

10:22:39 with one of the radio stations in Liberia, that is Mr Taylor's radio station. I used to contact them.

Q. What was the name of that station?

A. I do not recall the call sign that they had at that time, because by then the call signs used to change intermittently. I

10:23:13 do not recall the call sign for that station now.

Q. Now, going back to my previous question in terms of your communications within Sierra Leone to RUF and AFRC stations, what was the content of those communications? What were those communications about?

10:23:45 A. It was like for instance to get information from the various front lines in Sierra Leone, to coordinate movement of troops, to make request for logistics, by that I mean arms and ammunition, mining and so on and so forth.

Q. What were the communications specifically with relation to

I N D E X

WITNESSES FOR THE PROSECUTION:

DAUDA ARUNA FORNIE 21410

EXAMINATION-IN-CHIEF BY MR SANTORA 21410

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 1 DECEMBER 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Carolyn Buff
For the Registry:	Ms Rachel Irura Mr Momodu Tarawallie
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah Ms Amina Graham

them speaking.

Q. You said that this was really the first time you overheard them speaking directly on the radio. Was there any other time? Let me withdraw the question and be a little more specific. Was there any other time you heard directly Mr Taylor communicating with Mr Sankoh?

A. I cannot remember that. I cannot remember that. I cannot remember that. During my regime with Foday Sankoh I can't remember that any more.

15:48:50 Q. Now you said that - after you were in Koindu where did you go?

A. From Koindu I went towards that Kissi land, Sondokoro-Bendu area. From there Pa Sankoh assigned me to Issa, to Issa. I was with Issa from December. And that December - from that December

15:49:27 up to the time Pa Sankoh went and established Zogoda in 1994.

Q. One moment, Mr Witness. Who is Issa?

A. Mr Issa Sesay was a front line commander towards Koindu at that time.

Q. And you said that you went towards Kissi land and then you

15:50:01 mentioned a location. Where exactly did you go when you were assigned to Issa?

A. The village, we used to call there Issa Ground. Issa Ground. That was how we called the village. I can't recall the right name of the village. There are some villages at that time.

15:50:22 We did not call them by their real names. Sometimes, if you surfaced in one village where there was a farm where you had a lot of okra, we would call there okra ground. Yes.

Q. You mentioned an area called, and I think you said something along the lines of Kolo Bendu area --

I N D E X

WITNESSES FOR THE PROSECUTION:

DAUDA ARUNA FORNIE	21292
EXAMINATION-IN-CHIEF BY MR SANTORA	21292

EXHIBITS:

Exhibit P-254 admitted	21288
Exhibit P-255 admitted	21288
Exhibit P-256A and P-256B admitted	21288
Exhibit P-257A and P-257B admitted	21289
Exhibit P-258A and P-258B admitted	21289
Exhibit P-259 admitted	21289
Exhibit P-260A and P-260B admitted	21289
Exhibit D-75 admitted	21290

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 13 NOVEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rachel Irura Mr Momodu Tarawallie
For the Prosecution:	Ms Brenda J Hollis Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah Mr Terry Munyard Michael Walker

continue destroying.
Q. Now, Mr Witness, you have been talking about what Mosquito said and I'm looking at, on my font, page 77 starting with line 11. "So he said they were contact him and he will demand". So, 13:16:08 first of all, who is saying this? "They will contact him and he will demand", who is saying this?
A. That is Mosquito.
Q. And who is the "they" that will contact --
A. He said the international committee would want to have 13:16:25 talks with him because he was leading the RUF and he said whenever the international committee contacts him, he said the only thing that he will tell them was to free Foday Sankoh before we go to peace. He said without Foday Sankoh there will be no peace. That was Mosquito saying that.
13:16:55 Q. Mr Witness, were you to have a role in this plan that Mosquito gave you?
A. Yes.
Q. And what was your role to be?
A. I was to go back to Baiima together with the brigade 13:17:24 commander CO Denis whom we called Monkey Brown. We were to Baiima to Eagle and Manawai. The command was to attack Bunumbu, Segbwema, Daru, Tondola, Bendu Junction, Jomukafebu, Kumbema all the way on to Kenema. So that was my own part of the operation.
Q. Now, this second meeting, how many people attended this 13:18:23 second meeting?
A. We were up to 35 to 40, around that, the officers.
Q. Now, Mr Witness, you said that the areas that you were to attack and including Bunumbu, Segbwema, Daru, Tondola, Bendu Junction, Kumbema, all the way to Kenema. You named one other

location. Do you remember what that location was that you were to attack? It was something like Jomukafebu. Can you tell us that location again?

A. Yes, I said Tondola --

13:19:16 Q. Just the one location, sir. Something that sounded like Jomukafebu. What was this location?

A. Yes. That's the same, Jomukafebu.

MS HOLLIS: Your Honours, our phonetic spelling for that would be J-O-M-U-K-A-F-E-B-U:

13:19:39 Q. So after this second meeting then what did you do?

A. Mosquito came back to Buedu. At that time the reinforcement that he had come with from Liberia were at the MP in Buedu. Then we, the commanders who were to go with this mission, like Manawai, Eagle, CO Denis and myself, then he

13:20:28 provided Abu Keita and his reinforcement to us for us to attack the various areas that he had mentioned. From there he gave us arms, ammunition, medicines. That was Mosquito who gave us all these things.

Then he told CO Denis as the brigade commander for us to

13:21:02 move ahead on this mission. I saw him give arms, ammunition, medicines to Issa, Issa Sesay. He said Issa Sesay should go across to Kono together with Akim and others and Soriba, who were AFRC soldiers, to join Superman, CO Rambo for them to attack Kono and from there Akim should go and attack Tongo while Issa and

13:21:49 Morris Kallon would advance all the way on to Makeni.

Q. Mr Witness, you have mentioned someone CO Denis. You said he was a brigade commander. What brigade was he the commander of?

A. Well, he was the 1st Brigade commander in Kailahun.

Q. And I believe you said CO Denis, Monkey Brown. Is that the same person or different people?
A. It's the same person.
Q. And what was the nationality of CO Denis?
13:22:42 A. He's a Sierra Leonean.
Q. And what group did he belong to?
A. The RUF group.
Q. Now, Mr Witness, after you had received the reinforcements and you had received the arms and ammunition and other supplies
13:22:56 did you move to carry out your mission?
A. Yes.
Q. Were you able to capture Kenema?
A. We were unable to capture Kenema.
Q. When you carried out your mission did you follow Mosquito's
13:23:19 instructions about spare no soul?
A. Yes.
Q. What did you do?
A. We killed civilians, we burnt down villages that we had captured.
13:23:44 Q. Now, when you were unable to capture Kenema where did you go?
A. I came back to Segbwema because that was where we had captured.
Q. And how long did you remain in Segbwema?
13:24:10 A. I was in Segbwema until the Lomé Peace Accord.
Q. While you were in Segbwema did you receive information about any events in Freetown?
A. Yes.
Q. What information did you receive?

I N D E X

WITNESSES FOR THE PROSECUTION:

AUGUSTINE S MALLAH 20157

EXAMINATION-IN-CHIEF BY MS HOLLIS 20157

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 12 NOVEMBER 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rachel Irura Mr Momodu Tarawallie
For the Prosecution:	Ms Brenda J Hollis Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah Mr Michael Walker

remain at Zogoda?
A. Yes. I was there until the time Zogoda fell, that is 1996 when Foday Sankoh went to the Ivory Coast to the Yamoussoukro Peace Accord, when he left CO Mohamed in charge for him to take
12:38:00 care of the soldiers - the RUF soldiers - and we based at Zogoda, where he was, and until the Kamajors and the Sierra Leone soldiers attacked the RUF and finally dislodged them from Zogoda.
Q. During the time you were at Zogoda and Foday Sankoh was still at Zogoda, were you aware of any communications Foday
12:38:32 Sankoh had outside of Sierra Leone?
A. Yes.
Q. What were these communications?
A. Repeat the question.
Q. During the time you were at Zogoda with Foday Sankoh, '94
12:38:55 to some time in '96, were you aware of any communications Foday Sankoh had outside of Sierra Leone?
A. Yes.
Q. And what were those communications?
A. The communication, because I myself had access to Foday
12:39:17 Sankoh at any time, at any hour, as a strike force commander, so I was there when a radio man came to call Foday Sankoh. He said they wanted to talk to him. Who wanted to talk to him? Charles Taylor. I myself will be there where we would take Foday Sankoh and we would sit by just like that white man there, sitting down,
12:39:56 and we will be here whilst they are talking. That used to take place for over a day, every day, or some time once or twice a day. We used to see him asking and they would greet each other. He would ask for Foday Sankoh. He would enquire about Foday Sankoh's health. Foday Sankoh too would respond in the same way

I N D E X

WITNESSES FOR THE PROSECUTION:

AUGUSTINE SAMA MALLAH 20053

EXAMINATION-IN-CHIEF BY MS HOLLIS 20053

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 27 OCTOBER 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Julia Baly Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Ms Jacqueline Watts

A. No, from Kola Tree we went back up the hills towards Wilberforce.
Q. Thereafter, did you go to Benguema?
A. Yes.
15:18:14 Q. Whilst in Benguema a Brigadier Five-Five called a muster parade, didn't he?
A. Yes.
Q. And a muster parade was an event where all civilians and soldiers would gather together to be addressed by a commander?
15:18:42 A. Yes.
Q. And at that muster parade Brigadier Five-Five gave a speech, did he not?
A. Yes, he gave a speech.
Q. And in that speech he first and foremost welcomed all of
15:19:00 you, didn't he?
A. Yes.
Q. And said that they had come to save the civilians, is that right?
A. I can't remember that.
15:19:23 Q. And did he not go on to say, "There is not going to be any kind of ruthless behaviour on the civilians"?
A. He said that.
Q. In fact he went further, did he not, and said that - he told the abducted civilians and rebels twice during the muster
15:20:07 parade that you should observe certain rules such as no fighting amongst yourselves, no stealing, no raping or killing, is that right?
A. Yes.
Q. He went on to say that he would severely punish anyone

PRESIDING JUDGE: Mr Griffiths, maybe I am being pedantic, but you have put two questions in the negative and the witness has answered in the negative, but I think he is agreeing with you. You said, "You did not hear?" "No".

15:24:52 MR GRIFFITHS: Yes.

PRESIDING JUDGE: That is at line 18 of page 135, but I think he --

MR GRIFFITHS: Well, let's clarify it just for the sake of the record, Madam President, I fully agree:

15:25:04 Q. We accept those things did go on. We are agreed on that, aren't we, Mr Conteh?

A. Yes.

Q. But the point is you never saw anyone ordering anyone to carry out those crimes in terms of senior commanders?

15:25:23 A. No.

Q. Thank you. Now, would it be fair to say that throughout that period for the most part the group you were with were fleeing from ECOMOG soldiers?

A. Repeat the question again.

15:25:46 Q. For the ten months that you were with that group, would you agree that for the most part you were fleeing from ECOMOG soldiers?

A. Yes.

Q. Indeed from Jui, J-U-I --

15:26:01 A. Jui.

Q. You had to flee from Jui because of their greater fire power, didn't you?

A. Yes.

Q. Because they bombarded your positions with artillery and

I N D E X

WITNESSES FOR THE PROSECUTION:

AKIATU THOLLEY	19191
EXAMINATION-IN-CHIEF BY MS HOLLIS	19191
CROSS-EXAMINATION BY MR ANYAH	19220
RE-EXAMINATION BY MS HOLLIS	19274
PAUL NABIEU CONTEH	19284
EXAMINATION-IN-CHIEF BY MR SANTORA	19284
CROSS-EXAMINATION BY MR GRIFFITHS	19290
RE-EXAMINATION BY MR SANTORA	19310
IBRAHIM FOFANA	19315
EXAMINATION-IN-CHIEF BY MS BALY	19315

EXHIBITS:

Exhibit P-215 admitted	19314
Exhibit P-216A and P-216B admitted	19314

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 20 OCTOBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah

fourth day they would come. It was not on a daily basis, because there were civilians in the town, that is in Makeni, so they actually did not come on a daily basis. Maybe if they come today, they may not come tomorrow or the day after. Maybe if 15:57:31 they come in the morning and they come in the evening again on the same day.

Q. Were many people killed?

A. Well, the area where I was nobody was killed there. They did not kill anybody there. The area where I was, they did not 15:57:49 kill anybody there.

Q. To your knowledge, did Superman and Issa ever speak again after that?

A. Well, I don't know because at that time we had come to Makeni and everybody was free to do anything. So I don't know 15:58:09 except - no, I don't know.

Q. But in Makeni, during the period you were there and Issa was in charge, the MPs imposed discipline, didn't they?

A. Yes.

Q. So that, for example, if a soldier raped he would be 15:58:43 executed, wouldn't he?

A. Yes.

Q. And it's also right, is it not, that at that time, whilst Issa was in charge in Makeni --

A. Yes.

15:59:11 Q. -- looting, burning of houses, raping and so on you couldn't do any of that, could you?

A. No. The looting that one continued, but they did not burn houses because from the first time that they entered they were told not to burn and they were told, say, "Oh, no burning. No

I N D E X

WITNESSES FOR THE PROSECUTION:

EDNA M BANGURA	18662
EXAMINATION-IN-CHIEF BY MR SANTORA	18662
CROSS-EXAMINATION BY MR GRIFFITHS	18699
RE-EXAMINATION BY MR SANTORA	18791

EXHIBITS:

Exhibit D-67 admitted	18796
Exhibit D-68 admitted	18796
Exhibit D-69 admitted	18796

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 6 OCTOBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard

Q. What happened after this fight between Superman and Issa Sesay and Issa and Rambo?
A. Well, when we were in Lunsar, it was Rambo --
THE INTERPRETER: Your Honours, can he repeat his answer.
15:41:53 PRESIDING JUDGE: Mr Witness, the interpreter asks you to repeat your answer, please. You said "Well, when we were in Lunsar." Please continue from there.
THE WITNESS: I said when we were in Lunsar Rambo attacked him there - Issa there - at one time, so when we returned in
15:42:15 Makeni they fought against each other. It was at that time that Issa was driven from Makeni and he went to Magburaka. Those of us who had come from Kabala were now there. There came a time when a mediation took place and they came together again.
MR KOUMJIAN:
15:42:44 Q. Okay. Before we go on to discuss the mediation, this is what we understood, Mr Witness, from your answer, and listen carefully and tell me if it is correct. What the transcript says that you said is, "I said when we were in Lunsar Rambo attacked him there - Issa there ". Is that what you said, that Rambo
15:43:10 attacked Issa?
A. I said Superman. They attacked Superman.
Q. Okay. What was the mediation that you just spoke about? After Rambo was killed, what was the mediation you just spoke about?
15:43:38 A. Well, when this fighting took place, at that time there was a masked devil --
THE INTERPRETER: Your Honours, can he again repeat slowly.
PRESIDING JUDGE: Sorry, Mr Witness, to interrupt, but the interpreter is having a problem hearing you clearly. You said

"When this fighting took place at that time." Continue from there, please.

THE WITNESS: I said when they were in Makeni, when the fighting started between them, Superman and Issa and Rambo, when they fought that was the time that Superman killed Rambo. Then Superman - Issa moved and came to Magburaka. That was where he was. When we met again there was a traditional priest called Pa Demba. He was the one who mediated between them.

MR KOUMJIAN:

15:44:48 Q. Who was this man, Pa Demba?

A. A local medicine man; a local juju man.

Q. Did he belong to the army or the RUF or the STF or any of those groups?

A. He was with the RUF.

15:45:18 Q. Mr Witness, since you mentioned a medicine man, I am going to take you back to Kono. When you were in Kono, was there ever a medicine man there?

A. Yes, there was one there too.

Q. Was that before you went for training or after you went for

15:45:43 training?

A. After the training, that was the time that he was there.

Q. And what did this medicine man do?

A. He used to mark people. He used to make cuts on people saying that bullets - they would not be caught by bullets. It

15:46:09 was a kind of juju.

Q. Can you show us - I show you start to point - but can you show us where he would make the cuts on people? Can you show the Judges?

A. Well, I refused to take it because those whom I met there,

blood was oozing from them so I was afraid and refused.
Q. Did you see where they were bleeding from?
A. Yes. I went there and I saw him administering the marks on them. He was marking them on their chests, on their arms - upper
15:46:52 arms - and their backs.
Q. Thank you. Sorry for the digression. So after the mediation by Pa Demba, what happened between Superman and Issa Sesay?
A. Well, they were there at the time and they were working
15:47:21 together. That was where we were.
Q. How long did you stay in Makeni?
A. I took a year there.
Q. When you were in Makeni, did any other forces come to Makeni; not rebels, not SLA, not ECOMOG?
15:47:52 A. Yes.
Q. Who came?
A. UNAMSIL came, but they did not come there to fight. They had come there for peace.
JUDGE SEBUTINDE: Mr Koumjian, you seem to have been
15:48:05 introduced a character called Issa Sesay. I think the witness has consistently spoken of General Issa.
MR KOUMJIAN: That is correct, your Honour. That is my error, if I did that:
Q. Sir, did you see anything happen to the UNAMSIL?
15:48:31 A. Yes, at the time that we were there.
Q. What did you see? Sorry, what did you see happen?
A. Well, at the time that we were there Wallace left us there and went to Freetown. At the time they said it was the time for disarmament, he left us at the house and went. He went to

I N D E X

WITNESSES FOR THE PROSECUTION:

KOMBA SUMANA 17878

EXAMINATION-IN-CHIEF BY MR KOUMJIAN 17878

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 17 SEPTEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Ruth Hackler
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah Mr Michael Walker

elections was very simple, wasn't it? At that time the RUF was holed up in the bush and had no prospects of being able to campaign effectively in an election, would you agree?

A. At that time I wouldn't agree with that because you

09:45:49 wouldn't say that. We were in the bush, but we still had been defending ourselves.

Q. Yes, but what I mean is you needed to have access to the whole country as a political party if you were to engage in elections, didn't you?

09:46:10 A. Yes.

Q. And in order for you to participate throughout the nation of Sierra Leone there would need to be peace first, wouldn't there?

A. Yes.

09:46:24 Q. Which is why Sankoh said "Peace before elections"?

A. Yes.

Q. And the second reason why the prospect of peace in Abidjan was destroyed was because of Kamajor attacks upon RUF positions. That's right, isn't it?

09:46:48 A. Yes.

Q. And if we look behind divider 1, please, at page 11, if we look at the second paragraph on that page in February 2007 you told the investigators this:

"While Foday Sankoh was in Abidjan for the talks which led

09:47:21 to the signing of the Abidjan Peace Accord in November 1996, the Kamajors launched an attack on Camp Zogoda, which was the then RUF headquarters, and other areas under RUF control. Kabbah says it was the Kamajor attacks which occurred up to the AFRC coup, which destroyed the chance for peace at that time."

Is that true?
A. Yes.
Q. Because whilst the RUF were in Abidjan trying to agree a peace deal the Kamajors effectively took the RUF by surprise, didn't they?
09:48:07
A. Yes.
Q. And they scored a devastating victory against the RUF, particularly at Camp Zogoda, didn't they?
A. Yes.
09:48:23
Q. Many RUF fighters were killed?
A. Yes.
Q. And it came as a shock to the RUF, didn't it?
A. Yes.
Q. Now, please look behind divider 2. This is what you say at
09:48:56
paragraph 16 on page 5:
"CO Mohamed Tarawalli was the senior man in charge at that time" - you're talking about at the time of the Abidjan peace talks - "that Foday Sankoh went to Abidjan. The witness thinks that the agreement might have been signed when Zogoda was put in
09:49:33
disarray. Foday Sankoh had heard that Zogoda was going to be hit and relayed a message to Tarawalli with this information. Tarawalli was slow to react and the Kamajors won a major victory. Many RUF soldiers died and very few reached Kailahun. Mohamed Tarawalli later went missing and that was serious for the RUF."
09:49:59
Again, do you recall saying that to the investigators?
A. Yes.
Q. And that was the truth, wasn't it?
A. Yes.
Q. So in summary, Mr Kabbah, would it be fair to say that in

divider 1. Behind divider 1, page 4. I want to look at the second to last paragraph on that page:

"Kabbah recalls General Dopoe Menkarzon bringing 13 Beretta rifles to Pendembu in 1991. Kabbah says that the RUF 10:00:53 used to capture enough arms from the government forces that eventually they did not need to get arms from Liberia or elsewhere. However Kabbah is aware of ammunition coming in from Liberia on many occasions. Kabbah says Foday Sankoh used to go to Monrovia and come back with ammunition and food. Sam Bockarie 10:01:24 also used to go and bring ammunition back from Liberia."

Pause there. Is that the truth?

A. Yes.

Q. And let's go now to page 20, please, the second paragraph on that page:

10:02:09 "During that period of 1998 and 1999, Kabbah says that he never saw arms being shipped from Liberia. Kabbah says by that time the RUF had enough weapons. For example, Kabbah recalls numerous AK-47 rifles captured by the RUF after the big offensive of late 1998 and early 1999 from Guinean troops who were 10:02:51 stationed in Kambia. The RUF stored these rifles in Kailahun and did not use them until they fought the Donso in late 2000 near the Guinea border."

Is that true?

A. Yes.

10:03:15 Q. So between 1998 and 1999 no arms were shipped from Liberia?

A. No arms came, but we used to get ammunitions there. Arms are different from ammunition.

Q. I will come to the ammunition in a moment, but in 1998 to 1999 no arms from Liberia. That's your evidence, is it?

A. Yes.
Q. And it's the truth, is it?
A. Yes.
Q. You can state that fact quite confidently, can you?
10:04:04 A. Yes.
Q. The reason why I want you to be sure about this is we appreciate of course, don't we, that one of the most gruesome events of the Sierra Leonean civil war was what happened on 6 January 1999, so within the period you're telling us about now no
10:04:29 arms came from Liberia. That's right, isn't it?
A. Correct. We did not get any arms from Liberia.
Q. The second point is this. The attack on Kambia, who mounted that attack?
A. The Kambia attack, it was Superman and the SLA that were
10:04:55 there in the north.
Q. And can you give me a date for that? It was some time towards the back end of 1998, wasn't it?
A. That event took place during the same attack that I have been talking about when the ECOMOG were based and the capture of
10:05:31 Kono and subsequently they went to all the other areas.
Q. And the position is this, isn't it? A huge amount of arms and ammunition were captured in Kambia, weren't they?
A. Yes.
Q. Were Gullit and SAJ Musa also involved in that attack on
10:05:52 Kambia?
A. All of them were there. That was the time that all of them were in the north.
Q. And it was after that attack on Kambia when that large amount of arms were captured - it was after that that that same

group launched the attack on Freetown, wasn't it?
A. Yes.
Q. Using the arms they had captured in Kambia?
A. That area, you see, I will talk a little about it. The
10:06:36 arms that were captured in Kambia, they took arms to Kailahun
which were captured from Kambia. I do not know whether all of
them were sent because I was not there, so just the captured
arms, the ones that they would send, they were the ones that we
would see.
10:06:53 Q. I know about that and let's just digress for a moment and
deal with the point that you make. Let's go behind divider 2,
shall we? At page 5, paragraph 19:
"The witness advised that the AK-47s captured by the RUF
during the late 1998 offensive, were stored in his home in
10:07:50 Yandowahun, two miles from Kailahun. The weapons were all brand
new."
Is that true?
A. Yes.
Q. And the weapons, those were the weapons captured at Kambia,
10:08:06 weren't they?
A. Yes.
Q. And so many had been captured that some were actually put
into storage because they were not needed?
A. That was what they said in Kailahun, the ones that they
10:08:29 took and stored in my own village. You see, where I was based,
if they had any others --
THE INTERPRETER: Your Honours, would the witness be
instructed to repeat the last segment of his testimony.
PRESIDING JUDGE: Mr Witness, the interpreter asks that you

Q. And there was also some STF members amongst them, weren't there?
A. Yes.
Q. And those STF members were former ULIMO fighters, weren't they?
11:19:27
A. Yes.
Q. And remember us talking about, I think it was Monday, how these former SLA soldiers wanted to get back to Freetown. You remember us discussing that?
11:19:44
A. Yes.
Q. Now, it was only after that group entered Freetown that Sam Bockarie - well, let me put it differently. Let me start again. It was only after that group had entered Freetown and reached State House that they contacted the radio station in Buedu, is
11:20:15
that right?
A. It is correct.
Q. In fact you radio operators and RUF members in Buedu, the first time you knew that Gullit was in Freetown was when you heard it over the BBC. That's right, isn't it?
11:20:38
A. Yes.
Q. And when you heard it over the BBC it came as a complete surprise to you, didn't it?
A. Yes.
Q. And it was totally unexpected?
11:20:58
A. We were expecting that, because we used to get from the BBC - when they even attacked Waterloo we got the information and we knew that they were trying to advance to Freetown, even though Sam Bockarie had warned them to wait. We knew that since they never accepted the orders and that they were heading for

Freetown, so it wasn't a surprise to us because that was their own mission.

Q. Their own mission, thank you. But it was unplanned so far as Sam Bockarie was concerned, wasn't it?

11:21:45 A. Yes, it was not planned.

Q. Now once you heard the news on the BBC you radio operators in Buedu started calling desperately the other radio stations to find out precisely what was going on, didn't you?

A. Yes, we found out especially Superman's station who were

11:22:11 closer to the other men.

Q. And that was the only way you were able to get any information about what was going on on the ground?

A. Yes, later Perry came on the air --

Q. I am coming to Perry. Believe me, I'm coming to him now.

11:22:35 Then suddenly Perry called on the radio, didn't he?

A. Yes.

Q. And at what time was that, a time of day?

A. I wouldn't be able to say the exact time, but he called. He called us. He was the one who first called us.

11:23:01 Q. And he called because Gullit's group had run into trouble, hadn't they?

A. Yes.

Q. They were being suppressed, to borrow a word you used. That's right, isn't it?

11:23:21 A. Correct.

Q. And they desperately needed reinforcement?

A. You are correct.

Q. And that's when they called?

A. Yes.

I N D E X

WITNESSES FOR THE PROSECUTION:	
MOHAMED KABBAH	16404
CROSS-EXAMINATION BY MR GRIFFITHS	16404
RE-EXAMINATION BY MR SANTORA	16451
TF1-189	16479
EXAMINATION-IN-CHIEF BY MS HOLLIS	16481

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 16 SEPTEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah Ms Amina Graham

Q. And so so long as Benjamin Yeaten said anything everyone assumed without any evidence that it must have come from Charles Taylor, is that the position?
A. Yes, because they said he was his right-hand man and so
15:27:04 whatever he said he must have discussed that with the Pa.
Q. But there was no evidence to support it. It's just what people assumed, is that the case?
A. Yes.
Q. Thank you. Now, I want to ask you about another topic and
15:27:31 it's this. Jungle was a Liberian, wasn't he?
A. Yes.
Q. Now there came a time, did there not, when Jungle and a group of Liberians because of the incursion by ULIMO into Liberia became isolated in Sierra Leone?
15:28:09 A. From 2000 - from 1992 to 2000 - from 1992 to 1997, yes, they hadn't dealings.
Q. Because what had happened was Jungle had become cut off from Liberia and he was effectively thereafter fighting with the RUF, wasn't he?
15:28:42 A. Jungle - Jungle was there with their remnant renegades, not with the RUF. They were together with Fayia. They were in the bush in their own separate jungle. He was with General Fayia, the one who was in charge of Foya at that time.
Q. But he effectively became a part of the RUF, didn't he?
15:29:18 A. Yes, he used to come to us the time Fayia wanted us to go to Monrovia.
Q. The reason I am asking you about this is this. Yesterday when you were giving evidence you said this:
"A. Jungle even at the time of the intervention while our

I N D E X

WITNESSES FOR THE PROSECUTION:

MOHAMED KABBAH 16281

CROSS-EXAMINATION BY MR GRIFFITHS 16281

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 15 SEPTEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Mr Christopher Santora Ms Kathryn Howarth Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah Ms Jacqueline Watts

Q. Now can you estimate roughly between about how long - how many days passed between January 6, when the men first entered, to this communication that you've just spoken about where Sam Bockarie told Gullit to make the area fearful? Can you estimate
10:00:40 how many days or weeks passed between those two times?
A. It was not up to a week. Like, for example, this night when he spoke to Gullit, because Gullit told him that they were to pull out that particular night, that was when the conversation took place.
10:01:04 MR SANTORA: I'm sorry, your Honour, I just lost the page reference:
Q. Now you said that the communication between Buedu and the men in Freetown went on every day. Is that correct?
A. Yes.
10:01:54 Q. Aside from what you have already discussed what was the content of that communication that went on every day?
A. The communication was to give, let me say direct report, because any station or any front line that was under the RUF or RUF communication every day you should give a salute report or
10:02:31 situation report on the front line to the station in Buedu and Sam Bockarie was in charge. So every station within the RUF used to do that.
Q. So during the time of the Freetown invasion who was in charge?
10:02:55 PRESIDING JUDGE: In charge of what, Mr Santora?
MR SANTORA: I'm sorry, I apologise:
Q. Who was in charge of the men in Freetown?
A. It was Gullit who was in charge of the men in Freetown, the fighting force that went there, but Sam Bockarie was in charge of

the entire movement.
Q. Now you also said - you were speaking of a conversation between Sam Bockarie and Benjamin Yeaten during the time of the Freetown invasion. First of all, can you just describe generally
10:03:46 who, if anyone, was Sam Bockarie in communication with during the time of the Freetown invasion?
A. Sam Bockarie communicated with Benjamin Yeaten and he used to communicate as well with Charles Taylor, but for the communication with Charles Taylor that one he used the satellite
10:04:12 phone. And the capture of Freetown, that was not even a hidden thing that he would go to a corner and discuss like he used to do, that one he did in an open place when he was trying to inform Charles Taylor that our men were in Freetown. He did that in the open because the RUF was happy, that was a joy to the RUF that
10:04:39 they had entered Freetown.
Q. Let's start, first of all, what did you observe in terms of communications between Sam Bockarie and Benjamin Yeaten during the time of the Freetown invasion?
A. There had been communication between them for a long time.
10:05:08 It was - let me say it was a sisterly or brotherly operation that we had. So whatever good or bad information that we had from any of the ends we should share that with each other.
Q. Before you continue, I'm specifically asking you in terms of at the time of the Freetown invasion what was the state of
10:05:36 communication - what did you observe in terms of communication between Sam Bockarie and Benjamin Yeaten?
A. What I observed, it's just like for example when you and your subordinates would be doing something you would be giving him instructions or orders and that was the way I observed. Like

and call. At that time, Sam Bockarie would be on the standby. It was not any secret. It was not hidden or that the satellite phone was not there. No, he had it. He used to hang it on his pants walking around with it. It was not hidden. And for
10:10:47 communications it was - I would either be present or not, but I will know.

Q. Now I'm going to ask you to focus though on the time of the Freetown invasion. Now you've spoken generally about Sam Bockarie using the satellite phone, but I'd like you to be
10:11:09 specific. At the time of the Freetown invasion, how do you know he was - Sam Bockarie was in communication with a satellite phone with Charles Taylor?

A. All along communication on the VHF went all other commanders, but the satellite phone communication went on
10:11:45 directly to Charles Taylor. The night that the dialogue took place, that was at the MP headquarters in Buedu, the operator who was on duty, Tiger, Sam Bockarie told him to tell Sunlight to tell his Pa that he wanted to talk to him, and that is Charles Taylor, and that very night Tiger passed a message to
10:12:17 Sunlight. And where the satellite would receive call radios up at the MP and Sam Bockarie went into the vehicle and they went. That was the Planet 1 and the - we too were at the --

THE INTERPRETER: Your Honours, can the witness repeat.

PRESIDING JUDGE: Please pause, Mr Witness. The
10:12:50 interpreter needs to clarify and catch up with you. Would you go back to your answer and pick up again where you said, "That was Planet 1 and ...", and then continue from there, please.

THE WITNESS: Sam Bockarie I said he went into his vehicle that was - that was having the mobile radio. We referred to that

radio as Planet 1. The base radio, that was Marvel, too was in a vehicle and we went into that vehicle. We and the - myself and the other operators and some bodyguards, we went to the MP. That was where we were that night when he called and this discussion took place.

MR SANTORA:

Q. Okay, Mr Witness, I'm going to ask you to focus specifically on the incident you just described. First of all, were you present when Sam Bockarie made this call?

10:14:00 A. I was present. I said it was up at the MP station, because there is where you - there was the hill and that was where the satellite got coverage.

Q. Now who else was present in this particular instance when Sam Bockarie made this satellite call, if you recall?

10:14:26 A. I was present, Tiger who was on duty was present, Pascal who was with Planet 1, that is Sam Bockarie's station, was there. His bodyguard commander Foday too was there.

Q. Now in terms of when this particular call took place, do you know when it occurred?

10:14:56 MR GRIFFITHS: I hesitate to interrupt my learned friend, your Honours, but the Pascal mentioned at line 14, is that the same Pascal who was in Foya because unless he was beamed over, as on Star Trek, he couldn't be in two places at the same time?

PRESIDING JUDGE: I understood that the Pascal in Foya was

10:15:18 corrected to Mortiga and that Pascal was actually in Buedu. I need to go back to give you a reference.

MR SANTORA: Do you want me to look for the reference on that? I also recall the same thing.

MR GRIFFITHS: I'm sure it's my fault. I may have mistaken

something.

PRESIDING JUDGE: I have to concede, Mr Griffiths, that this particular identification of this person in Foya was - there was at least twice it was said Pascal and then it was at least twice said Mortiga.

10:15:56

MR GRIFFITHS: I'm sure it's my fault, your Honour.

MR SANTORA:

Q. Mr Witness, now I'm referring to this particular instance where you say that you were present when Sam Bockarie made a satellite phone call. Do you know approximately when this was?

10:16:11

A. The day that the communication occurred between Buedu station and King Perry in Freetown, it was that very night that the communication took place.

Q. Do you know what was discussed in this communication?

A. The one that I heard Sam Bockarie tell Charles Taylor was that our men had entered Freetown, they were advancing and they had even captured State House.

10:16:51

Q. Did you learn anything else about what was discussed?

A. He was just laughing while they were talking. He will say, "Yes, sir. Yes, sir".

10:17:28

Q. Who was laughing?

A. Sam Bockarie. Sam Bockarie.

Q. Now, how do you know he was speaking with Charles Taylor?

A. The communication for - even for them to talk came directly from our station, Buedu. He said he wanted to talk to Charles Taylor and, when the response came, that was why we even went to the MP to talk to Charles Taylor.

10:17:57

Q. Now, were there any other communications during this time that you have information about involving Sam Bockarie and the

satellite phone?
A. That is the communication that I monitored between him, that is Sam Bockarie, and Charles Taylor. That was the only communication that I monitored.
10:18:41 Q. Now, you also said - before in referring to Charles Taylor you said, "We called him Father". What did you mean by that?
A. Our Pa, he was the one we depended on. When Sankoh was not present he would be the one to depend on, so we depended on him.
Q. Now, you discussed several communications with regard to -
10:19:32 between Sam Bockarie and Gullit and in one of those conversations there was a conversation about the prisoners at Pademba. Is that correct?
A. Yes.
Q. What do you recall specifically that conversation to be?
10:19:58 A. Sam Bockarie said that Gullit should not leave the prisoners he had released, particularly President Momoh, that he should not leave them behind and that he should travel with them at night, not in the afternoon because in the afternoon it would be risky.
10:20:22 Q. And what was Gullit's response to that?
A. Gullit said he would do it and he brought them.
Q. What do you mean "He brought them"?
A. He took them from Freetown and brought them to our controlled zone.
10:20:44 Q. And at that point what was your controlled zone?
A. Starting from Lunsar, going towards Kabala right up to Kailahun, Kono, all of those areas were our controlled zones.
Q. Now, Mr Witness, on Friday you said that you remained in Buedu on the radio working on radio communications up until the

I N D E X

WITNESSES FOR THE PROSECUTION:

MOHAMED KABBAH	16162
EXAMINATION-IN-CHIEF BY MR SANTORA	16162
CROSS-EXAMINATION BY MR GRIFFITHS	16196

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 12 SEPTEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Ms Salla Moilanen

12:56:08 came and after three weeks when I came I was there when Sam Bockarie took off for Monrovia. Immediately he returned that was the time that that meeting was held.

Q. Now, I asked you who to your recollection was present at this meeting?

A. At the meeting were Issa Sesay, Denis Mingo - Denis was there, Monkey Brown, we had Eagle, Mannah Wai [phon], and some other men like the operator Zedman. All of us went to that meeting. We were all there.

12:56:53 Q. Were there any other radio operators there that you recall?

A. Yes. King Perry was there. Go-Joe [phon] whom we called Joe Kassa [phon], because they came with Superman, he was there.

Q. About how many people were at this meeting?

A. The meeting was attended by a large crowd, a very large

12:57:37 crowd, because we had members from the AFRC. We had the civil populace, that is the advisors, Pa Rogers and others, and the commanders who had come. The people were many there. Over a hundred people at that place.

Q. What was the subject? What do you recall about this

12:58:00 meeting? What was discussed?

A. At the meeting they talked about - they said we should construct an airstrip, that is, the airstrip was to be constructed at a village. I cannot recall the name of the village but it was around Buedu. Also the attack on Kono, how we

12:58:36 were to take Kono so that we would mine and be able to get ammunition to continue the struggle, and also the diamonds lost by Issa. These were some of the specific things that were discussed at the meeting that I can recall.

Q. Was anyone chairing the meeting or was anyone in charge of

the meeting?
A. Sam Bockarie who called the meeting chaired it.
Q. Now you've mentioned that the topic of an airfield was discussed. Actually I should say you mentioned that a topic of
12:59:31 an airstrip was discussed. Describe exactly what was - to your recollection, what specifically was discussed in terms of an airstrip?
A. That airstrip was to be constructed so that we can receive our own ammunition. That is we were to be getting ammunition
12:59:56 from Libya. That is when it arrives it won't come through Monrovia, it will come straight to us. When Sam Bockarie came that was the message that he brought. He said we were to try and get the war strip. The work commenced to construct the war - the airstrip but we did not see the plane that came.
13:00:26 Q. I'm just going to ask you to clarify the last portion of your answer, Mr Witness. You said, "But we did not see the plane that came." What do you mean?
A. We constructed the airfield for a plane but we never saw a plane land there.
13:00:48 Q. Who did the construction?
A. The construction was done by civilians, soldiers because when they were going to do that work Sam Bockarie will - we would take the radio along, we would be there for the entire day and in the evening we would return. Because there was a Caterpillar
13:01:10 there that was abandoned, that was repaired and that was - it was working there together with the civilians.
Q. Now you also said another topic that was discussed were the diamonds lost by Issa. What do you recall about that topic? What was discussed about that at the meeting?

I N D E X

WITNESSES FOR THE PROSECUTION:

MOHAMED BERETEH KABBAH 16085

EXAMINATION-IN-CHIEF BY MR SANTORA 16086

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 8 SEPTEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson
For the Registry:	Ms Advera Kamuzora Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Nicholas Koumjian Mr Christopher Santora Ms Leigh Lawrie
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths, QC Mr Terry Munyard Mr Morris Anyah Ms Emily Mitchell

Q. Was it just one time that you learnt this from Sam Bockarie's wife, or Sam Bockarie himself?
A. Well, from Sam Bockarie it was once and the other time his wife told me when he went and spent a long time.
11:06:12 Q. Who went and spent a long time?
A. Sam Bockarie.
Q. What did his wife tell you at this time?
A. His wife told me that her husband had said that he had a meeting in the farm, that is Charles Taylor's farm, and they were
11:06:37 discussing how the things were to meet us in Buedu, she said because they had to make arrangements about the airfield, how the things were to meet us in Buedu, because the vehicles that Jungle and others were to come with were not big enough and the transportation from White Flower to 50's place - and moving from
11:07:01 White Flower to 50 and from 50 to Buedu, that was a long process. That was why they were arranging something that could be a little faster and that's how she told me about airfield. She said her husband had said they were going to construct an airstrip where they would be bringing materials, arms and ammunition.
11:07:27 Q. Thank you, Madam Witness. Just before we move on on this point I just want you to clarify a point that was raised earlier. Justice Lussick made the point about you talking about trucks and about pick-ups. At what point were weapons or supplies loaded into trucks and at what point were they loaded or reloaded into
11:07:57 pick-ups? Can we be clear about that? You talked about loading from White Flower and then reloading at Benjamin Yeaten's place and you mentioned trucks, you have mentioned pick-ups. At what point were they in trucks and at what point were they in pick-ups?

[Open session]

MS IRURA: Your Honour, we are in open session.

PRESIDING JUDGE: Madam Witness, we are back in open session and I again remind you of your obligation to ensure that your answers do not reveal your security. Mr Bangura, proceed.

12:59:45

MR BANGURA: Your Honour, just to get the witness to be reassured that the series of questions which we have just had were actually in private session. I am not too sure whether the witness was quite aware of that fact. I may not have got the point:

13:00:16

Q. Madam Witness, we were talking about this meeting that took place and the point we last discussed was Sam Bockarie discussing the idea of a meeting with Eddie Kanneh. You said that during the meeting they also discussed something about Freetown, about moving towards Freetown. Do you recall saying that?

13:00:48

A. Yes.

Q. Can you explain clearly what they discussed at the meeting about Freetown?

A. He said they should discuss about how to go and attack Freetown during that particular mission and that they were at first supposed to clear up Kono and he said that Kono, Superman and Komba Gbundema and others should combine. It should be a uniform mission. They together with SAJ and others, because by then there weren't existing communication between them. He said after they and SAJ would have cleared up Kono they should go to Kabala and from Kabala they should proceed to Freetown. That was what he meant by "discuss", because by then there wasn't any communication between Sam Bockarie and SAJ.

13:01:18

13:01:46

Q. Madam Witness, the matters that you have just talked about,

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-585 15624

EXAMINATION-IN-CHIEF BY MR BANGURA 15624

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 2 SEPTEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Alain Werner Ms Leigh Lawrie Ms Ruth Hackler
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah
For the Office of the Principal Defender:	Ms Elizabeth Nahamya

A. He went to Liberia, Monrovia.
Q. And why did he go there?
A. According to him, he went there because Charles Taylor had invited him to discuss how to be able to release the United
09:37:21 Nations peacekeepers.
Q. How did he travel to Monrovia?
A. He used a vehicle from Koidu to Foya and from Foya he flew using helicopter to Monrovia.
Q. And do you know what kind of helicopter he used?
09:37:46 A. It was the same Weasua helicopter he had used.
Q. And what happened when Issa Sesay arrived in Monrovia?
MR MUNYARD: Madam President, before my learned friend continues with this, I know that yesterday her Honour Justice Sebutinde raised the question with Ms Hollis of whether this was
09:38:06 direct knowledge of the witness or indirect and my learned friend did indicate that she would enlighten us at some point. I am not clear at the moment, and I think we probably have reached the stage where we ought to know if this witness is giving us evidence of something he actually observed or something he was
09:38:26 told about.
PRESIDING JUDGE: Ms Hollis, your response?
MS HOLLIS: That was exactly the question yesterday and, as I explained yesterday, I have prepared the questions so that at the end in more detail can be discussed the basis of knowledge
09:38:45 without identifying the person's identity, so that - and this portion, the witness will testify about events and then there will be a portion where for each of the events the witness will explain in detail to the Court how it is the witness has this information.

Q. And what happened then when these materials were taken to Vahun?
A. The man who took them there, he handed them over to Benjamin Yeaten and the following day he returned to Issa.
12:17:56 Q. Now, Mr Witness, earlier you testified about Issa Sesay taking trips to Monrovia and giving diamonds to Charles Taylor. Where did Issa Sesay get the diamonds that he was giving to Charles Taylor?
A. He got them from Kono and Tongo.
12:18:27 Q. And did Issa ever say anything about how many diamonds he took to Charles Taylor?
A. He had said something about it some time in 2002.
Q. And what did he say?
A. In 2002 when RUF had been transformed into a political
12:18:56 party, the man who was appointed to be the presidential candidate of the RUF asked Issa what his account was and he said he hadn't any account, but that he had diamonds with Charles Taylor up to 5,000 carats and he had $150,000 that he had given to Charles Taylor for safekeeping and Charles Taylor had said any time
12:19:22 elections would be coming close he would assist the RUF and that was why he was keeping the diamonds.
Q. Now you testified that Charles Taylor had also said that he was going to hold on to the diamonds that were given to him by Issa and by Sam Bockarie to give to Foday Sankoh when Foday
12:19:42 Sankoh was released. To your knowledge, did Foday Sankoh ever receive those diamonds from Charles Taylor?
A. Well, he did not receive them in my presence and, in fact, he did not receive them because Foday Sankoh was not released. He died in detention.

Q. To your knowledge, did Issa Sesay ever receive those diamonds?
A. No, he did not receive them.
Q. To your knowledge, did anyone in the RUF receive those diamonds that Charles Taylor held?
A. No, nobody in the RUF received them.
Q. You have also testified about Issa Sesay meeting a person known as Alpha Bravo and on one occasion taking diamonds to Alpha Bravo. Were there any other times that diamonds were taken to Alpha Bravo?
A. Yes, but he did not go. He used to send one of his securities to Eddie Kanneh. Eddie Kanneh in turn would meet Five-Zero and they would take the diamonds to Alpha Bravo.
Q. Who was Five-Zero?
A. Five-Zero was a code name for Benjamin Yeaten. He was called Unit 50 again, Benjamin Yeaten.
Q. And how many times did that happen?
A. It happened about two times that I can recall now.
Q. Now you testified that when Issa Sesay took diamonds to Alpha Bravo, Issa Sesay was given $300,000. On these other occasions when diamonds were taken to Alpha Bravo what, if anything, did the RUF receive in exchange for these diamonds?
A. When they took the diamonds, RUF could not receive anything. All what Issa got - heard was that Alpha Bravo had gone back to Belgium. He said he would come later.
Q. So on these other two occasions to whom were these diamonds given?
A. Eddie Kanneh said he gave the diamonds to Alpha Bravo, that he and Benjamin Yeaten went there.

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-338	15138
EXAMINATION-IN-CHIEF BY MS HOLLIS	15139
CROSS-EXAMINATION BY MR MUNYARD	15239

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 1 SEPTEMBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Carolyn Buff Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Mr Alain Werner Ms Ruth Hackler
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah

Commander Zino did not arrive there up to the time he was about to leave, so in the interim he appointed Morris Kallon that he should take care of the place until Commander Zino arrives.

Q. And when did Zino arrive?

15:24:31 A. Two weeks after Pa Sankoh had left, that was the time Commander Zino arrived with his own forces at Zogoda.

Q. When you speak of Zino, do you know Zino by any other name?

A. Yes.

Q. What? What name?

15:24:51 A. Mohamed Tarawalli.

Q. Now how long was Zino, Mohamed Tarawalli, in charge at Zogoda?

A. We were there going up to October/November when the Kamajors invaded the place, so we all split. We all dispersed 15:25:21 from the place.

Q. And those who were at Zogoda, where did they go?

A. We split into two. Some went to Libya and some went to Burkina Faso.

Q. Now when you say some went to Libya, where was Libya 15:25:43 located?

A. Libya was a code name for Pujehun District. We had a town in Pujehun District which was called Sorogbema but for us to disguise that name we I used to call it Libya.

MS HOLLIS: Your Honours, Sorogbema --

15:26:08 THE WITNESS: Sorogbema.

MS HOLLIS: S-O-R-O-G-B-E-M-A:

Q. And you said others went to Burkina Faso. What was Burkina Faso?

A. Burkina Faso was a town that we had in Kailahun District

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-367	15006
CROSS-EXAMINATION BY MR GRIFFITHS	15006
RE-EXAMINATION BY MR KOUMJIAN	15065
TF1-338	15081
EXAMINATION-IN-CHIEF BY MS HOLLIS	15083

EXHIBITS:

Exhibit P-166 admitted	15077
Exhibit D-57A to C admitted	15079

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 20 AUGUST 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Carolyn Buff
For the Registry:	Ms Advera Kamuzora Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Ms Ruth M Hackler Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah

Q. Sir, what was the result of the attack in Kono District?
A. The result was a big blow on the side of the government at that time and the so-called ECOMOG.
Q. Were you forces able to capture anything during that
16:11:19 fighting that you recall?
A. Yes.
Q. What do you remember about what was captured?
A. We captured arms and ammunition from them.
Q. What kind of arms were captured, if you recall?
16:11:47 A. We captured heavy weapons like ground missiles and we captured light weapons.
Q. Were any heavy weapons that the defending forces had destroyed?
A. Yes. Those ground missiles, about three ground missiles,
16:12:16 they removed the fire pins and they went with them. They left the ordinary one there.
Q. Were any vehicles captured for --
PRESIDING JUDGE: Just pause, Mr Koumjian. Who is the "they" that removed the fire pins, please?
16:12:37 THE WITNESS: I said the RUF. I said we, the RUF, captured arms, ammunition, vehicles from the ECOMOG soldiers.
PRESIDING JUDGE: Yes, but, Mr Witness, you also said "these ground missiles, they removed the fire pins." Who removed the fire pins? "And went with them". Who is the they that
16:13:04 removed the fire pins and went away with them?
THE WITNESS: The ECOMOG soldiers who had the weapons, they were unable to run away with them, so it was easier for them to have removed the firing pin and run away with them, so they left the empty weapons there.

PRESIDING JUDGE: That clarifies my question, Mr Koumjian. Please proceed.

MR KOUMJIAN:

Q. Sir, do you know if any vehicles were captured or destroyed by the RUF and AFRC forces?

A. We did not destroy cars because we also wanted to capture them and use them. We did not used to destroy them because we would use them to transport our manpower to the front line. We would not capture them and burn them down, but we used to capture them.

Q. My specific question was in this attack do you know if any vehicles were either captured or destroyed in the fighting, any ECOMOG vehicles?

A. Yes.

Q. Sir, what happened to the ECOMOG forces that had been in defensive positions in Kono District?

A. We overran them and we captured some of them. Some who were unfortunate died. Those who were fortunate to run away, they ran away. So that was what happened.

Q. Those that ran away, do you know in what direction they went?

A. Yes.

Q. Where did they go, if you know?

A. Some took the main road, Makeni to Freetown. Some took the other road between Tongo to Kenema.

Q. Now you mentioned Akim. Do you recall if Akim had any results during this offensive, this attack, the forces that he was commanding?

A. Repeat that. I did not understand that result area.

Do you know if any ammunition was captured during these attacks in the Kono District on Koidu Town and surrounding areas?
A. Yes, as I told you earlier, we captured some arms and ammunition during that attack when ECOMOG had left the place and ran away.
Q. What happened with the arms and ammunition that were captured during this attack on Koidu Town and the Koidu district?
A. They had people who were responsible for such things and your - any one of us, anything you are responsible for, that was the area you are supposed to go and cover. Like in my case I was responsible for mining, I was not responsible for arms and ammunition. So the person who was in care of that was the SY - I mean the G4, Christopher. He was responsible for that. He used to gather everything and ensure that they were put intact.
Q. Okay, thank you. Sir, you've mentioned the name of Issa Sesay's adjutant. Can you say it again?
A. He was called Jabba.
Q. Have you ever seen Jabba's signature?
A. Yes, I had seen it before.
Q. When have you seen Jabba's signature?
A. At the time Issa Sesay was in Kono, because anywhere Issa was, he was there with him.
Q. Would you say you saw it on one or two occasions or was it more or less than that?
A. I can say we were all in the same place or in the same town and at any time Issa was giving pass to someone or Issa was issuing pass to somebody to move from there to another point and if Issa was not around to sign Jabba would sign, so I saw that different times.

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-367 14074

EXAMINATION-IN-CHIEF BY MR KOUMJIAN 14075

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 16 JULY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Mr Mohamed A Bangura Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah

Q. Yesterday I was asking you a line of questions that I never quite finished and that was about the Abidjan peace process and you said that when Foday Sankoh first went to Abidjan it was to talk peace with the NPRC government and you agreed that by the
09:31:27 time the Abidjan Peace Accord was finally signed later in 1996, it was the government of Ahmad Tejan Kabbah. Do you remember we'd had that discussion, you knew he'd been elected but you couldn't remember the date that he was elected?

A. Yes, sir.

09:31:51 Q. And you have given evidence that at some stage Camp Zogoda, the RUF camp in the hills that had been set up some time before, was attacked and the RUF were driven out of Camp Zogoda. Do you remember saying that?

A. Yes, sir. I can remember the driving of RUF from Camp
09:32:24 Zogoda, but that is not the actual description of Zogoda like you have said.

Q. Well, don't worry about the description of it. If anyone wants to take up that point they can. I'm simply concerned with the fact that the RUF were driven out of Camp Zogoda and they
09:32:40 were driven out by government forces, were they?

A. Yes, sir, in collaboration with the Kamajors.

Q. So they were driven out by government forces and Kamajors acting in concert with the government forces, yes?

A. Yes, sir.

09:33:04 Q. And this was during the time that Foday Sankoh was attempting to negotiate a peace accord at Abidjan with that same government, is that right?

A. Yes, sir.

Q. So the government was talking peace with Foday Sankoh, but

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-388 13811

CROSS-EXAMINATION BY MR MUNYARD 13811

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 8 JULY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Carolyn Buff
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard

moment. You said Benjamin Yeaten was overall in charge. Now, you have mentioned an Amphibian Father. Where did he fit in this chain of command, if you know?

A. Amphibian Father, what I knew was that he was controlling the Foya area and he was in control of a group called the navy group. He controlled that group, but what Benjamin Yeaten told us was that Charles Taylor appointed him as the joint chief of staff chairman and that he was the boss for all the other generals; he, Benjamin Yeaten.

14:52:40 Q. Mr Witness, Defence counsel also asked you questions about diamonds during your assignments 1 and 2. Defence counsel, I am referring to page 13121. The Defence counsel at one point asked you, "So, just so that I am clear, a portion of those diamonds, if I understand you, would go to Charles Taylor for safe keeping, is that right?", and you answered, "Yes." Mr Witness, the diamonds went to Charles Taylor for safe keeping for whom?

A. For Foday Sankoh.

Q. To your knowledge, did Foday Sankoh ever receive those diamonds that were held by Charles Taylor for him?

14:53:36 A. At the time Foday Sankoh used to meet me in Monrovia he never told me that the diamonds that they had been keeping with Charles Taylor were given back to him by Charles Taylor.

JUDGE SEBUTINDE: Mr Witness, does that mean they were never given back?

14:54:11 THE WITNESS: Foday Sankoh did not tell me that he had received diamonds from Charles Taylor. He never told me that.

JUDGE SEBUTINDE: Did he tell you that the diamonds were deliberately kept from him?

THE WITNESS: When he came he said Mosquito and others told

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-567	13124
CROSS-EXAMINATION BY MR GRIFFITHS	13124
RE-EXAMINATION BY MS HOLLIS	13190
TF1-388	13217
EXAMINATION-IN-CHIEF BY MR BANGURA	13218

EXHIBITS:

Exhibit P-148 admitted	13210
Exhibit P-149 admitted	13210
Exhibit P-150 admitted	13210
Exhibit P-151 admitted	13210
Exhibit P-152A admitted	13212
Exhibit P-152B admitted	13212
Exhibit P-152C admitted	13212
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Exhibit P-153A admitted	13213
Exhibit P-153B admitted	13213
Exhibit P-153C admitted	13213

Exhibit D-54 admitted

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 4 JULY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah

PRESIDING JUDGE: Mr Witness, that does not answer the question. The question is where were you at the time of the attempted attack on Kossoh Town?

THE WITNESS: We were at Hastings.

09:51:17 MS HOLLIS:

Q. Did you yourself take part in this attack?

A. Yes.

Q. Now, if we could look at page 2, please, and at the top of page 2 the date is 15 January 1999: "It was agreed that the men

09:51:41 in Freetown and the men at our point were to do joint operation on Jui and Kossoh Town." Do you recall that joint operation?

A. Yes.

Q. "The Freetown men scheduled to attack Jui and we to attack Kossoh Town. That night we attacked Kossoh Town, clear the

09:52:06 enemies but the Freetown men never turn up. Therefore the enemies, with the support of the Alpha Jet, drove us from Kossoh Town."

Now, were you able to join up with the Freetown men in this joint operation?

09:52:28 A. No, the enemy, we were not --

THE INTERPRETER: Your Honours, can he repeat this answer.

PRESIDING JUDGE: Mr Witness, the interpreter is trying to keep up with you. He hasn't heard you clearly so we would like you to speak a bit louder and repeat your answer from the point

09:52:45 you say, "The enemy, we were not". Continue from there, please.

THE WITNESS: We were unable to link up with the group in Freetown.

MS HOLLIS:

Q. Mr Witness, on page 2 under "Problems" the authors of the

Q. Mr Witness, do you know how to spell that, Weasua?
A. No, I don't know how to spell it.
MS HOLLIS: Your Honours, I believe that is W-E-A-S-U-A.
Q. Now, you indicated that you remained in Monrovia until
12:06:45 Foday Sankoh came to Monrovia. During that time that you were all in Monrovia do you know what Sam Bockarie did?
A. Sam Bockarie was in Monrovia to wait for Foday Sankoh. When he was there Foday Sankoh told Sam Bockarie to send a message to Johnny Paul Koroma so that the two of them can meet in
12:07:16 Monrovia before ever going to Freetown. So Sam Bockarie sent the message to Johnny Paul Koroma, who in turn came and met us in Monrovia in the same guesthouse. When Johnny Paul Koroma came later he too sent for some of his soldiers who were in Freetown. When they came they were lodged at a hotel called Hotel
12:08:02 Boulevard, but it had been changed to Hotel Royal.
When Johnny Paul came I saw Joe Tuah go to the guesthouse. I saw him give a parcel to Joe Tuah. Joe Tuah gave a parcel to Johnny Paul Koroma. Johnny Paul Koroma told us that it was Charles Taylor that had sent the parcel to him. He said the
12:08:38 parcel contained 15,000 US dollars to take care of him and his family.
Q. Now, if I can just ask you to pause there for a moment. You said that Foday Sankoh told Sam Bockarie to send a message to Johnny Paul Koroma so that the two of them can meet in Monrovia
12:09:04 before going to Freetown. What two are you talking about who were to meet in Monrovia?
A. That is Johnny Paul Koroma was to come to Monrovia. While Foday Sankoh when he comes from the Lome peace talks, they were to meet in Monrovia before proceeding to Freetown. That was what

I was trying to talk about.
Q. Who was it who was to meet in Monrovia?
A. Foday Sankoh was to meet Johnny Paul Koroma in Monrovia. The two of them were to meet his brother Charles before ever they
12:09:50 proceeded to Freetown.
Q. When did Foday Sankoh come to Monrovia?
A. Foday Sankoh came to Monrovia in 1999, but I can't remember the date. But before ever Foday Sankoh came I saw - before Foday Sankoh's arrival, they took Johnny Paul Koroma from the
12:10:24 guesthouse to Hotel Africa because they said they didn't want them to stay together. So, later I saw one man who came called Paul Moriba. At that time he was a GSM director. He came and said that he had got information that the generator that was at the guesthouse was not in good condition and so the Pa,
12:11:06 Charles Taylor, had instructed him to come and replace it. Immediately that generator was replaced, so later Foday Sankoh came and met us in Monrovia at the guesthouse.
Q. Now, tell us again the name of this person who came to replace the generator.
12:11:32 A. His name was Paul Moriba.
Q. Now, you mentioned earlier that Johnny Paul Koroma and his people went to the Boulevard Hotel and now you are talking about them going to Hotel Africa. Can you explain that to us?
A. Johnny Paul Koroma, when he went to Monrovia he was at the
12:11:56 guesthouse. When he was at that guesthouse he sent for his boys from Freetown. When they came they were lodged at the Hotel Boulevard which was later changed to Hotel Royal, so before Foday Sankoh arrived in Monrovia it was just Johnny Paul who was taken from the guesthouse to Hotel Africa. That is what I meant.

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-567 12935

EXAMINATION-IN-CHIEF BY MS HOLLIS 12935

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 2 JULY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Advera Nsiima Kamuzora Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah
For the Office of the Principal Defender:	Ms Elizabeth Nahamya

A. Yes, I used to see them there again.
Q. And how often did you see them there?
A. Well, at that time I was no longer based in Buedu. I was in Balahun. I will go there and return. Sampson, Jungle and
15:12:54 others used to come and the time they used to come, according to what they told me, they used to come with a truck that contained arms and ammunition, food and other things that were in there. They said they will normally stop the truck at Voinjama and then they will use small vans to transport the arms and ammunition
15:13:16 together with the other items to Buedu, or sometimes if the road condition was better the truck will come as far as Buedu.
Q. Did they tell you who they received these arms and ammunition from?
A. Well, Jungle and others were saying that it was the Papay,
15:13:45 Charles Taylor, who used to give the arms and ammunition.
Q. Did you ever see the trucks that were used to bring the arms and ammunition to Buedu?
A. At one time I saw a military truck come to Buedu.
Q. And how big was this truck?
15:14:21 A. It was - it was a ten-tyred truck. It had two in front, two in the middle and then - two in front, four in the middle and then two at the back.
Q. While you were based in Balahun, to your knowledge how many times did Sam Bockarie go to Liberia?
15:15:20 A. I understood that he came there three times.
Q. And who did he go with to Liberia these three times?
A. He went with Jungle. And the other time, according to he, Mosquito, because I was not there, what he told me was that Varmuyan Sherif at a point in time came to him, so the two of

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-567 12815

EXAMINATION-IN-CHIEF BY MS HOLLIS 12816

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 24 JUNE 2008
9.30 A.M
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Ms Shyamala Alagendra Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard
For the Office of the Principal Defender:	Mr Silas Chekera

officers said that. It simply says, "At the forum they said we should go and attack Kabala." I am personally wondering who "they" are.

MR KOUMJIAN: Okay, thank you very much:

09:38:29 Q. Mr Witness, who at the forum talked about attacking - first, who at forum talked about attacking Kabala?

A. Superman and SAJ Musa.

Q. One or - are you saying one of them, you're not sure which one? Are you saying both? Can you explain to us?

09:38:53 A. Superman was the first that made the proposal to attack Kabala and SAJ Musa supported him that he too was planning to attack Kabala, but he hadn't the manpower and ammunition, so it was good for them to go and attack Kabala.

Q. And who at the forum spoke about going to Makeni and

09:39:18 Freetown?

A. SAJ Musa.

Q. What was the reaction of Superman?

A. Superman said when they got to Kabala, when we would have gotten Kabala we would take another mission for Makeni, but our

09:39:46 first mission was for Kabala.

Q. After this forum was there an attack on Kabala?

A. Yes.

Q. About how long after the forum did the attack take place?

A. After the forum the following day we started moving, but we

09:40:10 spent a week on the way to attack Kabala.

Q. When you say "we started moving", what was the composition of the forces that attacked Kabala?

A. Superman was there, SAJ Musa and some STF fighters. Both AFRC, RUF, STF fighters, but Superman and SAJ Musa were leading

the attack.
Q. Was Kabala defended by any force?
A. Yes, they had two ECOMOG forces in Kabala at the time.
Q. What were the two ECOMOG forces in Kabala at that time?
09:40:58 A. The Guinean and Nigerian contingents.
Q. What happened when you attacked Kabala?
A. We took Kabala for three days.
Q. Were you - when I say "you", the AFRC and RUF forces. Were you able to capture all of the town of Kabala?
09:41:32 A. No.
Q. Please explain that.
A. We entered, we took over the town, but they had one secondary school there called Kabala Secondary School. We were unable to take over that campus. That was where the Guinean
09:41:58 contingents were based.
Q. Were any ammunition or weapons captured during this attack?
A. Yes, we captured a lot of weapons and ammunition from the Guinean contingent.
THE INTERPRETER: "From the Nigerian contingent", instead
09:42:28 of Guinean.
MR KOUMJIAN:
Q. What ammunition was used for the attack on Kabala?
A. Well, the ammunition that we captured from Mongor, the remaining ammunition that Superman brought with him.
09:43:05 Q. Can you now recall specifically any of the weapons that were captured in Kabala during that attack and if you can't, just tell us?
A. I can recall some.
Q. Please tell us what you remember.

A. They had a weapon called FM, the LAR rifles from the ECOMOG contingent, we captured up to 400. And some pistols and other weapons that I can remember.

Q. Okay, thank you. Mr Witness, the transcript didn't get all of that so I am going to repeat what we did understand and ask you to repeat what we did not.

MR MUNYARD: Before my learned friend talks about what we understood, I didn't understand very much and I would like the witness to explain.

09:44:05 PRESIDING JUDGE: We will start with the witness repeating his answer. Mr Witness, parts of your answer were not heard clearly. Please repeat your answer. If necessary we will ask to have the question put again.

THE WITNESS: Ask the question again.

09:44:33 MR KOUMJIAN: Your Honour, what I was going to do was read the transcript up to the indiscernible and then ask the witness to continue.

PRESIDING JUDGE: If you put the question again, please, Mr Koumjian.

09:44:46 MR KOUMJIAN: I will restate the question:

Q. Mr Witness, can you tell us what you remember about any weapons captured in Kabala?

A. Yes.

Q. Please say it slowly, especially when you get to the names 09:45:01 of the weapons because we are not all familiar with those. So please explain.

A. Yes, we captured some AK-47s, LAR rifles and some pistols, mortar.

Q. Okay, the end of your answer you said "pistols, mortar".

Are those two different weapons, just to be clear?
A. Yes, when I talk about pistols they are side weapons. When I talk about mortar they are heavy weapons, mortar guns. Mortar guns.
09:45:50 Q. Can you describe for us the mortar guns that were captured?
A. Yes, we captured 60 millimetre mortar bombs, 81 millimetre mortar guns.
Q. Thank you. Mr Witness, what happened after the three days that you occupied Kabala?
09:46:21 A. They pushed us out of Kabala and we retreated from Kabala.
PRESIDING JUDGE: Just before we move out of Kabala, Mr Koumjian, I notice in the first answer the witness mentioned something called "FMs" and I don't know what an FM is.
THE WITNESS: FM is the same LAR, but we cut it short, FM.
09:46:49 PRESIDING JUDGE: Thank you.
MR KOUMJIAN:
Q. Just so we are clear, what is an LAR?
A. That gun was always used by the Nigerian contingent. I don't know much about it.
09:47:07 Q. Is it a heavy weapon, is it a firearm, a handgun or a rifle?
A. It is a heavy weapon, because it is bigger than an AK-47.
Q. Is it something that a man can carry? One man can carry?
A. Yes, one person can carry it alone.
09:47:35 JUDGE LUSSICK: Mr Witness, is it an LAR or an SLR?
THE WITNESS: LAR. LAR.
JUDGE LUSSICK: Some kind of rifle, is it?
THE WITNESS: Yes, gun. LAR. LAR. They used the same bullets used by a G3. It uses the same bullets like G3.

MR KOUMJIAN:

Q. Thank you. Sir, during this attack on Kabala was there any communication that you know of between the forces that were doing the attack and anyone else?

09:48:26 A. Which of the forces are you talking about? I do not understand that question.

Q. Well, you have indicated that the attack - on the attack was Superman and SAJ Musa, correct, and various other RUF and AFRC and STF forces? Is that correct?

09:48:50 A. Yes.

Q. Did any of these forces that were attacking Kabala communicate with anyone outside of that Kabala area to your knowledge?

A. Yes.

09:49:10 Q. Please tell us what you know about communications from Kabala.

A. There was Superman communicating with Skinny - Mosquito - SAJ Musa was communicating with Brigadier Mani in Kurubonla and other communications were also going on at the time.

09:49:40 Q. Thank you. Now, you used the name Skinny. Can you explain who is Skinny?

A. Sam Bockarie.

Q. Mr Witness, who called Sam Bockarie Skinny?

A. All his friends used to call him Skinny because of his

09:50:06 body.

Q. Sir, after being pushed out of Kabala, what happened to the forces that had attacked? Where did you go?

A. We went to Koinadugu Town.

Q. The ammunition and arms that were captured, was there any

communication regarding those arms and ammunition?
A. Yes.
Q. Can you please explain that?
A. Yes, I was in the radio room with Superman, SAJ Musa, when
09:51:02 Sam Bockarie called and said that the ammunition and arms that we had captured from Kabala he wanted us to send some to him so that he can send it to the other front lines.
Q. What else was said then?
A. Repeat the question. I have not understood it.
09:51:23 Q. After Sam Bockarie said that he wanted some of the ammunition sent to him, what happened?
A. After the communication Superman and SAJ Musa and other commanders called a meeting, and in that meeting they discussed that the distance is too far to send those ammunition to Kailahun
09:51:52 District and so they would like to call Sam Bockarie and tell him that they would like to use the ammunition to attack Makeni. [Indiscernible]. After the meeting --
Q. Mr Witness, I am sorry that was my fault. I was speaking over the interpreter I believe at the end of the answer. We got
09:52:16 on the transcript "... to attack Makeni" and then the interpreter added something that I didn't get.
PRESIDING JUDGE: Mr Interpreter, can you recall the last part of the answer?
THE INTERPRETER: Yes, "That was what was on."
09:52:33 PRESIDING JUDGE: I am not quite sure if that makes sense to me.
THE INTERPRETER: "That was what was going on in short."
PRESIDING JUDGE: "After the meeting"? The words - it is before the words, "After the meeting."

MR KOUMJIAN: Your Honour, I believe the witness then said, "After the meeting." I am sorry, because I started speaking when the interpreter was adding something. I apologise.

THE INTERPRETER: Your Honours, he has to be advised to 09:52:59 stop mumbling the last bit of his answers. He mumbles them. We hardly get them clearly.

PRESIDING JUDGE: Very well, I will tell him. Mr Witness, the interpreter is having a problem. You are going more slowly now, that is good, but the interpreter tells us that you are 09:53:12 speaking slowly and mumbling at the end of your answers. You must keep the same volume throughout your answer, you understand?

Proceed, Mr Koumjian.

MR KOUMJIAN:

Q. Mr Witness, I have the same problem of dropping my voice at 09:53:33 the end of a sentence and so I will try not to. Sir, you indicated that there was discussion that the distance was too far to send the ammunition and so they would like to call Sam Bockarie and tell them that they would like to use the ammunition to attack Makeni. What happened then?

09:53:55 A. After that they went into the radio room and called him. After they had called him, he protested that they should send the ammunition to him. In fact, he was going to send some people to come for the ammunition.

Q. Okay, thank you. Now just clarify for us, so we are 09:54:16 absolutely clear, who called who? You used "he" and "them". Who called who in the radio room?

A. It was Superman that called Sam Bockarie. Superman and SAJ Musa called Sam Bockarie and Sam Bockarie told them that he needed the ammunition. In fact, he will send - he, Sam Bockarie,

will send people to come and collect the ammunition.
Q. Thank you. Did Sam Bockarie send anyone to collect the ammunition?
A. Yes, he sent people.
09:54:56 Q. When did they arrive?
A. After the communication, I think three weeks later people arrived to Koinadugu Town.
Q. Can you remember then approximately - well, first of all let us make it clear. What year was this that we are talking
09:55:19 about?
A. '98.
Q. And can you remember if it was dry season, or rainy season?
A. It was during the rainy season. It was raining at the time.
09:55:41 Q. About how long after the time you were pushed out of Kabala did the men arrive?
A. When they - almost one month when they arrived there.
Q. Okay, thank you very much. And the attack on Kabala, just so we are clear, was that in the dry season or the rainy season?
09:56:09 A. Early in the rainy season.
Q. Where were you when the men arrived sent by Bockarie?
A. In Koinadugu Town.
Q. Who were these people that arrived?
A. They had Liberians among them. The Liberians were in the
09:56:39 majority, with some Sierra Leoneans who escorted them.
JUDGE SEBUTINDE: Sorry to interrupt, Mr Koumjian. The witness said it was raining at the time and was during the rainy season of which year? Have I missed something? '98?
MR KOUMJIAN: I believe he started saying - he did say that

at the beginning before I asked him about the dry season and rainy season. Thank you:

Q. Mr Witness, can you give us an estimate - we understand we are not asking for an exact number. How many men approximately arrived?

09:57:18

A. Roughly, I think 60 men roughly.

Q. Now, you said some were Liberians. Can you estimate approximately what percentage, or how many of them, were Liberian?

09:57:34

A. I can't remember the number, but the majority of them were Liberians and a few Sierra Leoneans among them.

Q. Thank you. Was anyone leading this group?

A. Yes.

Q. Who was that?

09:57:59

A. One Senegalese. Senegalese.

Q. And who was this person? First, is Senegalese a name or a nickname?

A. It is a nickname because he was tall.

Q. What was the nationality of this Senegalese?

09:58:24

A. He was a Liberian man.

Q. What else do you know about him?

A. I knew him for the first time after we had gone for the ammunition in Kenema. He was the same Senegalese that I met in Kenema.

09:58:44

THE INTERPRETER: Your Honours, can he repeat that last bit.

PRESIDING JUDGE: Please repeat the last part of your answer, Mr Witness, for the interpreter. Pick up where you said, "He was the same Senegalese that I met in Kenema."

to take longer than quite quickly then we may have to retire.

We are informed that this will take about 10 minutes and therefore we will adjourn briefly for those 10 minutes. If the witness is to be escorted out then it will be necessary to put the blinds down.

Mr Witness, the technicians need to look at this problem more closely so we are going to leave the Court for about 10 minutes. Please adjourn the Court temporarily.

[Break taken at 10.13 a.m.]

10:19:26 [Upon resuming at 10.20 a.m.]

PRESIDING JUDGE: I understand it is rectified now, but Mr Koumjian if you put your question again and Mr Witness please tell us first if you hear the interpretation?

THE WITNESS: Yes.

10:20:30 MR KOUMJIAN:

Q. Sir, do you know if the Liberian forces that came under Senegalese, came with him, if these were people with any military training or military experience?

A. Yes.

10:20:50 Q. Who were they?

A. Most of the Liberians they said they were former NPFL fighters and like CO Vensy was an SSS man. He is presently in the SSS in Liberia.

Q. Thank you. Now a bit earlier, Mr Witness, in talking about 10:21:13 the forum, you said that Superman said it would be a good idea to form a battalion to search for Gullit. Was anything done about that suggestion?

A. Yes.

Q. Tell us what was done.

A. They were part of the CDF, but they called them in - I don't know how they called this tribe. In their own tribe, in the Kabala district, they called them the Kapras. In the Koranko they called them Kapras. They were part of the Kamajors, the CDF forces.

Q. Thank you. Now, then you said --

JUDGE SEBUTINDE: Is that correctly spelt in the transcript?

MR KOUMJIAN: I will check that, your Honour. I am not familiar with the word, but we will check it:

Q. Sir, you said that, "So when ECOMOG attacked us we repelled the attack and he came and told us we will not be able to sit here." Who said that?

A. Superman told us that we will not be able to sit here again. Superman.

Q. When SAJ Musa, you said, took his forces out of Koinadugu, what happened to Rambo Red Goat?

A. Rambo Red Goat surrendered to us and he said we are all brothers.

Q. What happened after he was surrendered? How did you receive him?

A. We received him nicely. We just laughed at him because he was talking funny, funny things and everybody was just laughing. We received him fine.

Q. Now, you said you went to Pumpkin Ground. Can you explain what that is?

A. Yes.

Q. What is Pumpkin Ground?

A. When we got to the town we did not meet anybody there. We

only met pumpkins in all the rooms in all under the beds, so we referred to the place as Town Pumpkin Ground, Town Pumpkin Ground.

Q. Do you know the real name of this place?

10:42:33 A. Yes.

Q. Can you tell us please?

A. Yira Filaia.

THE INTERPRETER: Your Honours, could the witness say that again.

10:42:43 PRESIDING JUDGE: Mr Witness, please repeat the name for the interpreter.

THE WITNESS: Yira Filaia.

MR KOUMJIAN: Your Honours, the spelling, if it isn't spelt already, Y-I-R-A and the second word F-I-L-A-I-A:

10:43:09 Q. Because it is easier for me to pronounce I will call this Pumpkin Ground. What happened after you went to Pumpkin Ground?

A. We based in Pumpkin Ground and Superman said we should start running missions to attack the ECOMOG forces.

Q. Did you attack any ECOMOG forces at this time?

10:43:33 A. Yes, we attacked ECOMOG forces.

Q. Where did you attack the ECOMOG forces?

A. We attacked Alikalia, [indiscernible].

Q. In this attack were any weapons or ammunition captured?

A. Yes, we captured a lot of arms and ammunition there.

10:44:15 Q. Sir, I want to go back to one thing you said when discussing the infighting. You said that when Superman said you should leave he gave some orders about what you should do in Koinadugu, is that correct?

A. Yes.

killed in the barracks. We saw their corpses there.
Q. Was anything captured by the RUF forces during this attack?
A. Yes.
Q. What do you recall that was captured?
11:21:43 A. We captured arms and ammunition, including armoured car, trucks and some - these small tactical jeeps for the officers and camouflage combat and other things.
Q. After Makeni where did you go?
A. After Makeni we went to Lunsar.
11:22:20 Q. Did you have to fight to go to Lunsar, or was Lunsar already occupied?
A. After Makeni, it was a time we and Komba Gbundema went with advance team. At the time I was all right. We and Komba Gbundema went to Lunsar to occupy Lunsar.
11:22:42 Q. How many people went with Komba Gbundema to Lunsar?
A. I can't estimate, but we were many because we went with so many cars.
Q. Do you remember about how long this was after Makeni had been taken?
11:22:57 A. I think in a week's period once --
THE INTERPRETER: Your Honours, can he repeat that last one. He was mumbling.
PRESIDING JUDGE: Mr Witness, could you repeat your answer from the point you said, "I think in a week's period once --" 11:23:17 Continue from there, please.
THE WITNESS: I said within a week, five days, we advanced to Lunsar.
MR KOUMJIAN:
Q. I apologise, but I need to go back for a moment to the

THE INTERPRETER: Senior to, your Honours. Interpreter's mistake.

MR KOUMJIAN:

Q. Now, Mr Witness, you indicated that there was some talk about joining your brothers. Was there any attempt --

A. Yes.

Q. Okay, can you explain?

A. Yes, when we got to Waterloo, Superman, Issa Sesay, Komba Gbundema and some senior officers got together and distributed the troops. They said Colonel Babay together with other commanders should go to Benguema barracks, whilst Rambo for the RUF, the late, should take another group to Hastings to attack Hastings including Red Lion - Red Goat, I mean. Rambo Red Goat. Myself and other commanders should go and attack Hastings, Jui, to get across the bridge and to go to Freetown and join our brothers.

JUDGE SEBUTINDE: Is Colonel Babay spelt correctly, or is this a different person?

MR KOUMJIAN: Komba Gbundema?

JUDGE SEBUTINDE: Colonel Babay.

MR KOUMJIAN: I will get the correct spelling, your Honour.

THE WITNESS: Colonel Babay, yes.

JUDGE SEBUTINDE: There is a person who was spelt B-A-B-A-Y before.

MR KOUMJIAN: Yes, that is the correct spelling, B-A-B-A-Y:

Q. So, Mr Witness, just so we're clear, who were you with at that time?

A. I was with RUF Rambo at that time to attack Hastings and Jui.

Q. What other commanders were with RUF Rambo?
A. Rambo Red Goat, Crazy and others.
Q. Okay, and what happened with your group?
A. When we got to Hastings we attacked Hastings, we cleared up
12:11:45 Hastings and we advanced to Jui because Jui is just very close to
Freetown. The distance between Jui and Freetown is short. But
when we got to Jui we did not - we did not overrun Jui and so we
got stuck there, so we got orders from Issa Sesay and he told us
that when we got to Jui there was another road that was passing
12:12:12 through Kossoh Town to Freetown and so we should release some
men, up to a platoon or a battalion, to join our brothers in
Freetown whilst we should try and clear up the main road. The
order came from the back from Issa Sesay directly to Rambo, RUF
Rambo.
12:12:33 Q. And what happened after that order was received from Issa
Sesay?
A. Later Rambo sent and asked who was supposed to be the
commander to go and join the people and that Issa Sesay then
appointed - said Rambo Red Goat because he said he knew his
12:12:56 brothers in the city well and he was once an SLA soldier. He
said he should lead the troops to go and join the others in
Freetown and that was what they did.
Q. Okay. Where were you when this order came and Rambo Red
Goat was dispatched to Freetown?
12:13:18 A. I was --
THE INTERPRETER: Your Honours, that is not too clear.
PRESIDING JUDGE: Mr Witness, please repeat your answer.
The interpreter did not hear it clearly.
THE WITNESS: We were part of Jui. We divided Jui into two

zones. ECOMOG was on one side and we were on the other side.

MR KOUMJIAN:

Q. Thank you, that leads to my next question. In Jui were you - why were you unable to go through Jui. As you had mentioned earlier?

12:13:57

A. Jui was at that time one of the strong bases for ECOMOG, because in '97 they were based at Jui and Jui was very strong and it was one of the strongest bases. It was from Jui that they ran the intervention into Freetown, so ECOMOG was very strong at Jui.

12:14:24

Q. What ECOMOG forces were at Jui?

A. The Nigerian contingent.

Q. Was there any battle between your forces and the ECOMOG forces at Jui at that time before Rambo Red Goat was dispatched?

A. Yes.

12:14:49

Q. You talked about Rambo Red Goat going with a group. Can you tell us approximately how many men were in that group?

A. Yes, it can be estimated at roughly 60 to 65.

Q. Who were these men that were under the command of Rambo Red Goat?

12:15:21

A. Some RUF men, some SLA and some STF.

Q. How were they armed, if you know?

A. Everybody would be armed from his own commander. The STF were armed from General Bropleh, the RUF Issa Sesay and Superman, and the SLA Brigadier Mani and Colonel T at that time. So, they were well armed.

12:15:51

Q. And do you know where Rambo Red Goat's group went?

A. They entered the city into Freetown.

Q. Now, earlier you had mentioned a bridge. Where was that bridge?

A. Between Jui and Freetown.
Q. Was it possible for your forces to go across that bridge?
A. No.
Q. Why not?
12:16:34 A. Because the bridge was open and nobody could have challenged the bridge at that time in attempting to cross that bridge, so we did not get across.
Q. What do you mean "the bridge was open and nobody could have challenged the bridge"?
12:16:53 A. The bridge was well protected by ECOMOG at that time.
Q. Thank you. So, do you know how Rambo Red Goat's group entered the city?
A. Yes.
Q. Tell us what you know?
12:17:14 A. From Jui, the part we were occupying, there was an old road at the back of the town where the train used to pass. Rambo used that road to go to Kossoh Town, that was at the back of Jui, and to cross the river from the upper side to cross over and when you cross you go to Freetown directly.
12:17:43 Q. After Rambo Red Goat's group left your group, where did your group go?
A. We went back to Yams Farm.
Q. What happened when you got to Yams Farm?
A. We manned checkpoints and we did some destruction there to
12:18:10 make the area fearful. We burnt some houses, we opened fire on civilians for them to get out of the place and we killed some civilians at Yams Farm.
Q. Did anything else occur at Yams Farm that you remember?
A. I can't recall again.

Q. Thank you. How long were you at Yams Farm?
A. We were there I think for a week and we retreated.
Q. Now, you talked about these forces led by Bazzy and Gullit being in Freetown. Did you receive information about what was
12:18:55 going on while they were in Freetown in any way?
A. Yes.
Q. How did you learn about what was going on in Freetown?
A. At first they called and said that they had taken over the State House and, secondly, they called that they have got to
12:19:20 Pademba Road where the RUF and the AFRC were in jail that were captured by ECOMOG. The next time they called they said they had freed some of the men, including Gibril Massaquoi, and they reported that they had been attacked by different contingents, like the Guinean contingent, the Nigerian contingent and
12:19:48 different troops. That was the time that Sam Bockarie called. I heard Sam Bockarie talking over the BBC that any contingent that attacked his forces in Freetown he will command his forces to burn all the embassies down.
Q. Okay. Mr Witness, you began your answer by talking about,
12:20:09 "At first they called and they said they had taken over the State House." Just so we're clear, who was it that was calling and saying that?
A. Alfred Brown was the radio man and Gullit will always be in the radio room calling directly to Superman, calling Sam
12:20:29 Bockarie, and I was monitoring those calls directly. Alfred Brown, Gullit, Bazzy, sometimes Major CY.
Q. Do you recall these persons inside Freetown, aside from telling about their situation did they say anything else during these communications?

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-375 12555

EXAMINATION-IN-CHIEF BY MR KOUMJIAN 12555

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 23 JUNE 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Mr Christopher Santora Ms Shyamala Alagendra Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

Q. Can you tell us what you know about Superman distributing the ammunition you brought?
A. Yes.
Q. Where did the ammunition go?
16:01:17 A. Some of the ammunition went to Rambo, RUF Rambo, to Koidu Geiya. Some of the ammunition went to Short Bai Bureh at Mortema. Some of the ammunition, we took it to Wordu to Komba Gbundema and some remained with Superman.
Q. Where did you yourself go at this time?
16:01:49 A. We went to Wordu, to Komba Gbundema.
Q. When you were in Wordu under whose command were you?
A. Komba Gbundema.
Q. Can you give us some details about any orders Superman gave for areas to be attacked in this mission?
16:02:20 A. Yes.
Q. Please tell us.
A. Superman told us to go to Wordu to join Komba Gbundema, to hand over the ammunition to him and go to Kurubonla to meet SAJ Musa, to work with him to attack Mongo Bendugu. That was the
16:02:48 instruction.
Q. Just to be clear, when you went to Komba Gbundema in Wordu, was this before or after the Fitti-Fatta mission?
A. After the Fitti-Fatta mission.
Q. About how long after the Fitti-Fatta mission?
16:03:13 A. Two days.
Q. Now, you said that Superman gave instructions that Komba Gbundema was to take the ammunition to Kurubonla, is that correct?
A. Yes.

Q. Did you go with him there to Kurubonla?
A. Kurubonla, yes.
Q. Thank you for correcting my pronunciation. Who was there in Kurubonla?
16:03:44 A. SAJ Musa.
Q. Thank you. Now, who is Komba Gbundema?
A. He was one of the commanders for the RUF.
Q. When you first went to him he was in which town?
A. Wordu.
16:04:23 Q. Were there any civilians with him?
A. Yes.
Q. Can you describe these people that were with him?
A. Yes. He was having civilians with him. The civilians, they used to call them the Junta 2s, the Junta 2. They wrote on
16:04:55 their chest "RUF", all of them. They wrote on their chest "RUF". They said they were Junta 2s for him.
Q. What were the ages of these civilians who were with Komba Gbundema?
A. Komba Gbundema had children from 5 years upwards; 5, 6, 7
16:05:13 upwards.
Q. Were there adults also with him?
THE INTERPRETER: Your Honour, could counsel please repeat the question.
PRESIDING JUDGE: You heard the request, Mr Koumjian.
16:05:27 MR KOUMJIAN: Yes, sorry:
Q. Mr Witness, Komba Gbundema, you said he had children from five years up with him. Were all the civilians with Komba Gbundema children, or were there adult civilians also with him?
A. Yes, he had his own son. All the others were abducted.

JUDGE SEBUTINDE: Mr Koumjian, did I hear the witness say they wrote on their chests "RUF", or Junta 2? Which was it? Because I don't see RUF on the record.

THE WITNESS: Yes, they called them Junta 2s. They wrote on
16:06:10 their chests "RUF", on their chests "RUF", but their names were - the names for them were Junta 2. Junta 2. On their chest "RUF".

MR KOUMJIAN:

Q. Mr Witness, first of all where was it that these markings of the civilians took place?

16:07:28 PRESIDING JUDGE: We've heard it was on their chest, but do you mean where was the physical location this operation was carried out?

MR KOUMJIAN: Thank you, I will try to make my question more clear:

16:07:42 Q. In what town, or village, or district was it that these markings took place?

A. The markings - they started marking the people from Kayima. I don't know the district in which Kayima is. I do not know if it falls under Kono, or Kabala. It's just between them, Kayima.
16:08:02 The markings started taking place in Kayima on to Wordu.

Q. Sir, how were these markings made?

A. I do not understand the question.

Q. You said they wrote "RUF" on their chests. How did they write "RUF" on people's chests?

16:08:41 A. Some people used razor blade. When they did not have a razor blade they had a sharp knife that can enable them to write "RUF", those small knives they will use.

Q. Now there was one question, by the way, where your answer seems to be that you understood a different question than the one

I asked. I was trying to ask you before if all the people with Komba Gbundema were children, or if there were any adults. Where there any adults, people over 18, or were they all children?

A. They had adults and - he had adults and children with him.

16:09:26 Q. The persons that had their chests marked "RUF", what ages were they?

A. Both children and adults had the marks on them at the time.

Q. Were they men, or women, or both?

A. Both.

16:09:49 Q. Were the women marked on their chest with the razor blade, or the knife?

A. Both of them.

Q. Mr Witness, what happened after you went with Komba Gbundema to Kurubonla?

16:10:13 A. When we went to Kurubonla, Komba Gbundema and SAJ Musa called a forum.

Q. How did SAJ Musa receive Komba Gbundema?

A. He welcomed us well and he was happy.

Q. What happened - first of all, who attended the forum?

16:10:39 A. SAJ Musa, Komba Gbundema, Brigadier Mani, General Bropleh and some other senior RUF officials like Osho and others.

Q. So was this a commanders' forum, or was it an open forum for all soldiers?

A. Commanders' forum.

16:11:04 Q. Were you actually present during the forum?

A. Yes.

Q. And in what capacity were you present?

A. As a bodyguard to Superman. I was there as Superman's eye.

Q. What happened at the forum? Oh, sorry, let me go back to

that. Can you please explain what you mean by that, that you were Superman's eye?

A. I was there to represent Superman to tell him whatever I see for myself.

16:11:47 Q. Was that something unusual or specific to this incident, or was that something - a duty that bodyguards would normally perform?

A. A duty that a bodyguard can normally perform.

Q. What happened at the forum that you attended as Superman's

16:12:05 eye?

A. At the forum SAJ Musa welcomed us and said he's long been expecting that for us to work together, but it was time now and Sam Bockarie's ready to work with him, so we were highly welcome and so we should plan how to attack Mongor Bendugu from the

16:12:34 Guinean contingent.

Q. Mr Witness, you mentioned some others who were in attendance and one was Brigadier Mani. Who was Brigadier Mani?

A. One of the senior officers in the national army, the SLA.

Q. Who was General Bropleh?

16:12:57 A. General Bropleh was ULIMO; head of the ULIMO at the time. I think he was in the army in Liberia, a former army commander in Liberia. In Sierra Leone he was an ULIMO commander, a Liberian.

Q. Do you know if there was any name for the forces he commanded?

16:13:18 A. Yes, the ULIMO.

Q. Okay, thank you. Do you know any other name for those forces?

A. Yes, the STF.

Q. After SAJ Musa made these remarks that you've told us

about, what did the others say?
A. The other people they accepted and Komba Gbundema too was happy. He took the view - he too said Superman should give the ammunition to run the mission and that he was ready for the
16:13:57 mission.
Q. Mr Witness, you had mentioned earlier that you had taken ammunition to Komba Gbundema that came from your trip from Gbarnga. Is that correct?
A. Yes.
16:14:10 Q. Was that ammunition still with Komba Gbundema when you went to meet SAJ Musa?
A. We were to take the ammunition along with us, yes.
Q. You indicated that SAJ Musa indicated that an attack was to be planned for Mongor Bendugu.
16:14:37 JUDGE SEBUTINDE: Mr Koumjian, the answer the witness gave is most uncertain. You asked whether the ammunition that was taken prior was still with Komba and then he says, "Yes, we were to take the ammunition along with us", meaning what?
MR KOUMJIAN: Thank you:
16:14:53 Q. Mr Witness, my question for you was whether the ammunition that you had taken from Gbarnga was still with Komba Gbundema when you went and met up with SAJ Musa. What is your answer?
A. I said, yes, the ammunition was with us, with Komba Gbundema and I. We took the ammunition along with us to Kurubonla
16:15:22 to go and meet SAJ Musa.
Q. After this forum, was there an attack that took place?
A. Yes.
Q. What area was attacked?
A. Mongor Bendugu.

MR KOUMJIAN: Your Honours, Mongor is M-O-N-G-O-R:

Q. Who participated in the attack on Mongor Bendugu?

A. Komba Gbundema, Colonel T, I myself and others.

Q. Who was Colonel T?

16:16:09 A. He was one of the senior officers from the national army, AFRC.

Q. Was SAJ Musa involved in that attack on Mongor?

A. No.

Q. Did SAJ Musa participate in the planning for that attack?

16:16:29 A. Yes.

Q. Were any forces defending Mongor when you attacked?

A. Yes.

Q. Can you tell us about those forces that were defending Mongor?

16:16:46 A. Yes, it was the Guinean forces.

Q. Were they - can you describe any armaments that the Guineans had?

A. Yes.

Q. What kind of weapons did they have?

16:17:03 A. They had a 40 barrel missile, 50 calibre, 106, one barrel missile. They had a lot of weapons - armoured car, war tank.

Q. What was the result of the attack on the Guineans in Mongor?

A. The attack was successful on our side.

16:17:34 Q. Can you describe what occurred?

A. We killed a lot of Guinean soldiers, civilians and we captured some ammunition and arms from them.

Q. First, I want to deal with - you've mentioned soldiers were killed, but you also mentioned civilians. Were these civilians

killed because you were targeting the Guineans and they were killed by accident, or were --

MR MUNYARD: I'd be grateful if my learned friend just asked him non-leading questions about this.

16:18:18 PRESIDING JUDGE: Mr Koumjian, there have been a few leading questions in the course of the afternoon that have not been objected to, but this is leading. You must rephrase.

MR KOUMJIAN:

Q. How were the civilians killed, Mr Witness? Was it

16:18:35 intentional, or unintentional?

A. Some of them were killed intentionally and some of them were killed unintentionally, because some of them were killed during the crossfire and some of them when we attacked and took over the town they were under their beds, or other areas, and we

16:18:55 started killing them.

Q. And why would you kill civilians that were hiding under their beds? What was the reason for that?

A. Because we went with one idea that when there are soldiers based in the town when no civilian is there they would not be

16:19:12 encouraged to be based there. When a civilian is there, they would be encouraged to be based there. That's why we killed them.

Q. Thank you.

JUDGE SEBUTINDE: I'm sorry, I don't understand that answer

16:19:23 at all.

MR KOUMJIAN:

Q. Can you explain your answer again, Mr Witness, about why you would kill civilians in a town that the enemy forces had occupied?

A. Yes, some of the reason - one of the reason is when the Guinean soldiers or any soldiers were based in a town they would not be encouraged to base there for long if there were a civilian there. If a civilian was there they would help them to brush the
16:19:54 town and do domestic jobs for them, so they would be encouraged to base there. That's why we always killed civilians when we meet them there, because we tell them that they were the ones helping the soldiers.

Q. Just to explore that a bit further, Mr Witness, when the
16:20:11 RUF captured a town did you use the civilians in any way to support you, or no?

A. We used them to support us, some of them.

Q. You also mentioned that weapons were captured. Can you recall any specific heavy weapons that were captured in the
16:20:40 attack on Mongor?

A. Yes.

Q. Please tell us which weapons you recall being captured?

A. We managed to capture one 40 barreled missile, an armoured car, one 50 calibre and some one barrel missiles from them.

16:21:11 Q. During the attack on Mongor did the town remain intact, the houses and the buildings in the town?

A. We burnt the town.

Q. And what did you burn in the town?

A. We burnt down the houses, we burnt their armoured car, we
16:21:39 burnt the one barrel, 40 barrel missile because we had no way to carry it and some other logistics. We burnt down cars.

Q. In the houses that you burned down, do you know whether or not there was anyone inside those houses?

A. Yes, people were in the houses that were burnt.

Q. Do you know if the people escaped from the houses that were being burnt, or not?
A. Yeah, some people escaped because we used to see people running around when we took over the town, but some people stayed
16:22:20 in their houses because we heard them shouting too.
Q. When you say some people stayed in their houses, what happened to those that stayed inside that you heard shouting, if you know?
A. Some of them were burnt down, because in some houses people
16:22:38 were screaming when fire was - were already on the houses, so I know that they were burnt. There was no way for them to escape.
Q. Now, Mr Witness, you've talked about some weapons that were destroyed and some that were burnt because you couldn't carry them. Were you able to carry away any weapons that were captured
16:23:01 from the Guineans in Mongo?
A. Yes.
Q. Were you able to capture any ammunition in Mongo?
A. Yes, we captured a lot of ammunition.
Q. Can you describe what you did with the weapons and
16:23:19 ammunition that were captured from the Guineans in Mongo?
A. Yes. The ones that we were able to carry, we carried with us to Kurubonla to SAJ Musa and we handed them over to SAJ Musa.
Q. What do you recall now as far as weapons you were able to carry to SAJ Musa?
16:23:47 A. We handed the ammunition over to SAJ Musa. From there Superman came and joined us. Both of them were in control of the ammunition and we undertook a mission for Kabala with the same ammunition that was captured from Mongo.
Q. I'm going to try once again but, Mr Witness, do you recall

whether you were able to carry any weapons to SAJ Musa and, if so, what were the weapons?

A. We carried a lot of weapons. We carried mortars, GMG, some RPGs that were captured, we took them along with us, and some other light weapons like pistols, AK-47s, we took them along with us.

Q. So these weapons that were handed over to SAJ Musa, do you know if they stayed with the SAJ Musa forces after the attack on Mongo?

16:24:52 A. Yes.

Q. Do you know if these weapons stayed with SAJ Musa forces after he left Kurubonla?

A. Yes.

Q. These weapons and ammunition that were captured in Mongo, they were captured using ammunition from where, Mr Witness?

A. The ammunition that we brought along from Gbarnga, Kono, I took some to Komba Gbundema in Wordu, it was the same ammunition that we were to use to attack Mongo Bendugu.

JUDGE SEBUTINDE: Where is Gbarnga, Kono?

16:25:48 MR KOUMJIAN: I believe those were two separate --

Q. Mr Witness, you said you took ammunition from Gbarnga and then you said Kono. Can you describe the route.

A. Yes, the ammunition that we collected from Gbarnga in Liberia, the President's farm, it was the same ammunition that we took along to Kono, Superman's ground, and Superman gave some of the ammunition to Komba Gbundema in Wordu and it was that same ammunition that we took to Kurubonla after the meeting. It was the same ammunition that we used to attack Mongo Bendugu.

Q. And it was in this attack that the ammunition and weapons

were captured from the Guineans and taken to SAJ Musa?
A. Yes.
JUDGE SEBUTINDE: It would also be helpful for us to have a time frame for the Mongo Bendugu attack, please.
16:26:42 MR KOUMJIAN:
Q. Mr Witness, I know it's difficult for you to get the exact times, but let's work together to try to get some idea. What year was it that you attacked Mongo Bendugu?
A. It was late '98. The ending of the rainy season we
16:27:12 attacked Mongo Bendugu. '98, I think so.
Q. Can you give us an approximate time in months, or not, for the end of the rainy season?
A. I do not remember the month.
MR KOUMJIAN: Your Honours, actually this would be a
16:27:32 convenient time for me to break. I'm moving to a different topic.
PRESIDING JUDGE: Very well, Mr Koumjian. Mr Witness, we're going to adjourn for today. We will be resuming court again tomorrow at 9.30. I have to inform you that now that you
16:27:47 have taken the oath to tell the truth here in the court, you are not to discuss your evidence with any other person until all of your evidence is finished. Do you understand this?
THE WITNESS: Yes.
PRESIDING JUDGE: Please adjourn court until tomorrow at
16:28:02 9.30.

[Whereupon the hearing adjourned at 4.27 p.m. to be reconvened on Tuesday, 24 June 2008 at 9.30 a.m.]

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-584	12412
CROSS-EXAMINATION BY MR ANYAH	12412
RE-EXAMINATION BY MR SANTORA	12450
TF1-375	12462
EXAMINATION IN-CHIEF BY MR KOUMJIAN	12469

EXHIBITS:

Exhibit P-146 admitted	12459
Exhibit P-147 admitted	12459
Exhibit D-51 admitted	12460
Exhibit D-52 admitted	12460
Exhibit D-53 admitted	12460

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 20 JUNE 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah Ms Megan Dorey

Q. Black Jesus was also imprisoned at Pademba Road, yes?
A. I don't know.
Q. Well, how do you know Black Jesus?
A. I knew him, but I never knew that he was at Pademba Road
10:03:36 because they never gave me a list that these are the names of people who had been sent at Pademba Road. If I know about Martin, it was because he was my colleague operator.
Q. Do you know where Martin Moinama is today, Madam Witness?
A. I don't know if he is alive. I heard that he died.
10:04:00 Q. Who told you he died?
A. The men who were in Freetown.
Q. Did you hear that from Foday Lansana, Madam Witness?
A. No. Foday Lansana did not go to Freetown.
Q. Well, let me ask you this: You said you heard it from the
10:04:31 men in Freetown, when exactly did you hear it from the men in Freetown?
A. Yams Farm.
Q. And were you at Yams Farm about the time of the 6 January invasion?
10:04:56 A. I was in Lunsar, but I went to Yams Farm after 6 January.
Q. So you heard after 6 January that the same Martin Moinama who had been released from Pademba Road Prison had been killed.
PRESIDING JUDGE: I think the witness said died. That, to me, includes natural causes.
10:05:24 MR ANYAH:
Q. Madam Witness, did you hear whether or not Martin Moinama had been killed?
A. Yes.
Q. What exactly did you hear?

A. Lately I understood that Martin was killed because of the testimony that he gave against Pa Sankoh and I cannot say that I asked anybody who killed him or not. No, I did not ask that. But the person who told me also told me that it was Sam Bockarie who ordered his killing.

10:06:12

Q. So if your sequence of events is correct, they released him from Pademba Road Prison and, if this rumour you heard is correct, at the request of Sam Bockarie he was killed, yes?

A. Yes, according to what the person told me.

10:06:46 MR ANYAH: Madam Court Officer, can we go to page 29 of tab 1. The relevant paragraph is 172:

Q. Madam Witness, this is what you told the Prosecution about Martin Moinama, October last when you met with them. The paragraph reads:

10:07:36 "The witness has heard of Martin Moinama, also known as the Cat, and he is late. The witness believes that he was killed before the intervention. During the Freetown invasion the witness did not hear any radio message about the Cat."

Madam Witness, why do they have you telling them that

10:08:06 Martin Moinama was killed before the intervention?

A. I can answer to that. The question was if I knew Martin and I knew him, and again they asked me when did I know that he was missing and I knew when he got missing and that was at the time when the ECOMOG took over Freetown and his wife stayed with

10:08:37 us and she told us that Issa arrested her husband and she was sure that he had been killed. That was what exactly I said. And I did not get any radio message about Martin, that he was taken to Pademba Road or not. I learned that from his wife, that he had died, because she herself did not see her [sic] after that

time, but later I learned that he died after 6 January.
Q. Madam Witness, you are now telling us Martin Moinama's wife stayed with you, yes?
A. Yes.
10:09:32 Q. She stayed with you and she told you what had happened to her husband, correct?
A. Yes.
Q. Indeed your answer just given in court - this is a reference to what you believed the Prosecution was asking you in
10:09:51 October last, you said:
"They asked me when did I know that he was missing and I knew when he got missing and that was at the time when the ECOMOG took over Freetown and his wife stayed with us and she told us that Issa arrested her husband and she was sure that he had been
10:10:15 killed."
This is what you've just said in court, yes?
A. Yes.
Q. When the ECOMOG took over Freetown, you're referring to the intervention in February 1998, correct?
10:10:31 A. Yes.
Q. Moinama's wife was staying with you at that time. She told you her husband had been killed, correct?
A. Yes.
Q. Then why are you telling us in court that during the 6
10:10:47 January invasion in 1999 Martin Moinama was one of those released from Pademba Road Prison by the RUF invading forces?
A. I have said it here that the people who released those people from Pademba Road and when they came back from Freetown it was from them that I learnt that Martin had been killed, but I

A. Yes.
Q. Does this person, Senegalese, have another name?
A. I don't know any other name for him. I don't know.
Q. Was that the first time you had met this fellow?
12:16:03 A. Yes.
Q. When you met him Superman had already moved ahead towards Koinadugu, correct?
A. Yes.
Q. And you say when you met Senegalese he had some men with
12:16:18 him, right?
A. Yes, it was Senegalese who met me.
Q. And let's be more specific. It wasn't just you. It was you and other RUF fighters, yes?
A. Yes.
12:16:36 Q. What nationality was this fellow Senegalese?
A. Like I answered last, I did not ask Senegalese about his nationality and I did not hear him speak any other dialect apart from the Liberian English and he told me that he was from Liberia. So I did not ask him whether he was a Liberian or what
12:17:05 his nationality was.
Q. How many men did Senegalese meet you at Yomadu with?
A. 30.
Q. And what did you understand the name of the group in which these men belonged to to be?
12:17:41 A. What they told me was that they were STF.
Q. When you say STF, what does STF stand for?
A. Special Task Force.
Q. And you agree that there was something called the STF or Special Task Force in existence around this time in 1998 among

the warring factions in Sierra Leone, yes?
A. Yes.
Q. The leader of the Special Task Force was David Livingstone Bropleh, General Bropleh, yes?
12:18:24 A. Yes.
Q. Special Task Force had been in Sierra Leone for a very long time fighting alongside the Sierra Leone Army, yes?
A. Yes.
Q. Special Task Force was made up of a number of ULIMO - ex-ULIMO fighters, yes?
12:18:43 A. Yes.
Q. You will agree with me that ULIMO were the enemy of the NPFL when you were in Kolahun in Liberia in 1993, yes?
A. Yes.
12:19:04 Q. You will agree with me that Special Task Force was made up of ex-ULIMO Liberians, yes?
A. That was what I also understood.
Q. Those Liberians are not necessarily people that would like Charles Taylor, given that they are from ULIMO, right?
12:19:35 A. Well, I cannot tell people's mind, but I knew about the ULIMO who were in Liberia and who fought against the NPFL. But I can't tell about the ones who were in Sierra Leone who were fighting as the STF. So I don't know.
Q. But you spent more time in Sierra Leone than you did in Liberia, yes?
12:20:00 A. Yes.
Q. It is one and the same ULIMO we are talking about when we speak of ULIMO in Kolahun in 1993 and ex-ULIMO fighters in Sierra Leone in 1998, yes?

A. The question I cannot answer directly, because the ULIMO and the STF, I came to know them when they joined the AFRC. So I can't tell whether they had been in Liberia at a certain point in time whilst they were fighting there at the time ULIMO was
12:20:43 fighting there, whether they were fighting amongst that group. So all the STF who came, when they said they were ULIMO, I don't know. Maybe they were the ULIMO who were fighting against Charles Taylor.

Q. You don't know, but we do agree that they were ULIMO - ex-ULIMO fighters, to be precise, right?
12:21:05

A. Like you have said it, I will take it that way.

Q. Well, it's not like I said it. Have you told the Prosecution they were ex-ULIMO fighters in a previous statement?

A. Yes.

12:21:26 Q. Now you said something in court that you did not believe that the men with Senegalese were STF. Do you recall saying that?

A. Yes.

Q. And why did you not believe that?

12:21:43 A. They asked me and I said the STF who joined the AFRC that I knew about were speaking better Krio because they had stayed long in Sierra Leone. They knew the names of so many towns and villages. But in the case of Senegalese, when they came together with the other men I did not hear them speak proper Krio. They
12:22:10 were speaking pure Liberian tongue. So I don't think they were part of the STF that I knew that I saw amongst the AFRC.

Q. But let's start with Senegalese. Senegalese, as far as you knew, was through and through an STF member, right?

A. No.

Q. Have you told the Prosecution before that he was STF?
A. I said Bai Bureh told me that Senegalese is an STF.
Q. You did say that, but you have also told the Prosecution that some of the STF you knew were Colonel Wallace, yes?
12:23:13 A. Yes.
Q. Also known as Sea Never Dry, yes?
A. Yes.
Q. You said there was a Colonel Ngallah, N-G-A-L-L-A-H, yes?
A. Colonel Ngallah, yes.
12:23:36 Q. You said there was a Major Koroma, K-O-R-O-M-O [sic], yes?
A. Yes.
Q. And then you told them Senegalese. "He was very tall and spoke Liberian and French." You included him amongst the STF, did you not?
12:24:01 A. I included him. That is when they came and joined us when we were at Koinadugu, he was together with the STF because they spoke similar languages and they ate the same food.
Q. Where did you first hear the name Red Lion battalion, Madam Witness?
12:24:33 A. At Koinadugu.
Q. And in what context did you hear that name?
A. Like I have said before, I met with the Red Lion battalion in Koinadugu because Superman and others had already been in Koinadugu and they asked me about the groups that were there and
12:25:01 they were the SLA, the STF and the RUF, and the particular Red Lion was mostly comprised of the SLA, even before the new Red Lion was formed at the time I was in Koinadugu.
Q. Well, let's leave the new Red Lion for a moment. Your evidence is that the first time you heard the phrase Red Lion

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-584 12328

CROSS-EXAMINATION BY MR ANYAH 12328

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 19 JUNE 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Advera Nsiima Kamuzora Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morrris Anyah

Q. What was the result of the operation?
A. When we got to at that bridge, the ECOMOG had left Koidu Town and gone to Tankoro, to that Five-Five bridge, but just as we were getting to the bridge there were people who were RUF
10:57:44 fighters in that bridge, but there were many in the bridge. The ECOMOG launched a bomb that exploded among them and over 20 RUF men died there. That made us to withdraw from that place. Though the other flanks where these men had come from, I was not with them so I can't tell exactly the time that they left Koidu,
10:58:25 but it was from that time that I left Koidu, around 4.30 in the morning, to return to Superman's ground.

MR SANTORA: Your Honours, there is just one spelling that we have spelled before. It didn't come across. Tankoro is spelt previously as T-A-N-K-O-R-O:

10:58:57 Q. Now, did there come a time when you left Superman Ground?
A. Yes.
Q. Approximately when did you leave Superman Ground?
A. From the time that I went to Superman's ground to the time that I left there, it was up to five months.
10:59:28 Q. Why did you leave Superman Ground?
A. I first left there and went to Foday Lansana in Tefeya, and when I came back Superman told me that Mosquito, who is Sam Bockarie, had given him an order to move to go to Kurubonla where the SLAs, headed by SAJ Musa, where they were based. He said he
11:00:23 should go and attack them, that Superman should launch an attack on the SLAs at Kurubonla, and that very day I was on the set when he sent a message to enquire if Superman had left to go. And Superman left that very day. He went to Yomandu.
Q. What about yourself? Did you leave with Superman, or did

you not leave yet?
A. I did not go, I stayed at the base, but when Superman went after three days he sent a message for me to go.
Q. Who sent a message for you to go?
11:01:28 A. Superman sent a message for me to join him.
Q. Where?
A. At that time he was in Yomandu.
Q. Continue. What happened after he sent that message?
A. The day that I received the message in which he included me
11:01:57 and some of his bodyguards that he had left at Superman's base, we left the next day, but when we got to Yomandu I did not find Superman there. Komba was not there. It was Short Bai Bureh that I met in Yomandu.
Q. What happened at - first of all, how long did it take you
11:02:29 approximately to get from Superman's ground to Yomandu?
A. A whole day, because I did not go straight.
Q. What happened when you got to Yomandu?
A. When I got to Yomandu Superman was not there, he had already left for Kurubonla, but when I got to Yomandu
11:03:06 I communicated with him that I and his other bodyguards have arrived in Yomandu. When he went to Kurubonla, the instruction which Sam Bockarie had given him he did not carry it out. He joined the SLAs and they moved from Kurubonla and went to Kabala. When I got to Yomandu and told him that we have arrived there, he
11:03:48 said Short Bai Bureh should get manpower from among his own men whom we met so that we and the manpower from Yomandu and those of us who had come from Superman's base could go and meet them, he Superman, where they were. I passed the night in Yomandu and the next day in the evening one Senegalese met us in Yomandu.

Q. Who is Senegalese?

A. Well Senegalese when I knew him, at first when he went that evening that he arrived Bai Bureh told me that he was an STF and the STF whom I knew were the ULIMO fighters who were fighting alongside the Sierra Leone Army in Sierra Leone. So, that was what Bai Bureh told me that Senegalese was STF. I surely knew him as a Liberian because he did not know how to speak Krio, he was speaking the Liberian English, and he said he was sent by Sam Bockarie to come and join Superman with reinforcement, which was composed of 30 men, for them to go and attack - for them to launch the attack which Sam Bockarie had sent Superman to carry out, but when he got to Yomandu Superman was not there at the time. The next morning --

Q. I am sorry, before you go on --

PRESIDING JUDGE: Yes. Mr Santora, this is getting somewhat confused.

MR SANTORA: That is why I was --

PRESIDING JUDGE: Yes, "he joined the SLAs", "I told him we had arrived there." Did she tell Sam Bockarie, or Superman, or who?

MR SANTORA: I am going to clarify that. I will clarify that portion first.

PRESIDING JUDGE: Yes, there is another series of "he"s thereafter.

MR SANTORA:

Q. Mrs Witness, I just have to ask you a few questions about some of the things you have just mentioned, okay? Now first of all you said, "Sam Bockarie had given him an order to move to Kurubonla." Who did Sam Bockarie give the order to?

A. To Superman.
Q. "... to go to Kurubonla where the SLAs, headed by SAJ Musa, where they were based. He said he should go and attack them." Who said - who do you mean when you said, "He said he should go"?
11:07:28 A. If I speak the Krio, I mean Sam Bockarie told Superman to go to Kurubonla and attack SAJ Musa's men.
Q. "And that very day I was on the set when he sent a message to enquire if Superman had left to go", who sent that message?
A. Sam Bockarie.
11:08:01 Q. And then, "Superman had left that very day. He went to Yomandu." Who left to Yomandu?
A. Superman left me at Superman's ground and went to Yomandu.
Q. Now, later on when you were saying - I asked you what happened when you got to Yomandu and you said:
11:08:34 "When I got to Yomandu, Superman was not there. He had already left for Kurubonla, but when I got to Yomandu I communicated with him that I and his other bodyguards have arrived in Yomandu." Who did you communicate with when you arrived at Yomandu?
11:08:51 A. Superman.
Q. And then, "When he went to Kurubonla, the instruction which Sam Bockarie had given him he did not carry out", who is the "he" you are referring to?
A. I am sure it was Sam Bockarie who instructed Superman to
11:09:22 carry out an operation in Kurubonla and Superman did not carry it out.
Q. And then you said, "He joined the SLAs." Who do you mean by "he" there?
A. I am still referring to Superman.

Q. "They moved from Kurubonla to Kabala", who is "they"?
A. Superman and his men and SAJ Musa and his men.
Q. Then you said, "When I got to Yomandu and told him we had arrived there", who did you tell you had arrived there?
11:10:08 A. I told Superman that I and his bodyguards whom he had requested for us to meet him had arrived in Yomandu.
Q. Now, later on you said you passed the night and the next morning - the next day, I am sorry, "In the evening, one Senegalese met us at Yomandu." You went on to say - when I asked
11:10:37 you who Senegalese was you said in your response, "He was speaking the Liberian English and he said he was sent by Sam Bockarie to come and join Superman with reinforcement." When you say, "He was speaking the Liberian English", who were you referring to?
11:11:02 A. You asked me - how you asked me who Senegalese is and I am talking about Senegalese.
Q. Did you yourself have a conversation with Senegalese?
A. I spoke with him.
Q. Can you just say what he told you in that conversation?
11:11:28 A. That is what I have just said. When I first got to Yomandu, when Senegalese got to Yomandu, Bai Bureh told me that Senegalese was an STF. Senegalese himself told me that he had come from Liberia and that it was Sam Bockarie who had sent him to join Superman.
11:11:59 Q. So do you believe Senegalese was an STF, or not?
PRESIDING JUDGE: Mr Anyah?
MR ANYAH: Objection. The witness said - I think she said Bai Bureh told her that Senegalese was STF. Counsel is asking her if she believed or not and I object to the form of the

question.

MR SANTORA: What is wrong with the form of the question?

PRESIDING JUDGE: She may have believed him, she may not have believed him. What is the nature of your objection?

11:12:39 MR ANYAH: She received the information from somebody and - well, I withdraw the objection.

PRESIDING JUDGE: At the end of the day whether she believed it or not doesn't go to the credibility of - sorry, does not go to whether he was an STF or not. What her belief is is

11:13:02 not relevant.

MR SANTORA:

Q. So, first you said you had a conversation with Short Bai Bureh and then you had a conversation with Senegalese. Do you believe he was STF, or not?

11:13:14 A. I did not believe that he was an STF.

Q. Why?

A. Because the STFs who joined the SLAs - I mean the AFRC and the RUF whom I saw and knew, they had taken a long time in Sierra Leone, they were speaking the Krio better, but Senegalese did not

11:13:54 speak a single Krio.

Q. Now, you said Senegalese himself told you that he had come from Liberia and that it was Sam Bockarie who had sent him to join Superman. Do you know where he came from in Liberia?

A. I did not know where he had come from in Liberia.

11:14:30 Q. And you said there was 30 men there as well. Who were these 30 men that you referred to?

A. The 30 men too were men who had arms and they were all Liberians. From what they spoke, the dialects they used, I did not know of in Sierra Leone.

Q. Did these men speak Krio, as far as you know?
A. No.
Q. Do you know where they came from?
A. I did not ask them individually, but their commander who
11:15:21 brought them, that is Senegalese, said they had come from
Liberia.
Q. Did you recognise the language they were speaking, or the
dialect?
A. I can still recall that there were some men among them who
11:15:53 were Kpelle, whom I saw and saw them talking with the STF, and
some of the Liberians who were still within the RUF who were
Kpelle I heard them talking the language.
Q. And do you know what language Senegalese spoke? Well, what
language did you speak with Senegalese in?
11:16:26 A. It was only Liberian English. I did not hear him speak any
particular language.
Q. Is there anything else you talked about in your
conversation with Senegalese?
A. I have already told you what Senegalese told me and it was
11:16:58 Senegalese and I in the group that we were, that is the signal
unit, which was composed of radio people or people dealing with
radio, that we went around with when we were leaving Yomandu to
go to Kurubonla.
Q. What happened after you met Senegalese in Yomandu?
11:17:41 A. We left Yomandu with Senegalese. I, Superman's bodyguards
and Short Bai Bureh's men who were in Yomandu whom he added on to
us, left Yomandu for Kurubonla. That was the next day, after
Senegalese and the others had arrived. The next day we left
Yomandu.

Q. Did you eventually arrive at Kurubonla?
A. We arrived at Kurubonla, having walked all day and all night. We arrived at Kurubonla, but Superman and SAJ Musa and others were not there any longer. It was only some soldiers, some SLAs and their wives whom they had, that we met at Kurubonla.
Q. Where did you go, if anywhere, after Kurubonla?
A. We went to Koinadugu.
Q. Approximately, how long did it take you in total to get from when you left Superman Ground to Koinadugu?
A. One week.
Q. Now when you arrived at Koinadugu, can you describe what you saw when you got to Koinadugu?
A. When we got to Koinadugu, before entering Koinadugu one last village from which you left, but it was not up to two miles to Koinadugu, that was where the STFs were. That was where I met the STFs whom General Bropleh was with. That was where they were based and that was where we met men who had come from Koinadugu from Superman's location where he and Superman, SAJ Musa, were. They came ahead of us in that village and we - together we entered Koinadugu.

It was in the evening that I entered Koinadugu. All the houses that were there it was just a few houses whereby the soldiers and SAJ Musa's men who had gone there did not occupy, and I did not really see civilians who were living by themselves, like you would say they were staying in their own houses, that is just civilians in a house, living in a house there.

Q. Now aside from Superman and SAJ Musa, what other commanders do you remember being present at Koinadugu when you were there?

MR SANTORA: Yes, and I hesitate to go into a new area.

PRESIDING JUDGE: You are going into a new area?

MR SANTORA: I am.

PRESIDING JUDGE: Well, it may be appropriate therefore to adjourn and take the break now. Madam Witness, we are now going to take our mid-morning break. We will resume court at 12 o'clock. Please adjourn court.

[Break taken at 11.30 a.m.]

[Upon resuming at 12.15 p.m.]

PRESIDING JUDGE: Counsel and Madam Witness, I apologise for the late recommencing after the break. We were unavoidably detained due to a pressing judicial and jurisdictional matter, hence the delay. Mr Santora, please continue.

MR SANTORA: Thank you, Madam President:

Q. Mrs Witness, at various points in your testimony you've referred to an individual called Major Sellay. Can you spell his name?

A. S-E-L-E, but he spelt it S-E-L-L-A-Y.

Q. When you say he, you mean Major Sellay himself spelt it S-E-L-L-A-Y?

A. Yes.

Q. One other matter before we continue, Mrs Witness. This morning, when you were talking about your conversation at Yomandu with Senegalese, you said that, "Senegalese himself told me he had come from Liberia." Did he tell you why he came from Liberia to Sam Bockarie?

A. Yes.

Q. Why?

A. What he told me was that Charles Taylor had sent him and

others to Sam Bockarie and Sam Bockarie sent them to Superman.
Q. Now, you were describing your observations at Koinadugu after you arrived there and, just for clarity, do you know approximately when you arrived at Koinadugu, what was the month
12:16:43 and year?
A. It was in August.
Q. And what year was that?
A. 1998.
Q. Now, you talked about various forces and units at Koinadugu
12:17:15 when you arrived. You referred to a Strike Force unit and a Red Lion battalion. What is the - what do you known about the Red Lion battalion?
A. The Red Lion battalion that I knew was the one that Red Goat, Colonel Rambo, the SLAs headed, but the Red Lion battalion
12:17:50 that was --

THE INTERPRETER: Your Honours, can the witness repeat this.

PRESIDING JUDGE: Pause, Madam Witness. The interpreter is trying to keep up with you. Could you please repeat the part of
12:18:00 your answer that he did not hear. Start at the point where you said, "But the Red Lion battalion, that was" - now continue, please.

THE WITNESS: The new Red Lion battalion that was formed at the time I got to Koinadugu, and that was formed by Superman, the
12:18:29 STF, the SLA or AFRC and the RUF, they constituted that Red Lion battalion.

MR SANTORA:

Q. What do you mean when you say the new Red Lion battalion?
A. Because there had already been a Red Lion battalion before

A. When I was in Lunsar, I was living in the same house where Superman was and it was at the same house that the radio station was. On 6 January I went at night and I operated, but it was not for the whole day and early in the morning --

12:55:32 THE INTERPRETER: Your Honours, can the witness repeat.

MR SANTORA: I'm sorry to interrupt, because I heard the witness say something that's very different than what came out and I perhaps should ask her to clarify.

THE INTERPRETER: Exactly, that's what the interpreter

12:55:47 wants her to repeat. I think she used the net, instead of the night.

MR SANTORA: Exactly. That was my point as well.

PRESIDING JUDGE: Put the question again, Mr Santora.

MR SANTORA: I'll start it over:

12:55:58 Q. Mrs Witness, I'm just going to ask you again if you can try and speak slowly so the interpreters can keep up with what you're saying, okay?

A. Yes.

Q. Okay. Now, I asked you from your vantage point at Lunsar

12:56:14 on 6 January 1999 can you describe what happened?

A. I started by saying that when I was in Lunsar I was at the same house as Superman's and it was at that same house that we had the radio that was there for Superman and was operated by me. 6 January I switched on the radio, but I did not operate for the

12:56:56 whole day. On 7 January, early in the morning --

Q. I am sorry, Mrs Witness. I don't mean to interrupt you, but I'm just going to ask you to take it step by step. On 6 January when you put the radio on, did you hear anything?

A. I did not hear anything.

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-584	12215
EXAMINATION-IN-CHIEF BY MR SANTORA	12215
CROSS-EXAMINATION BY MR ANYAH	12298

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 18 JUNE 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Advera Kamuzora Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Ms Megan Dorey

signing of the peace accord?
A. Yes.
Q. Now, earlier you said that when Zogoda was attacked and when CO Mohamed - when Sam Bockarie took over leadership from CO Mohamed, do you know when Zogoda was attacked?
10:38:30
A. I can't tell the exact month, but it was in '96.
Q. Do you remember if it was before or after the signing of the peace accord, if you remember?
PRESIDING JUDGE: [Microphone not activated].
10:38:57
MR SANTORA: No, I am referring to the attack, a different attack, your Honours, on Zogoda, not - unless I - one moment. I will verify it. If your Honours just - I am referring to an attack on Zogoda and I believe the record states that in terms of that time frame your Honours were alluding to, which is referring
10:39:33
to the attack on the witness's position at Black Water.
PRESIDING JUDGE: Oh, I see.
MR SANTORA: If that distinction is --
JUDGE SEBUTINDE: Well, you need to make that distinction clear, because we were talking of one attack and then suddenly of
10:39:46
some other attack.
MR SANTORA: I will make the distinction clear:
Q. Now, you said that Zogoda was attacked and this was when CO Mohamed - when Sam Bockarie took over leadership from CO Mohamed. Do you remember when this attack at Zogoda occurred in terms of
10:40:14
was it before or after the signing of the peace accord?
A. It was before they signed the peace.
Q. Now, after the attack on your position near Black Water and after the peace accord was signed, what happened to you?
A. When they attacked, when the Kamajors started attacking us,

were based in Gaya?
A. Yes.
Q. Where is that?
A. Gaya is between Bumpe and Mortema when you come from Sewafe
11:00:42 going to Koidu Town, but it's inside going to Yengema. It's not
on the main road.
Q. Just and - well, I will get into a more precise - how you
pointed out precisely later on, but just for clarity, do you know
what chiefdom Gaya is in?
11:01:09 A. I can't know the chiefdom because I did not grow up in
Kono.
Q. It is in Kono. How far away is it - you said between Bumpe
and Mortema, is that correct?
A. Yes.
11:01:27 Q. About how far away is it from Bumpe?
A. It could be four miles, because when you leave Bumpe, going
to Mortema, you will see Gaya junction on the main road, but the
Gaya itself is inside.
Q. What road is this you are referring to?
11:02:03 A. It is the Kono-Masingbi Road.
Q. And Gaya is in Kono District, is that correct?
A. Yes.
Q. So describe what happened when you started basing in Gaya?
A. Well, when I was in Gaya it was CO Isaac who took me,
11:02:47 together with Foday Lansana. We were in Gaya, in the barracks at
the headquarters where the SLAs were. That was where we stayed.
Q. Before I ask you to continue with describing this, can you
tell the Court what was your relationship with Foday Lansana?
A. He was my bush husband.

Q. And how long was he your bush husband for?
A. For seven years.
Q. And when - can you describe what was the time period of your relationship?
11:03:52 A. From 1994 to 2000.
Q. And did you have any --
JUDGE SEBUTINDE: Mr Santora, I imagine you are going to elicit evidence as to the meaning of this word "bush husband"?
MR SANTORA: Yes, I was planning on doing that, your
11:04:24 Honour, thank you:
Q. Now, when you say "bush husband", what do you mean?
A. Well, at the time that we were in the bush we were together in the same place as husband and wife and we gave birth to children. When I say bush husband, it means he never knew my
11:04:58 mother or my father, nor any of my relatives to whom he could have gone to ask for my hand in marriage.
JUDGE SEBUTINDE: Was this a marriage by consent?
MR SANTORA:
Q. Did you hear the justice's question?
11:05:26 A. I heard it well and I can say yes because I was not under gun point. At that time I was in the RUF and it was during the time I was undergoing my training. It was at that time that he fell in love with me.
Q. How many children did you have together?
11:05:57 A. We had three, but two are alive now.
Q. And Foday Lansana that you are referring to, what was his other name, if he had one?
A. CO Nya.
Q. And this is the same person that you said trained you on

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-584 12103

EXAMINATION-IN-CHIEF BY MR SANTORA 12103

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 6 JUNE 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

to the front lines. Is that your evidence, Mr Witness?
A. Yes.
Q. Well, let's look at tab 2 and your statement to the Office of the Prosecutor. Your Honours, this is the same statement from
10:12:07 late last year and I will be referring to page 7. Mr Witness, these are notes the Prosecution took, disclosed to us. On page 7, paragraph 32, it reads:

"The witness attended shortly after his birthday in April 1998 a secret meeting that was held in the bush between Buedu and
10:12:48 Dawa. There was approximately 100 officers present in this meeting and most of the RUF vanguards were there. Sam Bockarie, Harris Momoh, Eldred Collins, Sam Colley, Superman, Issa Sesay, Morris Kallon, Augustine Gbao, SYB Rogers, CO Isaac, Peter Vandi, Karmoh Kanneh, Ebony, Zedman, Amara Peleto and CO Rashid were all
10:13:34 there. Some AFRC were also there like JPK and Gullit. Jungle was there with another very important Liberian general who was there with some bodyguards. The witness cannot remember the name of the Liberian general."

Next paragraph, paragraph 33:

10:13:58 "During this meeting the situation of Issa Sesay who had dropped diamonds in Liberia was discussed and it was decided to send him to the front lines as a result."

Do you see that, Mr Witness?
A. Yes.
10:14:16 Q. You told this Court yesterday of a meeting where you were present concerning Issa Sesay in the jungle between Buedu and Dawa and you spoke of seeing Jungle there. You spoke of seeing General Ibrahim there, yes?
A. Yes.

Q. You told the Prosecution last October/November that you were present at this same meeting and that that was the meeting where Issa Sesay was punished by being sent to the front lines, yes?

10:14:57 A. Yes.

Q. You told the Prosecution that the reason for Issa Sesay's punishment was diamonds. He had dropped some diamonds in Liberia, yes?

A. No, I did not say so.

10:15:21 Q. Why did you tell us that you were at this meeting and yet you told the Issa Sesay investigators that you were in Koindu and you heard about this over the radio? Tell us why.

A. The punishment that was meeted out to Issa at the front line, that was what I was referring to when I said I was in

10:15:47 Koindu when I heard it over the radio. That is what I am talking about. But this other one when he dropped the diamonds, I was not in Koindu. I was at the meeting.

Q. The Prosecution's interview notes clearly say that it was at this meeting that the decision was made to send Issa Sesay to

10:16:12 the front lines and it is consistent with what you told us in court. Do you agree, Mr Witness?

A. Well, it was - that error was made by the Prosecutor. I did not tell them so, because I clearly spelt it out. Even in the last statement it is there and even to Issa Sesay's Defence

10:16:35 it is there. There were two different issues.

Q. Why did you tell the Issa Sesay Defence team you did not know what the problem was and yet in court the notes have you saying this was about diamonds?

A. There was a problem between Issa and Sam Bockarie. I did

not know what the problem was. This other problem is different from that other problem that existed between Issa and Sam Bockarie. It was between them. It was an individual problem between them. This was a general problem for the entire RUF. That was why everybody went to that meeting.

Q. Yes, and that was the meeting, as the Prosecution's notes say, you told them when Issa Sesay was sent to the front lines, yes?

A. Not to my knowledge.

Q. What is not to your knowledge? The Prosecution's notes are not to your knowledge that you have just seen?

A. The sending of Issa from this meeting, because from this meeting it was a front line arrangement after Issa Sesay's discussion. We weren't on a front line arrangement. I did not hear them send Issa from this meeting. It was only when I was in Koindu that they sent Issa to the front line, which I heard. That was as a result of a problem between him and Sam Bockarie, but this was a general problem for the revolution.

JUDGE SEBUTINDE: Mr Witness, are you saying that what is written in paragraph 33 is an error? Namely when it says, "During the meeting the situation of Issa Sesay who had dropped the diamonds in Liberia was discussed and it was decided to send him to the front line as a result", you are saying that that is a mistake?

THE WITNESS: It could be a mistake on the part of the Prosecution, yes, my Lord.

JUDGE SEBUTINDE: You are saying that it is not true, it didn't happen in the meeting, or that you weren't in the meeting? I don't understand. What are you saying?

THE WITNESS: After the meeting - during this meeting - to say that after this meeting - at that meeting we discussed sending Issa Sesay at the front line. That's what I'm talking about. It was not at that meeting. The front line which Issa went to when Sam Bockarie sent him there, that was an issue between Sam Bockarie and Issa. But here I am seeing the Prosecution - I am seeing that the Prosecution has written it there so that's what I'm saying, that it might be a mistake on the part of the Prosecution.

10:19:29 MR ANYAH:

Q. Mr Witness, I am putting it to you that you are lying when you try to suggest you're speaking about two different incidents. What do you say?

A. I am not telling lies. I am saying the truth, because 10:19:46 I was there. What I saw happen is what I am talking about.

Q. I am putting it to you that when you spoke with the Issa Sesay Defence team and you did not mention Colonel Jungle and you did not mention General Ibrahim and you did not mention any of these names, Superman and the like, because you said to them you 10:20:13 were not at the meeting, that was the more accurate story. That's what I'm putting to you. What do you have to say?

A. I did not tell Issa Sesay Defence that I went to a meeting and that Colonel Jungle and others were there and they never asked me about Colonel Jungle's business. It was Issa Sesay's 10:20:34 business that they were asking me about. They did not ask me about any outsider. It was Issa Sesay's personal business that they were asking me about. What they were asking me about was the answer I was rendering.

Q. And I am putting it to you that when you come into this

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-577 11159

CROSS-EXAMINATION BY MR ANYAH 11159

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 5 JUNE 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah

thanked Sam Bockarie and all of us who came to attend the meeting and that he was praying that the cause of the revolution will be successful. He said he was there to tell us that the RUF and the AFRC and the relationship between them was recognised by Charles 10:37:32 Taylor, and that he was saying that although we have been pushed out of the city, we shouldn't worry ourselves, but that he was advising that we try and get hold over Kono, because that was where we will get our resources.

Then he also discussed the maintenance of an airstrip. 10:37:55 There was an airstrip that we were trying to construct behind Buedu and he said we should also try, as fast as possible, to construct that airstrip, because in case of any emergency landing of materials, the aircraft will have to land there. So it was during that meeting that I again saw Colonel Jungle.

10:38:19 Q. Thank you, Mr Witness. Now, I just want to clarify a few things. First you said that there was a call to Koindu for the battalion commander and the adjutant to come to the meeting, so at the time of that call who was the battalion commander in Koindu?

10:38:48 A. It was Colonel Harris. He was called Colonel Harris.

Q. And who was Colonel Harris?

A. He was a junior commando. He was a Sierra Leonean.

Q. Do you know his full name?

A. Harris Momoh.

10:39:09 Q. And when did he come to Koindu to become the battalion commander?

A. It was when the Guineans attacked Koindu and he was the one that Sam Bockarie sent with the reinforcement to go and help the battle in Koindu. So when he went there, he now stayed there as

the commander.

Q. Now, you said that they called as well the adjutant from Koindu to come, so who was the adjutant that they called to come from Koindu?

10:39:56 A. At that time I was acting as adjutant in Koindu, I was.

Q. Because yesterday you told us that after the intervention you were sent to Koindu and at that time nobody was in charge of Koindu and you were acting as the one in charge in Koindu, so when did you become the acting adjutant in Koindu?

10:40:29 A. When Sam Bockarie sent Colonel Harris to take over in Koindu and when he became the commander I started acting as adjutant under him.

Q. Now, at the meeting that you told us about, who that you can remember was present in this meeting?

10:40:58 A. Colonel Harris was there, I was there, Superman came, Augustine Gbao, CO Augustine Gbao came, CO Augustine Gbao. Issa Sesay himself was there. There was an adjutant called Hi-Rash, Rashid Sandy, he was also present in the meeting and some other senior RUF authorities, most of them were present in that meeting

10:41:37 because it was a matter that concerned the RUF.

Q. And then when you said there was an adjutant called Hi-Rash, Rashid Sandy, who was Hi-Rash? Who was Rashid Sandy?

A. Well, Rashid Sandy was a junior commando. He was the man who was acting as general adjutant for the RUF, but he was not

10:42:05 actually the general adjutant because it was a vanguard called CO Kposowa who was the general adjutant, but at that time CO Kposowa was not with us. It was Hi-Rash that was acting as the general adjutant with us.

MR WERNER: Your Honour, I will try to get clarification

Buedu. He too had come from Koindu and gone Buedu. When I went I met them there. They told me, "Abor, why didn't you come for the meeting?" I said, "You know that we had some problem there and I was part of the fighting." That was what I called problem. 12:12:34 There was some pressure, those men wanted to advance and I said, "But we burnt down one of their war tanks from them, but we thought they would still attempt to advance on us so we were on a strong defensive, but we heard about the meeting so what was the meeting about?"

12:12:53 So Shabado, Ray and some other men explained to me that Master had come. They said he had come with ammo, a lot of ammo, and in fact he, Eddie Kanneh and others had come. One AFRC strong man who was called Eddie Kanneh, they said he came together with them. They said they went to Liberia to the father 12:13:23 and the Pa - they crossed Liberia and they went to Burkina Faso and when they came from Burkina Faso they came back with a lot of ammunition and arms, and when they came back they were even drawing plans for --

THE INTERPRETER: Your Honours, can the witness slow down 12:13:41 and repeat.

PRESIDING JUDGE: Mr Witness, you are going too fast again. You have speeded up. Please go back to where you said, "They came back with a lot of ammunition and arms and when they came back they were even drawing plans ..." Continue from there, 12:13:55 speak slowly for the interpreter. Please proceed.

THE WITNESS: So Shabado and others told me that they had drawn a war plan in the meeting. A lot of people attended the meeting. They said almost all the front line commanders attended. He said, "You were the only people that we did not

see, but then we understand that you had some pressure on you." He said they had drawn a war plan to go and attack Kono and Segbwema, Bunumbu-Segbwema axis simultaneously and that they were arranging for those men to go their own ammunition. I said, "How about the meeting? Who were the people attending the meeting?" They told me that Colonel Jungle was present and in fact Eddie Kanneh and CO Mosquito were there, the two of them came from the mission, that's the trip that they made to Liberia and Burkina Faso. They said the two of them came back. They said Colonel Jungle was there, General Ibrahim himself was there and Abu Keita and some other Liberians. He said all of them were there. In fact he said Abu Keita was to be with us for the mission. They said they had come. He said --

MR WERNER:

Q. Just pause, Mr Witness. First you talk - once you spoke about the Master, that Master came. Who did you refer to when you said Master?

A. Sam Bockarie. I had said it once or twice here in this Court that we used to call Sam Bockarie Master, so any time I use Master I will be referring to Sam Bockarie. Then Father, we used to call Charles Taylor the Father. So at times - I am still used to calling him that way, that's why. So they said they had come and they had drawn the plan and there was a big offensive at hand in the 2nd and 1st Brigades. Then he said, "Maybe they will even have to call you for reinforcement."

PRESIDING JUDGE: Mr Werner, I think your witness has strayed far away from your question.

MR WERNER: Yes, thank you, your Honour:

Q. You mentioned Eddie Kanneh, you said he was an AFRC strong

man. What else, if anything, were you told about Eddie Kanneh at that time?

A. They said Eddie Kanneh and Sam Bockarie went to Liberia, right up to when they went to Burkina Faso and the two of them returned from Liberia into Sierra Leone, the two of them were in the meeting.

Q. Mr Witness, just try, if you can, to answer my question. What else about Eddie Kanneh himself? You said he was an AFRC strong man --

12:16:59 JUDGE SEBUTINDE: Mr Werner, the question you asked the witness was, "What did you hear about the meeting?" Now I personally am lost. All this evidence he is giving, is it a precursor to the meeting or is this something that happened in the meeting? There are like two big paragraphs, I don't know 12:17:17 what they relate to. Certainly they don't appear to relate to the question you asked, "So what did you hear at this meeting?"

MR WERNER: Your Honour, the witness said that he was not at the meeting.

JUDGE SEBUTINDE: About the meeting.

12:17:30 MR WERNER: Yes, your Honour.

JUDGE SEBUTINDE: The answers he gives I do not think are related to what he heard about the meeting.

MR WERNER:

Q. So, Mr Witness, if you can set your mind to exactly what 12:17:43 Shabado told you - Shabado and the other bodyguards told you about what happened in this meeting. Can you tell us just at that time when you went there what were you told about that meeting?

A. The bodyguards told me about the meeting, that Master and

others had come, Master and Eddie Kanneh - I meant Sam Bockarie, they had come from Liberia with a lot of ammunition. So they called up for a meeting and so all front line commanders and senior vanguards were there at the meeting. They welcomed them and they explained how they travelled, where they went and how they had come and even the materials that they brought. They explained that in the meeting.

12:18:26

Q. Just pause there, Mr Witness. Who explained that in the meeting, how they had travelled? Who explained that, according to what you were told?

12:18:41

A. It was Sam Bockarie who was giving the report about how their trip was, what they went to do and what they had brought. That's what he was telling me. He said but there were a lot of dignitaries present in a meeting, even SYB Rogers, the War Council chairman, was present. The front line commanders too were in attendance. Then the Liberian government representative. He said Colonel Jungle and General Ibrahim were in the meeting. All of them were in the meeting together with Abu Keita. They called the name of a man called Abu Keita. He too came from Liberia, this Abu Keita.

12:19:10

12:19:36

They said Sam Bockarie explained about how they travelled, what they brought, whatever transpired during the trip and SYB Rogers, the War Council chairman, thanked them in his address whilst he was addressing the meeting and some other senior officers also spoke, like Morris Kallon. CO Issa too spoke and thanked them and they drew a war plan, how they were to attack Kono and Bunumbu-Segbwema.

12:19:58

Q. Pause there. You said that you were told about what they had brought. What did you mean? What was discussed according to

what you were told? What was discussed in the meeting about anything being brought? Can you tell that again?

A. They brought arms and ammunition, RPG rocket, the bombs. They brought a lot of those for the missions that was consistent with the war plans that they had drawn for Kono and Kenema. Those are the materials. They said they brought a lot of them.

Q. Mr Witness, several times you said that they had drawn a war plan. What were you told about this war plan? How drew the war plan?

12:21:18 A. It was Sam Bockarie together with the other senior officers like Issa, Morris Kallon and others. They drew how the attack should go on, who should go to Kono and who should go to Kenema. They divided the officers and from that meeting everybody should go straight to his location where he had been assigned. You

12:21:45 should go with your materials and start your attack.

Q. Now you mentioned someone called Abu Keita. Who was Abu Keita?

A. Abu Keita was a Liberian fighter who came, whom they said came. They said he too was present at the meeting and they said

12:22:13 he, Abu Keita, was to be part of the mission to go and attack.

Q. Were you told anything about who had sent Abu Keita to Sierra Leone?

MR ANYAH: Objection.

PRESIDING JUDGE: Yes, Mr Anyah?

12:22:35 MR ANYAH: I am objecting to the leading in the question.

PRESIDING JUDGE: Yes, it is leading, Mr Werner. Rephrase it.

MR WERNER:

Q. Mr Witness, what, if anything, were you told about who had

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-577 11030

EXAMINATION-IN-CHIEF BY MR WERNER: 11030

CROSS-EXAMINATION BY MR ANYAH 11117

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 4 JUNE 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah

apart from that particular time it was two times again that he told me that he went to Liberia with Sam Bockarie and came back, because I discussed with him after that two times that he told me something about that again.

16:08:43 Q. And the first time --

JUDGE SEBUTINDE: Was the discussion twice, or was the journey twice?

MR WERNER:

Q. So, Mr Witness, are you saying that Shabado went twice to
16:08:51 Liberia, or did he tell you twice about one trip to Liberia?

A. He went to Liberia two times, that is what I mean.

Q. And what did he tell you after the first trip to Liberia?

A. He said they brought materials; that is ammunition and bombs.

16:09:19 Q. And can you remember when did Shabado come back from Liberia with ammunition and bombs?

A. No, I can't recall the exact time that he came. When I used to take leave from Koindu to go to Buedu and see my family, at times I was fortunate to meet him there and that was
16:09:46 the time we had the privileged conversations. If it was the time that they were just returning from Liberia, or they were preparing to go there, he will explain those things to me. So those were all things that he told me so as to keep our spirits going, that something must come to the ground and that we should
16:10:07 hold on our ground.

Q. And concerning this first trip he told you about what, if anything, did he tell you about where he got these arms and ammunition from?

A. They went and got it from Liberia. From Charles Taylor in

Liberia.

Q. And how did you - well, Mr Witness, the second conversation you had with Mohamed Banya, what did he tell you about the second trip?

16:10:48 A. They went there for the same material business and food for the soldiers who were on the ground.

Q. Now again, Mr Witness, you told us about the day of your birthday in April 1998 and you told us what happened that day. The first time you spoke with Mohamed Banya about his first trip, was it before or after your birthday?

16:11:20 A. It was after my birthday. The first day I told you I saw him was on my birthday, when Sam Bockarie had the satellite phone. That was the time they went - my first time to see him go inside and it was after the fighting that took place in Koindu that I used to go to Buedu and come back. Those were the times I used to get those discussions with him.

16:11:49 Q. And about how long after - so, you told us that the fighting in Koindu started in June 1998. How long after that time did you have the first conversation with Mohamed Banya?

16:12:14 A. I can't recall the exact duration, how long it took, but it did not actually take long because immediately after that fighting Sam Bockarie used to invite us frequently for us to give him updates about how the fighting was going, because from Koindu to Guinea was just 17 miles and so any bombardment that was

16:12:40 happening there he could hear it. At that time the Guineans were frequently bombarding and by then the Guinean people had already packed up and run away, so he could either send somebody with a message to know what was happening or that he will send some of his boys to go and check. So he always wanted to know what was

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-577 10894

EXAMINATION-IN-CHIEF BY MR WERNER 10894

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 2 JUNE 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg
For the Registry:	Ms Advera Kamuzora Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Mr Christopher Santora Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

Q. Mr Kargbo, we are dealing with the second delegation. When the second delegation, who had gone you say to get arms and ammunition, came back, what did they tell you?

A. Well, when they came back they met us in Magburaka at that
13:21:57 time and they came on board a plane with the arms.

Q. How long after they had gone to Liberia did they return?

A. Within a week.

Q. So, they came back before the arms and ammunition came to Magburaka?

13:22:23 A. Some of them came on board the aeroplane.

Q. Who came on board the aeroplane?

A. I can recall Lieutenant Fonti Kanu and a guy who had on Burkina Faso military fatigue with head dress. They came down with the arms.

13:22:54 Q. Well the Burkina Faso man wasn't a member of the delegation that had gone from Freetown to Monrovia, was he?

A. He was not part of the delegation.

Q. No. I am asking you who went on the delegation and who came back on the plane and I also want to know who came back before
13:23:12 the plane?

A. SYB Rogers and others returned before the arrival of the aeroplane. Mike Lamin, Fonti Kanu and Musa were those who came on board the aeroplane.

Q. Right, so Mike Lamin doesn't come back until he lands with
13:23:36 that aeroplane with materials?

A. Yes.

Q. So put him on one side, when SYB Rogers comes back did he tell you what Mr Taylor had said?

A. By then he did not explain anything to the Supreme Council

I N D E X

WITNESSES FOR THE PROSECUTION:

SAMUEL KARGBO 10627

CROSS-EXAMINATION BY MR MUNYARD 10629

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 14 MAY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson Ms Carolyn Buff
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura
For the Prosecution:	Mr Stephen Rapp Ms Brenda J Hollis Mr Christopher Santora Ms Julia Baly Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah Ms Logan Hambrick

had to lie. I said, "Yes, they are fine." And that I didn't tell Taylor because I was afraid to tell him that because it could have appeared as though I was putting words into Gaddafi's mouth.

16:14:11 Q. Well, we will go into that a little further later, but I just want to understand your time in Libya. What period of time were you the ambassador in Libya and Tunisia?

A. Three years.

Q. And during the time you were there did you stay in those

16:14:31 countries all the time? During the time you were the ambassador, did you stay?

A. No, most of the time I was in Liberia. I am scared of cold. I have a cardiac problem. When the place is cold I won't stay there, I had to go back home. When the winter is over I go

16:14:49 back to work.

Q. And how did you stay up to date with what was happening in Liberia and the region when you were in Tunisia or Libya?

A. Well, it was a difficult thing because I was an ambassador at the time. Apart from being inspector general, when I became

16:15:11 ambassador I was behind the iron curtain. I was very far away from Liberia. I only knew about Liberia when I visited Liberia.

Q. You said you were ambassador for three years?

A. Yes.

Q. After being ambassador did you move to another position?

16:15:29 A. Yes, I became Vice-President when Enoch Dogolea died, when the former Vice-President died, then I became Vice-President in his place.

Q. And how did that come about?

JUDGE SEBUTINDE: Mr Rapp, what would assist us is some

time frames for these things, please.

MR RAPP: Yes:

Q. So you said - let's go back at the beginning. You were ambassador to Libya. When did that job begin?

16:16:01 A. 1997.

Q. And you were there for three years. When did you move to the vice-presidency?

A. 2000.

Q. And how did that come about that you became Vice-President?

16:16:18 A. Well, according to our laws the vice - when the Vice-President died there will be an election in the legislature. There was an election in the legislature and our own party, we voted against 52 names. 52 names in our party first, okay.

Q. And what was Taylor's attitude about you becoming Vice-President?

16:16:50 A. To be exact, he was the one who chose me to be his Vice-President before I could even put it into vote. He said I should become his Vice-President and that was put to a vote. Out of 52 persons who came forward I won the elections anyway to become a Vice-President to him.

16:17:14 Q. When you say elections, who voted?

A. The legislature voted and my own party voted.

Q. So you were elected by the legislature by the House and Senate?

16:17:29 A. Yes, the House and Senate and they represented the people of the country and so that's the law. They will not organise a new election which will cost more money, but the people of the House - in the House of the Senate and the House of Representatives, both houses voted and my name was put forward to

the people in the country. And lastly my party voted and they chose me to be the Vice-President.

Q. Let's move now to people involved in Taylor's government during his presidency both when you were ambassador and Vice-President. A bit ago you answered questions about Benjamin Yeaten from before and I wanted to ask you did Yeaten have a position during Taylor's presidency?

A. Yes, Yeaten was in a serious position. He was the director of the special services, SSS, Special Security Services. They were responsible for the President's movement, the President's family, the President's cabinet ministers and so forth.

Q. And that was one. You said he had two responsibilities?

A. Two responsibilities. He was also a battle group commander. When there was any conflict anywhere, he had a group called Jungle Fire, he had to take that assignment to go there. He was not really in his office as an SS director. He was always out of there ensuring that nobody brought war to Liberia because there were conflicts in all of that country. Some had come from Guinea and some other areas. So he was always there to ensure.

Q. And this Jungle Fire group, what did it do specifically?

A. It's a fighting group. The fighting group that was very strong. They were trained to fight. They were at the back of the SS director. Whenever there was trouble he moved with them to quieten tension and they were very strong people.

Q. Do you know how many people were in Jungle Fire?

A. I wouldn't know. I wouldn't know, but it was a group of soldiers.

Q. Can you recall any names of individuals that were members of Jungle Fire under Yeaten?

A. I will call one or two names that I can remember. The boss himself, Benjamin Yeaten. There was Zigzag Marzah, he was one of the strong men in the Jungle Fire. He was one of the commanders in Jungle Fire.

16:20:20 Q. Now, in terms of power, how did the power of someone like Yeaten in the Taylor government compare to say the power of a cabinet minister like a defence minister?

A. No, he was powerful, to be frank. Benjamin was a very powerful figure in Taylor's government. Even I myself as

16:20:46 Vice-President would almost always salute Benjamin Yeaten, because he had great powers. He could do anything to anybody before the President knows about it. He did not wait for orders any more.

Q. Well, who had more power, Taylor or Yeaten?

16:21:07 A. No, Taylor had more power. He was the President. He was the President. But Benjamin made himself so powerful that you could not mention harm to him. But Taylor was still the President. He had the greater power.

Q. The greater power than who?

16:21:28 A. Than Benjamin Yeaten.

Q. Did Yeaten have a deputy in the SSS?

A. Yes, he had a deputy for operations. He had two deputies that I knew of. He had Joseph Montgomery and Benjamin - I mean, sorry, he had Joe Tuah.

16:21:56 Q. And you have said they were deputies for different sections?

A. Yes, different operations.

Q. Okay, now what were the different operations that each of these men was in charge of?

I N D E X

WITNESSES FOR THE PROSECUTION:

KARMOH KANNEH	9745
CROSS-EXAMINATION BY MR MUNYARD	9745
RE-EXAMINATION BY MS BALY	9776
MOSES ZEH BLAH	9784
EXAMINATION-IN-CHIEF BY MR RAPP	9784

EXHIBITS:

Exhibit P-114 admitted	9781
Exhibit P-115A and P-115B admitted	9781

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 13 MAY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Christopher Santora Ms Julia Baly Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

peace agreement by combatants supporting the government. Is that your evidence?

A. The RUF did not attack, they defended.

Q. I want to ask you now about the second meeting. This is the one somewhere near the Waterworks. This is near Buedu, but in the bush, is that correct?

12:35:23

A. Yes, sir.

Q. And this was before Sam Bockarie went to Burkina Faso, is that right?

A. Yes, sir.

12:35:53

Q. How long before Sam Bockarie went to Burkina Faso?

A. Well, I can't remember the date, but I can draw your attention to the fact that it was after Abacha's death that we held this meeting. I did not date it.

Q. Well, Abacha died in June 1998. How long after Abacha's death was this meeting?

12:36:21

A. Well, that meeting, after June. It could be around August or September, around that period.

Q. And why do you say the meeting was held in the bush?

A. Well, we are afraid of the air raid, the ECOMOG air raid.

12:37:04

Q. Now was it you who told the Prosecutors about this meeting first of all, or did the Prosecutors say to you that they understood there had been a meeting and asked you questions about it?

A. Well, I can't remember if I told him or he asked, because it was in a statement. I don't want to tell you that, whether I told him or he asked.

12:37:40

Q. Yes, I will be corrected if I'm wrong, but I don't think that there is anything in your statements before 1 November 2007

they give you, the commander. So I did not know whether they coded it, or they just sent it.

Q. But as far as you are concerned that instruction went out to all stations loud and clear, yes?

12:59:27 A. Yes, sir, because he sent it to all stations.

Q. Now, who was at that meeting from the AFRC?

A. Johnny Paul was there.

Q. Yes.

A. Eddie Kanneh was there, Akim Turay was there, Gullit was

12:59:58 there and some others.

Q. Why wasn't SAJ Musa there?

A. Well, even in Kono SAJ Musa - SAJ Musa did not even come to Kono. Just after the AFRC, SAJ Musa was in the northern area.

Q. Right. And can I just establish again from you, it is my

13:00:37 fault I have momentarily forgotten, when do you say this meeting was held?

A. Waterworks. Between Waterworks and Buedu.

Q. I am sorry, Mr Kanneh. It is when, not where?

A. Well, I think that meeting was after Abacha's death. After

13:01:07 Abacha's death around June, almost about the end of 2008.

JUDGE SEBUTINDE: It can't be 2008, Mr Witness.

MR MUNYARD: I think he is suffering from the same problem as me quoting decades.

THE WITNESS: Sorry, sorry. Yes, 2009.

13:01:34 MR MUNYARD:

Q. Mr Kanneh, I think that you have just moved by a decade - by ten years.

A. Yes.

Q. Don't worry about it. Even some of us do that.

A. He is also liable to make mistakes, so as he stands there he has also been making mistakes and he will say "Sorry". So I am also a human being and so if I make a mistake I will then say "Sorry". So, I want to say sorry.

13:02:06 PRESIDING JUDGE: Thank you, Mr Witness.

MR MUNYARD:

Q. That is absolutely fine.

PRESIDING JUDGE: So, do you want to try and answer the question now? He did say it was after Abacha's death, around

13:02:28 June.

MR MUNYARD: Yes.

PRESIDING JUDGE: And then you got the years mixed up.

THE WITNESS: After June.

MR MUNYARD: Yes, I just want to check something:

13:03:05 Q. This was the very long meeting, yes?

A. Yes, sir.

Q. Have a look, please, in tab - yes, it is the same tab, but at page 44283. (I am trying to use the handwritten note because it is more contemporaneous, as I understand it, but I can't find

13:03:35 the point in there that I am now about to draw attention to.) I would like to look at page 44283, paragraph 38. Now I am going to read this out to you, Mr Mongor [sic]. Tell me if this is what you told the Prosecution.

A. Kanneh, sir, not Mongor.

13:04:10 Q. I am sorry, I am afraid --

PRESIDING JUDGE: I thought I was the only one with a surname problem.

MR MUNYARD: No, it may be hunger that is causing it, but there we are:

Q. Mr Kanneh, did you tell the Prosecution the following, paragraph 38, that you believed in terms of the timing of this meeting that it was after the intervention? Did you tell them that?

13:04:39 A. Yes, sir.

Q. That it was after Issa Sesay dropped the diamonds, did you tell them that?

A. Yes, sir.

Q. That it was before Sani Abacha of Nigeria died, did you

13:04:54 tell them that?

A. After his death.

Q. Did you tell them that it was before Sani Abacha of Nigeria died?

A. No.

13:05:03 Q. So, that is wrong where they have recorded that on that page that we have just been looking at?

A. Yes, sir.

Q. Because if it was before Sani Abacha died it would have to be either the very beginning of June, or May, or even earlier,

13:05:28 wouldn't it?

A. Yes.

Q. Now, I think the reason why I called you by the wrong name is I want to ask you about Mr Mongor. He was present at that meeting, you say?

13:05:48 A. Isaac Mongor?

Q. Yes.

A. Yes, sir. Yes, sir.

Q. Did you and he speak at all, to each other I mean?

A. Well, we did not personally discuss, but he was a senior

A. Repeat that. Let me get it clearly.
Q. Do you remember telling the Court when you were giving your evidence to Ms Baly that this meeting started about 9, lasted three hours and ended about midnight?
13:17:09 A. Here? In this Court yesterday?
Q. Yes. And that's not actually right, is it? It started later and ended later, didn't it?
A. It started at 9 and when it ended we went to bed. That was what I made mention of here.
13:17:38 Q. Could it have started as late as 11 at night?
A. No.
Q. Page 44309, please, about halfway down the page we see a sentence that reads, "The following questions refer to the time after Sam Bockarie came back from Burkina Faso." Mr Kanneh, you
13:18:26 were asked a question, or it has been recorded at any rate that you were asked the question, "Was there another meeting at Sam Bockarie's house that took place at night?" Were you asked that question?
A. If at the time Sam Bockarie came whether there was a
13:18:48 meeting held in his premises?
Q. This is the interview of 1 November last year. Do you remember being asked, "Was there another meeting at Sam Bockarie's house at night?"
A. Yes, this is the meeting you are trying to talk about.
13:19:09 That is the meeting.
Q. And the answer that is recorded at the bottom of that page is, "Yes, it took place from 11 p.m. to 2 a.m." Did you say that?
A. Well, that was the time. The misunderstanding was with the

time, whether it is 11 or 9, if I said so then I'm sorry.
Q. So you agree that it did take place from 11 p.m. to 2 am?
A. Yes, sir. Let's take the 11, the one that I had said before.
13:19:55 Q. Right. So you think that the answer that you gave nearer to the time of these events is likely to be more accurate than the evidence that you have given in court. Do you agree?
A. If it's this particular one the time is 11 at night?
Q. Do you agree that the answers that you gave to questions
13:20:29 that were asked nearer to the time of the events you were discussing are likely to be more accurate than your evidence in court if there is a disagreement between --
A. No, no.
Q. Hang on, if there is a disagreement between the evidence
13:20:46 you give in court and the answers that you appear to have given nearer to the time of the events?
A. No.
Q. And it was after this meeting ended that you all gathered round on the veranda and a phone call was made to Mr Taylor, yes?
13:21:11 A. Yes.
Q. So at 2 o'clock in the morning some time in December of 1998 your colleagues decide to ring up Mr Taylor in Liberia and wake him up, if indeed he was asleep, and give him the news of this meeting? Is that what you were telling the Court?
13:21:40 A. Our colleagues? Repeat starting from that side. That our colleagues woke up Mr Taylor, please repeat that question, sir.
Q. Are you telling the Court that at some time after 2 o'clock in the morning on a night in December 1998 your group of commanders telephoned Mr Taylor to give him the news of the

MR MUNYARD: Madam President, I'm in the Court's hands.

PRESIDING JUDGE: Is it in answer to the question, Mr Witness?

THE WITNESS: Yes, sir. I want to ask something. I want to get some clarification.

14:35:29

PRESIDING JUDGE: What is the clarification you need?

THE WITNESS: I would like to know if the total went up to 12, because I was not counting when I was calling the names.

MR MUNYARD: All right. I can answer that:

14:35:50 Q. Mr Kanneh, what you said was that, "We were 12 in number", and you gave the names that you could recall. I don't think you gave a total of 12 names in your evidence on Friday, but you were giving the names that you remembered and what you said was this:

"Well, we were 12 in number that particular night that we

14:36:12 were present. I don't know how many names I have made mention of, but we were 12 in number."

Do you see? You may not have remembered all of them on Friday, but you did it make it very plain that there were 12 of you.

14:36:28 A. Yes, sir. That's what I said, because when I called out the names later I said "and others".

Q. I'm going from page 9419 of the transcript. Now, let's see what the Prosecution have recorded by looking at tab 3, page 44309. I'm starting here simply to establish that we're talking

14:37:16 about the right meeting. Halfway down the page, "The following questions refer to the time after Sam Bockarie came back from Burkina Faso." You were asked, "Was there another meeting at Sam Bockarie's house that took place at night?", and your answer, "Yes, it took place from 11 p.m. to 2 a.m." Over the page, "Who

was there?", and this was the answer that you gave then. We'll go through the answer and you can tell us if it's been correctly recorded, "Mike Lamin, SB [meaning Sam Bockarie], SYB Rogers, Gbessay Ngobeh" - have I got his name right or wrong? Gbessay Ngobeh, sorry. "CO Lion, Jungle, Martin, Gaddafi (Foday), Issa Sesay, Jallow, Tom Sandi, Rashid Sandi, Junior Vandi, Sam Kolleh and Major Francis who was a Gambian."

Now, did you tell the Prosecution in November of last year that those 16 people were present at the meeting.

14:38:51 A. No, I spoke about 12 people and even yesterday I called SBY [sic] Rogers's name.

Q. I'm going to come back to SYB Rogers in a moment, but there's no mention of Morris Kallon in that list that we've just read out from the notes of your interview on 1 November last

14:39:22 year. Was he there, or wasn't he there?

A. Morris Kallon was there.

Q. There's no mention of Matthew Barbue there in that list. Was he present at the meeting, or wasn't he?

A. He was there, sir.

14:39:45 Q. There are, as I've said, 16 names listed there, not 12.

A. Well, in that meeting there were 12 of us.

Q. When this was read back to you did you correct it?

A. No, sir.

Q. Why not?

14:40:07 A. Well, I did not know whether it had gone beyond 12, but I know we were 12, so - and I called out 12 names.

Q. Two of whom don't even appear in this list that I've just read out to you from the notes of that interview. When it was read back to you did you not point out to them that Morris Kallon

and Matthew Barbue were there?
A. Well, I did not tell them that, but they were present.
Q. Sorry, you didn't tell them that Morris Kallon and Matthew Barbue were there? Is that what you're saying?
14:40:57 A. No, they were present in the meeting.
Q. Did you tell the Prosecution that in November last year?
A. Well there are some names in this list that I - I was not the one who gave them the names, but there was Morris Kallon and there was Matthew Barbue as well.
14:41:23 THE INTERPRETER: Your Honours, the witness has called a name that he's referring as --
PRESIDING JUDGE: Mr Witness, the interpreter did not hear a name clearly. Please repeat your answer. Pick up from where you said, "... but there was Morris Kallon and there was Matthew
14:41:38 Barbue as well." What was the other name you mentioned?
THE WITNESS: There was Morris Kallon and Matthew Barbue. I said he spoke about CO Lion and I did not mention his name for that 12 man meeting.
PRESIDING JUDGE: When you say you did not mention his name
14:41:59 are you referring to your interview with the Office of the Prosecutor, or are you referring to court?
THE WITNESS: Prosecution's office.
JUDGE SEBUTINDE: Mr Witness, are you saying CO Lion was not at the meeting?
14:42:21 THE WITNESS: Not at all.
MR MUNYARD:
Q. So out of this 16 we've got to cross out CO Lion, yes?
A. Yes, sir.
Q. Well, let's go through this list and see who you say was

there. Mike Lamin?
A. Yes, sir.
JUDGE SEBUTINDE: Mike Lamin was there?
THE WITNESS: Yes, sir.
14:43:06 MR MUNYARD:
Q. I'm just going to your evidence from Friday. Now I know you couldn't remember all the names, but Mike Lamin was a very top level commander, general, within the RUF, wasn't he?
A. Well he did not get that rank, general.
14:43:37 Q. Let's not worry about the actual rank. He was one of the most senior figures in the movement, wasn't he?
A. Yes, sir.
Q. Somebody who spoke very strongly?
A. Yes, sir.
14:43:58 Q. How is it that you'd forgotten that he was there when you were giving us this list of those on Friday?
A. When I called out the names, I don't think the names were even up to 20. Maybe those were the ones I left out. The names were not even up to 12 and that's why I said "and others". So, 14:44:26 those were the others.
Q. All right, let's go through. Mike Lamin was there. Sam Bockarie was there?
A. Yes, sir.
Q. SYB Rogers was there, or was he?
14:44:41 A. Yes, sir.
Q. Because you didn't mention him on Friday, I don't think. No, you didn't.
A. Friday I spoke about him.
Q. You might have spoken about him but when you were giving

the list of names you didn't include him, but we can include him in, can we?

A. Well --

Q. Don't worry about it, Mr Kanneh. We can include him in, can we? What about - you did mention, and I'm not going to try for a third time, the man you know as Chucky. You did mention him to the Prosecution in November?

A. Yes, sir, he was there.

Q. CO Lion we cross out. Jungle?

14:45:39 A. Yes, sir.

Q. You mentioned Jungle?

A. Yes, sir.

Q. Now, Martin?

A. Yes, sir.

14:45:51 Q. Was he there?

A. Yes, sir.

Q. He was there, all right. Gaddafi also known as Foday, was he there?

A. No.

14:46:04 Q. So, we cross --

A. No, sir.

Q. Who is Gaddafi, also known as Foday?

A. He was one of the battalion commanders who was at the Joru axis.

14:46:24 Q. Right, so he wasn't there. Issa Sesay, you mentioned him on Friday?

A. Yes, sir.

Q. What about this person Jalloh (MP)?

A. No, he was not there.

Q. Who is Jalloh (MP)?
A. He was a military police.
Q. Tom Sandi, was he there?
A. No, sir, at that time Tom Sandi was in Kailahun.
14:47:02 Q. Rashid Sandi, was he there?
A. Yes, sir.
Q. Junior Vandi, JR?
A. Yes, sir.
Q. Sam Kollie?
14:47:23 A. Yes, sir.
Q. Major Francis?
A. Yes, sir.
Q. What about Eddie Kanneh?
A. Yes, sir.
14:47:37 Q. He was there, was he?
A. Yes, sir.
Q. You mentioned him on Friday as being present, but you don't actually mention him to the Prosecution in November as being present?
14:47:56 A. I mentioned him. Maybe they did not write it.
Q. So they managed to forget that name, did they, when they were writing? As you were giving the list of names they've managed to lose that one, is that your evidence?
A. That they added and deducted, yes.
14:48:17 Q. All right. And then when it was all read back to you, what did you say about CO Lion, Gaddafi Foday, Jalloh and Tom Sandi being in the list of 16 when in fact they weren't there?
A. Well I don't know how they got it, but even myself I'm a little doubtful how these names are in this group - in this group

now.

Q. Why are you doubtful?

A. Because I mentioned 12 names and now I am seeing some other names in the list, so I'm surprised.

14:49:06 Q. But, Mr Kanneh, how could these names, CO Lion, Jalloh, Tom Sandi and Gaddafi Foday have possibly been written down by the Prosecutors who were interviewing you if you hadn't actually told them these names?

A. I cannot tell how they managed to write it, but even today

14:49:42 you asked me about some other names and I was not the one who gave them those names. It was a statement. Maybe they got the names from some other place.

Q. When they were interviewing you back in November last year, did they have other people's statements in front of them and were

14:50:03 they asking you questions based on what other witnesses had told them?

A. Never. That had never happened.

Q. So where could they have got these names from, apart from you?

14:50:20 A. Even you yourself there were questions that you asked me and you mentioned names that I had not given to them, so I don't know how you people would manage to get names like those. I don't know.

Q. Well, I can tell you I get them from what the Prosecution

14:50:41 wrote down as you were listing the names. That is where I get them from, do you understand?

A. Yes, sir, but I would like to know if they had said I mentioned 16 names, if that is what they wrote on the paper.

Q. Are you telling us that you had not appreciated until now

that that is exactly what they have said; that you mentioned those 16 names?

A. Well, I spoke about 12. All along I've been talking about 12 in my statements and even yesterday.

14:51:31 Q. We've been at this for the last 20 minutes. Are you saying that you didn't realise that the Prosecution got these names from you?

A. Yes, sir.

Q. And if it's right that these were the names you told them,

14:51:52 how is it that you told them the names of four people who were nowhere near that meeting?

A. Please repeat that.

Q. If they've got it right in recording these 16 names, how is it that you managed to give them the names of four people who

14:52:13 were nowhere near the meeting?

A. Well, I have not even accepted that I was the one who gave them those extra four names. The ones that I mentioned, I accepted to you that those were the names that I gave to them.

Q. You mean the ones that you mentioned in evidence and the

14:52:35 ones that you've agreed out of this list of 16, you accept that you gave those names?

A. No.

Q. I'm going to move on. Oh, I just want to ask you about one other person. Was Isaac Mongor at this meeting?

14:53:13 A. No.

Q. Are you quite sure about that?

A. Yes, sir, I did not see him.

Q. This is the meeting at which Sam Bockarie tells you about all these arms, ammunition and other items that he'd brought back

from Burkina Faso, yes?
A. Yes, sir. Yes, sir.
Q. And there was only one such meeting, was there, with these 12 senior figures from the RUF, plus Jungle?
14:53:53 A. Yes, sir.
Q. And this is the meeting at which SYB Rogers was present, is that right?
A. Yes, sir.
Q. Even though you didn't list him on Friday. Do you agree
14:54:15 that you didn't list him on Friday when you were giving the list?
A. I called his name.
Q. Did SYB Rogers have anything to say at that meeting that you can now remember?
A. No.
14:54:34 Q. Did anyone praise Sam Bockarie for what he had achieved in bringing back these materials from Burkina Faso?
A. Amongst us, the 12 people who were there?
Q. Well, yes, not amongst anybody else who wasn't there.
A. Well, even if that could have happened maybe it is just
14:55:15 because I cannot recall now. I am not saying nobody said that or did so, but I cannot recall now.
Q. Were any photographs produced during this meeting?
A. No, there were no photographs.
Q. When do you say it was that you saw the materials that he'd
14:55:41 brought back from Burkina Faso?
A. After the meeting, the following morning.
Q. The following morning. Did you see any photographs then?
A. No.
Q. And, let me suggest to you, any photographs of a hotel in

Q. Can I just ask you about something else at the foot of that page, please, 44312. You were asked this question, "During the meeting was there discussion about getting manpower support from Liberia?" Do you remember that, that question?

15:39:22 A. Yes, sir.

Q. And the answer that you are recorded as giving is this, "Jungle and Morris Kallon and Lion suggested that." Did you say that?

A. Well, the two men whom you have mentioned, I spoke about

15:39:49 them, but I did not mention Lion.

Q. Yes. Morris Kallon is not one of the 16 names that you listed earlier on, that we looked at on page 44310, when you answered the question, "Who was there?" So that would make 17 names if indeed you did say those first 16, wouldn't it?

15:40:37 A. Who is the 17th?

Q. Morris Kallon who has just appeared in this answer.

A. No, no. Even among that 12 people there is Morris Kallon's name and even the 16th name that you mentioned, there was Morris Kallon's name, and the 12 men that I called, Morris Kallon's name

15:41:05 is among them.

Q. The rest of the answer is as follows, "SB ...", that's Sam Bockarie, "... rejected this because of past problems when the NPFL came." Did you say that?

A. That he did not agree that a force would come from NPFL,

15:41:30 yes, I said that.

Q. Your answer is recorded on the LiveNote as, "That he did agree that the force would come from NPFL, yes, I said that". In fact the answer that's recorded here - here on the page of the interview notes - is that Sam Bockarie rejected the suggestion of

manpower support from Liberia. "Sam Bockarie rejected this because of past problems when the NPFL came."

A. Yes, sir, I said that.

Q. That is what you said?

15:42:17 A. Yes, sir. Yes, sir.

Q. And then it goes on to read, "SB ...", Sam Bockarie, "... was okay with ULIMO-K assistance."

A. He said he preferred ULIMO-K. He said he preferred them to the NPFL. That was what I mentioned.

15:42:44 Q. And were ULIMO-K still in existence in December of 1998?

A. No, at that time ULIMO-K was no longer in existence, but their members were still around.

Q. All right. So Sam Bockarie was basically saying that he did not want manpower support from Liberia, is that right?

15:43:36 A. From NPFL, yes, it's correct.

Q. And for NPFL in 1998 do you mean the Armed Forces of Liberia?

A. Yes, sir. Yes, sir. The Armed Forces of Liberia, Mr Taylor's troops.

15:44:05 Q. Thank you. So, Bockarie rejected the idea of support from Mr Taylor's troops?

A. Yes, sir.

Q. Over the page, please, 44313. Do you have that page there?

A. Yes, sir.

15:44:50 Q. "Resume interview - 1430", that's 2.30 in the afternoon. "Further to night time meeting at SB's house", and then some more questions were asked and the first is, "Was there any discussion about civilians?" Your answer was, "No discussion about civilians". Were you asked that question and did you give that

A. Yes, sir.
Q. And this was all part of what you describe as Operation Free the Leader, was it?
A. Yes, sir.
16:01:32 Q. And would it be right to say that the number one objective of that operation was indeed to free the leader?
A. Yes, sir.
Q. Right. If I can now just go through some individual points with you. Now, Mr Kanneh, I'm just going to ask you a series of
16:02:24 questions that aren't necessarily connected subjects, but they're matters that you dealt with in your evidence earlier to the Prosecution and I just want you to deal with these loose ends, as it were. First of all, you told us that somebody called FOC was present at a meeting at the EMG ground. Do you remember saying
16:02:57 that?
A. Yes, sir.
Q. And you told us that FOC was the leader's bodyguard, that's to say Foday Sankoh's bodyguard.
A. Yes, sir.
16:03:10 Q. Are you sure about that?
A. Yes, sir.
Q. You're sure that he was Foday Sankoh's bodyguard?
A. Yes, sir.
Q. Was he ever anybody else's bodyguard?
16:03:26 A. He was attached to a commander, but he never was a bodyguard to another person.
Q. All right. You told us also that after the overthrow you received instructions from Foday Sankoh and first you moved with Sam Bockarie, first to Pendembu, then Daru, then Benguema. Do

I N D E X

WITNESSES FOR THE PROSECUTION:

KARMOH KANNEH 9619

CROSS-EXAMINATION BY MR MUNYARD 9619

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 9 MAY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Christopher Santora Ms Julia Baly Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

out they will have it - those on paper, and after the main points were discussed they will have the AOB, that is any other business, and so if you had extra problems, target problems, if you had things that were disturbing you in your own area, like
10:05:41 personal things, the things that used to happen on the front line, shortages, shortages of ammunition. I spoke about shortage of ammunition in my own area and so many other men discussed things that were happening in their own areas, but the major items for which they called the meeting were those ones.
10:06:05 Q. You have referred to this particular meeting, this eight hour meeting, as "The first meeting we held". Was there a meeting - another meeting - after this first meeting?
A. Yes.
Q. How long after the first meeting was the next meeting?
10:06:34 A. Well, it did not take too long. It was within a short period, and it was the time after Mr Bockarie had travelled and returned that we held the meeting; after he had travelled to Burkina Faso and when he returned.
Q. How do you know that Mr Bockarie travelled to Burkina Faso?
10:07:05 A. Well, before he left he told us. He told us, those of us who were around. Especially those of us who were in the Kailahun District, some of the commanders, he told us that he was going to travel.
Q. And did he, as far as you know, travel to Burkina Faso?
10:07:35 A. Yes.
Q. How long was he gone for?
A. Well, that man he went - I think he spent up to a month before he returned.
Q. Did he tell you what he did when he was in Burkina Faso?

A. Well when he returned he did not actually convene a general meeting to tell us what he went for, but when he came the things that he brought that made us to actually believe that he went there because we had never received such items.

10:08:23 Q. What were those things that he brought?

A. He brought sufficient war materials: arms and ammunition, bombs, combats, boots and some other items.

Q. What quantity of arms did he bring?

A. Well I cannot estimate that now, because I was not present

10:09:01 when he arrived and before we arrived there everything was now stored in the ammo dump.

Q. Did you ever learn about what type of arms he brought?

A. Yes.

Q. What were they?

10:09:20 A. He brought AK-47s, he brought G3s.

Q. What are G3s?

A. It is an arm. The Nigerians call it Babangida. That is G3. He brought hand grenades. He brought mines. He brought RPG rockets. He brought the tubes - the RPG tubes. He brought G3

10:10:13 rounds and some other things, but for now those are the ones I can recall. The items were plenty. He brought combats and boots.

Q. What do you mean by combats and boots? What are they?

A. Well, that is what call somebody a soldier. The fatigues

10:10:45 that the soldier puts on are what is referred to as combat and the boots that they normally wear.

Q. Do you know whether Sam Bockarie went to Burkina Faso on his own, or with another person or other people?

A. Well according to him he said it was him and General

Ibrahim, because just as he told us in the first meeting it was the same thing that he told us later. He said he and General Ibrahim. Ibrahim Bah.

Q. Did he tell you at any stage what he had done in Burkina Faso?

10:11:41

A. Well he said he went and met with the President of Burkina Faso, because he went to him personally.

Q. And did he tell you what took place when he met with the President of Burkina Faso?

10:11:59

A. What happened?

Q. Yes, in the meeting with him and the President of Burkina Faso?

A. Repeat, repeat. I am not getting it clearly. I am not getting all.

10:12:24

Q. Did Sam Bockarie tell you what happened in this meeting that he had with the President of Burkina Faso?

A. No, he did not discuss that with me.

Q. Now, you said this second meeting that you held was after Sam Bockarie returned from Burkina Faso. My question is

10:12:52

approximately how long after he returned was this second meeting held?

A. Well just as he returned, because it was in December that he returned and at that time it was almost little beyond middle way December, and it was in the same December that we held the

10:13:21

meeting.

Q. And what year are we in?

A. It was in 1998.

Q. Where was this meeting - this second meeting - held?

A. At Sam Bockarie's house.

Q. Where was Sam Bockarie's house?
A. That is going towards Foya, Foya Road.
Q. What town was it in?
A. Buedu.
10:14:01 Q. Who was at the meeting?
A. Well, we were up to 12 in number present.
Q. Are you able to name the 12 who were present?
A. Well, I can try. I can try.
Q. Please do.
10:14:26 A. Well Mr Bockarie was present, Issa was present, Morris Kallon was present, Jungle was present, Eddie Kanneh was present, I was present, Major Francis was present, Matthew Barbor was present, Junior Vandi was present, Gbessay Gbobah who is normally referred to as Chucky was present and I think --

10:15:13 JUDGE SEBUTINDE: I am sorry, but could you repeat Chucky's name? Please repeat Chucky's name.

THE WITNESS: Gbessay Gbobah. Gbessay Gbobah.

MS BALY:

Q. Just before I turn to the spellings, can you recall if
10:15:32 anyone else was present?
A. Well, we were 12 in number that particular night that we were present. I don't know how many names I have made mention of, but we were 12 in number.
Q. Now, one person you mentioned who you have not mentioned
10:15:53 before is Major Francis. Was that his full name, or do you know his full name?
A. Well, that was how we used to call him. He was a Gambian, Major Francis.
Q. What was his position?

A. Well, when Mr Bockarie came he called on us because there was no need for him to call all the officers again, so those of us who were closer to his location, he invited us. We came to Buedu and then he explained to us that he has brought ammunition, he has brought enough logistics so that we will be able to run any kind of mission. So he said we should now plan how to take the move and that the first target should be Kono, to Makeni, up to Freetown. And that the next target should be Segbwema and Daru, that is heading towards Kenema and to go to the southern province. So those were the things we discussed and the issue of SAJ Musa's disloyalty that he has been doing all along. That was also something we discussed.

Q. When you say the first target should be Kono, to Makeni, up to Freetown, what do you mean by that the first target was to be Kono?

A. Well, Kono is a mining area. In that whole country that is the place we know for high level productivity for diamonds, so we believe that if we were able to capture there first it would have been good for us. That was the reason why Kono - he said Kono should serve as the first target that we should capture.

Q. Were any particular commanders given the role of capturing Kono?

A. Well, yes.

Q. Who?

A. Well, Sam Bockarie told us that this plan was designed in Monrovia with Mr Taylor. He said it was designed in Monrovia so he only brought it to brief us, that this should be the way we should do things so that we will be able to succeed in the war.

Q. Who was it that was going to attack Kono?

A. Well, the commanders were there, Issa was there, Morris Kallon and Superman. They were the most senior men that were supposed to run this mission in those areas.

Q. When you say run this mission in those areas, which areas are you talking about?

10:28:34

A. Kono.

Q. The plan was then to move on to Makeni, is that right?

A. Yes.

Q. What was to take place at Makeni?

10:28:49

A. Well, they should clear starting from Kono up to Makeni and those are towns that you cannot just jump over and go to Freetown, they were provincial headquarters, you have to pass through them first.

Q. What do you mean when you say, "They should clear"? What do you mean by "clear"?

10:29:16

A. Clear in the sense - clear in the sense that when as you push forward you shouldn't spare any town, you shouldn't jump over any town, you shouldn't leave any town untouched. You have to pass through them all and make sure that they are under control. That is what I mean by "clear".

10:29:41

Q. What commanders were given the role of clearing Makeni?

A. It was Issa who was the overall for that operation and Morris Kallon was his deputy and Superman was third in command.

Q. Then you said on to Freetown. Was anyone given the role of moving on to Freetown?

10:30:23

A. Yes, they gave the mission to somebody.

Q. Who?

A. Well, Sam Bockarie sent the message to SAJ Musa even before they attacked Kono but he refused. He rejected the orders. He

said he cannot take orders from him, so there was a heated argument over the issue.

Q. When you refer to this heated argument, did it take place in this meeting?

10:31:06 A. You mean whether the argument took place during the meeting?

Q. Yes.

A. Yes, after the meeting he called him, but in fact the argument had started for a long time ago.

10:31:25 JUDGE SEBUTINDE: Mr Witness, we did caution you about saying "he called him". Please use names so that we can follow. Please repeat your answer.

THE WITNESS: Okay. Well, repeat the question.

MS BALY:

10:31:43 Q. The question was when you were referring to a heated argument I asked you whether the heated argument took place in the meeting that you have been giving evidence about?

A. After the meeting, but there had been arguments even before the meeting, before this mission there had been an argument.

10:32:07 Just at the time Sam Bockarie sent the message to all the stations, right from that time SAJ Musa was not happy about it. He was disgruntled right up to this mission time and after they had held the meeting. He sent the same order to SAJ Musa and he refused even before the Kono thing.

10:32:32 Q. I am going to come back to this issue about SAJ Musa in a moment, all right? One of the things you said was that the next target was to be Segbwema and Daru.

A. Yes.

Q. Who, if anyone, was given the role of taking Segbwema and

Daru?
A. I was.
Q. Now the second issue that you said that was discussed at the meeting was SAJ Musa.
10:33:21 A. Yes.
Q. What was it about SAJ Musa that was discussed at the meeting?
A. Well, Sam Bockarie told us that the complaint had gone up to Mr Taylor, that the man's complaints had been lodged about his
10:33:44 disloyalty towards the mission, and he too gave his own piece of advice just so that --
Q. Can I just ask you to pause there for a moment. Once again it's important that you use people's names. Sam Bockarie told you that a complaint had gone up to Mr Taylor, "That the man's
10:34:07 complaint", who is the man that made the complaint?
A. Sam Bockarie lodged the complaint to Mr Taylor against SAJ Musa regarding his attitude.
Q. What was it about SAJ Musa's attitude that he complained about?
10:34:30 A. He said he was a man who did not take any order from people. He was disloyal to the command.
Q. At the meeting was there any other discussion about SAJ Musa, apart from the fact that Sam Bockarie had made a complaint to Mr Taylor?
10:35:02 A. Yes, Mr Bockarie made us to understand that that man should not leave to tell the story and the only way we were to --
Q. What man?
A. SAJ Musa. SAJ Musa.
Q. SAJ Musa should not leave to tell the story. Continue from

there?

JUDGE SEBUTINDE: Not live. The record says "leave", but it is actually L-I-V-E, I imagine.

MS BALY: Yes:

10:35:34 Q. What did you say? Can you repeat your answer? You said, "Mr Bockarie made us to understand that that man should not ..." Can you continue from there?

A. He said we should go all out to ensure that that man should not live to tell the story.

10:35:54 PRESIDING JUDGE: Mr Interpreter, what word did the witness use?

THE INTERPRETER: Live to tell the story.

PRESIDING JUDGE: L-E-A-V-E?

THE INTERPRETER: L-I-V-E.

10:36:04 MS BALY:

Q. And just so it is clear, what man should not live to tell the story?

A. SAJ Musa.

Q. Did Sam Bockarie say anything else about SAJ Musa not

10:36:21 living to tell the story?

A. Yes, yes.

Q. Now, take it slowly and tell us what he said.

A. He said we should only be able to get him when there was a mission, when there was operation going on. He even made us to

10:36:43 understand that that was something he had been discussing with Gullit, that during any mission that man should not live. He should die because he was a traitor. He referred to him as a traitor.

Q. Did Sam Bockarie say how SAJ Musa was to die?

A. Well, in the military terms they say it should be during operations. You know, if they will mean arms. He should die during the battle. He should be shot.
Q. Did he say who should shoot him?
10:37:30 A. He just told us that he had spoken to Gullit and that the two of them had been discussing that even before Gullit went to where SAJ Musa was. That was what he made us to understand.
Q. He made you to understand that he had been discussing this with Gullit, is that what you are saying?
10:37:53 A. Yes, yes.
Q. Did he make you understand who was to do the killing of SAJ Musa?
A. It was the discussion that he had with Gullit. He did not specify who should do the shooting, but the discussion had been
10:38:13 going on together with Gullit.
Q. This particular meeting, how long did it go on for?
A. It was a very short meeting, just for three hours, because it was at night and we did not even want Johnny Paul to know.

PRESIDING JUDGE: Ms Baly, I am not clear from the record
10:38:41 when this meeting took place.

MS BALY: I think we actually have that. It is mid-December. He did give the evidence that the meeting took place in December of 1998 and he said around the middle, if I can just find it. I can clear it with the witness now:
10:39:12 Q. Mr Witness, I am going to ask you again when was it that this meeting - this second meeting - took place?
A. It was at night in December.
Q. December what year?
A. 1998.

Q. Are you able to say - and please tell us if you can't say - when in December the meeting took place, or when abouts?
A. I cannot recall the exact date now, but it was at night that we held the meeting. I cannot recall the date.
10:39:53 JUDGE SEBUTINDE: Ms Baly, the witness mentioned a phrase that SAJ Musa was disloyal to the command. What command? I would like to know.
MS BALY:
Q. What command was SAJ Musa disloyal to?
10:40:10 A. The RUF command.
Q. Was he disloyal to the RUF command generally, or was it some commander in the RUF specifically?
A. Well, I believe in the RUF if somebody was disloyal to Sam Bockarie's command then that should be that you are disloyal to
10:40:35 the RUF command because he was the head.
Q. Thank you.
A. Thank you too.
Q. This meeting - this three hour short meeting - was there anything else discussed apart from the plan to attack Freetown
10:40:54 and the SAJ Musa issue?
A. Yes.
Q. What?
A. Well, at that time even the leader who had his revolution was there. That should be the first target, to go to Pademba
10:41:18 Road and to free - to release the leader, and second we were to go to State House and overthrow the President and if possible, if we met him there, we should kill him.
Q. Just so it is clear, what President was to be overthrown and if possible killed?

MR MUNYARD: I am sorry, but now I don't know who the "they" is. I said, "They were the ones who came". Can we please find out from the witness who he is talking about at this stage?

MS BALY:

10:46:54 Q. Now what you said a moment ago was, "I said they were the ones who came". Who are "they" that came?

A. Jungle. Jungle.

Q. So, Jungle is one person?

A. And Sam Bockarie.

10:47:14 Q. And Jungle and Sam Bockarie you have already told us were both at the meeting, is that right?

A. Yes, yes.

Q. Now apart from Jungle telling you that he had discussed the plan with the Pa in Monrovia, did Jungle say anything else at the

10:47:36 meeting? At the meeting?

A. Well, that is what he said. That is what he said.

Q. After the meeting, immediately after the meeting, what did you do?

A. After the meeting, I returned to my area of operation to be

10:48:09 able to start preparation for my own responsibility that was given to me so that I would carry it out.

Q. Before we go to that, this meeting you said was held at night. About what time in the night was the meeting held?

A. That meeting I will think it was 9 o'clock, or thereafter.

10:48:45 Q. It went for approximately three hours. Did it finish around midnight?

A. Yes, yes.

Q. On that night immediately after you left, or immediately after the meeting had finished, did you see Jungle?

everything to run the mission.

Q. Where was this phone?

A. It was the same veranda at the back of Mr Bockarie's house. The veranda at the back. That was where the phone was.

10:52:39 Q. What type of phone was it?

A. It was a satellite phone.

JUDGE SEBUTINDE: Ms Baly, I am still unclear about this area. This witness, when you asked him what happened in the meeting, he then spoke about this testimony you are considering

10:53:04 and he says, "Yes, later after the plan had gone on Sam Bockarie spoke to Mr Taylor about the plan, how the mission was to carry on" and et cetera, et cetera. Now, this later, how much later was this after the meeting is what I would like to know and how this witness knew about this conversation I would also like to

10:53:28 know.

MS BALY:

Q. When you gave some evidence and Justice Sebutinde has just read out some of the things that you said about conversation with Charles Taylor by Sam Bockarie about the plan, where were you

10:53:53 when that conversation took place?

A. All of us were in the veranda where the meeting was held. I was at the veranda myself. I was part of the meeting.

Q. Did this conversation take place during, or as part of the meeting, or at the conclusion, or after the meeting?

10:54:24 A. About the time the meeting was to be ended. All of us, 12 of us were there.

Q. Are you saying the 12 of you were there when the conversation took place?

A. Yes, because the meeting had not ended yet so all 12 of us

were still there.
Q. Just so that it's clear, who was doing the talking on the satellite phone?
A. I said first it was Mr Bockarie.
10:55:10 Q. Just so it's clear, and I know you have gone over this, but just take it one step at a time, what exactly did Sam Bockarie say at that time on the phone?
A. He told him about the mission that had been discussed in Monrovia. He said he had come and put it to the senior officers
10:55:37 and that was the meeting that was going on and that the same plan he had given to him was the same plan they had come to discuss.
Q. Same plan that they had given to who?
A. Sam Bockarie.
Q. After Sam Bockarie spoke you said Jungle spoke.
10:56:05 PRESIDING JUDGE: Who gave the plan?
THE WITNESS: Mr Taylor. Mr Taylor.
PRESIDING JUDGE: Thank you.
MS BALY:
Q. After Sam Bockarie spoke, did anybody else speak?
10:56:17 A. Yes.
Q. Who?
A. Jungle.
Q. And what did Jungle say?
A. He repeated the same thing to Mr Taylor, because he was the
10:56:35 representative for him in the RUF, so he explained the same thing to him; that the plan they had discussed in Monrovia, they had come and put it to the senior officers and they had assured him that they would go ahead with the plan.
Q. How long did this conversation or did these conversations

take?
A. They did not take long. It was just short conversations, just as what I have explained. It was not a long thing. I did not, for example, look at my watch to see how many minutes or
10:57:21 hours, but it was just a short conversation.
Q. After the conversation is that when you went to sleep for the night?
A. Yes, all of us went to sleep.
Q. The next day --
10:57:41 JUDGE SEBUTINDE: Ms Baly, I would also like to know, and this is why I asked, how does this witness know about this conversation? I don't know how the satellite phone works but I can understand him listening to Bockarie and Jungle. How does he know who was on the other side?
10:58:00 MS BALY:
Q. Mr Witness, how do you know who was on the other side of the satellite phone who Sam Bockarie and Jungle were talking to?
A. Well, they told us that they were talking to Mr Taylor, that they were calling Pa Taylor. And when they called the
10:58:24 conversation was going on, we were not hearing what the other side, but when the other side was talking they were responding and the discussion was going on. They said it was Mr Taylor.
Q. During the actual talking that was going on did you hear Mr Taylor's name mentioned?
10:58:49 A. Yes, sir.
MS BALY: I hope that makes it clear how he knew:
Q. The next day what did you do?
A. Well, the next day he invited us again to go and see the armament that he had brought, the logistics that he had brought.

I N D E X

WITNESSES FOR THE PROSECUTION:

KARMOH KANNEH 9401

EXAMINATION-IN-CHIEF BY MS BALY 9402

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 8 MAY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Christopher Santora Ms Shyamala Alagendra Ms Julia Baly Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

Q. What is the Waterworks that you've referred to?
A. Well, it's a place which was a kind of dam that they had that pumped water to the town. That was the dam.
Q. And why was this meeting held at this particular place, that is between this Waterworks and Buedu?
16:11:24
A. Well at that time there was serious fighting between us and ECOMOG and we were afraid of the air raids, so we decided to look out for a thick forest where we would hold the meeting. So, that was why we went there.
16:11:50
Q. Who was it that called this meeting?
A. Mr Bockarie.
Q. Are you able to say when this meeting took place?
A. Well, this meeting took place after the intervention. That was in 1998.
16:12:19
Q. How long after the intervention, just approximately, did this meeting take place?
A. Well if my memory serves me well, because when we left February, we went to Daru March, it was April, May, around June, or even before the death of Abacha. We held that meeting before
16:12:49
Abacha died.
Q. And when you say you held the meeting before Abacha died, who are you talking about? Who is Abacha?
A. Abacha was the President. He was the one who sent the Nigerians here. He was the President of Nigeria at that time.
16:13:17
Q. What was the purpose of the meeting?
A. Well, Mr Bockarie called this meeting and it had so many reasons for which we held the meeting.
Q. I'm going to ask you who was at the meeting and then I'll come to the reasons for the meeting. How many people were at

Q. Who did he want - who is "them"? Who did he want to know that?

A. Well, the new men who joined us. That is the AFRC group, Johnny Paul and his men.

16:19:34 Q. Another thing you said was discussed at the meeting was the Fitti-Fatta mission. What was said about that particular mission?

A. Well he said he would want us to go and clear the mining area, that is Kono, and that the Pa had told him that nothing

16:19:58 goes for nothing and that he had no machine to make arms, that they were materials. He also bought them from some other areas. So, he said - he said we should go and capture the mining area so that we would be able to get money from there and get the materials.

16:20:16 Q. Just so it's clear who is this person, the Pa, that you just referred to?

A. That is Mr Taylor - Mr Charles Taylor. Former President Taylor.

Q. Another thing that you said was discussed at the meeting

16:20:40 was Sam Bockarie's travel to Burkina Faso with General Ibrahim, is that right? Was that discussed at the meeting?

A. Yes, yes, yes, we discussed that.

Q. What did Sam Bockarie say about that?

A. He said that Mr Taylor told him that he would link in with

16:21:09 Blaise Compaore, the President of Burkina Faso, and it was Mr Ibrahim Bah who was going to travel with him. He was to move with him.

Q. Move with him where?

A. To Burkina Faso.

Q. Did Sam Bockarie say when this was to take place?
A. Well, he did say that it was not going to take a long time and it was going to be in that same month. After the month that we held the meeting, after the Fitti-Fatta operation, then he
16:21:51 moved on this mission.
Q. And I think the final thing you said that was discussed at the meeting was Issa Sesay, what Issa Sesay had done, is that right?
A. Repeat that.
16:22:10 Q. Another topic that was discussed by Sam Bockarie at the meeting was something that Issa Sesay had done, is that right?
A. Yes, yes, yes.
Q. What did Sam Bockarie say about Issa Sesay at the meeting?
A. Well, he told us - he said sorry to everybody for what
16:22:38 happened and he asked for forgiveness for Mr Sesay for what he did when he took the diamonds with him to Monrovia and he said on his way they got missing. Those were the things he told us.
Q. Just pause there for a moment. Who asked for forgiveness?
A. Well, Mr Sam Bockarie said so. He said Issa said we should
16:23:11 forgive him and he said when he went the Pa himself told him that we should forgive him.
Q. Did Sam Bockarie say why Charles Taylor was going to link him to Burkina Faso - send him to Burkina Faso?
A. Yes, because he said he told him about the mission that we
16:23:43 were to take to free the leader and it was a mission that involved heavy materials because we were supposed to clear the ECOMOG force before we get to Freetown, so he said he was going to link us up where we would be able to get direct material so that we would bring them over and be able to run the mission.

Excuse me for a while to be able to drink.
Q. Are you okay now?
A. Yes, yes, yes.
Q. And when he referred to this mission to free the leader,
16:24:29 what mission was he referring to?
A. Well, that was Operation Free the Leader and that was the material he went for for us to come and run the mission to capture Freetown and free the leader.
Q. I'll come back to that.
16:24:56 A. Yes, okay.
Q. For how long did this meeting last?
A. Well, this Waterworks meeting lasted for eights months - I'm sorry, eight hours.
Q. Did anyone apart from Sam Bockarie speak at the meeting?
16:25:24 A. Yes.
Q. Who?
A. It was Sam Bockarie who spoke more and then later Jungle spoke and he buttressed the introduction that Mr Sam did, told the former AFRC members, and he did say that he would try his
16:25:48 utmost best to see that things worked out well. So he said so, and then later Johnny Paul too spoke and some other people also spoke during the meeting.
Q. Can you remember whether there were high level commanders at that meeting?
16:26:11 A. Yes, sir.
Q. Can you remember who they were?
A. Yes, I can recall some.
Q. Can you name the ones you can recall, please?
A. Yes.

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-028	9258
CROSS-EXAMINATION BY MR ANYAH	9258
RE-EXAMINATION BY MS ALAGENDRA	9304
KARMOH KANNEH	9311
EXAMINATION-IN-CHIEF BY MS BALY	9311

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 5 MAY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Mr Mohamed A Bangura Ms Shyamala Alagendra Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

you're going to ask a question you say it's incorrect, then put it correctly.

MR BANGURA: I will just go over the whole issue again:

Q. Mr Witness, you said that Kabila told you that they had been given a new order, is that right?

A. Yes.

Q. What was that order?

A. Well, the order, he said SAJ Musa has ordered them to go to Freetown. To go to Freetown. He said when we go to Freetown we were to overthrow the government that was in power. He said then when we were getting to Freetown we should not burn a house, we should not kill and not to loot or amputate.

Q. Now you also said that Kabila told you or he mentioned something about the previous order which you had. Do you recall that?

A. Yes. He said that won't work. He said the same order, the same way that we had been coming, it was the same order. When we get to Freetown it will be Operation Spare No Soul. Then I asked him what Operation Spare No Soul was. Then he said starting from ants, goats, humans, nothing should stay.

Q. When you say nothing should stay, what do you mean?

A. Well, that was the answer. When I asked him that was the answer he gave me. Even humans, ants, goats, all should be killed.

Q. Now when you say that that won't work, and he was talking about the new order which was given to him, what did he say would not work?

A. Well, he said the order that SAJ Musa has given to them, for him that will not work, he said because when we go to town

starting from goats, sheep, humans, houses, he said nothing will remain, he was going along with a different order.

Q. You also talked about the old order that they had which they were going by. Did he say what the old order was?

13:21:17 A. Because when we got to that town they said we should burn down the town and kill, he said that same order was what we were going by, and loot.

Q. Thank you. Now after Kabila had informed you about this new order that was given to them by SAJ Musa did anything happen?

13:21:37 A. After that, that evening all of us left the town. We were walking during the night. We were walking during the night. We left that town and in the night we started walking and we passed through some villages and we got to one village. When SAJ Musa found out there were no persons in that village SAJ Musa ordered

13:22:02 that that town should be burnt down, so we burnt down that town. Kabila gave me petrol and he sprinkled it right round the house and he gave me a match and I scratched the match and set the house on fire. That was in the night.

MR MUNYARD: Madam President, could I ask for some

13:22:23 clarification, please. It may just be me, but looking at the transcript the witness has been giving evidence about the SAJ Musa order not to burn and kill. Then he goes on to the order from Kabila to spare no soul. Then I've got at page 88 line 10 on my typeface:

13:22:54 "Thank you. Now after Kabila had informed you about this new order that was given to them by SAJ Musa did anything happen."

The implication of that was that the second order was a new order from SAJ Musa. That isn't how I had understood his earlier

evidence to be. I had understood his evidence to be SAJ Musa gives one order, Kabila gives a new contradictory order. In other words, it is Kabila who gives the new order, not SAJ Musa as Mr Bangura's question implies.

13:23:32 PRESIDING JUDGE: I think Kabila was resurrecting an old order, but let us get it properly from the witness. Mr Bangura, you've heard counsel for the Defence and it should come from the witness.

MR BANGURA: I understand the confusion earlier, but I

13:23:52 thought that was cleared up in subsequent questions, but I will get the witness to:

Q. Mr Witness, the orders which - let us talk about the order which Kabila told you about that he got from his boss which you called a new order, now who gave Kabila that order that he told

13:24:14 you about?

A. When we got to Colonel Eddie Town, after the meeting that they've held, it was SAJ Musa who gave that order that when we get to Freetown - when we were heading for Freetown and when we get to Freetown it was just to overthrow. He said they should

13:24:34 not kill a civilian, they should not loot, they should not burn a house.

Q. That was the order which he told you about which was given by SAJ Musa, is that correct?

A. Yes.

13:24:49 Q. Now Kabila then said something to the effect that the order wouldn't work, is that right?

A. Yes.

Q. And did he suggest anything else?

A. Then he said that that order won't work. He said when we

get to Freetown he - even ants he would not leave. He said he was going by Operation Spare No Soul when we get to Freetown.

Q. And when he said he was going by Operation Spare No Soul, was this an order which was already there before?

13:25:39 A. Well, the order that we came with, when we were under O-Five, when we got to that village where he ordered to kill and burn anybody we meet in that town, those towns that we came across, when Kabila gave me that tablet, those tablets, where I did the killings. From then on to the point where we got to SAJ

13:26:05 it was a different order that SAJ gave.

Q. But when you now say that Kabila says Operation Spare No Soul was that the same as the order which had been given by O-Five before?

A. Yes.

13:26:27 Q. Thank you. Now you were telling the Court about what happened when you got to a town where there were no people and you said SAJ Musa gave an order to you. Is that right?

A. Yes. I don't know that village. It was only in that village that he gave an order that the town should be burnt.

13:27:05 Q. And in carrying out that order what role did you play?

A. My boss Kabila had petrol and he said we should sprinkle it right round the house. Then he gave me matches for me to scratch and put it on the house. Then I did that and we left that town that very night.

13:27:35 Q. Now who sprinkled the petrol around the house?

A. It was Kabila, my boss.

Q. Now when you moved from that village where did you go next to?

A. Well, throughout then we were walking in the night. I

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-143	8964
EXAMINATION-IN-CHIEF BY MR BANGURA	8964
CROSS-EXAMINATION BY MR MUNYARD	9048

EXHIBITS:

Exhibit P-100 admitted	8942
Exhibit P-101 admitted	8944
Exhibit P-102 admitted	8945
Exhibit P-104 admitted	8947
Exhibit P-105 admitted	8947
Exhibit P-106 admitted	8948
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Exhibit D-20 admitted	8951
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Exhibit D-29 admitted	8955
Exhibit D-30 admitted	8956
Exhibit D-31 admitted	8956
Exhibit D-32 admitted	8956
Exhibit P-112 admitted	8969
Exhibit P-113 admitted	9040

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 29 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Mr Mohamed A Bangura Mr Alain Werner Ms Shyamala Alagendra Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

invasion of Freetown as directed by SAJ Musa: 1, instigated by the execution of these 24 officers; and, 2, to facilitate the reinstatement of the army. Yes, Mr Witness?

A. Well, that was the word that he told us. He said we should go and reinstate the army. He said we should go with these words, then we will get support from the people.

Q. We know what words he used. We are trying to get at the meaning of those words and at the time those words meant that was a reason, amongst others, to go and invade Freetown, yes?

12:05:05 A. Yes, my Lord.

Q. Yes. None of this had anything to do with the RUF, did it, either the execution of the 24 officers, or the reinstatement of the army?

A. It had something to do with them, my Lord.

12:05:28 Q. Tell us what it had to do with the RUF?

A. Well, in the execution you see the 24 officers, but you will see the names of other people, including Foday Sankoh who was in prison there, and then also, like I said, you have some names of political detainees who were there who were also part of

12:05:54 the AFRC, who had come together with the RUF and the SLA, that formed the AFRC. So it also had something to do with them.

Q. Mr Witness, the two documents I have just read to you are your own words and they focus on 24 SLA officers and their execution. Do you hear mention there of Foday Sankoh being in

12:06:18 jail as a factor for the Freetown invasion?

A. But what I am trying to say is that when this happened and when Mosquito went over the air, he commented and he said it. He said, "Our men will march into Freetown. We will ensure that our men March into Freetown, as long as they are executing our

A. Okay.
Q. Now this disagreement between Sam Bockarie and SAJ Musa, are you aware that Bockarie said that he would not take any orders - rather, let me rephrase that. Are you aware that SAJ
12:56:38 Musa said he would not take any orders from Sam Bockarie after this conversation?
A. Well, yes, from their communication he said that. Despite that the troop advanced.
Q. Are you aware that Sam Bockarie in turn said that he will
12:57:00 not send any reinforcements to SAJ Musa?
A. Well, I won't dispute that fact, because there was communication between the two people, except I recollect, but I won't dispute that fact.
Q. Yes. And upon your retreat when you encountered Issa Sesay
12:57:26 - and I think you said in the vicinity of Benguema, correct?
A. Yes, my Lord.
Q. There was still distinct lines of leadership between the RUF and the AFRC or SLAs, yes?
A. No. Well, Gullit was there in Benguema, but there was
12:57:52 cordiality. Cordiality was restored because we were able to organise, I said despite the differences that existed, but at that time we were able to come together. We reorganised in Benguema.
PRESIDING JUDGE: Witness, the question was: Was there
12:58:06 still distinct lines of leadership between the RUF and the AFRC or SLA. Please answer that question.
THE WITNESS: Yes. Yes, my Lord.
MR ANYAH:
Q. Issa Sesay was not necessarily reporting to Gullit, yes?

A. Well, in my presence he did not report. He went and said we should organise a meeting to prepare to attack and Gullit said, "No problem, sir." So that brought the preparations. He had command over Gullit.

12:58:44 Q. Yes, but it would be fair to say that at this point in time these were essentially two groups working together because they had one enemy in common, the government of Ahmad Tejan Kabbah, yes?

A. Yes, my Lord.

12:59:02 Q. Yes. Let's talk briefly about diamonds, Mr Witness.

A. Yes.

Q. You mentioned at some point during your evidence last week about stocks that Superman was responsible for. Can you tell me again what those stocks you were referring to were?

12:59:31 A. Well, I said whenever mining would have gone on and when they were reporting, when they brought the diamonds, if they didn't put it in a bottle they would have an envelope and they would put it in there. Whatever diamonds they had, that was where they put them. From there they would take the diamonds to

12:59:51 Superman. I said at one time Superman, whatever was happening, he would call Bazzy to show them to him. He said all this was going to Sam for them to prepare to get more ammunition and logistics for the troops.

Q. Did you ever see what happened?

13:00:14 JUDGE SEBUTINDE: Who is Sam?

MR ANYAH:

Q. Yes, Mr Witness, did you mean --

A. Sam Bockarie, sorry. Sam Bockarie, Mosquito.

Q. Mr Witness, all of these were told to you by Superman. Is

A. Yes, my Lord.
Q. The reason it says, "Funds required to facilitate the attendance of witness at the Special Court for interview process." Do you see that?
14:46:12 A. Yes, my Lord.
Q. And we can confirm from tab 1 that you were in fact interviewed on 24 November 2003.
A. Yes, my Lord.
Q. Do you agree they spent this 20,000 leones on you on that
14:46:31 day, Mr Witness?
A. Yes. Yes, my Lord.
Q. Also, on the same day they bought you lunch. I am speaking of entry number 3 now. It says, "Lunch was provided for witness while he attended for witness reconfirmation process", the sum of
14:46:52 10,000 leones. Did they buy you lunch during the interview, Mr Witness?
A. Yes.
Q. You see the entry on entry number 4 speaks of 10 April 2004? Do you see that, Mr Sesay? You are looking at the wrong
14:47:21 tab, if I might suggest that. It is the last entry on page 1.
A. Yes.
Q. The category is transport, it is a Saturday, 10 April, and it says, "Payment to witness for transportation: 5,000 leones". We have no record of you being interviewed on 10 April 2004.
14:47:55 Mr Sesay, what were they paying for your transportation for on that day?
A. Well, as far as I can recall, I was in the prisons. I think this date they took me, but they did not conduct an interview and they said there was not even much time and so

I returned. So, they gave me this money for transportation. That happened. I was in prisons. They will go and collect me, I will be escorted by prison officers, the Special Court people will go and pick me and at times they will interview me.

14:48:36 Q. Mr Witness, are you saying they gave you money to pay your way back to the prison?

A. I did not request for money. They will say this is an allowance. I never requested for money. They will bring some document to me, they will say, "This is your transport

14:48:55 allowance", and I will sign. I did not request. They will bring the document and I will sign. To say that I requested that they should give me money, no.

Q. In fact, Mr Witness, you have told us you were not released until 21 August 2004, right?

14:49:14 A. Yes, my Lord.

Q. So this category of transport it was actually an allowance they were giving you because you were being transported under guard to and from the Special Court premises, right?

A. Well, yes. I don't know, this is their own provision that

14:49:38 they made. Even though I was under escort, it is - I don't know whether it is the procedure put in place by the court. I will sign for the money, they give it to me and I will take it.

Q. And they have the category as "Transport" while you are a prisoner being transported under guard. You see that,

14:50:00 Mr Witness?

A. As I said, I did not request for this and I met that procedure in the court. The court had its principles put in place, so when I went I will sign and then they will give it to me and say, "This is transport allowance".

MR ANYAH:

Q. Mr Witness, we do have records of you being interviewed on 1 March 2005. We also have records of you being interviewed on 31 March 2005 which is entry number 10. Did you receive 35,000 leones on that day, Mr Witness?

14:57:29

A. Yes, my Lord.

Q. That was to cover transport costs to come down from the provinces to meet with the Prosecutor, right?

A. Yes, my Lord.

14:57:49

Q. Mr Witness, I want you to look at tab 1 because now we come to some area that the Chamber might wish to have clarification about. If you look at that chart about your meetings with the Prosecution, if you look at entry number 21, that will be row 21, it has the date there 12 May 2005. Do you see that, Mr Witness?

14:58:18

A. Yes, my Lord.

Q. 12 May 2005. Row number 22, the next date we have records of you meeting with the Prosecution is on 8 May 2007. Do you see that, Mr Witness?

A. Yes, my Lord.

14:58:37

Q. No records whatsoever of you meeting with them in the entire period of the year 2006. Do you see that?

A. Yes, my Lord.

Q. Now let's go back to tab 22 and look at the amounts paid to you and the dates. Let's count how many times they paid you money, or spent money on your behalf in the year 2006 when we have no records of you meeting with them. Entry number 11, the date 4 April 2006. Do you see that, Mr Witness? Can you see entry number 11? Do you see that, Mr Witness?

14:59:12

A. 4 April, yes, 2006.

Q. If we go from entry number 11 to entry number 12, to the next page entry number 13, to the next page entry number 14, to entry number 15, to entry number 16, entry number 17, entry number 18, entry number 19, entry number 20, entry number 21, entry number 22, entry number 23, entry number 24, we are now up to page 7 of the document, entry number 25, 26, 27, 28, entry number 29, entry number 30, entry number 31, entry number 32, entry number 33, entry number 34, entry number 35, entry number 36, entry number 37, entry number 38, entry number 39, entry number 40, we are now in September 2006, entry number 41, entry number 42, entry number 43, entry number 44, you can count up to entry number 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, all the way up to - I should have stopped on 58, entry number 58, page 15.

From entry number 11 through entry number 58 all payments made in the year 2006 and we don't have one record - one record of you having been interviewed for any of those dates. Do you understand what I am saying, Mr Witness?

A. Yes, my Lord.

Q. What were they meeting with you about for all these meetings and spending all of this money on you in the year 2006?

A. My Lord, just as I said, I was under their control. So any time I was at my house they will call me say Bobby, you come. We need this, or we need this, or maybe they can say we want this direction or that, so I would help. And they used to call me constantly and I was under their control. They had relocated me for my protection. I did not go anywhere. Any time they needed me, I will go there. They will call me say we want you to enlighten us on this, we want you to do this for us then I will

do it. But to say that I want to dispute the contents of this document, no, that's not what I am saying. Most of the times they will go and pick me up and when I will come back they will say, "No, we don't need you now" and I will return. They will
15:03:14 give me transport allowance and if I am there for some time, spend some time with them, they will give me money for meal.
Q. 40 something entries, about 47 I have counted, we don't have one interview note from any of those 47 events. Shall we take one, for example, and look at it. Let's look at entry
15:03:35 number 13. See entry number 13, Mr Witness, top of page 4, it has there 8 June 2006. Do you see that, Mr Witness? Madam Court Officer could you assist him?
A. Yes.
Q. Has there 8 June 2006. Category, information. Amount in
15:04:21 question, 15,000 leones. Let's look at the dates and the reason. Reason, "Paid for three days meals" and it gives the dates 6 June, 7 June and 8 June. This entry corresponds to 8 June. Let's flip back a page and see if you had anything to do with them on 7 June. No record for 7 June. What we see in entry
15:04:52 number 12 is that you are paid for breakfast for 6 June, 5,000 leones. Do you see that, Mr Witness?
A. Yes, my Lord.
Q. And when we flip the page to entry 13, on 8 June, despite the fact they paid you 5,000 leones for breakfast on the 6th they
15:05:24 give you money for three days meals, including 6 June, including 7 June when they are not even meeting with you at all, and then for the day in question 8 June. Do you see that, Mr Witness?
A. Yes, my Lord.
Q. Were they giving you money to feed you on days that you

were not meeting with them, Mr Witness?
A. No. As long as they called me to the office and I went there they will make transportation - provision for transportation. Whatever information I was called for, I was in their hands. Whatever they needed, information or anything, I will go there. If they invited me I will honour their invitation.
Q. Yes, Mr Witness, I understand that, but you see what is happening. On 6 June they gave you 5,000 leones for breakfast. On 8 June they are giving you money for three days meals including the 6th that they have already given you 5,000 leones for. Do you see something wrong with that, Mr Witness?
A. I don't see anything wrong with that. As I said, I will be at my house and they will say Bobby, get ready, maybe you will come or we will come to pick you. I cannot dispute the fact.
Q. You remember when we started with your cross-examination on the 17th, I recall, or perhaps it was not the 17th, but whenever it was, some time last week, Thursday last, we started out with the document in tab 23. If you flip over one page you will see that document. That is by the Witnesses and Victims Section, or rather if you flip over one tab. Do you see that it says that you were brought under the protection of the court - I am reading from paragraph 2 now of that document - on 14 March 2005? Do you see that, Mr Witness?
A. Yes, my Lord.
Q. The money the WVS, or Witnesses and Victims Section, spent on you is distinct and different from the money spent on you by the Office of the Prosecutor. Are you aware of that, Mr Witness?
A. Well according to the document, yes.

Q. So since 14 March all your expenses - and you see the categories in the document in tab 23, rent, child care, all of that was being taken care of by the Witnesses and Victims Section. What we are speaking about in tab number 22 are
15:08:17 payments by the Office of the Prosecutor and they are paying you twice for meals for the same day. Do you understand the records in entry number 13 and entry number 12, what they say, Mr Witness?

A. Yes, yes, yes.

15:08:54 Q. Do you understand that there is something unusual about paying someone 5,000 for breakfast on 6 June and then on 8 June you give him additional money for meals on 6 June which has just passed?

A. Well this document states it clearly, June 6, 7 and 8, and
15:09:26 in particular they knew that I had to go and they will engage me that day, the following day and the day following that. They will give me the money in advance, because they will say, "We don't want to be disturbing you every now and then to be signing documents". At times they will call me, they will want me to go
15:09:46 with them to see areas where we were fighting and I will go with them. Places like Hastings, I will go there and show the place to them. I am not denying this fact.

Q. Do you see the next entries for 12 June? They are entries 14, 15 and 16 on the same page we were looking at.

15:10:05 A. Yes, my Lord.

Q. Do you see for entry number 14 they gave you 5,000 leones on Monday, 12 June for lunch? Do you see that, Mr Witness?

A. Yes, my Lord.

Q. Now look at entry number 16, also pertains to 12 June,

Monday. They gave you another 5,000 for meals. Do you see that, Mr Witness?

A. Yes, my Lord.

Q. Same day, one payment for lunch and another payment for meals, yes?

15:10:36

A. Yes, because if I went there in the morning they will provide money for breakfast, they will go and buy it for me and if I will be there until lunch they will provide money for lunch. They did the buying. They will buy it and when they come they bring the document and I will sign.

15:10:56

Q. Twice paid for food for the same day.

A. That is what I have just told you. I said if I will be there in the morning they will provide breakfast. They will pay. In that courtroom it is that everything they bought there it is expensive. As long as I spent time there, they will provide feeding.

15:11:18

Q. Mr Witness, entry number 15 says you were paid 10,000 leones for transport and lost wages, reason "Transportation for witness to go home and report at the SCSLP" the following day, 13 June 2006. Do you see that, Mr Witness?

15:11:40

A. Yes, my Lord.

Q. What kind of work were you doing in the year 2006, Mr Witness?

A. Well, I was still with my church and apart from that I had some business run by my brother and my sisters. I helped that and I monitored that. Apart from that, as I said, at times the court will call me that somebody had come and they want to visit this and that area, so I will come there and go to the place and I will ask them to pay for my transport fare because I will not

15:12:01

go there taking money from my own pocket. At times they send vehicle for me, but when I will be returning they give me transport fare.

Q. My initial question was what sort of work were you doing. Are you saying you were employed by your church, Mr Witness?

A. Yes, my church employed me. I used to get salary from Flaming. Even where I am now, I get salary from that.

Q. And you said you were doing some business on the side through your family, yes?

A. Yes, and in fact I have a whole house and they pay rent to me and every year I get 3.5 million. Two apartments: the one downstairs 3.5 and the other one upstairs, where my brother was, they pay the money to me directly. My sister sends money for me every month. I will not tell you a lie.

Q. That is okay.

A. Okay.

Q. How much did you make on average between your church and all these other ventures on the average day in 2006?

A. Well, I would have some other businesses. I had some other ways to get money. Every month I had other means to get money, apart from the church. The church used to give me 150,000 monthly. The pastor pleaded with me to accept that and I said, "Okay, no problem". Apart from that, I have my own investment. I have some money in the bank which was paid to me by the army. I have the documentation. 5 point something million. I went and bought Treasury bearer bonds. I get interest from that.

Q. At this time, though, you were already living --

JUDGE SEBUTINDE: Mr Interpreter, what was that last thing you said?

THE INTERPRETER: Profit from that. I have - I bought Treasury bearer bonds.

MR ANYAH:

Q. Mr Witness, by this time, 12 June 2006, you were living in accommodation provided by the Special Court, correct?

A. Yes, my Lord, that is correct.

Q. You did not have to pay rent whatsoever, right?

A. Yes, my Lord.

Q. Yes. The Special Court was feeding you in the place where you were staying, right?

A. Well they were not feeding me directly, but I had my weekly allowance that they gave to me and I did not trust them. They asked me to be relocated and they used to give me allowance.

Q. When we look through these records and we see meals and breakfast, these sums being given to you they are in addition to the weekly allowance they used to give you when you were in this house, right?

A. No, as I said, this department that you are referring to, if they called on me and if I went there they will give me my transportation fare. That happened. Because there were times I would be in the church and they will call me. They will just say, "Pay and when you come we will refund your money".

Q. Mr Witness, let's not focus on transportation. Let's focus on the issue of feeding, meals. It is correct, is it not, that the Witness and Victims Section gave you feeding allowance while you were housed by them in Freetown, correct?

A. Yes, weekly allowances. Yes.

Q. And my point is separate and distinct from that whenever the Office of the Prosecutor would get you for interviews, or

meetings, they also gave you money for food, yes?
A. As long as I went there, they provided my feeding. As long as they invited me to the office and I went there, they provided my feeding and transportation cost.
15:16:48 Q. And that was in addition to what WVS was giving you on a weekly basis for food, yes?
A. Well I did not request for this, as I said.
Q. I didn't ask if you requested for it, Mr Witness. I didn't ask if you requested for it. It might be a gift, for all you
15:17:08 knew. I am just asking if it was in addition to what the Witnesses and Victims Section was giving you for food on a weekly basis?
A. No, no, when they invited me I will go there. They will go and pick me up and I will come. They will give me my
15:17:31 transportation cost. The food, they used to buy it. They will go and buy it. I didn't know how much they bought it and I will sign for it on the document.
Q. Yes, well let's break it down. When you would go to the Special Court premises you are telling us they would buy you
15:17:45 food, right?
A. Yes, my Lord, they will go and bring food from the canteen. When they will bring it they will say this is 5,000 and they will ask me to sign. Whatever, they will ask me to sign on a document and I did.
15:18:01 Q. On the dates when you did not go to the Special Court premises and you stayed in the house that was being provided for by the Witnesses and Victims Section you used to eat based on the allowance they gave you, right?
A. Yes.

Q. So the allowance you were receiving for food from the Witnesses and Victims Section was different from money spent on you for food whenever you went to the Special Court premises, right?

15:18:38 A. It was different. As long as they invited me to that office that you are referring to - not the WVS, this prosecution - if the investigators wanted to see me they provided my transportation cost. When once they provided transportation they would bring the document and I will sign.

15:18:57 Q. Mr Witness, if you look at entry number 11 where we started with, 4 April 2006 - do you see that?

A. Yes, my Lord.

Q. And if you go all the way to the end of the page you see the page number is "Page 3 of 17"? Do you see that, Mr Witness?

15:19:32 A. Yes, my Lord.

Q. All of the entries from entry number 11 all the way to page 15 - actually, it is even worse. All the way up to page 16 of this document, entry number 63. From entry 11 through entry number 63. Entry number 63 speaks of the date 6 November 2007.

15:20:11 Do you see that, Mr Witness?

A. Yes, my Lord.

Q. For all of those entries, the dates between lines 11 and 63, none of those dates correspond to any interview dates of yours that we have records of. From pages 3 through pages 16, we

15:20:36 don't have any records of you meeting with them on any of those dates. And what the Chamber would like to know, I suspect, is what were you doing with them during all of these meetings? What was going on?

A. My Lord, just as I said, I will be at my house and they

will invite me. At times they will ask me to go and show them a particular place, or they will ask me - they will call me and ask me, "Do you know this person?", I will say, "No", or maybe they will want to get information from me or somebody else. I was in
15:21:17 their hands. At times they will call me, or they will take me and ask me that I should take them to West Side. Maybe somebody else wanted to see the West Side. So, mostly that was why they took me. They would say they had a visitor who wanted to see West Side and I will say, "Okay, let's go. No problem". I will
15:21:37 just take an excuse from my pastor, but I will tell them and say, "Be prepared for tomorrow. We will go to the place", and we will go there.

Q. Mr Witness, look at the entry in entry number 63. As of 64 - entry 64, 16 November, we know you were interviewed on that
15:22:03 day, but the preceding entry, entry number 63, it says you were given the sum of 60,000 leones and the category is "Information". The reason you were given this money is "Purchase of information". What information were they buying for 60,000 leones, Mr Witness?

15:22:23 A. It was not to buy something. At times they will call me and they will tell me we want you to go to this and this place. Maybe it is in the provinces, I will ask them to give me transportation and I will go. If they wanted information from me, there were many areas, at times Karina and some other places,
15:22:49 I would go there. I had taken people there who wanted to see some places and if you want to see places like those it will cost you money, it will cost you transportation. So they would give me the money.

Q. Why doesn't it say money for transportation. It says,

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-334	8784
CROSS-EXAMINATION BY MR ANYAH	8784
RE-EXAMINATION BY MS ALAGENDRA	8911

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 24 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rosette Muzigo-Morrison
For the Prosecution:	Mr Nicholas Koumjian Mr Alain Werner Ms Shyamala Alagendra Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

my Lord. After the AFRC trial I went back to my house and also when the RUF trial started I was called upon and in that I raised concern regarding security matters. They said okay, I should stay in the safe house. After which - during the RUF trial I was
15:41:01 taken to the safe house and I have spent about two years now in the safe house, but to say for the past four years - I was living in my family house in Wellington, so this I want to state clearly.

Q. Very well. Do you agree then that for the past two years
15:41:21 you have been staying at a house regarding which the rent has been paid for by the Special Court for Sierra Leone?

A. Yes.

Q. You finished testifying in the RUF trial in July 2006, right?

15:41:43 A. Yes, thank you.

Q. And you testified in the AFRC in May and June 2005, correct?

A. Yes, my Lord.

Q. This area on Spur Road - did you say it was Spur Road,
15:42:05 Mr Witness, the area where the safe house is, right?

A. Yes, it's Spur Road.

Q. This is an expensive area of Freetown, right?

A. Well, my Lord, this question is broad because you also have people - because in my case I don't even know how much is paid
15:42:44 for that place. The place was rented and I am staying there.

Q. Mr Witness, are you aware that since March 2005 until now the Special Court has spent in excess of 30,000 US dollars on you?

A. Well, I will not deny the fact that that happened, because

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-334	8428
EXAMINATION-IN-CHIEF BY MS ALAGENDRA	8428
CROSS-EXAMINATION BY MR ANYAH	8520

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 23 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rosette Muzigo-Morrison
For the Prosecution:	Mr Nicholas Koumjian Ms Shyamala Alagendra Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

A. When we got to Benguema we asked for them and they said they had taken them for safety. They said they were going to as far as Kailahun.

Q. Who said this?

10:09:24 A. As I can recall, Gullit informed us because we were the last batch to withdraw from Freetown and he told us that they had taken them to Makeni but they were to take them to Kailahun.

Q. In your testimony yesterday you said the Red Lion battalion, the STF, RUF and the NPFL men --

10:09:59 MR ANYAH: Can I have a page reference?

MS ALAGENDRA: I was coming to that:

Q. At page 8298, line 18 you said the STF, NPFL and RUF from the Red Lion battalion used head bands?

A. Yes, my Lord.

10:10:38 Q. I asked you what colour were these head bands and your answer - your Honours, I am referring to line 18. Your answer was, "Most of them were red. That is danger. They all had red on." Now apart from red head bands did they wear head bands of any other colour?

10:11:12 A. There were some people in the Red Lion who had white head bands too, some others had red.

Q. And those who had white, was there anything written on the white head bands?

A. Some people wrote "RUF" on the white head bands.

10:11:57 Q. When you say, "That is danger", what do you mean?

A. Well, this battalion, wherever they got to they will come in a most powerful way. Wherever they go they will perform - then if it comes to attack they will perform very well. If it comes to burning they would do it to extremes. So wherever Red

Lion got to, that was danger.

Q. Witness, do you recall --

JUDGE SEBUTINDE: Excuse me, is this an interpretation that the witness himself puts on this colour, or was this a policy of Red Lion? Is this his personal interpretation of the colour red?

MS ALAGENDRA: I will ask him, your Honour:

Q. Witness, can you explain why is it that you say the wearing of red head bands meant danger as you have explained it to me?

A. When we were advancing even we who were fighting with the team, if the Red Lion battalion was amongst us we will be happy with them because when they are with us we would be happy. The moment we saw them we said, "Oh, danger is here", but then we were really happy with them because they were really hard fighters. When we saw them we just said, "Oh, the danger men have come." The red indicated danger. As soon as we saw them we knew then that danger was in our midst.

JUDGE SEBUTINDE: So, Mr Witness, this was your personal assessment of the colour?

THE WITNESS: All of us who were in the troop, who were in the brigade, when the Red Lion battalion would come all of us would say, "Oh, danger has come", because they tied red head bands. We said, "Oh, danger is here."

MS ALAGENDRA:

Q. Witness, when you say, "Danger has come" who did you refer that they were a danger to?

A. I was referring to the Red Lion battalion. Whenever they moved. If we were in this area, for example, and Red Lion battalion came there we said, "Oh, danger is here" because they were really fierce.

Q. And they were dangerous to who?
A. They were dangerous to the ECOMOG and even the civilians. What I observed was that most of them had no relations in Freetown, not like us who had family members in Freetown, so they
10:15:17 didn't care.
Q. What does it mean that they didn't care?
A. They hadn't family members in Freetown. Say, for example, you say, "Okay, let me be careful what I do. I will select among whom I do this too." They were not even familiar to the terrain
10:15:43 so wherever they would go they would just be dangerous to anybody they saw.
Q. Witness, yesterday you were testifying about a communication between Gullit and RUF Rambo.
A. Yes, my Lord.
10:16:07 Q. And in that communication you testified that RUF Rambo said - your Honours, I am referring specifically to line 14 at page 8300. "He said, well, the SLA Rambo, whom we referred to as Red Goat, who was alongside with them." In your testimony so far you have referred to SLA Rambo who was Moses Kabia and who was
10:16:47 the chief security officer to Johnny Paul Koroma.
A. No, my Lord. This Rambo Red Goat was Idrissa Kamara. His call sign was Red Goat. It was not Moses Kabia. Moses Kabia had gone before. He was with Johnny Paul Koroma.
MS ALAGENDRA: Your Honours, Idrissa Kamara is spelt
10:17:18 correctly in the record:
Q. When you say that Rambo Red Goat who was alongside with them, he was alongside with who?
A. Rambo Red Goat was with Superman. They were together with SAJ in Koinadugu, but during the infight he stayed with Superman,

refer to the back as rear. Behind.
Q. What, if anything, happened to these government officials who were taken to the headquarters?
A. When Gullit called from Ferry Junction that we should go
10:28:42 and take reinforcement, we went back to the rear and we met - they had been killed and their corpses were displayed around Ferry Junction.
Q. Did you come to know who killed them?
A. Gullit said he issued out the order. He asked for the men
10:29:05 and he said he had ordered their execution. There was no need for them to be in our midst.
Q. Do you know why they were killed?
A. This was an order that Gullit gave out. He said they should be executed. He said they were collaborators and they
10:29:27 were the people who fought against us that led us to go into the bush.
Q. What, if anything, happened after this incident?
A. After this incident I, Colonel Eddie and others were appointed to go and receive Rambo and his team around the Allen
10:29:57 Town area, so we went back and received them at Allen Town and brought them to Ferry Junction.
Q. Do you recall who Rambo came with? Well before that your answer "received Rambo", which Rambo are you talking about?
A. This time it was Rambo Red Goat, Idrissa Kamara. He
10:30:32 brought the team.
Q. Witness, at this stage can I ask you when you are referring to Rambo to be specific as to which Rambo you are talking about, please.
A. Yes, my Lord.

Q. Witness, do you recall if Rambo Red Goat came with anyone?
A. Yes, my Lord.
Q. How many people did he come with?
A. They were above 50. There were RUF and some SLA whom
10:31:10 I knew.
Q. Do you recall out of the 50 how many were SLA?
A. The SLAs were very few. The RUF were more in number than
the SLA.
Q. Are you able to give us a number as to how many SLAs?
10:31:37 A. The SLAs were about 20, but the remaining were all RUF.
Q. Witness, do you know who sent Rambo Red Goat and his men?
A. Excuse me?
Q. Do you know who sent Rambo Red Goat and his men to Allen
Town?
10:32:13 A. As I said earlier, when Gullit called RUF Rambo saying that
he had had an order to release reinforcement to enter and
reinforce us in Freetown. He said he got the order from
Mosquito.
Q. After the arrival of Rambo Red Goat and his men, did
10:32:46 anything happen?
A. Well the troop had a high morale at that time, because we
expected that. Everybody was happy - the RUF, the SLA, everybody
was happy - because they were heavily armed. And when they came
we all moved to Ferry Junction and Gullit said that we should
10:33:16 move and join the team at Eastern Police so that we should
advance back to State House, after which we moved and we
undertook another advance to State House and recaptured State
House.
Q. Witness, at this point can you give us a date? What date

until now we have been talking about a group that remained behind. I want to know when you say "fighting force", which group are you referring to? The group that remained behind, or the group that went ahead?

11:07:42 A. Well, it was the group that was in the front that advanced to capture the State House. That is the advance fighting force. We had another group who were with Gullit. That was the brigade. They also had the family members, but this fighting force was the group that was at the battlefront.

11:08:03 Q. Witness, you have just spoken about a fighting force that you were with.

A. Well, like I have spoken about this fighting force, this was the force that advanced to recapture State House, so this is the same force that I am talking about. That was the group in

11:08:31 which I was. It comprised the Red Lion battalion mixed with all other groups that I have spoken about, together with SLA Rambo and the reinforcement that he brought. That was the fighting force that I am talking about.

Q. Witness, I understand the composition of the fighting force

11:08:52 at the time of the recapture of the State House. Now, I am asking you about the composition of the fighting force at a later stage now when the groups were withdrawing out of Freetown. Do you understand my question?

A. Yes, my Lord. This fighting force continued to remain

11:09:16 together until we got to Crazy Yard. That is the mental home. We were all together until Gullit left us at PWD and he moved with the family members, but the fighting force still remained together because it was this force that Gullit was always looking up to. Any time the fighting force retreated, the brigade will

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-334 8303

EXAMINATION-IN-CHIEF BY MS ALAGENDRA 8304

3847

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 22 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Doreen Kiggundu
For the Registry:	Ms Rosette Muzigo-Morrison
For the Prosecution:	Mr Nicholas Koumjian Mr Alain Werner Ms Shyamala Alagendra Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

A. Yes, it was Lieutenant Colonel Basky.
Q. Did he have any other name?
A. Saidu Kambolai.
Q. Witness, the troops that left Colonel Eddie Town, where did you all go to?
11:23:27
A. Well, as I said, we headed towards Mange Bureh.
Q. After Mange Bureh did you go anywhere else?
A. Yes, we attacked Mange Bureh and headed towards the Port Loko area.
11:23:54
Q. Did you go to any specific place in the Port Loko area?
A. Well, there was a village which they called Maraykula. We attacked Maraykula and Five-Five who was at the rear had to burn down - ordered that Maraykula be burnt so Maraykula was set on fire.
11:24:24
MS ALAGENDRA: Your Honours, Maraykula is M-A-R-A-Y-K-U-L-A:
Q. Who set Maraykula on fire?
A. Well, Five-Five and the other men who were with him, because Maraykula was a place we almost rested. Some people went
11:24:50
- some men went to the jungle and others were in the town, so Five-Five put that village on fire.
Q. What was put on fire in the village?
A. The houses.
Q. Did the group move anywhere after Maraykula?
11:25:10
A. Yes, we left Maraykula and headed towards Lunsar - the Lunsar axis.
Q. Just to be clear, where is Lunsar?
A. Lunsar is in the Bombali District.
Q. Did anything happen in Lunsar?

A. Well, we set up a temporary place at a place called Mamusa. That was where we created the temporary base. And then SAJ said we should attack Lunsar, because we had received information from monitoring that ECOMOG base was at Lunsar. So we appointed
11:25:58 Colonel Terminator and other men who joined and we attacked Lunsar.

Q. Did anything happen during the attack on Lunsar?

A. Well, yes. We captured some military ammunition from Lunsar from the ECOMOG forces who were there and we withdrew.

11:26:26 Q. Where did you withdraw to?

A. We returned to Mamusa.

Q. Did the group move from Mamusa at some point?

A. Yes, my Lord, but I left out something because when we left Colonel Eddie Town and advanced towards Mange Bureh, as I said,
11:26:50 we were ambushed and SAJ Musa said that the officers who were involved should be demoted, they should be reprimanded until they prove themselves. So about seven of us who were involved in that ambush who were second lieutenants were reprimanded and SAJ said we should continue at the front until we proved ourselves. It
11:27:19 was then that we finally attacked Mange Bureh.

Q. When you were demoted was there a change in your rank?

A. He reprimanded us and said we should go as sergeants. All of us who were involved in that ambush should hold the positions of sergeants until we proved well. But he said we should stay at
11:27:44 the battlefront. He must not see us at the rear. We should be in the front until we proved ourselves, because it was during that ambush that they killed some of our men.

Q. Did the group move from Mamusa at some point?

A. Yes, my Lord, we left Mamusa and advanced towards Gberi

junction. Gberi bridge and Gberi junction. Gberi junction, sorry.

MS ALAGENDRA: Your Honours, perhaps this is a convenient time to stop.

11:28:33 PRESIDING JUDGE: Very well, Ms Alagendra. Mr Witness, we are now going to take the mid-morning break. We will resume court again at 12 o'clock. Please adjourn court until 12.

[Break taken at 11.29 a.m.]

[Upon resuming at 12.00 p.m.]

12:01:43 PRESIDING JUDGE: Ms Alagendra, please proceed.

MS ALAGENDRA: Your Honours, can I ask that the witness be given the map of Bombali District.

THE INTERPRETER: Your Honours, before that the interpreter would like to make a correction.

12:02:09 PRESIDING JUDGE: Yes, Mr Interpreter, what is that correction?

THE INTERPRETER: The witness spoke about a base and he used the words "temporal base" and it was inadvertently interpreted by the interpreter as "temporal base". It actually

12:02:27 should be interpreted as temporary base.

PRESIDING JUDGE: Thank you. We will have to find out on the record and have it noted accordingly.

THE INTERPRETER: Thank you.

PRESIDING JUDGE: The map you referred to is Bombali, is

12:02:39 it, Ms Alagendra?

MS ALAGENDRA: That is right, your Honour. It appears at S5 of the map book.

JUDGE SEBUTINDE: Ms Alagendra, whatever you said was not on the record because I think your microphone was not on, or

something.

MS ALAGENDRA: Yes, I will just repeat that. I was asking that the witness be shown the map of Bombali District, which appears at the page marked S5 of the map book.

12:03:39 Your Honours, the procedure that was used previously was that the map was removed from the sleeve and put onto the screen and the witness was marking the locations as we went. He was also provided with a black marker like pen for him to circle the locations and another colour which he used to write the numbers.

12:04:10 MS MUZIGO-MORRISON: Black?

MS ALAGENDRA: One black and the other pen used was blue. He used the black to circle and the blue to write the numbers. Thank you.

PRESIDING JUDGE: Are we ready to proceed?

12:04:56 MS ALAGENDRA: I am, your Honour. I was just checking whether the witness was ready.

PRESIDING JUDGE: Have we ascertained yet if the witness is able to read the map?

MS ALAGENDRA: I will ask him, your Honour:

12:05:14 Q. Witness, can you clarify for the Court your ability to read maps?

A. Yes, my Lord.

MS ALAGENDRA: Is that sufficient, your Honour?

PRESIDING JUDGE: I think it is.

12:05:31 MS ALAGENDRA: Thank you, your Honour.

PRESIDING JUDGE: Obviously, if it is to be challenged it will be challenged.

MS ALAGENDRA:

Q. Witness, the map in front of you it says on top of it that

it is the map of Bombali District, Sierra Leone. I am going to ask you to - witness, I am going to ask you to look at this map in front of you and I am going to ask you to mark some of the locations in Bombali District that you have named in the course 12:06:28 of your testimony these last few days. Is that all right?

A. Yes, my Lord.

Q. Witness, you referred to a place called Karina. Do you see Karina on the map?

A. Yes, my Lord.

12:07:21 Q. Could you circle Karina on the map and can you put a number 1 next to Karina. You referred to a place Gbendembu in the course of your testimony. Can you find Gbendembu on the map?

A. Yes, my Lord.

Q. Can you circle Gbendembu.

12:08:06 JUDGE SEBUTINDE: Could you move the map so we can see on the screen, because we can't.

MS ALAGENDRA:

Q. Put a number 2 next to it, please, witness. You referred to Rosos in the course of your testimony. Do you see Rosos on 12:08:42 the map?

A. Yes, my Lord.

Q. Can you circle it and put a number 3 next to Rosos.

JUDGE SEBUTINDE: We can't see anything. We can't. We can't see what it is he has circled.

12:09:23 MS ALAGENDRA: Perhaps it can be zoomed in a little bit:

Q. Witness, you referred to Mateboi in your testimony. Do you see it on the map?

JUDGE SEBUTINDE: Did the witness put a 3 against Rosos? It doesn't look like he did.

THE WITNESS: No, my Lord.

MS ALAGENDRA:

Q. Witness, can you put a number 3 next to Rosos, please. Can you circle Mateboi on the map?

12:10:19 A. Yes, my Lord.

Q. And put a number 4 next to it. In your testimony to the Court you stated that Major Eddie Town which later became Colonel Eddie Town was situated in between the Tonko Limba Chiefdom and the Sanda Magbolontor Chiefdom. Do you recall that?

12:11:08 A. Yes, my Lord.

Q. Could you first circle Tonko Limba Chiefdom on the map, please. Put a number 5 next to that. Do you see Sanda Magbolontor Chiefdom on the map?

A. Yes, my Lord.

12:11:47 Q. Could you circle that and put a number 6 next to that. Witness, would you be able to tell the Court where exactly Colonel Eddie Town was located on this map?

A. Well, I don't have the right name for Colonel Eddie Town. It is between Sanda Magbolontor, it is not too far from Madina to

12:12:50 Kantia, because from Kantia to Colonel Eddie Town is not too far away, also from Madina --

THE INTERPRETER: Your Honours, can the witness take it slowly.

PRESIDING JUDGE: A little slower for the interpreter,

12:13:05 Mr Witness, please. Mr Interpreter, have you got all the answer?

THE INTERPRETER: No, your Honour.

PRESIDING JUDGE: Tell me where you have lost? Where did you lose it?

THE INTERPRETER: Let him repeat everything, your Honour.

PRESIDING JUDGE: Mr Witness, you were saying about Madina. You said also from Madina. Can you continue from there, please?

THE WITNESS: I said Madina is not too far away from Colonel Eddie Town. I also mentioned Kantia which is also not too far away from our base which was Colonel Eddie Town.

MS ALAGENDRA:

Q. Witness, by looking at the map would you be able to point to the Court where Colonel Eddie Town is? If you can just answer the question first before looking at the map. Could you, or could you not?

A. I can locate from the map. I can just not recall the name of the village.

Q. That is fine. Can you look at the map and where you say Colonel Eddie Town was located could you put an X in that place. Could you put a number 7 next to that, please, witness. Do you see Madina on the map?

A. Yes, my Lord.

Q. Can you circle Madina and put a number 8 next to Madina. Do you see Kantia on the map?

A. Yes, my Lord.

Q. Can you circle Kantia and put a number 9 next to that. Do you see Kukuna on the map?

A. Yes, my Lord.

Q. Can you circle Kukuna and put a number 10 next to that, please. Do you see Makeni on the map?

A. Yes, my Lord.

Q. Could you circle Makeni and put a number 11 next to that, please. Thank you, witness. Your Honours, this will be all the markings for the Bombali District map. Your Honours, can I ask

that this map be marked for identification MFI-22, I believe.

PRESIDING JUDGE: I think that is correct. Now a one page document, a map headed "Bombali District - Sierra Leone" as marked by the witness with numbers and circles from 1 to 11 is marked for identification MFI-22. Yes, please proceed, Ms Alagendra.

MS ALAGENDRA: Thank you, your Honour:

Q. Witness, just before the break you told the Court that you left Mamusa and you advanced towards Gberi junction. In that same answer you also said Gberi bridge and Gberi junction. Can you be a bit more precise as to where the troops moved to from Mamusa?

A. From Mamusa we headed towards Gberi junction.

Q. Where is Gberi junction?

A. Gberi junction is also between the Port Loko District and Bombali District. It is a junction between Port Loko District and Bombali District.

MS ALAGENDRA: Your Honours, Gberi junction was spelt correctly earlier, so I am going to leave the record for later correction.

JUDGE SEBUTINDE: That is Port Loko junction. Was that Port Loko junction?

MS ALAGENDRA: That is what I heard, your Honour:

Q. Did you go to any other place from Gberi junction?

A. Well, the troop moved for Gberi bridge.

Q. And from Gberi bridge did the troop move anywhere else?

A. Well, we encountered a small target where we met the Kamajors. We flushed them and advanced ahead towards Mansumana axis, that was Masiaka, Mansumana axis.

Q. When you arrived at the Mansumana axis in Masiaka did you hear anything?

A. Yes, when we approached Masiaka, Mansumana axis, we got news from the international media where the Government of Sierra 12:21:28 Leone claimed that they had flushed the junta troops, that was the AFRC/RUF troops that was heading for Freetown, that they had flushed them out and Masiaka was their defensive and no troop will cross Masiaka.

Q. Did anything happen after you heard this news?

12:22:02 A. Yes, my Lord.

Q. What happened?

A. Well, immediately SAJ Musa called on the brigade administration and said we were to organise a troop to attack Masiaka immediately, so to destroy the defensive made by the 12:22:32 government at Masiaka.

Q. What happened after SAJ Musa passed this instruction?

A. Well, manpower was gathered together from the different battalions and organised themselves and advanced on Masiaka. Papa 17, Colonel Papa - Lieutenant Colonel Papa, his aka was Papa 12:23:12 17, was appointed by SAJ Musa who led the troop to attack Masiaka.

Q. Witness, just to be clear, this Colonel Papa, is he a different person from Hassan Papa Bangura?

A. Yes, my Lord, he is a different person. Papa 17 - because 12:23:36 that was the way we used to call him - he came along with SAJ Musa's group. He is different from Colonel Hassan Papa Bangura who was the operation commander.

PRESIDING JUDGE: Sorry to interrupt - you are going to ask the same question as I was going to ask. Please continue.

MS ALAGENDRA:

Q. Are you saying Papa 70 or Papa 17?

A. Papa 17. One seven.

Q. Thank you, witness. Did anything happen after Papa 17 was appointed to lead the troops?

A. Yes, my Lord.

Q. What happened?

A. Well, I also joined the troop. Together, like I have said the demoted officers that SAJ Musa had said they should engage at the front line to prove themselves, we went and attacked Masiaka, but on our first attempt we were unable to capture the ground. It was only the second attempt that we entered Masiaka.

Q. Did anything happen when you entered Masiaka?

A. Yes, my Lord.

Q. What happened?

A. Well we encountered stiff resistance from the Guineans who were based at Masiaka, but we were able to dislodge them and got some ammunition from the Guineans who were based there. I also captured an SPG, which is a support propelled grenade. We lost a commander, he was killed during the battle, Papa 17, after which houses were burnt in Lunsar - and I am sorry in Masiaka and some Guineans were killed. We - they retreated from Masiaka. We retreated from Masiaka and came back to the temporary base and reported to SAJ.

Q. Witness, who were the Guineans based in Masiaka?

A. Well, this was the troop that was with ECOMOG. They were part of the ECOMOG troop that were based in Sierra Leone.

Q. Who burnt houses in Masiaka?

A. Well, myself and the other commanders. I mean, the troop

that entered Masiaka. We set fire to the houses in Masiaka.
Q. You said you returned back to base. Where did you return to?
A. Well, we went back to the base between Mansumana and
12:27:13 Masiaka axis where we made our temporary base.
Q. Witness, when you returned to this temporary base did anything happen? Did anything happen to your rank?
A. Yes, SAJ Musa recommended me and one Amidu Kamara called Keforkeh. He said automatically we should be promoted to captain
12:27:49 for the bravery and the capture of the SPG.
Q. Witness, can you repeat the name again, please?
A. Amidu Kamara, AKA Keforkeh.
MS ALAGENDRA: Your Honours, Amidu is A-M-I-D-U Kamara and Keforkeh is K-E-F-O-R-K-E-H:
12:28:20 Q. Witness, is Keforkeh an alias?
A. Yes, my Lord.
Q. What happened after this, witness?
A. Well after base SAJ Musa said troops should go to the highway and ensure that they tried to ambush the ECOMOG troop
12:28:51 passing on that highway, so Colonel Terminator was appointed and some other men. They went to the highway, they ambushed two ECOMOG vehicles that were moving from Masiaka to the Waterloo Highway and we succeeded in ambushing them and then we returned to the base.
12:29:18 Q. Now you say, "They went to the highway, they ambushed two ECOMOG", and then you say, "we succeeded in ambushing". Who was involved in this ambush?
A. Like I said, Colonel Terminator was the leader. It was a mixed group. Colonel Terminator was the commander, Lamin

Sidique, who led the ambush team, and we at the end succeeded. I was with them, we succeeded in ambushing the ECOMOG force and then later the two vehicles were burnt and then we returned to the temporary base.

12:30:08 Q. Did anything happen when you returned to the temporary base?

A. Yes, my Lord.

Q. What happened?

A. Also, SAJ Musa also appointed Terminator and selected some

12:30:30 other people to go and disorganise the base at Mile 38 that he had got an information that ECOMOG were there. There also Terminator led the group together with some others and attacked Magbuntoso, which was Mile 38, and they succeeded in pushing the ECOMOG forces there. They also retreated, but indeed the leader,

12:31:07 Terminator, was shot, he sustained injury, so we retreated and came back to SAJ.

Q. Is Mile 38 known by any other name?

A. Well, the name --

PRESIDING JUDGE: Just a moment, please. Mr Anyah, you are

12:31:25 --

MR ANYAH: Yes, I would be grateful for some indication as to the time frame for the attack on Mile 38.

PRESIDING JUDGE: Ms Alagendra, you have heard the application.

12:31:37 MS ALAGENDRA: I will do that, your Honour.

PRESIDING JUDGE: Thank you.

JUDGE SEBUTINDE: I also thought the witness said Mile 38 was Magbuntoso. He already said that.

MS ALAGENDRA: Yes, your Honour, I see it. I apologise.

JUDGE SEBUTINDE: We need the spelling though.

MS ALAGENDRA: Magbuntoso, your Honour, is spelt M-A-G-B-U-N-T-O-S-O:

Q. Witness, this attack on Mile 38, when did it take place?

12:32:12 A. Well, this was early end of December in 1998.

JUDGE SEBUTINDE: What is "early end of December"?

MS ALAGENDRA:

Q. Witness, what do you mean by "early end of December"?

A. This happened towards the Christmas. We were going towards

12:32:38 the Christmas in 1998, in December. It was around the 20-something in December 1998.

Q. Did the troops move anywhere after Mile 38?

A. Yes, after they returned SAJ Musa said the entire troop should advance and so we had to advance towards RDF. This was a

12:33:16 brigade advance. ECOMOG retreated from RDF. We advanced towards Mamamah. Yes, we went and based at Mamamah.

Q. What is RDF?

A. Well, this was a base settled by the NPRC called Rapid Deployment Force with the Sierra Leone Army heart.

12:33:49 MS ALAGENDRA: Your Honours, Mamamah is spelt M-A-M-A-H [sic]:

Q. Witness, where is Mile 38 located?

A. Mile 38 is between Koya rural district.

Q. Where is RDF located?

12:34:14 A. It is also within that same area, Koya rural district.

Q. Where is Mamamah?

A. Mamamah too is within with Koya rural district.

Q. And where is Koya rural district?

A. Well, this is between the west end - I mean within the

Western Area, but it is also a district by itself that is called Koya rural district. It is not too far from Masiaka.

JUDGE LUSSICK: Now, Ms Alagendra, when the witness says, "Mile 38 is between Koya rural district", does he mean within Koya rural district?

MS ALAGENDRA:

Q. Witness, can you clarify that for the Court, please?

A. Yes, my Lord.

Q. Please do so.

12:35:29 A. Mile 38 is within Koya rural district. Mile 38, Mamamah, RDF are all within Koya rural district.

Q. Witness, when the troops arrived at Mamamah, did anything happen?

12:36:08 A. Well, yes, we listened to an announcement over the international media and General Mosquito went over the air and said the troop is moving towards Freetown and that they have captured a military strategic base which was RDF and they were heading for Freetown. Then he said also from the rear they are coming and they were advancing towards Kono and they will move to capture Daru.

Q. Witness, in this broadcast that you heard, do you recall if General Mosquito said anything about who were the troops that captured RDF?

12:37:13 A. Well, he said his men that, "We are moving towards Freetown". He said his men that were moving, the AFRC and RUF joint force that were moving towards Freetown, had captured a military strategic base which was RDF and that they were moving towards Freetown. He said the other forces are also moving to capture Kono and Daru as well.

Q. Did he specify which other forces?
A. Yes, he said the AFRC/RUF forces are moving from all angles.
Q. Witness, how long after your group captured RDF did this
12:38:04 announcement come on?
A. It was just after we captured there and based at Mamamah that the announcement came up.
Q. Did anything happen as a result of this broadcast?
A. Yes, my Lord, as far as I can recall.
12:38:32 Q. What happened?
A. Well SAJ Musa called Alfred Brown, who was one of the radio men, and he was angry with him that he was giving information to Mosquito and he was not happy with that. He said he will not subject himself under the control of Mosquito. So he was not
12:39:04 happy with that because Mosquito was an SBU and so he was angry with Alfred Brown, but later the other commanders spoke to him so --
Q. So?
A. Let go of Alfred Brown.
12:39:27 Q. Okay, witness, I want to clarify a few issues out of this answer. Firstly, witness, you testified earlier about an RUF commander called Alfred Brown and here you are talking about Alfred Brown who was one of the radio men. Were there two Alfred Browns in your group?
12:39:56 A. No, my Lord. Like I have said earlier, I said Alfred Brown came together with SAJ Musa. He was a radio man. They came together to Colonel Eddie Town. This very Alfred Brown was the one SAJ Musa was angry with.
Q. Which group did Alfred Brown belong to?

A. Alfred Brown was an RUF. He was with the RUF.
Q. Now can you explain to us what you mean by SAJ Musa saying he was not happy with that because Mosquito was an SBU?
A. Well, just as I said, because of that infighting that
12:40:57 happened with SAJ in Koinadugu he said there are no longer any differences, but the troops should advance, because that was their earlier plan, that there should be a brigade advance to Freetown. He said he should not link up with or give any information to Mosquito.
12:41:21 Q. Witness, you still haven't explained what you meant when you said because Mosquito was an SBU, just that phrase.
PRESIDING JUDGE: Mr Witness, do you understand the question?
THE WITNESS: Yes, my Lord. SAJ said Mosquito was not a
12:41:45 trained man. He said SAJ, he was a trained military man who had gone through military courses. He said Mosquito should not - now that he is advancing, should not control him. He said the main aim was to advance and capture Freetown. There was no need to take command from him until they have captured Freetown.
12:42:07 MS ALAGENDRA:
Q. Who called Mosquito an SBU?
A. It was SAJ Musa who said Mosquito was an SBU to him.
Q. And this explanation you have just provided, who gave this explanation?
12:42:28 A. Well, it was SAJ who said that.
Q. After Mamamah did the troops move anywhere else?
A. Yes, my Lord. The ECOMOG started bombarding that area, so we moved ahead to Newton and we captured Newton.
Q. Where is Newton?

A. Newton is close to - after Waterloo we have Newton. It too is in the Koya rural district.
Q. How long did the troops remain in Newton?
A. Well, we were there until during the night. We spent some
12:43:29 hours at Newton. Towards nightfall SAJ said we should advance to capture Waterloo and advance on to Benguema.
Q. Did the troops advance to Waterloo?
A. Yes, before we advanced we declared born naked, Operation Born Naked wherein all of us removed our uniforms that we were
12:44:03 wearing, our uniform shirts and tied it around our waist so that we will be able to identify ourselves. If you were putting something on we will know that you were an enemy. After which we advanced to capture Waterloo.
Q. Witness, who declared Operation Born Naked?
12:44:43 A. Well, it was SAJ Musa. He said so that we will be able to identify one another because it was a night combat. Everybody should remove the uniform shirt that you had and tie it, so whoever was not in that form would be considered an enemy.
Q. You said the troops advanced to capture Waterloo, was
12:45:08 Waterloo captured?
A. Yes, my Lord. We advanced and captured Waterloo.
Q. Witness, can you give us a time frame at this stage?
A. Well, this happened around 23 December 1998.
Q. Did anything happen when the troops arrived in Waterloo?
12:45:39 A. Well, yes. We captured Waterloo and we were giving messages to the civilian populace that we have come, those of us who had gone had come again, that they should come and join us and that we have come to reinstate the army as SAJ has said that this was a way of cajoling the civilians. That those of us who

they had pushed out had come back. That we have come to reinstate the army and that the people should support us. So we were talking to the people in Waterloo, giving them messages to go and tell the people in Freetown that we were coming.

12:46:30 Q. Did anything else happen in Waterloo?

A. Well, later SAJ Musa sat together with the brigade administrator whilst the others were looting, looting to get logistics like rice and other things in Waterloo, SAJ summoned Foday Bah Marah and told him to take some men so that we can go

12:46:59 and capture Benguema. Whilst they were in Waterloo Foday Bah took me and some other men. We were mixed. We went to attack Benguema. When we attempted the ECOMOG responded with a heavy support firing. That caused Bulldoze, that is Foday Bah Marah, to tell us to wait and as he was going to inform SAJ that the

12:47:37 manpower that was in Benguema was very heavy. So I and the other men waited until later when we saw the brigade coming. SAJ --

Q. I would ask you to pause. You're talking about looting taking place in Waterloo. Who was looting?

A. Well, this was done by the combined team that came because

12:48:03 that was the area where we found food and other things, so everybody was taking.

Q. Who were you looting from?

A. The civilians whom we met at Waterloo, they were the ones we were taking things from.

12:48:23 Q. At this stage in Waterloo witness, where was the Red Lion battalion?

A. Well, as I said, it was a brigade advance. All of us came to Waterloo.

Q. Do you know if SAJ Musa was aware that the troops were

looting?
A. Well, you know he was sitting down, because when we captured Waterloo at the junction they were sitting down there, himself, Bazzy and Gullit. Everybody was taking what he wanted.
12:48:58 The looting was going on.
Q. So does that mean he knew?
A. Yes, he saw with his own very eyes. He saw that people were taking things that they wanted. Everybody was taking what he wanted.
12:49:16 Q. You were saying that you and the other men waited until later you saw the brigade coming.
A. Yes, my Lord.
Q. Can you please continue from there?
A. Well, when the brigade got closer to us we advanced and
12:49:37 this time SAJ Musa joined with the advance. He had an AA and he was shooting continually and later we used a 60 millimetre mortar. Finally we disorganised the ECOMOG force that we found in Benguema and we captured Benguema. At that time everybody was busy because Benguema is a military training centre so everybody
12:50:07 was busy in Benguema. Some people were looting, some people were taking ammunition, everything. Whilst this was going on --
Q. Witness, can I pause you there first please. What is an AA?
A. It's the anti-aircraft weapon. It's a support weapon.
12:50:31 Q. Please continue. You were saying while this was going on?
A. Well, while this was going on I, Bazzy, O-Five, Colonel Eddie went towards where they had mounted a 120 millimetre mortar. We were trying to fix the plate very close to the drill shell and the ammunition dump.

Q. Who had mounted the 120 millimetre weapon?
A. Well, this weapon was being used by the ECOMOG to bombard our base at Mamamah.
Q. Please continue, witness.
12:51:30 A. So whilst we were trying to fix the plate we heard an explosion, a heavy explosion, in Benguema. So in this explosion all of us stood and saw one Barrie who was also a PS, personal security, Captain Barrie, to SAJ Musa. He was carrying somebody. He said, "Oh, Eagle, problem." He said, "Eagle has encountered a
12:52:04 problem." So he put him down.
Q. Witness, I will ask you to pause. Your Honours, Barrie is B-A-R-R-I-E. Witness, who is Eagle?
A. Well, it was SAJ Musa. That was his call sign that he was using, Eagle.
12:52:30 Q. Please continue, witness.
A. So within that period they brought the - broke a door and put SAJ on it. O-Five was trying to give milk to SAJ, but SAJ could not take it. So they started saying, "Oh, it looks like Eagle has died." But when they laid SAJ, the helmet that he was
12:53:04 wearing was pierced, something that I myself saw. After that Amara Kallay told me that, "Ice T, let's move away from this area, let's go." He said because if the other men found out that SAJ had died this would cause a very serious problem, so let us go. So I too left there. By then Gullit had come there,
12:53:38 Five-Five had come. I left Bazzy, Colonel Eddie, O-Five. They were all close to the corpse and I left and I joined Amara Kallay and we moved towards Macdonald.
Q. Witness, I am going to ask you to pause. At this stage now did you know what happened to SAJ Musa?

A. Well, from what I saw, when they gave SAJ the milk straight off I knew SAJ had died.
Q. Did you know what had happened to him prior to him being carried to where you were?
12:54:26 A. Well, this bomb exploded in that area. That was what they said. Gullit said the bomb killed SAJ.
Q. In which area?
A. Well it was in Benguema that this incident happened, but after that - after we had left - I and Amara Kallay and others,
12:54:53 Junior Lion, and we went to Macdonald where we settled, the troops were divided. Gullit, Five-Five, O-Five, Hassan Papa Bangura, all of them were together with SAJ's corpse. They were also around the hill in Benguema.
Q. Witness, I am going to ask you to pause there to explain to
12:55:25 the Court what is it that you saw when you said you saw his helmet pierced - SAJ's helmet. What did you see?
A. Well what I saw was a bullet hole that went through that hit SAJ, because you can see where the bullet went through, where it was pierced, and so I believed that SAJ was shot. Later the
12:56:02 rumour was doing the round around the brigade that it was Gullit who killed SAJ.
Q. You said that you returned and you saw Gullit, Five-Five, O-Five and Hassan Papa Bangura with SAJ Musa's corpse. Can you continue from there, please?
12:56:26 A. I said I left them there. When all of them had come I moved with Amara Kallay and we went to Macdonald Hill where Junior Lion, Foday Bah, Basky and some other men and other members whom we were fighting together with based. There was a day that we were not able to see Gullit and their own group, so

later a patrol team located us and brought us to where Gullit was based. So, when we got there to my surprise I saw Gullit fully dressed with - fully dressed in SAJ Musa's helmet and the uniform that SAJ Musa was wearing, and above all Alabama, who was SAJ Musa's CSO, was very close to Gullit.

12:57:34

MS ALAGENDRA: Witness, I am going to ask you to pause. Your Honours, I apologise for not directing your attention to this earlier, but at the time the witness was explaining about what he saw with the helmet he had pointed to the right-hand side of his temple and I just wanted the court record to reflect that.

12:57:54

PRESIDING JUDGE: Yes, we will put on record that the witness indicated with his hand the right-hand side of his temple while describing the helmet being pierced by a bullet at the side of the head. The side of the forehead, in fact.

12:58:19

MS ALAGENDRA: Yes, your Honour. Thank you:

Q. Witness, what happened after you saw Gullit dressed in SAJ Musa's uniform and helmet?

A. Well, Gullit did not say anything. Automatically we all recognised him as the commander, so he was in full control of the troops now.

12:58:54

Q. Witness, what if anything happened to SAJ Musa's corpse?

A. Well, when we got there Gullit said they have buried SAJ Musa at Koba Water area. He said they have buried him.

MS ALAGENDRA: Your Honours, Macdonald is spelt M-A-C-D-O-N-A-L-D, Alabama is ALABAMA, Koba Water is K-O-B-A and Water the normal spelling:

12:59:22

Q. Witness, do you recall the date that SAJ Musa was buried?

A. Well, as I said, we almost entered on 23 December and he died that night in the morning hours of the 24th. As far as

I can recall it was at that time, because when we came they had buried him.

Q. So which date is it, 23 or 24 December?

A. It should be the 24th, because it was on the 23rd that we attacked Benguema. That was when he died. So, on 24th in the morning that was when they said they buried him.

Q. Did anything else happen after this?

A. Well after this, we got to that point, Gullit said we should go deep into the jungle.

Q. Which point?

A. We came towards deep into the Benguema - the hills around Benguema. It was around there that we went.

Q. What happened after Gullit said the troop should go deep into the jungle?

A. Well, after this Gullit restructured the brigade and made some other appointments.

Q. While restructuring the brigade, did Gullit say anything?

A. Well the only thing that Gullit said when he saw I and Keforkeh, he said that captain promotion that we were going along with we were not supposed to be going along with a captain promotion. He said we should be acting as lieutenants until we prove ourselves well. He said I and Keforkeh should not carry that promotion. That was what he told us.

Q. Did Gullit's position change at this stage?

A. Yes, my Lord.

Q. What did it change to?

A. Well, straightaway Gullit became - he later became - after SAJ's death he became the chief in command and he made other appointments.

Q. Do you recall the other appointments he made?
A. Yes, I can recall.
Q. What were the other appointments?
A. He made Bazzy the deputy chief in command and a member of
13:02:53 the brigade administration. He made Santigie Borbor Kanu to continue his position as chief of staff and member of the brigade administration. He also appointed Franklyn Conteh, whom we also called Woyoh. He made him the director of operations, DOO.
Q. Did anything happen to the ranks of the battalion
13:03:24 commanders?
A. Yes, he also promoted the lieutenant colonels to colonels.
Q. Did Alabama have any assignment at this stage?
A. Yes, Alabama was still with him as his CSO.
Q. Did anything happen to O-Five's position, who you said
13:04:06 earlier was operations commander?
A. No, my Lord. O-Five remained to be the operation commander. He also appointed Foyoh as the mission commander, Colonel Foyoh. He also appointed Junior George Johnson as the task force commander. Then he appointed Roadblock, Commander
13:04:39 Roadblock, as the military police commander.
Q. Was there a deputy operations commander?
A. Yes, my Lord. He appointed Junior Sherrif as the deputy operations commander.
Q. At this stage were there any changes as to the number of
13:05:08 battalions?
A. Well, the battalion remained the same.
Q. Can you remind us again what they were?
A. We had the 1st battalion, the 2nd battalion, the 3rd battalion, the 4th battalion and the 5th battalion, RDF and the

Red Lion battalion.

Q. Were there any changes in the commanders of these battalions?

A. Yes, there were slight changes in the commanders. For instance the RDF had a commander, but he was an SLA. We called him NPFL. They appointed him as commander for the RDF because Colonel Terminator had had a problem and also Bulldoze, Foday Marah, we also called him Bulldoze, they made him the second battalion commander. We also had Foday Bah Marah, who was Bulldoze. He became the G4 commander. He was responsible for all arms and ammunition that we had. He kept them. We had civilians who would carry those ammunition as we went along, so we called him G4.

Q. Witness, at this point the family members that you have been referring to who were the captured civilians, where were they?

A. They were all taken to the jungle. We did not leave them behind.

Q. You testified that there were SBUs with the various battalions. At this point where were the SBUs?

A. I said the entire brigade, including the SBUs, the family members, all of them went to that Macdonald Hill.

Q. The SBUs, were they still divided amongst the various battalions?

A. Yes, my Lord. They were with the various battalions and commanders.

Q. Do you recall if the Red Lion battalion had SBUs?

A. Yes, they too had SBUs that were with them.

Q. Did your position change, witness?

A. Well, the only position was that I still remained as a front line - as combat commander always engaged at the battlefront, because Gullit too said we should prove ourselves because he too questioned our promotion that was made by SAJ Musa.

13:08:28

Q. Witness, you have said "front line' and you have said "combat commander". Can you be a bit clearer as to what your position was at this point?

A. Well, as I am saying, when I say "front line" it is the same word, "combat". When you are in the combat zone you are in the front line. It is a killing zone and so you were always engaged - you are always engaged in battles.

13:08:49

Q. Apart from being a combat commander, did you have any other assignment at this point?

A. Well at this time, as I said, I was still with Basky at the 5th battalion. I was with Basky.

13:09:12

Q. Did you have any assignment in the 5th battalion?

A. Yes, I was the IO of the 5th battalion, intelligence officer.

Q. What was your duties as intelligence officer?

13:09:36

A. Well at the time that I was with the battalion I was to ensure that I got intelligence about the areas that we were leaving, if there were enemies threats. If we had an information from the headquarters, as the IO I will bring that up and give reports to the battalion commander.

13:10:00

Q. At this point how many fighters were in your group, do you recall?

A. Which of the groups?

Q. The group you were with, the entire troop, how many

fighters were there?

A. Well, the group we came with up to Freetown was large, the troop was large. We were nearly 1,000, those of us who came.

Q. Witness, after these deployments were made did anything happen?

13:10:42

A. Well, yes, Gullit said that he had had a dream and he wanted that dream to come true, that he had dreamt SAJ Musa - sorry, he said a woman had dreamt that SAJ Musa was crying, that the operation should continue. That is we should complete the

13:11:12

mission to capture Freetown. He said so he was talking to the men to be prepared so that we can go and attack Freetown.

Q. Witness, can you be a bit clearer as to who had this dream, SAJ Musa or a woman?

PRESIDING JUDGE: I think SAJ had passed on. It was Gullit

13:11:36

or --

MS ALAGENDRA: I beg your pardon:

Q. Gullit or the woman?

A. It was the woman who met Gullit and told him that she had had a dream and in this dream SAJ Musa was crying that the

13:11:50

mission should continue and that we should enter Freetown. So Gullit informed the troops. But after that Gullit said we should go and attack a place in the peninsula. I have just lost the name of the place. So he organised this team headed by Junior Sherrif. York. York. Okay, York. We went to attack York. So

13:12:27

Junior Sherrif headed this group and we went and attacked York, but we lost our artillery commander and that caused us to withdraw to the jungle where we had based.

MS ALAGENDRA: Your Honours, York is Y-O-R-K:

Q. Witness, where is York?

A. York is around the peninsula in Freetown.
Q. Witness, did I spell York correctly?
A. Yes, my Lord, Y-O-R-K.
Q. Thank you. Did anything happen after this operation in
13:13:16 York?
A. Well, we lost one of our commanders there called Lagah. He was the artillery commander, so that caused us to retreat to the jungle.
MS ALAGENDRA: Your Honours, Lagah is L-A-G-A-H:
13:13:40 Q. Did anything happen after you retreated to the jungle?
A. Yes, when we came back Gullit mounted the set and called Mosquito and informed him that the troops - the troop was ready to advance on Freetown, but that we needed reinforcement to reinforce him to capture Freetown.
13:14:13 Q. How do you know about this communication?
A. Well, this happened because at that time it was within the brigade. We had not gone yet. We were within the jungle. Gullit was trying to organise. So it happened in my presence, when Gullit made this. And I was not the only person there.
13:14:35 Most of the senior commanders were also there when he called Mosquito and told him that the troop was prepared but that he needed reinforcement to attack Freetown.
Q. Witness, when you say mounted the set, what set are you talking about?
13:14:56 A. I am talking about the radio communication set that was with us.
Q. Do you recall if Mosquito responded?
A. Yes, my Lord, I can remember.
Q. What was Mosquito's response?

A. Well, Mosquito said the reinforcement was on its way, but there are targeted areas that they needed to clear up, but the reinforcement was coming, we will get reinforcement from Kono and Makeni. He said Super, Issa Sesay would come and reinforce us so
13:15:40 that we can bulldoze Freetown.

Q. Did he say which areas needed to be cleared up?

A. Yes, my Lord. He said the troops were preparing. He said they were weakening the ECOMOG so that they will not reinforce Freetown. He said they were weakening the ECOMOG in Kono and
13:16:06 that they were weakening them also in that Daru axis, between Daru and Segbwema axis. He said so when they would have done that they will reinforce us so that we can make an advance on Freetown.

Q. When he said they were weakening the ECOMOG so they will
13:16:26 not reinforce Freetown, firstly tell the Court who was weakening the ECOMOG?

A. Well, as I earlier said, it was an operation that was planned. The RUF, SLAs who were in the eastern part around that Kono area moved, those of us who were in the north moved and
13:16:51 those of us in that Kailahun-Daru axis also moved. So whilst we were attacking they were simultaneously attacking. So it was a strategy that we used so that the ECOMOG would not reinforce each other in any other position. So those who were in Kono would not reinforce those in Makeni. Those who were in Daru would not
13:17:10 reinforce those who were in Kenema. Those who were within Benguema would not be able to reinforce because we had destabilised them in Freetown.

So this was the strategy that we used and this was what Mosquito was telling Gullit. He said now that the men were

pushing to ensure that they weakened ECOMOG they would come and reinforce us later and we will all bulldoze our way to Freetown.

Q. When you say, "He said when they have done that we will reinforce us so that we can make an advance on Freetown", can you explain that bit?

13:17:56

A. Well, what he was saying is that he will reinforce the troops that were being led by Gullit to advance on Freetown. Troops will come from - he said from Kono axis and Makeni to reinforce us so that we can make a bigger advance to bulldoze the ECOMOG in Freetown.

13:18:18

Q. Witness, earlier you referred to a person by the name of Super. Who is Super?

A. Well, Superman. We used to call him Denis Mingo. His name is Denis Mingo and he was an RUF commander. He is also a Liberian but he is an RUF commander.

13:18:41

Q. Did Mosquito say which troops were heading towards Kono?

A. Well, yes. He said Issa has moved. Issa, Morris Kallon and Rambo RUF and Akim have moved from Gandorhun Jagbwema Fiama Highway to capture Kono. He said the other troops have left Kailahun to move to that Daru axis so that they can capture Daru and Segbwema, because since Daru had a brigade he said they should destabilise there and Segbwema so as to weaken the ECOMOG strategic bases and we will bulldoze Freetown and they will be unable to reinforce Freetown.

13:19:14

13:19:38

Q. Who would bulldoze Freetown?

A. Well, the troop that was led by Gullit and the reinforcement that was to come would push ahead and bulldoze Freetown.

Q. So that who will be unable to reinforce Freetown? You said

"they"?

A. I have not got you clearly.

Q. Sorry, your answer was: "We will bulldoze Freetown", you have explained that is Gullit's group, "and they will be unable to reinforce Freetown." Who would not be able to reinforce Freetown?

A. That is the ECOMOG that were based in the provinces will be unable to reinforce and destabilise us in Freetown.

Q. Witness, the Akim you are referring to, who is this?

13:20:41 A. Akim Turay was an SLA who withdrew to Gandorhun along with Johnny Paul Koroma.

Q. Witness, did anything happen after this communication?

A. Well, after this communication we did some sacrifice. We performed some sacrifice and Gullit sprinkled the water on every

13:21:21 fighter and we moved towards Hastings, the hills around Hastings, we moved towards that area and we were still waiting for the reinforcement.

Q. What was the purpose of Gullit sprinkling this water?

A. Well, he was a man with so many beliefs. He said that was

13:21:52 a sacrifice for us to be able to enter Freetown. They did it and sprinkled the water. It was put in a calabash, or a bowl, sorry, and they sprinkled that on each and every one of us.

Q. Did anything happen after this?

A. Well, the troops, the whole brigade moved. We were still

13:22:17 in the hills. We moved towards Hastings hills.

Q. Where is Hastings, witness?

A. Hastings is around Freetown Highway, Freetown-Waterloo Highway.

Q. Witness, did anything happen after this?

A. Well, actually we based and waited at the Hastings hills. We were hungry so Gullit said the troops should go and get food in Waterloo. So we moved to Waterloo to get some food and we returned to the camp. Later when Gullit mounted the set again he
13:23:25 called Issa --

Q. Witness, I want you to pause. Where did you get food from in Waterloo?

A. Well, that was a food finding that we went on in Waterloo because after we have gone through there and SAJ had died we were
13:23:45 in the hills seeing people down. So Gullit said we should go down there to get food because we were hungry. So we moved back to Waterloo and looted enough food and returned to the hills.

Q. Whose food did you loot?

A. Well, the civilians whom we met in Waterloo, we took -
13:24:12 forcefully took their foods from them and returned.

Q. You told us Gullit then mounted a set and called Issa?

A. Yes, my Lord.

Q. Can you repeat again who did he call, I think I interrupted you?

13:24:31 A. Gullit called Issa and told him that we were waiting for the reinforcement.

Q. Which Issa did he call?

A. Issa Sesay of the RUF, because they called him Solar System. That was his call sign that he was using because he,
13:24:55 Gullit, was - he had his own call sign. Bazzy had Dark Angel. Every one of them had their call signs. Various commanders had their call signs. Gullit was Black Jah. Bazzy was Dark Angel. Five-Five was Cave. Mosquito was Log and most times we called him Skinny.

Q. How do you know about this communication?
A. Well, this, as we returned, Gullit said he will call those men because he has waited. So that happened in my presence also, because it was within the jungle that Gullit mounted the set. But he had the monitoring set and the one that he used to talk. He mounted the set and called Issa. So Issa told him that he has moved and they were towards Makeni, they captured Kono and they were heading for Makeni. He said they were still on course to weaken the ECOMOG forces so that they can reinforce us, Gullit, so that all of us can enter Freetown.
Q. Did Gullit respond?
A. Yes, my Lord. Gullit said, well, he was still standing by waiting for the reinforcement. He said he will still wait for the reinforcement. And that day also over the international media we heard that the RUF/AFRC have captured Kono and were moving towards Makeni.
Q. At this time did you know where Superman was?
A. Yes, Superman also called because - I mean, sorry, Gullit also called Superman. Superman also confirmed that they were within Bumbuna together with Brigadier Mani and they were advancing towards Binkolo to capture Makeni, because it was a two-pronged attack, according to the monitoring that we were doing.
Q. What do you mean by a two-pronged attack?
A. Well, Issa, Morris Kallon and others were coming from the Kono axis to enter Makeni. They were to use Matotoka, Magburaka to enter Makeni whilst Super was coming from Binkolo - sorry Bumbuna, Binkolo and was to use the highway to Makeni.
MS ALAGENDRA: Your Honours, perhaps this may be a

convenient time to take a break.

PRESIDING JUDGE: Very well, Ms Alagendra, if that is an appropriate time in the evidence. Mr Witness, we are now going to take the lunchtime adjournment. We will resume court again at 13:28:09 2.30. Please adjourn court.

[Lunch break taken at 1.30 p.m.]

[Upon resuming at 2.30 p.m.]

PRESIDING JUDGE: Please proceed, Ms Alagendra.

MS ALAGENDRA: Thank you, your Honour:

14:30:18 Q. Witness, just to take you back a little bit, you've testified that Gullit's group, or in relation to Gullit's group and the communication with Mosquito, you said, "We will bulldoze Freetown". What did you mean by bulldoze?

A. That is we will clear any military target that would be in 14:30:54 front of us whilst we'll be advancing.

Q. Witness, you were explaining what was a two-pronged attack and you said, "We were monitoring". Could you be a bit precise as to who was monitoring?

A. The brigade Gullit was moving with had a monitoring set 14:31:42 which was monitoring all the areas that was under the AFRC/RUF control as to how the advance was proceeding.

Q. Witness, from Waterloo did the troops you were with move anywhere?

A. As I said, after Waterloo we went back to Benguema.

14:32:16 Q. Did anything happen in Benguema?

A. I don't know the time frame. I had explained the attack on Benguema. I don't know what you're referring to. I don't know the time frame.

Q. No, witness, I will repeat the question. My question was

did anything happen in Benguema? I hadn't asked you for a time frame yet.

PRESIDING JUDGE: This is after the return?

MS ALAGENDRA: Yes, your Honour.

14:32:52 PRESIDING JUDGE: Mr Witness, are you - do you understand the question? The witness looks puzzled. Perhaps you could put the question again, or rephrase it slightly.

MS ALAGENDRA: Yes, your Honour:

Q. Witness, you testified that after Waterloo your group

14:33:10 returned to Benguema. Is that correct?

A. I want to know if you are referring to the two instances. The advance when we were in the hills when we were hungry and went back to Waterloo, I don't know if that is the attack you're referring to?

14:33:42 PRESIDING JUDGE: I'm just trying to understand the sequence here. They came down through Newton into Benguema towards Hastings. Is the evidence that they then went back to Benguema? That they went backwards?

MS ALAGENDRA: Your Honours, if I may a minute to check the

14:34:02 transcript?

PRESIDING JUDGE: Yes, I see the line you're referring to actually, but - just a moment, please. Mr Anyah is on his - was on his feet.

MR ANYAH: I understood the evidence to be that they were

14:34:14 at Waterloo and then some members of the group, the witness as well as Foday Bah, went on a tangent to Benguema for a specific purpose and retreated back to Waterloo. And then the second mention comes when they are at Hastings, and that is in relation to leaving Waterloo, going in search of food and coming back to

Waterloo. So I think the witness is perplexed perhaps, because he has already addressed the first events in Benguema and I will leave it at that. It's up to the Prosecution to put their case.

PRESIDING JUDGE: Of course, Mr Anyah, but that may well help us clarify the situation.

Ms Alagendra, the witness of course is yours and if he's puzzled you can rephrase it.

MS ALAGENDRA: I will try my best, your Honour.

Q. Witness, you spoke - you testified about a food finding mission?

A. Yes.

Q. When you were based at Hastings, the hills at Hastings, you said?

A. Yes, my Lord.

Q. And you did say that took place in Waterloo, am I correct?

A. Yes, my Lord.

Q. And then you spoke about communications which took place when you were at the hills at Hastings?

A. Yes, my Lord.

Q. So, I was referring to the food finding patrol that you went on to Waterloo.

A. Okay, thank you.

Q. And my question to you is after the food finding patrol in Waterloo where did you go to?

A. We returned to the Hastings hills where the brigade was based.

Q. Did anything happen at that point?

A. After that we were at the Hastings hills. After we had had some food we saw helicopters - combat helicopters - bringing

manpower to Hastings, so Gullit said we were to organise another advance so we should go and disorganise the evacuation that was going on in Hastings. So we prepared ourselves, Basky, Junior Lion and others. The troop was led by Basky and I too joined the troop, moved to Hastings and attacked Hastings.

Q. Witness, these helicopters - combat helicopters - do you know who they belonged to?

A. Yes, my Lord.

Q. Who?

A. It was the Nigerian ECOMOG who were based in Hastings.

Q. And you were saying they were bringing manpower to Hastings. What is this manpower you're talking about?

A. As we were overlooking from up the hills, we saw reinforcement from - there were --

THE INTERPRETER: Your Honours, can the witness repeat from where he said "reinforcement"?

PRESIDING JUDGE: Mr Witness, pause. The interpreter has not caught up with you. Repeat, please, from the point you say, "Up in the hills we saw the reinforcement". Continue from that point.

THE WITNESS: We saw the reinforcements that the helicopters were bringing to Hastings at the airfield and at the Hastings police training school, PTS, they were alighting and they were deploying, taking positions in that area.

MS ALAGENDRA:

Q. And you were also talking about an evacuation. Who was being evacuated?

A. When we were in the hills we saw the helicopter coming from the Lungi end, bringing Nigerian ECOMOG forces to be reinforced

at Hastings.

JUDGE SEBUTINDE: It's still not clear what evacuation he's talking about. Perhaps he's not using the word in the normal sense?

14:39:24 MS ALAGENDRA: I will try to clarify that, your Honour:

Q. Witness, you did use the word "evacuation" and you said, "Gullit said we were to organise another advance so we should go and disorganise the evacuation that was going on in Hastings". Can you explain what evacuation was going on in Hastings?

14:39:46 A. Let me put it in a simple way. The helicopter was bringing Nigerian soldiers to reinforce the others in Hastings at the airfield and the police training school, PTS. We overlooked them whilst we were in the hills. We saw everything.

Q. Was it only reinforcements that were coming into Hastings?

14:40:16 A. They had a military position there, so they were just bringing some more to build up on the number to reinforce the Nigerian forces that were there.

Q. Were there people being removed from Hastings?

A. No, my Lord, we did not see any civilian movements.

14:40:46 Q. What happened after you saw this?

A. Gullit said, well, we should organise a team that would go down to Hastings to disorganise that troop that had come there.

Q. Did anything happen after Gullit said that?

A. Yes, my Lord. He appointed Basky and some other men from

14:41:28 both battalions and I too joined the troops. We moved and attacked Hastings.

Q. Witness, when you say both battalions, which two battalions are you referring to?

A. I said the battalions I'm referring to, all of the

battalions. All of them contributed manpower to go and attack Hastings.

Q. Witness, just give us a figure as to how many battalions contributed manpower to attack Hastings?

14:42:11 A. The various battalions, 1st Battalion, 2nd Battalion, 3rd Battalion, 4th Battalion, 5th Battalion, the RDF and the Red Lion Battalion, all of them contributed troops.

Q. What happened during the attack on Hastings?

A. During that attack we were able to disorganise the ECOMOG

14:42:43 troops who were there, some of them were captured and we executed them and we burnt the Hastings airfield. We met some old aircrafts already at the field. We set them on fire, after which we withdrew to the Hastings jungle.

Q. Who was executed?

14:43:17 A. Some of the Nigerian ECOMOG soldiers whom we captured from that place.

Q. Do you recall how many Nigerian soldiers were executed?

A. About three of them that we captured.

Q. How were they executed?

14:43:42 A. We shot them. When we captured them we shot them to death.

Q. Did anything else happen during the attack on Hastings?

A. As I said, we set Hastings - we set fire on Hastings and we burnt some of the old aircrafts that were on the field and we returned to the temporary base that we had established at

14:44:20 Hastings, in the hills.

Q. Did anything happen after you returned to the temporary base?

JUDGE SEBUTINDE: Ms Alagendra, I'm not sure if Hastings is a village, a town, what is it?

MS ALAGENDRA:

Q. Witness, where is Hastings?

A. Hastings is just after Jui. It's between Freetown and Waterloo on the highway. They used to call the place Hastings Town. It has an airfield, it has the PTS, police training school, in that area.

Q. Did anything happen after you returned to the temporary base?

A. Yes, we went back and reported to Gullit. Basky reported exactly what had happened. He gave a situation report about our performance in the area and after which we were there for some time and we were attacked in the hills where we lost some of our men. We lost our support firer Johnny and we also lost one of the commanders. I have forgotten his name now. He was a colonel. He too was killed.

Q. Did anything else happen in Hastings?

A. The only thing was that we repelled the attack and Gullit said we should get prepared that night and advance towards - we were to make a brigade advance to Hastings again, Jui and Allen Town, then we should enter.

Q. What do you mean by a brigade advance?

A. This time you are not just to choose a - say this particular battalion should go, or you select people from different battalions, no, the whole brigade should move and go and capture Hastings, Jui and Allen Town.

Q. Did anything happen after Gullit said that?

A. Yes, my Lord. The night we prepared and we made an advance towards Hastings again. We recaptured Hastings and we had a very fierce fight between the ECOMOG force and our own troops. We

fought, we lost some of our men and finally we were able to push them. Because we used our heavy support weapons, we pushed ECOMOG from Jui and captured Jui. Whilst the troop that Gullit was leading captured Jui, Junior Lion and some other men used the
14:48:08 route towards Grafton whilst I, Tito and others moved towards the bridge at Jui and captured the Jui bridge.

Q. Witness, where exactly is Jui?

A. Jui is within - is between the Freetown-Waterloo Highway. It's just after Allen Town. From Jui you go to Grafton.

14:48:55 Q. Witness, at this time what was your position?

A. I was a combatant officer. I was at the front line, engaged at the front line in the battles.

Q. The troops that you were with moving towards Jui bridge, who was leading that group?

14:49:26 A. Tito was the commander who moved with me and others to the Jui bridge and we crossed the bridge and they said we should wait and Tito left me and some other men defending the bridge. He went back and took the entire brigade, the family members, as I said, the civilians that we had captured, those were the ones we
14:49:58 referred to as family members, and the entire brigade. They met us and we crossed and we went to a place in Allen Town that was a very small jungle. We were based there for some time.

Q. Witness, at this point where was the Red Lion battalion?

A. Well, Red Lion battalion too moved at the brigade - I am
14:50:32 sorry, where - that place in Allen Town, all of us were there. It was only Junior Lion and some other men who used the Grafton Highway. He was going - he was continuing, pursuing the other ECOMOG guys who were going around that end, the Grafton end.

Q. Witness, you've spoken about a group led by Tito, a group

led by Junior Lion and a group led by Gullit.
A. Yes, my Lord.
Q. In relation to these groups where was the Red Lion battalion?
14:51:17 A. Well, Red Lion battalion was with the brigade. That was where Tito - the troop that Tito led. We went to capture the bridge and when we captured the bridge we went back and all of them came down together with the entire brigade and we went and established a temporary base at Allen Town.
14:51:46 MR ANYAH: Sorry to interrupt again. I would be grateful for some time frame indications if we are now in January 1999, or still in December 1998.
PRESIDING JUDGE: Ms Alagendra, you've heard counsel.
MS ALAGENDRA: Yes, your Honours, I will do that:
14:52:05 Q. Witness, before you proceed further can you tell the Court where we are in terms of time?
A. This was 4 January 1999.
JUDGE SEBUTINDE: We didn't get any time frames for the Hastings attack. Also, Ms Alagendra, I would seek some
14:52:28 clarification. The witness talked of burnings in Hastings. He says they burnt Hastings. I'm not sure what exactly it is that they burnt apart from a few aircrafts, old aircrafts.
MS ALAGENDRA: I will go back to that, your Honour:
Q. Witness, I am going to take you back a little bit. The
14:52:50 attack in Hastings that you described, when did that happen? Do you remember the date?
A. That was around 3 January 1999.
Q. You spoke about burnings taking place in Hastings. What was burnt in Hastings?

A. Hastings, it was the airfield, the structures that were at the airfield and the old aircrafts. Those were the things we burnt.

Q. Was anything else burnt in Hastings?

14:53:35 A. No, my Lord. We just attacked the military base that was there and we withdrew.

Q. Witness, you just told the Court that the Red Lion battalion was with the group that was being led by Tito. Am I right?

14:53:58 A. I said the group which I moved with, Tito was the commander, the group that captured the bridge. That was the area that Red Lion and the brigade used, because after we had captured the bridge the Red Lion battalion, the entire brigade, moved and we crossed the bridge. We went and based at Jui - I'm sorry, Allen Town.

14:54:30 Q. Is it your testimony that the Red Lion was with the brigade?

A. Yes, was with the brigade while we were advancing, because this advance, we were mixed. This time it was not by battalion, we were together, because the first attempt when we tried we lost some of our men. So Junior Lion withdrew and he was even beating some men to bring them to the fore. So it was a mixed troop. But Tito, I and others moved, we crossed and captured the bridge. We crossed and we waited there and Tito returned to take the

14:55:24 brigade where the Red Lion battalion too was part of.

Q. Witness, when you talk about the brigade at this point what are you referring to?

A. Well the brigade comprised Gullit who was the CIC, there was Bazzy who was the deputy CIC, there was Five-Five who was the

chief of army staff and you had the adjutants and other commanders and the family members. The civilians whom we captured, we called them family members.

Q. You've testified that after your group captured Jui bridge you moved to Allen Town, am I right?

14:56:22

A. Yes, my Lord.

Q. When your group arrived at Allen Town, did you meet anybody there?

A. As we got to Allen Town, the civilians had already left the place.

14:56:46

Q. Did you meet the other groups?

PRESIDING JUDGE: That's a bit vague, Ms Alagendra. What other groups?

MS ALAGENDRA: I'll be clearer, your Honour:

14:57:03

Q. Witness, when you arrived at Allen Town do you know where the brigade was?

A. As I said, when we got to Allen Town Gullit and the others came. We went and established a temporary base at a place that is actually primary jungle. It was not a thick forest. But at that time Junior Lion and the other guys who moved towards the Grafton end had not come yet, so we were at that primary jungle temporarily.

14:57:32

Q. For how long did you remain there?

A. We were there until towards the evening when we came to the town itself - the Allen Town itself - and we occupied the houses, because we met the civilians that had already left their houses.

14:57:59

Q. For how long did you remain in Allen Town?

A. We were in Allen Town until 5 January, waiting for Junior Lion, and on the 5th Junior Lion came. He came from the Grafton

end to Allen Town, but while he was advancing towards Allen Town to meet us we had a jet raid. A jet attacked our positions and we lost one of our colonels, Colonel Chucks. He died. We continued waiting almost towards 1 a.m.

14:59:10 Q. What jets are you talking about?

A. This was the ECOMOG Alpha Jet, which we referred to as the 448.

Q. Would you please state again the name of the colonel who died?

14:59:33 A. Colonel Chucks.

MS ALAGENDRA: Your Honours, if I can ask the witness to assist us with the spelling:

Q. Witness, can you spell Chucks?

A. C-H-U-C-K-S.

15:00:02 Q. You said you continued waiting until almost 1 a.m.?

A. Yes, my Lord.

Q. Did anything happen after 1 a.m.?

A. Yes, Gullit called all the battalion commanders and the military supervisors and he addressed the troops.

15:00:30 Q. How did you know this?

A. This happened in my presence in Allen Town.

Q. What did Gullit say?

A. Gullit said that the troop was then about to enter Freetown and that he was ordering that as we would be entering Freetown we

15:00:59 would make sure - we should ensure that we burnt down all police stations and, secondly, we should open the central prisons because there were soldiers in the prisons. We had had information as well that Foday Sankoh was in prison there, who was the RUF leader, and other political detainees too were there

in the prisons, so we should ensure that those people were freed from the prisons. We should also make sure that collaborators, those who opposed the junta forces which comprised the RUF and the SLAs, that we should kill them. And he also said - he said something, he said, "From your pockets to my pocket", that is whatever that was of value if you're a civilian and I am a fighter and if I see you and I asked you to give me what you had, if you refuse to hand it over to me I shall kill you.

Q. Did Gullit say anything else?

15:02:41 A. He said we should ensure that as we would be entering we should defend Freetown so we'd be able to get a good number of civilians so if there was anything, if we had resistance, we should capture those civilians and we will use them to gain recognition.

15:03:03 Q. Did he say anything else, witness?

A. As far as I can recall, these are some of the things that he spoke about and he said we should be prepared to attack Freetown.

Q. Witness, do you know who you were going to attack in

15:03:24 Freetown?

A. The ECOMOG troop was based in Freetown, so we were going there to attack them and the government which was in Freetown at that time.

Q. Apart from the ECOMOG that was in Freetown, do you know if

15:03:50 there were any other forces in Freetown?

A. Yes, we were aware about the Kamajors' presence there and some of the other SLA members who were fighting alongside the ECOMOG forces. They were loyal to the government.

Q. Can you remind us what do you mean by SLA?

A. This was the Sierra Leone Army, but when we left, when we came from the jungles, some of them went and surrendered to the government whilst we took to the jungle.

Q. Witness, at this time what was the size of Gullit's troops?

15:04:54 A. As I said we were more than 1,000, those of us who entered Freetown.

Q. Can you tell the Court what kind of weaponry your group had at this point?

A. My Lord, we were well armed. We had SPG, which was support

15:05:23 propelled grenade. We had commando mortars, which we called also 60 millimetre mortars. We had 81 millimetre mortars too. We had rocket propelled grenades. Almost all the battalions had them. We also had LAR, which is light automatic rifle. We had SMG, which was sub-machine gun. We used that too. We had AK-47 and

15:06:16 we also had machetes. Some men had machetes when we entered Freetown. The unarmed civilians had machetes.

Q. Did you have any kind of vehicle in your group?

A. At the time we were in Allen Town we hadn't a vehicle at that time. We did our attacks on foot. We hadn't a vehicle at

15:06:52 that time.

Q. Witness, what happened when the troops left Allen Town?

A. Immediately after that the brigade waited just for a while. Gullit and the others waited for a while whilst we were being organised - the fighters were being organised. We were mixed.

15:07:29 The Red Lion - it was like a brigade advance. Four battalions moved. We came down Allen Town, the ECOMOG forces attacked us and we repelled the attack. We pushed them. We came right down to Calaba Town, firing heavily. We came and captured Brewery. As we captured Brewery, we based there. From there as I said the

A. After that we advanced towards the library, which was very close to the State House, and we came up towards Tower Hill, and the other group went down to the Cotton Tree and we attacked the State House. They were pushing from the other end and we were
15:28:38 pushing from the other end and we captured State House. From there the brigade came where Gullit and the family members came.
Q. Gullit and the family members came where?
A. At State House.
Q. When you say "State House", witness, what do you mean?
15:29:07 A. This was the President's - sorry, it was the office of the President. That was the time of former President Ahmad Tejan Kabbah's time.
Q. Do you recall the time when State House was captured?
A. As I said it was a short time around 6 a.m., almost 6 a.m.
15:29:35 to 6 something. That was when we captured State House in the morning hours.
Q. Did anything happen after State House was captured?
A. Yes, we met and Gullit said we should go and open the central prisons. Bazzy joined us, together with some other men,
15:30:07 and so we were moving towards Pademba Road. We burnt down the CID headquarters. That is the Criminal Investigation Department which belonged to the Sierra Leone Police. We burnt that down. From there we advanced towards the central prisons, which is called Pademba Road Prisons. We met some resistance from the
15:30:38 ECOMOG, but they eventually retreated and we broke into the prisons and the manpower that we met there was so high. It was nearly 3,000 - nearly 3,500, including soldiers, prominent lawyers, so many people who were with the AFRC.
JUDGE SEBUTINDE: Mr Interpreter, did he say 3,000, or

3,500?

THE INTERPRETER: He said 3,000 and later he said 500 after, so I don't know whether he met 3,000 or 3,500.

MS ALAGENDRA:

15:31:25 Q. Witness, can you tell us again the number of people who were released from Pademba?

A. I want to use the gents.

PRESIDING JUDGE: Please assist the witness.

MS ALAGENDRA: Your Honour, if I may?

15:36:14 PRESIDING JUDGE: Are you all right, Mr Witness?

THE WITNESS: Yes, my Lord.

PRESIDING JUDGE: Please proceed, Ms Alagendra.

MS ALAGENDRA: Thank you, your Honour:

Q. Witness, can you tell the Court again how many people were

15:36:22 released from Pademba Road Prison?

A. It was about 3,500 that we met in the prison, because they were mixed.

Q. Witness, at the time when --

JUDGE SEBUTINDE: What does he mean by "mixed"?

15:36:47 MS ALAGENDRA: Your Honour, I think he explained that earlier, but I will ask him to explain it again:

Q. Witness, when you say "mixed" what do you mean? Can you explain that?

A. There were SLAs whom we met there, there were some RUF

15:37:09 members who were in the prisons too and there were some political detainees too, including some prominent lawyers, and there were some women in the prisons and some criminals whom the government had arrested and were there.

Q. Witness, at this point when you released the prisoners from

Q. Witness, can you remind the Court who is FAT Sesay again, please?
A. FAT Sesay was the brigade administrator that we had.
Q. Witness, at this point in the State House who was in
15:56:04 command of the troops?
A. It was Tamba Alex Brima, who was called Brigadier Tamba Alex Brima.
Q. Do you know if Tamba Alex Brima was reporting to anybody?
A. Yes, my Lord.
15:56:26 Q. Who?
A. When we captured State House all the reports he made to Mosquito. Whatever happened he briefed Mosquito.
Q. At this time in the State House, witness, were there other commanders present?
15:56:50 A. Yes, my Lord.
Q. Who?
A. You had Bazzy. He was at the State House. He was the deputy commander. You had Five-Five. He too was in the State House. You had Woyoh and others, the military supervisors
15:57:14 themselves were based in State House and even Hassan Papa Bangura was based in State House.
Q. Was anything happening at the State House at this time?
A. Well, at that time we had just captured State House and soldiers, the SLA, the troops, the RUF, all of them who came,
15:57:40 they were all moving around and they were getting young girls and women and they were bringing them to State House at that time. We also captured some Nigerian ECOMOG soldiers. We brought them to State House and they brought them before Gullit.
Q. How many young girls were being brought to the State House?

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-334 8184

EXAMINATION-IN-CHIEF BY MS ALAGENDRA 8184

SCSL

UNITY FREEDOM JUSTICE

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 21 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Doreen Kiggundu
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Ms Shyamala Alagendra Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

MS ALAGENDRA:

Q. What happened after this communication?

A. Well, Gullit switched off the set and said we should prepare for the advance and he ordered that that village should be burnt down, that the village should be put on fire and it was B company and C company which were that rear, they set the village on fire while the brigade moved.

Q. Witness, do you recall the name of this village?

A. No, I cannot recall, but it was within that Bumbuna axis. I cannot recall the name of the village now.

Q. Who set the village on fire?

A. It was an order from Gullit, he called the B Company commander and issued out the order.

Q. What was burnt in this village?

A. They set the houses on fire.

Q. Were there any civilians living in this village?

A. No, we did not meet civilians in that village.

Q. Now, you said the brigade moved. Where did the brigade move to?

A. We moved towards a village together with the brigade and captured one man called Tamba Sewa. They said he was a juju priest.

MS ALAGENDRA: Your Honours, for the record Tamba Sewa is T-A-M-B-A S-E-W-A:

Q. This village that you moved to, witness, where you met Tamba Sewa, do you know which district it is?

A. It was in Koinadugu district. It was very close to Bumbuna.

Q. Did anything happen --

JUDGE SEBUTINDE: Ms Alagendra, Tamba Sewa was a juju priest, not a Jewish priest.

MS ALAGENDRA: Yes, the witness did say juju:

Q. Just for the record, when you say "juju" what do you mean?

10:16:38 A. According to my idea, these are people they would go to to worship, to prepare - I don't know how they call it. We used to call it [indiscernible], they make some charms for you which we'll use to fight. Charms that you use to fight.

Q. Thank you, witness. Did anything happen at this village?

10:17:12 A. Well, Tamba Sewa was arrested and he said - pleaded with Gullit not to kill him. He said he would help the troop, he would prepare something that everybody would have which will disable the enemy from attacking us. He pleaded with Gullit that they should not eat the goat, but the sheep and the ducks they

10:17:49 were free to eat and after that he prepared the charms which he gave to every fighter. We tied the charm on our arms. From there the troop left and headed towards Bumbuna Highway.

Q. What happened after that?

A. When we left that village we moved ahead and had an attack.

10:18:35 Q. Witness, can you give us a time frame now where we are at?

A. This was around July, July to August 1998. July, sorry, 1998. June/July 1998. June/July 1998, yeah.

Q. And where did you have an attack?

A. Just after the village where Tamba Sewa was, whilst we were

10:19:05 going we were attacked.

Q. Do you recall who attacked your group?

A. Yes, my Lord.

Q. Who?

A. This was the Executive Outcomes, the South Africans.

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-334 8057

EXAMINATION-IN-CHIEF BY MS ALAGENDRA 8057

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 18 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Ms Shyamala Alagendra Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

map?

A. Yes, my Lord.

Q. Can you circle Bumpe and put a number 8 next to that. Now, you testified about a place called Yengema.

12:42:07 A. Yes, my Lord.

Q. Do you see Yengema on the map?

A. Yes, my Lord.

Q. Can you circle it and put a number 9 next to that. You testified about a place Yomandu.

12:42:36 A. Yes, my Lord.

Q. Do you see Yomandu on the map?

A. Yes, my Lord.

Q. Can you circle it and put a number 10 next to it. Thank you, witness.

12:43:28 MS ALAGENDRA: Your Honours, that is all the markings for this particular map. Can I ask that this map is marked for identification with MFI-21?

PRESIDING JUDGE: Very well. This is a map headed "Kono District - Sierra Leone" with markings by the witness TF1-334 and 12:43:54 it is marked for identification MFI-21, is it?

MS ALAGENDRA: 21, your Honour.

PRESIDING JUDGE: Thank you.

MS ALAGENDRA:

Q. Witness, you said that the group you were with was 12:44:41 withdrawing and you were heading towards Tombodu. Did your group arrive in Tombodu?

A. Yes, my Lord. I arrived with commander Bomb Blast, Hassan Papa Bangura, in Tombodu.

Q. When you went to Tombodu, who did you find there?

A. Well, when I arrived in Tombodu Gullit was there, Bazzy, Woyoh, Abdul Sesay who was the - who were the military supervisors. Ibrahim Bioh Sesay was there and other commanders, and the family members as I have named them before.

12:45:38 Q. Witness, you earlier told us what family members meant. Could you tell us again, please, at this point. When you say family members, who are you referring to?

A. I said that these were the civilians who I and the other people captured who were under our command, both the RUF and the

12:46:02 SLAs that were in that area, those whom we had captured.

Q. At this point when you withdrew to Tombodu, what was the number of the captured civilians that your group moved with to Tombodu?

A. Well, the number was large. The number was large, because

12:46:26 most of them who continued to be with us at the base, we ensured that, like I said, we protected them so that nobody will escape. They continued to stay with us. About 200 of them were with us.

Q. These roughly 200 civilians, where were they captured from?

A. Well, some of them were captured in Makeni and some in Kono

12:46:55 where we were based.

Q. Witness, you testified earlier about the ammunition that was distributed by Superman to Bazzy and Bomb Blast. At this point in Tombodu, were there any left?

A. Well, we had got this ammunitions before, like I said, to

12:47:25 repel the ECOMOG forces. When we withdrew we still had this ammunition.

Q. How long were you and the group you were with in Tombodu?

A. Well, the same day of the withdrawal, when I and Hassan Papa Bangura arrived, Gullit informed Hassan Papa Bangura that

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-334 7974

EXAMINATION-IN-CHIEF BY MS ALAGENDRA 7974

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 17 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Mr Alain Werner Ms Shyamala Alagendra Ms Kirsten Keith
For the accused Charles Ghankay Taylor:	Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

head towards my headquarters at Cockerill, but I met some heavy fighting around that State House axis, so I helped and we captured State House.

Q. Witness, you have said Major Johnny Paul Koroma made announcements of the members of his council and he made announcements of other appointments, could you first tell us what were the other appointments that he announced?

A. Yes, my Lord.

Q. Please proceed, witness.

10:10:06 A. Well, he named himself as the chairman and he announced his vice-chairman at that time was Corporal Foday Sankoh, but he said in the absence of Corporal Foday Sankoh, Lieutenant Colonel SAJ Musa would act at that time in his place. And he also named the PLO-1 who was Abu Sankoh who was also called Zagalo. He named 10:10:40 the PLO-2 was Tamba Alex Brima, Gullit. He named the PLO-3 was Ibrahim Bazzy Kamara. Most times we called him Machiavelli or Dark Angel.

Then he also named other members in his council. He 10:11:23 announced the secretary general at that time was Colonel AK Sesay. He announced Corporal Gborie as one of the council members. He named Hassan Papa Bangura as one of the council members. He named Foday Kallay as one of the council members. He also called Samuel Kargbo whom we most times called Jungler, he also named him as a council member. He also named Adams, 10:11:59 Corporal Adams, he too was a member of the council. He also named Franklyn Conteh who we called Woyoh. He too was named as one of the council members. He named Moses Kabia whom he also appointed as his CSO, whom we also used to call Rambo, he too was a member of the council. He named Sullay, Corporal Sullay,

Sulaiman, he too was a member of the council. Corporal Hector Bob Lahai, he too was a member of the council. Corporal Abdul Sesay, he too was a members of the council. And Corporal Momoh Bangura whom we called Momoh Dorty, he too was a member of the council. He also named Corporal Santigie Borbor Kanu, he was also a member of the council.

And he named some other people and at that time he also named the new chief of the defence staff who was SFY Koroma, Colonel SFY Koroma. And he also named the chief of army staff, was Colonel SO Williams. He also named Commander Gilbert who was heading the navy wing.

MS ALAGENDRA: Witness, I need to stop you just there.

PRESIDING JUDGE: Yes, Ms Alagendra.

MS ALAGENDRA: Your Honours, I was just looking at the time. I believe you have another engagement.

PRESIDING JUDGE: Yes. As we mentioned yesterday the Judges have been invited to attend the swearing in of the new Registrar, so we will adjourn now until the time which we originally set which was 11.30 and there will not be any other break in the course of the morning.

Mr Witness, we are going to take an early adjournment as the Judges have to attend another function and we will be recommencing court at 11.30. Please adjourn court.

[Break taken at 10.15 a.m.]

[Upon resuming at 11.30 a.m.]

PRESIDING JUDGE: Please proceed, Ms Alagendra.

MS ALAGENDRA: Your Honours, before the break the witness had gone through some names which I would like to spell for the Court at this point.

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-334 7859

EXAMINATION-IN-CHIEF BY MS ALAGENDRA 7859

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 16 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Alain Werner Ms Shyamala Alagendra Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

Marvel to Foya to collect materials which were in bales. We only knew in fact those bales contained ammunition when we crossed into Sierra Leone back to Buedu and the G4 commander was called to come and collect the materials to the warehouse. Those bales were opened into and what we saw were materials, ammunitions, and they were handed over to Captain Felix and taken to the ammo dump in Buedu.

Q. Thank you. Do you recall when you made this trip on board the vehicle with Marvel to Foya?

14:59:26 A. I really cannot recall because what I stated last was really just - it was a mistake really, because at the time I stated those vehicles were present in Buedu the mission - the operation in Freetown had long been undertaken.

Q. Now you were asked about names by which you go and let me

15:00:04 caution you before you get to answer the questions I am going to ask you shortly.

A. Yes, sir.

Q. Do not call out any name by which you go.

A. Yes, sir.

15:00:14 Q. Right. Answer the questions without calling out names.

A. Yes, sir.

Q. You were asked about names by which you go other than your actual name. Do you remember?

A. Yes, sir.

15:00:25 Q. And you talked about code names which were different from a call sign that you go by. Do you recall?

A. Yes, sir.

Q. Now what is a code name?

A. A code name is a sort of a nickname given to somebody

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-516	7711
CROSS-EXAMINATION BY MR ANYAH	7711
RE-EXAMINATION BY MR BANGURA	7808
TF1-334	7848
EXAMINATION-IN-CHIEF BY MS ALAGENDRA	7849

EXHIBITS:

Exhibit P-95A and P-95B admitted	7835
Exhibit P-96 admitted	7841
Exhibit P-97 admitted	7841
Exhibit P-98 admitted	7842
Exhibit P-99A and P-99B admitted	7845
Exhibit D-16 admitted	7846
Exhibit D-17 admitted	7847
Exhibit D-18 admitted	7847

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 10 APRIL 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

Q. Now the name Ebony, what was it? This same person called Samuel Lamboi was called Ebony. Ebony was what? What kind of name was that?

A. It was just a nickname.

11:19:41 Q. Do you know how he got that name?

A. Before I joined the signal unit Ebony was already on the radio operating, that is across the Moa River.

JUDGE LUSSICK: So that answer is no. Is that correct?

THE WITNESS: No, sir.

11:20:08 MR BANGURA: Thank you, your Honour:

Q. Do you recall the name Senegalese?

A. Yes, sir.

Q. Who was that person?

A. Senegalese at one time was a member of the RUF. That was 11:20:29 the time ECOMOG intervention took place. I think he met me in Sengema and he was to travel to Kono. He was once a member of the ULIMO fighters. According to report we gathered when RUF joined their forces with AFRC was that that Senegalese was one of the soldiers who were fighting alongside the government forces, 11:21:02 the SLAs. So when ECOMOG intervention took place he also retreated to Buedu. So he was commanded by Sam Bockarie to move to Kono on assignment.

MR BANGURA: Thank you. Your Honours, that will be all for this witness. Thank you, Mr Witness.

11:21:26 PRESIDING JUDGE: Thank you, Mr Bangura. The witness has his hand up. What's the problem, Mr Witness?

THE WITNESS: I just want to make a clarification somewhere. Yesterday there was a question and so I thought of it and I really want to put it clear.

I N D E X

WITNESSES FOR THE PROSECUTION:

TFI-516 7134

EXAMINATION-IN-CHIEF BY MR BANGURA 7134

CROSS-EXAMINATION BY MR ANYAH 7186

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 9 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Carolyn Buff
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Alain Werner Ms Kirsten Keith
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

reported that they were persistently attacked and Sam Bockarie came on the radio and told Gullit to instruct the men to burn down some areas, in fact the government buildings, so that will raise alarm in the international community.

09:35:01 Q. Now, this communication which Bockarie had with Gullit, my question was, "Do you recall a situation where after communicating on a 21 with 020 in Liberia, do you recall a situation where Bockarie came back and gave an order?" So are you saying that this order which he gave followed a conversation

09:35:34 on the 21 with 020?

A. Yes, sir.

Q. Thank you. Do you recall any other communication that Bockarie had during this period with 020?

A. Communications was going on with 020 and Base 1 and some of

09:36:00 those communications were like one I have explained and the other was the instructions to Gullit to report with the POWs who were released from the prison. I mean the prisoners who were released from Pademba Road prison, that they were to be taken to Bockarie's location.

09:36:30 Q. It's not so clear, was there a communication on the question of the prisoners between Bockarie and another radio?

A. Yes, sir.

Q. Which radio was that?

A. That was Base 1.

09:36:46 Q. And following that you said Bockarie then communicated with Gullit?

A. Yes, sir.

Q. In Freetown?

A. Yes, sir.

Q. And what did he specifically say?
A. Bockarie told Gullit to ensure that all the prisoners who were released from Pademba Road prison were sent to his location.
Q. How do you know this?
09:37:09 A. I monitored this on the radio myself.
Q. You mentioned yesterday that a radio operator with the forces in Freetown would communicate with your radio in Buedu and you called the name of Elongima, is that correct?
A. Yes, sir.
09:37:35 Q. Apart from Elongima was there any other radio operator in Freetown who communicated with Buedu?
A. After the death of SAJ Musa, King Perry also used to communicate, operator King Perry.
Q. Thank you. Now, you mentioned that Sam Bockarie gave an
09:37:52 orderer to "burn down the fucking place" when there was pressure in Freetown. Do you recall that?
A. Yes, sir.
Q. And did you get any report about atrocities in Freetown?
A. Yes, sir. The operator reported and he went further to
09:38:15 tell them to listen to BBC, that he had had an interview with the BBC correspondents.
Q. Now, the question was did you get any report about atrocities in Freetown?
A. Yes, sir. The radio operator, Elongima, briefed us that
09:38:39 the men who were left by the commander at that particular location were engaged in some kind of atrocities, that in fact they had gone on the rampage. He said, "They are just doing things at their wish."
Q. Did he say exactly what sort of atrocities were being

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-516 6975

EXAMINATION-IN-CHIEF BY MR BANGURA 6975

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 8 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Carolyn Buff
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

operations.
Q. And back to Buedu, what role did you perform there?
A. I was still a radio operator. I was communicating still.
Q. Were you working alone as a radio operator?
10:49:04 A. No, I had some other senior radio operators like Ebony, Mohamed Kabbah, Tolo - Osman Tolo - and Zedman Sahr James.
MR BANGURA: Your Honours, Tolo is T-O-L-O:
Q. Ebony, did he have another name?
A. Sam Lamboi. Samuel Lamboi.
10:49:33 Q. Thank you. Now, were you assigned to any particular commander at Buedu at this time?
A. To Sam Bockarie. I was appointed to Sam Bockarie. Appointed - assigned to Sam Bockarie.
Q. Now, do you recall which particular radio you were
10:49:55 operating in Buedu at this time?
A. Sam Bockarie's radio, but the call sign was changing. For example today it is Bravo Zulu 4, tomorrow it is Marvel and the next day it is Planet 1. Just like that.
Q. At the particular time that you got - that you were sent
10:50:17 back from Sengema to Buedu, what was the call sign for Sam Bockarie's radio?
A. Okay, it was Bravo Zulu 4.
Q. Bravo Zulu 4, is represented - is it represented by letters?
10:50:38 A. Yes, sir.
Q. So, what letters would it be?
A. BZ4.
Q. Thank you.
A. So, in communication at times we will refer to that as

communicate with the other side?
A. When I got to Buedu it was at that time I was given the authority to communicate.
Q. Now, which radios did you communicate with in Liberia on the other side?
10:56:52
A. On the other side - before crossing there I was given a radio set. I crossed into Liberia with a radio set. Of course, when I arrived and 50 received me from Foya --
Q. Can I pause you. I think you are not actually answering the question. Before you left to go to Liberia when you said at some point at Buedu you had authority to communicate, you could also communicate with the radios in Liberia. Is that correct?
10:57:11
A. Yes, sir.
Q. Now which radios in Liberia, or which stations in Liberia, would you communicate with at that time?
10:57:27
A. Call sign 020, 020, that was located at the Executive Mansion Ground in Monrovia, and one call sign, Base 1, like I said earlier, was located in Congo town at Benjamin D Yeaten's residence. That is by White Flower and White Flower is the personal residence of President Charles Taylor of Liberia.
10:57:56
Q. Thank you. Before these - before this time when you could communicate to 020 and Base 1, was there any radio - any other radio - that you communicated with in Liberia?
A. Yes, there was also another radio station located in Foya. That is Foxtrot Yankee as we referred to.
10:58:29
Q. So, at the point of your assignment to Liberia there were - (your Honours, my attention has just been called to the spelling for Foxtrot. Foxtrot Yankee.)
THE WITNESS: We just say "FY" and we were referring to

A. One Base 1 had our code. Base 1 was operated by an operator called Sunlight.
Q. Where was Base 1?
A. Base 1 was located in Congo Town, that is to Benjamin
12:30:18 Yeaten's personal residence.
Q. And you stay it was operated by?
A. Operator Sunlight, one, and, two, operator Dew.
Q. Can you spell Dew?
A. D-E-W.
12:30:34 Q. Now, these names that you've just mentioned, the names of the operators, how do you refer to them in communication parlance?
A. Those were code names and I knew them only by those code names.
12:30:48 Q. So the operators for the radio called Base 1 were?
A. The name Base 1 was the call sign of the radio. Dew, Sunlight were the code names of the operators who operated that radio.
Q. And you say that radio had access to the RUF code?
12:31:10 A. Yes, sir. They had a copy of our code and the other station Zero 20 at the Executive Mansion Ground, that was operated by Sky 1.
Q. When you say operated by Sky 1, what do you mean?
A. Sky 1 is the name of the operator who operated that radio
12:31:32 with the call sign 020, 020.
Q. To your knowledge who did the operators Sunlight and Dew for the radio Base 1 report to?
A. They reported to Benjamin D Yeaten, Unit 50.
Q. And when you say Unit 50 and you call Benjamin Yeaten's

name, what was Unit 50? Why was it called Unit 50?
A. That was his code name. He was called by that name, Unit 50.
Q. Now, you also mentioned radio call sign 020 which you say
12:32:25 was at the Executive Mansion, is that correct?
A. Yes, sir.
Q. It had a radio operator whose code name was --
A. Sky 1.
Q. Sky 1. Now, who do you recall that - the radio at the
12:32:45 Executive Mansion reported to who?
A. To the president.
Q. Who was the president then?
A. President Charles Taylor was in power at that time.
Q. Now, let us focus briefly. You say that these two radios
12:32:56 had the code for the Sierra Leone - for the RUF radio network, is that correct?
A. Yes, sir.
Q. How do you know this?
A. I was an operator and when I was taken to Liberia the
12:33:11 number of times I received a message from them in our code and besides when I was to cross into Liberia I was given a special code which was distributed to operators Sunlight, Sky 1 and the other radio that was in Foya and that was the code we used.
Q. Now, let's for a brief moment focus on communication within
12:33:42 Sierra Leone, the RUF within Sierra Leone. Now, you have mentioned that the RUF operated on a 7 megahertz and that means that the frequency numbers on this network started with the number 7, is that correct?
A. Yes, sir.

they be initiated?

A. They could call us. Sometimes if our call sign - when it was Bravo Zulu 4 they could call, "020 calling for Bravo Zulu 4" and we could respond. And in response they could tell us, "Have
14:42:32 your principal informed to get on the 21, that the chief is on the 21 the talk to him" and the message would be relayed to Sam Bockarie.

Q. Now here you have just given an example using Bravo Zulu 4. In your earlier testimony you said this was the previous call
14:42:52 sign for Bockarie's radio. Is that correct?

A. Yes, sir.

Q. So if you got a call on Bravo Zulu 4 it means that call came before a certain time, a certain period in time. Is that right?

14:43:03 A. Yes.

Q. It would be before what time?

A. Before the operation in Voinjama, because the call sign changed to Planet 1 when the operation in Voinjama was carried out and those recruits brought to Buedu. That was the time the
14:43:20 call sign changed.

Q. Now when there was a call from 020 and indicating that they wanted log to go on the 21, who would come on the 21 to speak to Log?

A. They made reference to the chief. The operator could make
14:43:44 reference to the chief by telling us on the radio to have Log informed to go on the telephone and Log was Sam Bockarie in the code and the chief they were referring to was Charles Taylor.

Q. Now how did you know that he would be speaking to Charles Taylor?

A. After their conversation himself could come on the radio to draft message to be transmitted to the front line and he could tell us. He never used to hide anything from us.

Q. Now apart from telling you, would you tell from the nature of the conversation who he was talking to?

A. He could say, "Yes, sir", the thing would be implemented, "Yes, sir", and thereafter he would go. We had the radio room like this. In fact when the radio was transferred to the vehicle and when the station was now in the vehicle the vehicle was parked just by or let's say outside of the radio room where he had the computer and the satellite phone.

Q. And did Bockarie in your experience and the time you were with the RUF, who would he defer to by answering "Yes, sir" in your recollection?

A. He could refer to Benjamin D Yeaten as sir and his chief.

Q. Apart from those two do you recall anyone else who would call him on the radio and to whom he would answer "Yes, sir"?

A. No, I can cannot confirm that.

MR BANGURA: Now, your Honours, at this stage I want to deal with the document which I had referred to earlier.

PRESIDING JUDGE: Yes.

MR BANGURA: Can the witness be shown - the document is marked ERN 00047121:

Q. Mr Witness, do you recognise that piece of paper that has been shown to you?

A. Yes, sir.

Q. What do you recognise it as?

A. It is an example of how the messages were processed. As you can see the preamble, let's say for example there is a

Q. Okay. And Elongima's message was to the effect that - can you go over that again? His message was to what effect? What did he say?

A. That the men have gone on the rampage. He said they are just killing - wounding civilians.

Q. But what did he say in relation to his Sunray, meaning his commander?

A. His commander?

Q. Yes, what did he say in relation to his commander?

A. He said his commander had gone somewhere around - because he left them at certain point and told them he was going to collect ammunition.

Q. Now apart from this --

JUDGE SEBUTINDE: Sorry, what is the name of this person you just called, Mr Bangura?

MR BANGURA: Elongima.

JUDGE SEBUTINDE: Did you spell that before?

MR BANGURA: He spelt that before, E-L-U-G-E-M-A:

Q. Mr Witness, would you like to spell it again, please

A. E-L-O-N-G-I-M-A

Q. Now did you follow the activities of the group in Freetown until the end of that operation?

A. We were serving duty and sometimes I was not on duty, at times I was on duty, but I could read the details from the message book.

Q. Now during the course of this operation in Freetown and you were at Buedu do you recall any communication by Bockarie with any other persons outside Sierra Leone?

A. He was in persistent communication with 020 and Base 1.

Q. Do you recall what was the subject of the communications he had with those two stations?

A. Okay. Having heard the message about the release of the prisoners from Pademba Road Prison and those that were released were the former President of Sierra Leone, Joseph Saidu Momoh, one Walter Nicholls, Dr Lee, a man who established a network African BBC, Hilton Fyle, Victor Foh and some others. This message was transmitted. In fact it was not transmitted. Base 1 intercepted that communication and later on called and 50 was called to come on the radio and to talk to our principal. Our principal requested to talk to 50 and the message was transmitted to Sunlight. Sunlight made available his principal and 50 came on the radio and then Sam Bockarie was congratulated. He said, "I have heard - I have got the information." He said, "Congratulations, job well done."

Q. Thank you, Mr Witness, but would you like to explain this again using more the names of the persons who communicated rather than their code names?

A. Sunlight.

Q. Sunlight meaning the operator for --

A. The operator for call sign Base 1.

Q. That is whose radio?

A. Benjamin D Yeaten's radio, the SSS director.

Q. Okay. So what happened? What did Sunlight do?

A. It was a conversation that was conducted between 50 and Sam Bockarie.

Q. 50 meaning?

A. SSS director, Benjamin D Yeaten, general.

Q. Thank you. And what was the conversation about?

A. Sunlight monitored that conversation and reported to his commander and then a request was made for 50 to get on the radio, because we told him that, oh, this message had already been received by Base 1.

15:17:35 Q. Which message did Sunlight monitor?

A. The release of the prisoners from Pademba Road Prison. And whilst communicating with - that was Gullit's station communicating with Sam Bockarie's radio station. Whilst communicating and Sunlight intercepted that communication --

15:17:57 Q. From Liberia?

A. -- from Liberia and said he had got all necessary details, okay. Sam Bockarie was then informed about this message and then he came on set requesting to talk to 50 on the other side and 50 came on the radio. They had that radio conversation and in that

15:18:17 conversation 50 congratulated Sam Bockarie that indeed he had got all the details, his operator had briefed him about all that was communicated on that radio.

Q. What details? What did he specifically say about?

A. 50 stated that he had had the message of the release of the

15:18:38 prisoners from Pademba Road Prison, including ex-President Joseph Saidu Momoh.

Q. Now, how did Sunlight - or how was Sunlight able to monitor this message that was being communicated by Gullit to Sam Bockarie, the initial message? How was Sunlight able to

15:18:59 monitor that?

A. Sunlight, like I said earlier, had access to our radio net. They knew almost all our frequencies. There was nothing hidden from them on our radio network.

Q. Now, in your experience was this the first time that a

A. Most of the messages transmitted by ECOMOG were transmitted through the Morse code and those SLAs I am talking about had already been trained in Morse key code communication before joining the RUF.

15:29:30 Q. Thank you. Now, do you recall whether any other form of support was coming from outside Sierra Leone for the RUF?

A. Yes, added to the three men I have named, one other one is Ache. Ache was also part of the monitoring team.

Q. The SLA operators?

15:29:54 A. Yes, sir.

Q. Can you spell that?

A. Ache Pon [phon], Ache. We only used to call it in short, Ache.

MR BANGURA: Your Honours, A-R-C-H-I-E?

15:30:11 A. Or A-C-H-E, take it like that, Ache.

Q. A-C-H-E?

A. Yes, sir.

MR BANGURA: We will go by the witness's spelling, your Honour:

15:30:20 Q. Now, was there any other support coming from outside Sierra Leone for the Freetown operation as far as you recall?

A. For Freetown operation Sam Bockarie could cross into Liberia to get materials, but really these things happened for quite so long really to have to think to recollect.

15:30:49 Q. Now, when you say Sam Bockarie could --

A. Cross into Liberia to get ammunition.

Q. Are you saying that he did cross into Liberia during that period? Is that what you are saying?

A. Yes, sir. In fact, at one time he had a call from Base 1

to report to Monrovia for briefing. He went and within 72 hours time he came back.

Q. To your recollection the Freetown invasion lasted for a certain period. .is that right?

15:31:20 A. Yes, sir.

Q. How long was it to your recollection?

A. Manoeuvring to go to Freetown, fighting in Freetown and the time of withdrawal, I think happened in three weeks time, approximately or estimatedly.

15:31:38 Q. And within that period you said Bockarie travelled to Liberia?

A. Yes, sir.

Q. On a call from who?

A. From Base 1. Base 1, 020.

15:31:50 Q. Now, you have called two different radios here and meaning from two different persons. Who particularly was Bockarie answering a call to?

A. Messages were transmitted from Base 1 and reinforced by 020. Messages transmitted by 020 and reinforced by Base 1. That

15:32:16 was the kind of situation.

Q. Do you know why Bockarie was called to Liberia during that period?

A. He went, according to him, that he was called by his chief for briefing.

15:32:32 Q. And did anything happen? When he came back did you learn what had happened in Liberia?

A. He came with some materials.

Q. What happened to those materials? What materials?

A. Ammunition and commanders were called to come from Kono to

receive those materials.

Q. Thank you.

JUDGE SEBUTINDE: I am sorry, Mr Bangura. What command? RUF or what?

15:33:07 MR BANGURA: I will get the witness to clarify, your Honour:

Q. When you say commanders were called from Kono to get the materials, which commanders were called from Kono?

A. During that time the AFRC/RUF - the RUF was mixed up with

15:33:22 the SLAs and at that time the government soldiers were referred to as the junta forces and the RUF were called the People's Army.

Q. Now at the time of the Freetown invasion what was the state of RUF operations generally around the country, apart from the troops in Freetown? Do you recall where RUF had operations at

15:33:53 that time, or about that period?

A. Around Segbwema. Somewhere around Segbwema.

Q. And do you recall who was there, I mean which commander was there?

A. I can't recall now.

15:34:35 Q. Thank you. Now coming back to communications generally between the RUF and Liberia, the other side, generally what was the subject of these communications as far as you know? This is not limiting you now to the period of the Freetown invasion, but generally when you were at Buedu before you left to go across to

15:34:58 Liberia what would be the substance of these communications between your radio in Buedu and the radios with which you communicated in Liberia?

A. Sometimes it was Sam Bockarie requesting for ammunition.

Q. And to who would this request be made?

A. To Base 1. Base 1. And he could come on the set, sometimes communicating with 50, and he could say he is hungry and response could be, "The iron bird will come with your food."

Q. Now --

15:35:42 A. Meaning, when we talk about the iron bird we are referring to a helicopter. And food, when he says he was hungry, that is he needed a replenishment of ammunition.

MR BANGURA: Now, your Honours, I just notice that "iron bird" has come up "board":

15:35:58 THE WITNESS: Iron bird. That was the helicopter.

MR BANGURA:

Q. Right. I believe bird is intended to be the bird?

A. And sometimes this information could be transmitted by 020.

Q. 020 is the radio station at the Executive Mansion?

15:36:18 A. Executive Mansion Ground.

Q. Now Sam Bockarie, if he wanted supply of ammunition would come on the radio and would say he was hungry. Is that what you said?

A. Yes, sir.

15:36:28 Q. And Yeaten would respond saying that the iron bird was coming. How did 020, the Executive Mansion radio, get into this? How would they get into this?

A. Sometimes the message was transmitted to Base 1 and the movement of the iron bird to Foxtrot Yankee, which is Foya, could

15:36:48 be transmitted by 020.

JUDGE SEBUTINDE: Excuse me, Mr Bangura, I thought Base 1 was Benjamin Yeaten?

MR BANGURA: That is so, your Honour.

THE WITNESS: That is correct.

JUDGE SEBUTINDE: So Base 1, he would sometimes be communicating with 50? I thought 50 was Benjamin Yeaten.

MR BANGURA: It doesn't sound right.

JUDGE SEBUTINDE: You see.

15:37:14 THE WITNESS: That might be a slip of tongue.

JUDGE SEBUTINDE: I am looking at page 147, the last three lines, 22, 23 and 24, you see? He is talking of Base 1 communicating with 50. What is that?

MR BANGURA:

15:37:30 Q. Can you clarify, Mr Witness, when these communications take place - the question was specifically about communications between Bockarie and Bockarie's radio stations referring - we are referring here to Planet 1 and Marvel?

A. Yes, sir.

15:37:48 Q. Communications between Bockarie's station and the other side. The question was the other side?

A. Base 1. Base 1.

Q. So when if Bockarie was in need he would normally communicate with Base 1. Is that what you're saying?

15:38:05 A. Yes, sir.

Q. And how did 020, which is the other radio, how would they come into this?

A. There was communication between 020 and Base 1.

Q. Yes.

15:38:18 A. Requests were sometimes made to Base 1 and the acknowledgement of the movement of the iron bird, meaning the helicopter, sometimes came from 020.

Q. Now, the request, how was it made? Was it made by radio or was it made by another form of communication?

A. Sometimes by form of communication and sometimes verbally between Sam Bockarie and 50.

Q. Now when you say verbally, would they communicate on the radio?

15:38:52 A. That is when we talk about verbal communication you are having the commander himself on set and the commander in the distance on set and communication going on between them.

Q. Without the use of operators on either side? Is that what you're suggesting?

15:39:06 A. The operator trains the radio to a particular frequency and calls the commander to come on the radio. So also the other commander in the other station calls - I mean the other operator in the distance calls the commander on set - I mean the two commanders on set and they communicate directly.

15:39:26 Q. Now in these communications would there be people present in the radio room when Bockarie communicated?

A. The radio operator is obliged to be by the radio.

Q. Have you been present in any of these communications when Bockarie spoke to Benjamin Yeaten on the other side?

15:39:49 A. Yes, sir. Otherwise I would not have explained what I am explaining here today.

Q. Now you mentioned that when a request is made for weapons and to Base 1, Yeaten, that request would be transmitted to 020 which is the other radio, the radio at the Executive Mansion.

15:40:15 What would they then do when they got this request?

A. The communication we are talking about is purely about ammunitions. Ammunitions.

Q. Yes?

A. Okay.

Q. And what would be the situation when 020 got this message?
A. They are could respond by telling Bockarie to go to Foxtrot Yankee that the iron bird will be there with his food. That is to go to Foya, the helicopter would be coming with the
15:40:49 ammunition. But sometimes they could call us to tell us to expect either Zigzag and Colonel Jungle, or General Dopoe that they were en route with materials to his location in Buedu.
Q. Now you have mentioned a few names. You mentioned Colonel Jungle?
15:41:14 A. Yes, sir.
Q. Earlier in your evidence you mentioned Jungle. Are they one and the same person?
A. Jungle, yes, sir. Jungle is the same Daniel Tamba.
Q. Right. And you also have now mentioned Dopoe. Who is that
15:41:28 person?
A. Dopoe Menkarzon was said to be a special force in the NPFL, but at one point in time crossed into Sierra Leone. He was asked to return because they carried out certain operation which led to the killing of civilians in Sierra Leone. That was early 1992.
15:41:51 The operation was code named Top 20. They killed our people and the people grew annoyed. They had to in turn go on the rampage to fight against them. In fact they were saying that Corporal Sankoh was nobody, that they were only answerable to Charles Taylor. And a particular group came. After Top 20 that was
15:42:14 resisted. They again carried out another operation called Top 40. They killed our people. We could not bear it up, you know. There was that confrontation between the Liberians and the junior commandos. So they told us that their chief was working out modalities to send or dispatch a particular group that was to

calm down that situation. So we received a group. They referred to them as Special Forces, SBUs. They came into Sierra Leone and they had Dopoe and others disarmed. They were sent back to Gbarnga.

15:42:52 Q. So Dopoe Menkarzon had been in Sierra Leone long before this time?

A. Yes, they were the ones that entered into Sierra Leone in 1991, but because of their mischievous attitude --

Q. Okay, thank you, Mr Witness.

15:43:04 A. He was deported. He started coming in again with arms and ammunitions at the time Sam Bockarie was in Buedu.

Q. About what time was this? When did they start coming - when did they restart coming into Buedu with arms and ammunition?

A. They started coming back to Buedu in the year 1998 and he

15:43:25 remained coming until a UN patrol team started coming into Buedu.

Q. Now you also mentioned Jungle. You had mentioned a name earlier. At what stage did Jungle get involved in the transport of material from Liberia?

A. At first he was placed in a sort of cut off like I said.

15:43:54 At some point in time in 1993 the ULIMO-K cut off the supply line between the RUF and the NPFL, but there was still a pocket of NPFL fighters along the Sierra Leone-Liberian border. So when ECOMOG came to disarm those combatants including Colonel Jungle came on the side of the RUF and he was in Buedu with

15:44:26 Sam Bockarie.

Q. About what time did he actually join Sam Bockarie in Buedu?

A. This started - 1996 he started coming. But at that time the road was still blocked.

Q. So when did he actually get involved in transporting --

A. 1998.
Q. '98?
A. Yes.
Q. When in 1998?
15:44:49 A. In 1998 after the ECOMOG intervention in Freetown.
Q. And you mentioned also that Dopoe Menkarzon started coming back into Sierra Leone with materials from Liberia in '98. About what time in '98?
A. After ECOMOG intervention.
15:45:10 Q. Now ECOMOG intervention we know was in what --
A. After ECOMOG intervention and Sam Bockarie retreated from Kenema back to Buedu.
Q. Was it very long after the intervention that we are talking about?
15:45:25 A. No, not. Not too long.
Q. Now what about Zigzag Marzah, do you know when he started coming into Sierra Leone with materials?
A. The same time. The same time. And of course that Zigzag was SOD, Special Operational Division.
15:45:42 Q. And which unit is that?
A. There was a unit in Liberia called SOD. Those were Charles Taylor's security forces.
Q. Now these three men that you have just mentioned, now on whose instructions did they come to Sierra Leone with material?
15:46:02 A. They could - in fact it was Sam Bockarie who told us that his chief had told him that certain people were coming and the operators could tell us. If it was Zigzag that was coming they could tell us that Zigzag would be at your location, he has moved. And if it were Jungle we were informed before that Jungle

was on the way coming.
Q. How would you be informed?
A. By the radio. The radio was meant for free flow of communication. There was nothing hidden.
15:46:36 Q. With these messages that came about material, were they messages that were written down or were they just -
A. Some of the messages. In fact transmitting messages about the movement of materials were put into code.
Q. When you say they were put into code, would they not be
15:47:00 decoded using the normal code charts --
A. They were --
Q. -- that the operators had?
A. They were put into code. When our messages are put into code they are then sent to be transcribed and recorded into the
15:47:14 operational books.
Q. Okay. Now, how frequently did these men bring materials from Liberia to your recollection?
A. One cannot really state that they brought materials that has taken five days and other materials is going to be sent, no,
15:47:40 but it was happening regularly.
Q. How regular? Weekly, monthly?
A. One cannot be precise on that, really, but this is the kind of situation that I witnessed myself.
Q. How were the materials - how was the transaction initiated?
15:48:12 You have said that Bockarie, when he needed, he would indicate that he was hungry and then how would the request be processed from the other side?
A. We could at times send message requesting for materials, ammunitions, in code, and they could in turn receive the message,

process it and the response would be transmitted to us, either telling Bockarie to go to Foya, or telling us about the movement of those men - any of those men I have mentioned into Buedu, or sometimes to Foya. It was not certain: Today it is going to be a helicopter flying from Monrovia to Foya with ammunition and tomorrow it is going to be materials brought by Colonel Jungle, either from Monrovia with the helicopter, or by the helicopter, and moving from Foya on land. We had vehicles there in Foya. When the helicopter came to Foya the materials were then loaded into the vehicle and taken to Buedu.

Q. Now, was it --

A. Let me make that point clear. The flying of ammunitions from Monrovia to Foya really came into being when the insurgents, as the Liberians referred to them, the insurgents started attacking Lofa, Voinjama and its environs.

Q. When was this?

A. That was some time in 1999 and onwards to the last date we closed down our communication.

Q. Before this time how were materials transported from Liberia to Sierra Leone?

A. On land. On land. Sam Bockarie could go to Monrovia and come with ammunitions in a vehicle. He had a ten tyre truck that he was travelling by quite often into Liberia and back, but the flying started when there was a threat in Lofa County. Fighting was taking place in Lofa County. That was the time they strategised the flying of ammunitions by air to Foya. we had a special group of armed men assigned in Foya and that group included one FOC and one other Takpo. They were in Foya. They were there to take care of - to keep security at the airfield.

before?

A. Yes, I can remember travelling to Foya. What I told the investigator last, I was not sure really whether it was during the time of the Freetown operation, that was yet to be confirmed. But I could remember travelling to Foya, myself, Zedman and one operator, Tolo, were on board one of those communication vehicles.

Q. Which one of the communication vehicles?

A. The one we had Marvel planted in. We went to Foya. In fact at first he travelled to Foya and then he was flown into Monrovia. He told us he was called by the chief. So he went to Monrovia. After 72 hours he came back and we were called to receive him at Foya. So those materials - in fact what we saw coming from the helicopter were bales of jeans, were bales of jeans, but when we got to Buedu on the contrary we saw the content of those bales were ammunitions and the ammunitions were handed over to the G4 in Buedu called Captain Felix.

Q. Now, Mr Witness, you started by saying that you told the investigator, and you're not sure whether this was in the - around the Freetown invasion. Are you referring to the time that you went on this trip to Foya? Is that what you were trying to say?

A. Yes, sir, together with about 18 of his bodyguards.

Q. Now this trip to Foya, was it before you left Buedu for your assignment in Liberia?

A. Yes, sir.

Q. Right. And you say Bockarie had left before you went to Buedu on a call to Monrovia. Is that right?

A. Yes, sir.

Q. And you say he was called by who?
A. By his chief. That was what he told us. That after the satellite conversation he was called by his chief and he was travelling to Monrovia.
16:06:18 Q. And your understanding of his chief was?
A. Charles Taylor. That was what he told us.
Q. And he came back, you said, 72 hours later?
A. Yes, sir.
Q. Where did he come?
16:06:34 A. To Foya and that very day back to Buedu.
Q. And you were informed that he was back at Foya. Did you get informed before he arrived at Foya?
A. We were informed by the radio station 020 and also Base 1.
Q. Those are the radio stations in Liberia?
16:06:56 A. In Liberia.
Q. What were you specifically informed about?
A. That Log was on his way back to Foya.
Q. And so you went to Foya?
A. Yes, sir.
16:07:12 Q. Yourself and who?
A. We were on board the other vehicle and that vehicle was to be used to transport those materials to Foya.
Q. Now when you say the other vehicle, which vehicle are you talking about?
16:07:23 A. Marvel. There was another Land Cruiser which we had the radio Marvel planted in.
Q. Right. And so you got to Foya. What happened when you got there?
A. Sam Bockarie came on the helicopter.

Q. Who arrived there first, yourselves or the helicopter that brought him?

A. We were there. We were there before his arrival. We had already received information about his movement and we set in for Foya.

Q. So you were there when the helicopter arrived?

A. Yes, sir.

Q. And what happened when it arrived?

A. The drivers were commanded to load those vehicles with those bales of jeans.

Q. Now you said that those bales of jeans contained ammunition. How did you know this?

A. When we got to the base, to Mosquito's ground --

Q. Where?

A. In Buedu. It was in Buedu those bales were dismantled and he said that he is doing that not for any other purpose but really to keep security, because journalists, according to him, were going to Foya to really see the relationship that was going on between the RUF and the Liberian side. So those materials were concealed. Myself, I knew the content of those bales were ammunitions when we arrived at Buedu.

MR BANGURA: Your Honours, the last answer started with in and I don't quite make out what --

JUDGE SEBUTINDE: The word is Buedu.

MR BANGURA: Buedu comes up later in the sentence.

JUDGE SEBUTINDE: No, the sentence reads, "In Buedu" full stop. "It was mainly in Buedu that those bales were dismantled."

MR BANGURA: Thank you, your Honour:

Q. Now you said the reason for them being concealed in jeans

was to?
A. To maintain security.
Q. How did you know this?
A. Sam Bockarie told us everything when he arrived.
16:09:44 Q. Now do you recall any other shipment of arms and ammunition or other material, very specific ones, not the general?
A. I have said materials were - ammunitions were coming in.
Q. Now how frequently would you recall that these materials came in?
16:10:31 A. Materials were requested for when operations were going on on the front lines.
Q. And were these requests ever denied?
A. No, no, only sometimes when requisition was made he was told to wait a little while.
16:10:55 JUDGE SEBUTINDE: Mr Bangura, the witness's testimony has been that materials means ammunition, but you then go on to ask him a question can he tell us of any other shipment where arms and ammunition were shipped, so I don't know.
MR BANGURA: Your Honours, I believe I had in the
16:11:15 previous --
THE WITNESS: I have explained in the particular --
MR BANGURA: Mr Witness, just hold on, please. I believe I had in a previous question asked him what the material consisted of apart from ammunition, but I will get the witness to say
16:11:28 again:
Q. Mr Witness, apart from ammunition, the materials that were brought from Liberia, what did they include apart from ammunition?
A. Medicine, petrol and food. And I said during General

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-516 6820

EXAMINATION-IN-CHIEF BY MR BANGURA 6820

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 7 APRIL 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Mr Mohamed A Bangura Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

of the dates when you were interviewed, is that correct?

A. Yes, my Lord.

Q. We looked last week at some of those occasions and I am not going to go over that material again, but I will just go through it, as it were, to tick off those dates. So we start on the first page of tab 17. We have looked already at box number 1, 28 August. That was prior to your first interview. The first interview was in the second box, 30 August, and we looked at that. We also looked at the next interview in box number 3 where you received 50,000 leones, the same as box number 2, for transport, meals and lost wages, and again the third interview, on 4 September, the same sum for the same reasons.

If you go over the page, please, box number 5 is Friday, 8 September. Again the same amount of money, 50,000 leones, for meals, transport and lost wages. Now, number 5, 8 September, follows on from number 4 which is 4 September, but we know that you were interviewed in between those two dates: On 5 September and then again on 6 September, but there are no sums recorded for those two dates of interview.

The next time you were interviewed after 8 September, in box 6, was 17 September, but there is no receipt for that date, or on that date as such. The next receipt we see is box 6. Can you have a look at that, please. Friday, September 29th 2006, transport and lost wages, 15,000 leones. No reference to meals there. Can you pause for a moment and just think back. Was there ever a time when you went along to see the Prosecution for an interview, but they didn't at the end of that interview, on that day, hand over the money to you, they gave it to you at some later date? Did that ever happen, or did you always get it on

the same day as you have told us both this morning and last week?
A. No, I can't recall that. The one you have spoken about, I don't think I was given the money on that same day.
Q. Well, I am not going to spend a long time on this, but the
09:37:56 one I have spoken about is 17 September 2006. How can you now remember whether on 17 September 2006, one out of 26 different days on which you were interviewed, that on that specific date you weren't given the money on the day?
A. Well, as we go along discussing issues about the monies
09:38:43 then maybe my - I will reflect and recall about the money issues that you are talking about. That was why I said so.
Q. The question I asked you is how can you remember on 7 April 2008 that on the day you were interviewed, 17 September 2006, on that particular day they didn't give you the money there and
09:39:10 then, they gave it you at some other time? How can you remember that now?
A. Well, I want to tell you that the date you are talking about I can't recall it actually, but I recall that there were days that I went there that they did not give me money and I
09:39:35 returned.
Q. Well, can you recall saying in the last eight minutes that every time you were interviewed you were paid? You certainly said that when I first asked you about this last week?
A. Yes, I said it. I have said it. I have not denied that.
09:40:09 Q. Are you now saying that you have got that wrong and there were in fact days on which they didn't pay you?
A. Well, it was not a large amount, but I think they were always giving me money, but if I am not mistaken I think it was just about two times that I was not given money, but the money

was later given to me.

Q. Let me see if I have understood that. Are you saying that there were about two occasions on which they didn't give you any money on the day, but they gave it to you later, or are you saying there were about two occasions on which they gave you no money at all, either on the day or at any time after that?

A. I said they gave me the money later.

Q. All right. After 17 September the next time you were interviewed was 1 October 2006. In fact, in box 6, Friday 29 September, you are given 15,000 leones, although that wasn't a date on which you were interviewed. You were interviewed two days later on Sunday, 1 October; but if you look at box 7, which is the next one in time after box 6, that relates to 23 December 2006 when you were given 40,000 leones for meals, transport and lost wages again. Now, in the meantime, between 29 September and 23 December, you had been interviewed on 1 October, 8 October, 11 December and 23 December, the same date of the next receipt in box 7. Were there four occasions when you received - well, let me put that in another way. Were there three occasions on which you can think that you weren't paid at all in October and December 2006, or is the position that you just don't know now?

A. Well, I can't recall now.

Q. Box 8, 20,000 for meals, transport and lost wages, another Sunday. You said last week that you wouldn't lose wages on a Sunday. Do you still maintain that?

A. I don't sell on Sundays.

Q. No, all right. Box 8, Sunday 28 January, meals, transport and lost wages. Lost wages there for that Sunday, is that a mystery to you as to why they would pay you for lost wages?

A. Well, maybe that is the procedure of their own job. I cannot dispute that.

Q. Box 9, please. Another Sunday, 4 February, which was indeed a date on which you were interviewed. The reason given 09:45:01 there is "monies provided to witness to enable clarification interview on 4 February 2007", that is the Sunday, another 20,000 for meals, transport and lost wages.

The next occasion on which you were interviewed was 8 February 2007, but there is no payment specific to that date in 09:45:31 this document. The next date where there is a payment is box 10, Wednesday 21 February 2007, "monies provided during interview with witness management unit/investigations on 21 to 22 February 2007". Now, I just want to ask you - I don't want to know the detail, certainly not at the moment at any rate. Did you have 09:46:13 interviews with the witness management unit/investigations on 21 and 22 February 2007, that is just over a year ago, that you can now remember?

A. Well, the people who were there, all I know is that they are Special Court workers who are there, who normally went to 09:46:53 call me. So I can't tell the difference between them to say this person is this and that other person is that, but all I know is that they were all Special Court people, so when they needed me they called me.

MR MUNYARD: Would your Honour bear with me for just a 09:47:10 moment:

Q. This is a document supplied to us by the Prosecution, you understand, not from court staff as such. Can you remember being interviewed on two consecutive days, one day after another, in late February last year by somebody in the Prosecution?

A. Well, I can't recall that now because it has taken a long time, but I know that those things have been happening.

Q. Right. We don't have any interviews for either of those dates, so if you were interviewed on those dates then that brings the total number of days on which you were interviewed to 28. Again, 40,000 for transport, lost wages and meals on 21 February. The next box is Monday, 26 February 2006 and it is described as follows, "reimbursement provided to witness during clarification by Witness Management Unit on same date", presumably meaning the date Monday, 26 February 2007. 20,000 for meals, lost wages and transportation then. We don't have any document relating to an interview on that date, but if you were interviewed on that date by the Prosecution then that would bring it to 29 separate dates.

09:48:12

09:48:59

The next time you were interviewed you were interviewed on 14 and then on 15 June 2007.

09:49:33

PRESIDING JUDGE: Just pause a moment, Mr Munyard. Did you ask - I didn't record or hear a reply when you put the 26 February interview to the witness.

MR MUNYARD: Yes, to be fair to the witness I think the only thing he could say is "yes" because I was simply putting the fact in evidence that this document demonstrates that there was an interview on that date, 26 February.

09:49:51

MR KOUMJIAN: Your Honour, I would say that is a matter of interpretation of grammar: Whether "on same date" refers to the reimbursement, or the clarification.

09:50:11

PRESIDING JUDGE: I think you have a question on record, Mr Munyard. In fairness to the witness he should be allowed to answer it.

MR MUNYARD: I completely agree. Shall I put it again?

PRESIDING JUDGE: I think it would be best. Put it again.

MR MUNYARD: I will put it again in a way I hope the witness is able to answer:

Q. Mr Mongor, if you have a look at box 11 the date is Monday, 26 February 2007. On that date you were given 20,000 leones for meals, lost wages and transport and the reason that is specified there is "reimbursements provided to witness during clarification by Witness Management Unit on same date". Now, do you have any memory now of being paid for - or being paid on that date during a clarification interview?

A. Well, the date that you are talking about I can't recall now because it has taken a long time, but I received money, but I can't recall the dates.

Q. Right, but do you agree that the document suggests that you were paid money for an interview on Monday, 26 February 2007?

MR KOUMJIAN: Your Honour, I would object because that is asking this witness to give an opinion as to the grammar of that sentence and what it means and I would say since clarification by WMU, WMU does not do the clarification. So clarification - "reimbursements provided to witness during clarification by WMU on same date", to me it is quite clear what the meaning of that is and I don't think it is proper to ask the witness to give his interpretation of the English.

MR MUNYARD: I am very happy for my learned friend to give what his interpretation is. I, of course, have nothing to do with the WMU of the Prosecution. He will know better than me.

MR KOUMJIAN: I would just point out that it is logical that WMU does not do clarifications. They to do do reimbursements, so if it says "reimbursement by WMU on this date"

that is what took place.

PRESIDING JUDGE: Thank you for that clarification, Mr Koumjian. Likewise I am not aware of the bureaucratic procedures, but clarification is now before us and it would appear that "on the same date" refers to --

MR MUNYARD: Can I have a try at this and Mr Koumjian will correct me if I have got it wrong:

Q. Mr Mongor, it appears that you were paid by the Witness Management Unit on the same date, i.e. Monday 26 February 2007, for your expenses during a clarification interview. Do you agree?

A. Yes, I agree that I received money, but I can't recall the date now, my Lord.

MR MUNYARD: All right, thank you. Can I invite the Prosecution to supply us with records of the interviews referred to in both boxes 10 and 11?

MR KOUMJIAN: Yes, thank you, your Honour. I want to make it absolutely clear that the Prosecution has provided the Defence with all interviews with this witness and if there is a record of a payment on a certain day we have checked all interviews have been provided to the Defence of this witness.

MR MUNYARD:

Q. Box 12, please. Mr Mongor, the next date on which you are paid anything is Thursday, 29 November 2007. It is for communication and it is 30,000 leones. Now, that is some nine months after the previous payment in February of 2007. In the meantime, we know that you were interviewed on 14 and then on 15 June 2007 and on 25 and then on 26 July 2007. So that is four separate dates between boxes 11 and 12. Do you have any

recollection of not being paid for four interviews in the middle of last year?

A. I can't recall now concerning the dates you are talking about.

09:56:02 Q. Box 12, 29 November 2007, you were interviewed on that date. Then if we go over the page to box 13, Wednesday 5 December 2007, again for communication another 30,000 leones. You had been interviewed the previous day on 4 December 2007. Do you now know what you were either given money for, or what given

09:56:38 something to the value of 30,000 leones for communication means?

A. Well, I can recall that the 30,000 that you are talking about was for me to buy a top-up card for my phone.

Q. Right. The next box, 14, Wednesday 5 December 2007, 120,000 leones for communication. Was that top-up cards, or was

09:57:18 that something else? Sorry, it is the same date, but it is a separate receipt.

A. I received that money they gave me.

Q. And what was it for?

A. Well, I had requested for communication business so they

09:57:55 gave it to me.

Q. Yes, but what do you mean by communication business? It is four times as much as the two previous payments of 30,000 which were top-up cards.

A. Yes.

09:58:15 Q. What was this one for?

A. Well, the 120,000 leones that you are talking about was given to me and I used some for communication business. That is also to buy some top-ups for my phone. Then the remaining, I used it for meals.

Q. So can you remember now how much you spent of it on communication, on top-ups?

A. Well, I can't recall everything now. To say that I can recall everything now and give you the exact amount that I used on communication I cannot recall it now, but I am sure that I was given money for me to buy top-up and put it into my phone most times.

Q. Can I just clarify something with you and I know you told us last week, but can you remember the date when you came to The Hague this year?

A. I came here in January.

Q. Right.

A. That was the time I came to The Hague.

Q. All right, thank you. Any idea now whether it was early January, late January? Can you be any more specific than that?

A. I can say it was in late January that I came here.

Q. All right. The next tab, please, number 18. I think the witness is still on the previous tab. Yes, thank you. Mr Mongor, this is a further sum of money that was expended in relation to you and your family by the Witness and Victim Service. That is a separate body of the Court, different from the Prosecution. You can see there, in paragraph numbered 2, "subsistence allowance", that you were brought under the protection of the Court on 10 March 2007, that is just about 13 months ago, and since then, to 26 February of this year, you have been paid a total as follows: A subsistence allowance of 7,852,000 leones. Now, I don't want to know details of any addresses, or anything like that, but did you move house at all on or around 10 March 2007? I am not talking about coming to The

Hague. I am talking about when you were still in Sierra Leone.
A. Yes, my Lord.
Q. Right. Was your rent paid for on or after that date, around 10 March of last year?
10:02:48 A. Well, it was the Court that paid. I did not pay myself.
Q. Thank you. As well as having your rent paid for, were you also provided with money for food for you and your family?
A. Yes, my Lord.
Q. So is this right: That the Court provided you with an
10:03:14 allowance? They paid money to you to pay for the food for yourself and your family since around 10 March last year?
A. Yes, my Lord.
Q. In addition to that, we see under the heading "Other Expenditure", medical 234,600 leones. Now, I don't want to know
10:03:46 the details of that, but were those medical expenses for you, or for your family, or for both you and your family?
A. It was for me and my family.
Q. Right. Childcare 660,000 leones. Again, I don't want to know any of the detail, but were you paying for childcare before
10:04:20 10 March 2007, or not?
A. Before coming to the Court, is that what you mean?
Q. No, this is all since 10 March 2007 that these payments appear to have been made and I am just trying to find out whether these were payments to you that constituted a benefit to you that
10:04:54 you hadn't had before. Now, if you want me to explain that in a different way I will, but do you follow? If you hadn't had to pay for childcare before March 2007, then receiving 660,000 leones for childcare after that date would be a benefit to you, wouldn't it?

A. No, my Lord.
Q. Is it no that you didn't have to pay for childcare before March 2007, or no it wasn't a benefit to you?
A. I was paying for childcare.
10:05:45 Q. Right. Before March 2007, before you moved?
A. Yes, my Lord.
Q. So after that date the Court paid for the childcare, is that right?
A. Yes, my Lord.
10:06:07 Q. So that was a sum that you no longer had to find out of your own pocket because the Court were now paying for it, is that right?
A. Yes, my Lord.
Q. Transportation 285,000 leones. Can you just give us, in
10:06:32 very broad terms, some understanding of what your transportation costs were after March of 2007? Where was it you were having - what travel were you having to do that the Court paid for? Again, I don't want to know addresses, or locations. I just want the know in general terms.
10:06:59 A. What? To say what?
Q. We see here a figure of 285,000 leones for transportation. Was this transportation cost something that you had to undertake because of your move, or what was it for?
A. Well, I think those were the monies given to me for
10:07:40 transportation. That is what I totalled up to that amount. That is what I want to believe.
Q. Right. What transportation was involved?
A. Yes, sometimes I went to the provinces. Sometimes I used taxi and the puda pudas that went to the provinces.

Q. Did you go to the provinces as part of your giving assistance to the Prosecution, or were you going to the provinces for your own personal reasons?

A. Well, I did not go to the provinces on behalf of the 10:08:44 Prosecution, but I went to the provinces to visit my other family members.

Q. Right, and the Court paid for that?

A. Yes, my Lord.

Q. So again that was something that you didn't have to pay for 10:09:02 out of your own pocket?

A. Yes, my Lord.

Q. And so that was a benefit to you?

A. Well, it was the Court that told me that if I was planning to visit anywhere, to go anywhere, I should inform them. So that 10:09:29 was the assistance that they used to give me.

Q. Right. Then finally we have got rent, maintenance and utility bills, 1,039 dollars, the equivalent to 3,117,000 leones. Now, you told us when I was asking you about the 7,852,000 leones up above that they paid your rent and they also paid you money 10:10:04 for food and so on, but the rent appears as a separate figure down here, the equivalent of just over 3 million leones. So does this follow: That the 7,852,000 up above must relate to food only?

A. Yes, my Lord.

Q. The grand total there is 14,337,000 leones. Do you see 10:10:45 that?

A. I have seen it there, my Lord.

Q. And out of that the medical expences, the childcare, some of the transportation and the food payments are all a benefit to

you, aren't they?

A. These were things that I used to do before. I did it myself. So if I was - so I was now under their auspices, then maybe that was the way their office operated, so I had no objection against it, my Lord.

10:11:37

Q. Well, I am not suggesting that you would object, Mr Mongor. The one thing I haven't asked you about is the heading, "Miscellaneous". Do you see that down there in that list just below "Transportation", 2,223,400 leones? Miscellaneous presumably means all sorts of other bits and pieces that don't fall in the categories we have looked at so far. Can you give us some idea of what you were given money for that didn't fall under the headings that we have looked at thus far?

10:12:01

A. Well, I lost my phone, my communication set, at one time and at that time even when they tried to contact me they couldn't get me and so I made them understand that I lost my phone, so they assisted me with a new phone at that time. So some of those things they did them.

10:12:41

Q. Right. A new phone wouldn't cost 2 million leones, would it? What else? Could you give us some other examples?

10:13:05

A. It wouldn't cost 2 million leones, but I think I have been requesting from them sometimes - in fact, I can recall when my father was sick, when he was admitted in the hospital I informed them and they gave me some money.

Q. Yes, they gave you some money for what?

10:13:36

A. Well, I asked them to assist me because my father was sick and it is because you are talking about other things that were expenditures that they did to me, that did not concern food and other things, and I have told you about the issue of the phone

and I have told you about the other assistance that they gave me, like the case of my father. When I asked them, they assisted me.

Q. Yes, but doesn't your father's visit to hospital come up the category of medical that we have already looked at? I asked you if it covered both yourself and your family and you said it did cover your family as well.

A. Yes.

Q. So that wouldn't come under miscellaneous, would it? Can you give us examples of anything else, apart from buying you a new telephone, that would come under the category of miscellaneous?

A. Well, there were so many things, but some of them I might have forgotten now. These were monies that they assisted me with. Actually I can't recall all of them now, but I believe that they gave me money. Even at the time my father was in Liberia and at that time he was sick, I recall that I informed them and even at that time when I was about to travel to go there, I informed them about that also. They helped me with money also. All of those things.

Q. Right. Well, that would come under transportation, wouldn't it?

A. Yes, it should come under transportation. I am not disagreeing with that fact.

Q. Not miscellaneous. Is there anything else you can think of that isn't covered in the categories above, apart from a mobile phone, that would account for the expenditure of some 2 million plus leones?

A. I might have forgotten, really.

Q. Can we go back, please, to tab 2.

the moment.

PRESIDING JUDGE: Mr Witness, did you say that SAJ Musa did not voice his opinion to you, or did not voice his opinion to "us"?

11:02:51 THE WITNESS: To us.

MR MUNYARD: All right. Right, Madam President, are we ready to move on from that one?

PRESIDING JUDGE: Please proceed.

MR MUNYARD: Thank you:

11:03:23 Q. Mr Mongor, I want you to think carefully about this question that I am going to ask you now. When you were first being interviewed by the Prosecution, was it your position that Charles - that you didn't really know anything about Charles Taylor's role, if any, in the invasion of Freetown on 6 January

11:03:50 1999?

A. Yes, if my memory serves me well maybe I said that.

Q. And is that right: That you didn't really know anything about Charles Taylor's role, if any, in the invasion of Freetown in January 1999?

11:04:29 A. Well, I did not know initially, but later I came to know.

Q. Well, I don't want to be unfair to you. When you say "later I came to know", what do you mean by that? When is later?

A. When communication started going on.

Q. Right. Let me make it perfectly plain, I am not talking to

11:05:00 you about the time that these things were happening, 1998 and 1999. I am talking about your discussions, your interviews, with the Prosecution that start at the end of August 2006. Now, when you were first being interviewed by the Prosecution in 2006, you couldn't really tell them anything about Charles Taylor's

involvement in the invasion of Freetown on 6 January 1999 because you didn't know anything about it, did you? Do you agree?

A. I want you to ask that question again. Let me understand it well.

11:06:00 Q. Right. You start to be interviewed at the end of August 2006 and you are then interviewed many times in 2006 and again many times in 2007. When the Prosecution first started to ask you questions about Charles Taylor's involvement, if any, in the invasion of Freetown on 6 January 1999, you told them you didn't

11:06:45 really know anything about whether or not he had any part in that, didn't you?

A. Yes, my Lord.

Q. And that was the truth, wasn't it?

A. That was what I said.

11:07:05 Q. What you first said to them, that you didn't know anything about Charles Taylor's involvement in the invasion of Freetown, was true, wasn't it? You didn't have any knowledge about Charles Taylor being involved in the plan to attack Freetown in January 1999, did you?

11:07:31 A. I told them that, my Lord.

Q. Thank you. There came a later stage later on when you started to tell them a story along the lines of the evidence that you had given to us in March, namely that Charles Taylor had told Sam Bockarie that you should attack all these other towns and

11:08:06 then move on to Freetown. That is right, isn't it?

A. Yes, my Lord.

Q. Why did you tell them that Charles Taylor had the plan to attack Freetown later on when earlier you had told the Prosecution that you really didn't know anything about his

involvement in the invasion of Freetown in January 1999?
A. Yes, I said that.
Q. No, why did you change your story - hang on - later on, when you were being interviewed later on, having originally said
11:08:53 that you don't know anything about Charles Taylor's involvement in the attack on Freetown in January 1999?
A. When they asked me whether I was saying the truth, what I was talking was the truth, and they said they wanted me to say the truth, I said, "Well, the plan was something that Mosquito
11:09:19 brought and he explained to us that it was he and the Pa who discussed that we should attack all the other areas and then advance on Freetown and capture there." That was the time I told them, "Okay, I will tell you the truth. This was what Mosquito explained to us when he returned."
11:09:47 Q. So why didn't you tell the Prosecutors that when they were first asking you about what, if anything, you knew of Charles Taylor's involvement in the attack on Freetown in January 1999.
A. Yes, I did not initially tell them, but later when they asked me they said to me that they wanted me to say the truth
11:10:19 about what I was explaining and then I also told them that, "I don't want to lie. Now I will tell you the truth." I said, "This plan came from Mr Taylor and it was when Sam Bockarie returned that he brought the whole plan that the attacks should go on", and that was the time I told them that.
11:10:43 Q. Right, so before you were ever interviewed by the Prosecution you knew all along that the plan to attack Freetown was Charles Taylor's idea, yes?
A. Yes, I knew.
Q. When they first start interviewing you were you telling

them lies?

A. I did not tell them at all.

Q. I am going to try again on that one. When they first asked you, "What can you tell us about Charles Taylor's involvement in the attack on Freetown in January 1999?", did you tell them the truth, or did you tell them lies?

11:11:21

A. I did not tell them the truth. At the start, at the first time, I did not tell them the truth, but later I came out plain to them.

11:11:50

Q. Would you like to explain to the learned judges why you claim that you lied to the Prosecution in the early stages of your interviews?

A. What did you say, sir?

Q. Would you like to explain to the learned judges sitting

11:12:08

there why you lied to the Prosecution in the early stages of your interviews?

A. Well I myself who is sitting here now I thought those things were strategies that the people used and, although they had told me that they had nothing to do with me, I think it was

11:12:41

something that they were doing to cajole me so that later they will be able to get me round and to arrest me for something. But later when they actually told me that I shouldn't hide anything away from them, I should tell them the truth, and then I later came out to plain to them and said, "Okay, I will tell you the

11:13:06

truth", and I said to them that, "Yes, this plan was a plan that came from Liberia and it was Mosquito that brought it that we should carry out the attack".

Q. Right, let us look at what you have just told us:

"I thought those things were strategies that the people

used and, although they had told me that they had nothing to do with me, I think it was something they were doing to cajole me so that later they will be able to get me round and to arrest me for something".

11:13:46 On 12 September of 2006 you had been given a letter granting you immunity from prosecution, hadn't you?

A. They told me that.

Q. You have told us this morning that you knew before you ever started being interviewed by them that they were going to give

11:14:09 you this letter. Did you think that the letter might not be worth the paper that it was written on? Is that what you are saying?

A. Well it worth it, but I am a human being. I needed to think. Sometimes somebody will write something on a piece of

11:14:40 paper and then I will read it and sometimes what is said in the paper then I will just look at it that way, but equally so I am a human being. I had my own way to feel about it.

Q. So, you were still worried? Despite having had the promise of immunity, you were still worried that they might actually

11:15:10 charge you with an offence and you would end up being on trial in front of this Court. Is that right?

A. At times I had the feelings in mind and sometimes I thought over them, but sometimes again I will sit down and say, "What actually did I do? I did not do anything", but as a human being

11:15:38 you will be sure - you will not be cock sure, so sometimes I sat down and said, "Maybe these things will happen, or maybe they will not happen", and sometimes I had a free mind and sometimes I had it in mind I thought that it was going to end up this way.

Q. So, have I understood you correctly? Throughout 2006 are

you saying that you were still worried that they might prosecute you even though you were co-operating with them?

A. Yes, I was co-operating with them. Yes, I had really accepted to talk to them and they also had assured me that they were not going to do anything to me, but at the same time I had a shaky heart.

Q. Right, and because of your shaky heart you decided you wouldn't tell them the truth about some things. Is that right?

A. Well it was when I started, but later when they actually assured me I said, "Okay", this thing - I decided to give in and I decided to tell the truth. So whether anything was going to happen to me now let it just happen, whether they were going to kill me let them kill me, but I said, "Okay, I will say the truth", but as long as I wanted peace for myself and I also wanted peace for them I decided to give in to say the truth to them.

Q. So, in how many interviews did you tell them lies?

A. Well I don't think I can recall that it was so and so interview, but based on this particular interview that we are talking about I decided to give in myself and say the truth. And as long as I wanted peace I decided to say the truth and if anything was going to happen after that let it happen, but I said I will say the truth to them.

Q. Let me see if I have understood, Mr Mongor. You were worried that they would still prosecute you and so you decided that you would give them more information that they wanted to hear in order that they would not prosecute you. Is that what you are saying?

A. No, my Lord, not what they wanted to hear that I told them

only to satisfy them, but I am saying that I gave in myself so that I will say the truth for the sake of peace. This was the reason why I was willing to say the truth for to them, but I am not saying that this was any reason just for me to say something
11:19:06 that will satisfy them. I was not trying to satisfy them at all.
Q. Did you feel at any stage during the whole interview process that you were being pressed by them?
A. What is the pressed, my Lord?
Q. You understood it last week because you said when I used
11:19:33 the same term, "No, I wasn't being pressed by them". Have another go at that question, please, and try and give me an honest answer. Did you feel that you were being pressed by the Prosecution to give them information at any stage during the interview process?
11:20:03 A. Well, when you talk about press I take it that it is just like when you press somebody to say something that you want to satisfy you. That was not the case actually. It was not the case that I was being pressed just to say, okay, say this, or say this or say that. That was not what they were doing to me.
11:20:33 Q. Are you sure about that?
A. But at times they asked me question and later they will ask me the same question. Like, for instance, if they asked me a question today and when I went some other time when I came back they will ask me that same question. Something like that.
11:20:53 Q. Yes. In fact, you do know what pressed means because last week you asked me to stop pressing you. Do you remember that? Do you recall?
A. Yes, I recall when I told you not to press me. It was when you were asking me over and over, over and over.

Q. Right. Was there ever a time when the Prosecution made it clear to you that they really wanted more information out of you than you were currently giving them and that there must be more information you could give them?

11:21:42 A. They wanted more information from me based on the roles that I played and the things that I knew about for me to come out plain and explain to them.

Q. Mr Mongor, just tell the learned judges, would you, some of the lies that you told in the first interviews? Give them some

11:22:07 example of things you told the Prosecution that were lies.

A. Well I can't recall now, except this topic that we are discussing on now concerning the J6 that we were discussing, I told you that initially I did not tell them with regards Mr Taylor's plans. But when they later told me that, "We

11:22:50 actually want you to tell this Court the truth", and then I also accepted that I will be willing to say the truth, then I decided to come out plain, but if you think there is any other that you have recognised or that you have realised that I did that I had not said initially that I have not been able to say now, you come

11:23:11 up with it and then I will answer before this Court plainly that, yes, that is it.

Q. Well, I am not going to rise to the challenge. You just tell us - tell the Court - how it was to your advantage not to tell them the truth about Charles Taylor's involvement in the

11:23:41 attack on Freetown on January 6th 1999?

A. Well I don't know about any advantage that you are talking at, my Lord.

Q. You have told the Court this morning a series of questions - sorry, a series of answers and I am just going to go through

I N D E X

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Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 4 APRIL 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Mr Mohamed A Bangura Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah Ms Elizabeth Duby

A. Yes, I have it.

Q. It is headed "Additional information provided by witness TF1-532", that's you. "The witness gave the following additional information in the course of proofing interviews on 16 and 20 February in The Hague." Then it also says, "This material has not been reviewed with the witness or read back to him."

I am now going to review at least one passage of it and read it back to you to see if you agree that this is an accurate note of what you told the Prosecutors just a few weeks ago here in The Hague. I would like you to go to the third paragraph from the bottom where there is a sentence that starts, "In discussing the Magburaka plane shipment." Would you let us know when you have got that?

A. I have seen it, my Lord.

Q. Let's read it and see what you say about this:

"In discussing the Magburaka plane shipment the witness said that the shipment received included two single barrel AA guns with ammunition."

Is that right? Have they recorded that correctly?

A. It is correct.

Q. "And GMG ammunition." Did you tell them that?

A. I told them.

Q. General machine gun, I think. "But did not include any AK-47 ammunition." Did you tell them that?

A. I told them.

Q. "Which limited the military benefit of the shipment." Did you tell them that? Did you tell them that by not including any ammunition for your AK-47s that rather limited the value of what you'd received in the Magburaka airdrop?

A. Yes, I told them.
Q. "He understood the shipment was from Libya." Did you tell them that?
A. I told them that.
10:18:48 Q. So why was it, Mr Mongor, that not five minutes ago you told this Court that you didn't know about any arms from Libya?
A. Yes, the reason why I said so, it was because you were talking about the RUF and this particular shipment was not for the RUF. It was Johnny Paul through whom this particular
10:19:23 shipment came. So that was why I said when you are talking about the RUF arms deal and money issues with Libya, I told you I don't know about that.
Q. I asked you at page 19, on my screen line 12, "Do you know anything at all about arms from Libya?" Answer, line 13,
10:19:55 "I don't know about arms from Libya."

MR KOUMJIAN: Your Honour, to be fair to the witness the context - I believe we should begin reading from line 6. Line 6 on my screen. I have font 14. It begins with, "You know perfectly well."

10:20:15 MR MUNYARD: Yes, that's line 7 on mine, but there you are.

"Q. You know perfectly well that the RUF and in particular Foday Sankoh was in contact with Libya seeking either arms or money for arms during the mid-1990s, don't you?
A. I don't know whether he had direct contact with Libya
10:20:35 for arms and ammunition.
Q. Do you know anything at all about arms from Libya?
A. I don't know about arms from Libya."

That is in the context of the RUF seeking arms from Libya in the mid-1990s. I hope I have properly put it into context

Q. So you told them there, did you, that the Magburaka arms came from Liberia?

A. Yes, it came from Liberia because it passed through there before it arrived. That was why I said that.

10:30:53 Q. But you told us just a moment ago that those arms came from Libya?

A. Yes, even if you read that particular page that we have just come from the sentence from there will tell you that the shipment came from Libya, but it was through the help of

10:31:22 Mr Taylor in Liberia before it entered Sierra Leone. If you go back to that page you will see it there.

Q. Right, let us just do that. You want us to go back to the previous page that we were looking at a moment ago?

A. Yes, where we talked about the Magburaka shipment.

10:32:24 Q. Page 100209. Yes, you are quite right. You say it was arranged with the help of Mr Taylor and came through Liberia, yes? So you have now got it coming from Libya but through Liberia, yes?

A. Yes, it came to Liberia through the help of Mr Taylor

10:33:09 before it came to Sierra Leone.

Q. Right. I would like you to look, please, at page 39007, which is in the tab we were looking at a moment ago from July 2007, tab 12. Now can you confirm that you have got that, please? Have you got that page?

10:34:33 A. Yes, I have seen it, my Lord.

Q. That page has numbered paragraphs on it. I would like you to look, please, at paragraph 76, the second paragraph from the bottom. Do you see there?

A. Yes, my Lord.

Q. Paragraph 76:

"Witness was present in Magburaka before the intervention when a plane dropped boxes of arms/ammos at an improvised Airport. The plane dipped down a short distance from the ground and dropped the boxes."

10:35:17

Pausing there for a moment, was it before the intervention, or was it after the intervention? You told us this morning that it was after the intervention?

MR KOUMJIAN: Objection, that misstates the evidence. The witness said he referred to Johnny Paul Koroma as Head of State even after the intervention. He never made that remark about the shipment.

10:35:30

MR MUNYARD: The Court knows what the evidence was.

PRESIDING JUDGE: Yes, I recall that remark being made.

MR MUNYARD: Oh, that remark was made, but he gave the date as 1998 which is why that led to that remark, because I then said, "Well, if it is 1998 and Johnny Paul is Head of State, does it mean January before they were pushed out, or are you referring to him as Head of State after they were pushed out?" Answer: "Yes, I still called him Head of State after they had been pushed out." That is how we got onto the discussion of Johnny Paul being referred to as the Head of State, because he had been specific about the year in which this arms drop took place. 1998 is the year he gave for the arms drop in his evidence to the Court this morning.

10:35:40

10:35:58

10:36:24

PRESIDING JUDGE: I am getting lost. Mr Munyard, put your question again, please.

MR MUNYARD:

Q. This morning you told the Court that the air drop at

Magburaka was in 1998. Do you remember telling them that?

A. Yes, I recall that I said that.

Q. Thank you. In this paragraph here you say it was before the intervention, so are you saying that it was during the very 10:37:04 first few weeks of 1998? Is that what you are saying? Because we know the intervention comes around January/February of 1998. I will be corrected if I am being imprecise there.

PRESIDING JUDGE: I think it was February.

MR MUNYARD: Yes.

10:37:22 MR KOUMJIAN: It is a stipulated fact. February 14, I believe.

MR MUNYARD: Fine. Valentines Day, yes:

Q. Was it in the first six weeks then of 1998 that the Magburaka air drop occurred?

10:37:43 A. Well, I have said that the shipment came in 1998 and after that it was not a long time after that that we were pushed out of Freetown.

Q. Paragraph 77, please:

"The witness was part of the team that received the 10:38:15 arms/ammos. The team was led by [Colonel] SO Williams."

Did you tell them that, those two facts?

A. I talked about SO Williams. I also talked about Fonti Kanu.

Q. Right. All I am concerned at the moment to ask is did you 10:38:51 tell them the two things that are in that paragraph: first of all that you were part of the team that received the arms and, secondly, that the team was led by Colonel Williams? You have answered the second part. Have they recorded it accurately? That is all I am interested in knowing.

A. Yes, I told them that I went there. I was part of the team that went there; that went to the airfield.

Q. Over the page, please, paragraph 78:

"Witness did not know where the plane came from but knew the RUF/AFRC were expecting materials from Burkina Faso."

Did you tell them that?

A. I did not talk about Burkina Faso.

Q. Are you quite sure about that?

A. I am sure.

10:39:59 Q. All right, so the investigator and/or the lawyer who were interviewing you on that date have got that wrong, have they?

A. How can I talk about Libya and the next moment I move from that and talk about Burkina Faso? I talked about Libya.

Q. This is the second part of that interview. If we go back 10:40:34 to it - I am not asking you to go back to it, but if anyone wants to check the date it is on page 39004 and it is 10.30 am on 26 July 2007. Paragraphs 49 onwards are on 26 July. So you told them Libya and they managed to write down not just a mistake like Liberia instead of Libya, but a country that doesn't even sound 10:41:07 like Libya. Is that what you are telling the Court, Mr Mongor?

A. I would not talk about Libya and then later I come and talk about Burkina Faso again. I want to believe even the person who was interviewing me should have asked a question that will have enhanced correction to be made, because I told them that the 10:41:50 plane came from Libya and then passed through Liberia to Magburaka. So, I will not go the next moment and say the plane came from Burkina Faso. You know, we are all human beings. Think if I will say something like that to you and you make sense out of it.

Q. And so this is one of the interviews that you have told us was read back to you. This is one of the interviews that took place in Freetown and was read back to you so that you could correct any errors that the interviewers had made in the course 10:42:42 of writing down what you say. Now, Mr Mongor, I specifically asked about this interview this morning before I started asking you questions. There are no handwritten notes of this interview. On the face of it, therefore, it appears that this must have been typed directly into a computer. I say on the face of it, 10:43:07 I simply don't know, but that is what appears to be the case with this interview.

A. Yes, maybe that is what you will say. I will not deny the fact of what you are saying.

Q. That wasn't my question. I was just stating the fact that 10:43:28 this appears to be an interview that was typed at the time. Now do you remember who was interviewing you on 25 and 26 July last year, the middle of last year?

A. I can't recall.

Q. All right. We will come back to that in due course. When 10:43:59 you were interviewed on earlier occasions we know that you remember the interviewer writing things down on pieces of paper. Can you remember any interviewers at any stage typing the interview into a computer as it was happening?

A. Well, I can't recall that now, whether it happened that 10:44:29 way, because I will not be able to remember everything now.

Q. But you are quite clear, aren't you, that at the end of each interview they read back to you what they had recorded so that you could correct any mistakes they had made?

A. I can't remember that now.

Q. I am just asking you generally, a general question, do you understand, that the process of interviewing involved somebody asking you questions, those questions being either written down or typed into a computer and then your answers, the information
10:45:19 that you had given them, being read back to you so that you could correct it. That's what happened in the course of the very many interviews in Freetown, isn't it?

A. When you talk about computer this and that, or whether they wrote - they typed it directly into a computer and later read it
10:45:50 back to me, I can't recall that, but I will tell you that yes, if they wrote any interviews they will read it back to me.

Q. And when you say wrote it doesn't matter whether they were writing in handwriting or typing into a computer, everything that you said was written down, recorded in some way, and then read
10:46:15 back to you, is that right?

A. Well, I can't recall that somebody interviewed me and typed it into a computer and read it back to me. I can't recall. But I am sure that the interviews that were written by the investigators were read back to me.

10:46:48 Q. Thank you. Now let's go back to Burkina Faso. When the interview took place in July of last year was it read back to you?

A. I can't recall that now, but I have told you that I believe and I assume that all the documents that were prepared by the
10:47:24 investigators were read back to me, my Lord.

Q. Right. And indeed later on, particularly at the end of 2007 and again in 2008, you had quite lengthy interviews, didn't you, in which your earlier interview notes were gone through with you and you were asked to clarify, or expand on those earlier

interviews, weren't you? I can show you if you wish to jog your memory, but it's there. Indeed we have looked at some of these where it says clarification of such and such an earlier interview.

10:48:17 A. I am not denying that.

Q. When this interview was read back to you why didn't you put your hand up and say, "What on earth are you saying? I never mentioned Burkina Faso"?

A. I will not say that I had never spoken about Burkina Faso 10:48:46 because in a topic generally the issue of Burkina Faso must come inside, but on this particular topic I was unable to remember to call the attention of the investigator at that particular time.

Q. Right. Well, let's just look at that. So you remember the investigator reading back to you the words "Burkina Faso", do 10:49:29 you, and for some reason you weren't able to call the attention of the investigator at that particular time? Is that what you're telling us?

A. Well, I can't say it was for some reason, because if I say it was for some reason it means I had certain things in mind and 10:50:01 maybe that was the reason why I did not tell him at that time to correct it, but sometimes maybe it is possible that it was a mistake and that I should have told the investigator, but I did not actually ask any further questions for corrections to be made at that moment.

10:50:27 Q. How do you remember?

A. What do you mean, my Lord?

Q. We're talking about the 16th time on which you were interviewed by the Office of the Prosecutor. How do you remember what went on in the course of interview number 16 when you can't

even remember who it was who was interviewing you on that occasion?

A. Well, I can't understand the way you are talking - you are saying it, about what I did not remember, but I have so many other things in mind that I cannot tell you specifically the things that I would recall, or maybe my memory did not serve me well at that time to go back to this mistake and correct it.

Q. I think I might have made a mistake as well. I think I have double counted the 14 and 15 June and both the 25 and 26 July interviews so we are probably on interview number 18 at this stage. Mr Mongor, are you saying that you have a recollection of the interviewer reading out to you "Burkina Faso" but for some reason you didn't correct him or her?

A. I did not talk about and I am unable to say it was for some reason. I am saying maybe the idea did not occur to me, or maybe my mind did not run there early.

Q. Well, your mind ran very fast to it when I put it to you just now, didn't it? You said, "How could I have said Burkina Faso when I have been telling you they came from Libya?"

A. Yes, because I was confused just now in that area.

Q. Paragraph 79, please. Sorry, before we finish paragraph 78 I should read the second sentence. Back to paragraph 78, please, Mr Mongor, "He thinks Ibrahim Bah was involved in arranging the plane to bring the arms/ammo." Did you tell them that?

A. Yes, I told them that.

Q. This is the arms and ammo from Burkina Faso. Do you understand what this sentence is actually referring to?

PRESIDING JUDGE: Mr Munyard, I find that somewhat confusing. You have put to him that the arms were from Libya.

He said they were from Libya via Liberia. Are you now putting to him they were actually from Burkina Faso?

MR MUNYARD: Your Honour, I hope I haven't put any destination - sorry, not destination, provenance to him. I am simply putting what he has been saying. I'm not claiming that any arms ever came from anywhere.

PRESIDING JUDGE: I understand that, but the series of questions is whether the word "Burkina Faso" or the word "Libya" was used.

10:54:21 MR MUNYARD: All right. I will try and tie it up now. We will just do paragraph 78 and then we will do 79 and then we will move on:

Q. I am going to read paragraph 78 again to you:

"Witness did not know where the plane came from but knew 10:54:42 the RUF/AFRC were expecting materials from Burkina Faso. He thinks Ibrahim Bah was involved in arranging the plane to bring the arms/ammo."

Were you telling the interviewers that Ibrahim Bah was arranging a plane to bring arms and ammo from Burkina Faso, or 10:55:07 from Libya?

A. Ibrahim Bah, he did arrangements on both sides.

Q. Well, that may well be, I don't know, but would you now please go back to the question I asked you and deal with that?

A. Yes, I spoke about Burkina - Libya that he made the 10:55:47 arrangements at the time he came to Freetown, Ibrahim Bah.

Q. I don't want to take an unfair point against you. You have just used both countries there. Which one are you intending to convey to the Court Ibrahim Bah had arranged for the arms/ammo to come from?

A. The arrangement he made for the ammos to come, the first one was from Libya when they brought the AAs at that time.
Q. We are talking about the Magburaka air shipment in this section. No, hang on --
10:56:44 A. Yes, yes, it is --
Q. Are you talking about the Magburaka air shipment?
A. Isn't that what you are talking about, my Lord?
Q. Yes, that's what we're discussing, the Magburaka air shipment.
10:57:06 A. The Magburaka air shipment was from Libya and the aircraft left and it passed through Liberia. Through the help of Mr Taylor it came to Magburaka and it was Ibrahim Bah that came to JPK and they made the arrangement before he left.
Q. Were you there when this happened?
10:57:48 A. Well, I went with Ibrahim Bah because we were the ones who took Ibrahim Bah to JPK's house and after we had all spoken together they later had a closed door meeting and then after that JPK told us what the arrangements were that they have made for us to get something for supplies to come.
10:58:23 Q. So the answer to my question is, "No, I wasn't there when JPK and Ibrahim Bah made this arrangements because that was in a closed door session", is that right?
MR KOUMJIAN: That was not the question that was asked. The question was, "Were you there?", which is rather - could be
10:58:44 interpreted in a number of ways: in the country, in the city, in the location.
PRESIDING JUDGE: We really don't know what they spoke about together whilst the witness was present. That is unclear as well.

MR MUNYARD: All right:

Q. Were you there when JPK and Ibrahim Bah made this arrangement to bring in arms from Libya?

A. At the time they were in the room talking I was not there, but I was within Johnny Paul's compound.

Q. Right. Would you turn, please - well, that is just - it may just be me, but - no, it is all right. We have established this is from Libya. Turn to paragraph 79 then, please, over the - sorry, it is on the same page, 39008. Do you see that?

A. Yes, I have seen 79.

Q. "Before the arrival of the plane the RUF had arrangements for arms to be shipped in from Burkina Faso but when they joined the AFRC, the contract was renewed by JPK."

Did you tell them that?

A. Yes, I told them that.

Q. Which contract was renewed by JPK?

A. He renewed the contract by talking to Ibrahim Bah so that he will be able to bring arms and ammunition for the movement at that time.

Q. "Before the arrival of the plane ...", this is the plane at Magburaka, yes?

A. It was before we received the first supply that came.

Q. "Before the arrival of the plane ...", are you referring to the plane at Magburaka?

A. Yes, the plane that came to Magburaka.

Q. "... the RUF had arrangement for arms to be shipped in from Burkina Faso but when they joined the AFRC, the contract was renewed by JPK."

Now, you have told us that he renewed the contract by

talking to Ibrahim Bah?

A. Yes.

Q. So this is the contract - this is the arms that were brought in by that plane at Magburaka, is it?

11:02:16 A. No, that was not it.

Q. This is another contract, is it?

A. Yes, after he had spoken to the man and the man agreed to carry on, but it did not happen until we were pushed out. He did not bring any consignment any longer until the time we were

11:02:50 pushed out.

Q. And after you were pushed out, did he bring a consignment from Burkina Faso?

A. Well the time we were pushed out of Freetown I did not hear about, or I did not know about, any further ammunition that was

11:03:19 brought from Burkina Faso, although we had some ammunition that came behind rebel lines, but I did not understand whether it came from Burkina Faso.

Q. Mr Mongor, you have just said:

"Yes, after he had spoken to the man and the man agreed to

11:03:40 carry on, but it did not happen until we were pushed out. He did not bring any consignment any longer until the time we were pushed out."

So after you were pushed out, did he bring a consignment?

A. No, he did not bring any consignment that I am aware of

11:04:16 with regards the contract that JPK that had given - that JPK had given to the man that he agreed to, or whether he later brought arms for that reason. I don't know about that.

Q. And we are talking here about a contract between JPK and Ibrahim Bah for arms to be shipped in from Burkina Faso, yes?

A. Yes, my Lord.
Q. You were telling the interviewers in July 2007 that the Magburaka air drop came from Burkina Faso because Ibrahim Bah, who had previously arranged a contract with the RUF, now arranged
11:05:05 it with Johnny Paul Koroma and that is where these arms came from, weren't you, Burkina Faso, the Magburaka air drop?
A. No, my Lord, that was not where it came from.
Q. I am going to ask you just one last time. Are you aware of any arms and ammunition - arms or ammunition coming from Burkina
11:05:42 Faso after you were pushed out?
A. Well, when we were pushed out I can't recall now whether any arms or ammunition came from Burkina Faso for us. I can't recall that, my Lord.
Q. Well, just try please. Try a bit harder. Was there any
11:06:14 time after you were pushed out when you were aware that any members of the RUF and/or the AFRC obtained arms as a result of contacts in Burkina Faso?
A. Well I can't recall it now, because I don't think I have it in mind now that arms and ammunition came from Burkina Faso that
11:06:59 I recall, my Lord.
Q. Do you remember when you first started giving evidence telling these judges about an occasion when you heard that Sam Bockarie and SYB Rogers had been to Burkina Faso and they showed you photographs of the hotel that they had been in?
11:07:24 A. Yes, my Lord, I said that.
Q. Does that help to jog your memory about the question of arms coming from Burkina Faso?
A. I said that, but I don't think and I can't recall whether I did say that arms and ammunition came from that place that came

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-532 6627

CROSS-EXAMINATION BY MR MUNYARD 6627

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 31 MARCH 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Andrew Cayley

you want me to go over that. I did say that it was something like a container, like a jar, where normally it is something like - it was a jar in which the diamonds were and normally when they brought them he will call the commanders all to come to be present so he will show them to the commanders so after seeing them before he kept it.

Q. Okay, thank you. You have reminded me that you did discuss that previously. Mr Witness, who were the mining commanders for the RUF?

11:15:28 A. Well, the commander who was there on behalf of the RUF was Kennedy. Kennedy and Alpha were there. They were in charge of the mining. I think I have said this before.

Q. Thank you. Now, you have mentioned seeing Johnny Paul Koroma with diamonds. Did you ever see any RUF commanders with

11:16:01 diamonds?

A. Yes, RUF commanders had diamonds. Like Mosquito had diamonds.

Q. Can you tell us when you saw Mosquito with diamonds?

A. The mining which was taking place in Tongo Field, the

11:16:34 diamonds that came out as proceeds from there were handed over to Mosquito. I think I have said before that there was a point in time when I also left Freetown, I went to Tongo Field and I met with Mosquito in Tongo Field at that time and in fact he left me there when he came back to Kenema Town. I think I have said that

11:17:02 before.

Q. Did Sam Bockarie ever tell you what he did with the diamonds that he obtained?

A. Yes, he told me that the diamonds that he had been receiving were always taken to Monrovia to Mr Taylor in exchange

of ammunitions. In fact it was the issue of the diamonds that brought a problem between Mosquito and Foday Sankoh and, if you can recall, I had said that when Foday Sankoh came from Lome to Monrovia Mr Taylor showed him some diamonds that were taken to him by Mosquito, but he did not take them from him.

11:17:50

And according to Foday Sankoh he said that Mr Taylor showed him the diamonds that Bockarie had been taking to him in exchange of ammunition, so Foday Sankoh went angry and on his return he blamed some of us who were the commanders, especially me. He blamed me, saying that the diamonds that we have been getting we have not given any up-to-date report to him with regards all the diamonds that we have been getting - that we have been gathering. We have all taken the diamonds and taken them and handed them over in Liberia and so he was angry with us, but I tried to clear my own area because I told him that I never went to Liberia so I had no hands in it. And then he said, "Well, when I am saying that you have been taking diamonds over to Liberia I am not accusing you specifically, but I am accusing all of you because it is your commander who took those diamonds to Charles Taylor in Liberia".

11:18:25

11:18:51

11:19:18

Q. Thank you. I want to move on to a different topic for a short period of time and that is the military discipline system, if any, in the RUF. Mr Witness, did the RUF have any kind of internal discipline system?

A. Yes, they had it.

11:19:43

Q. Can you describe the system?

A. Yes, well we had the MPs who were in charge of discipline. They were there to ensure that any soldier who intended to move from one point to the other should have a pass. If you didn't

I N D E X

WITNESSES FOR THE PROSECUTION:

TFI-532 6160

EXAMINATION-IN-CHIEF BY MR KOUMJIAN 6161

CROSS-EXAMINATION BY MR MUNYARD 6229

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 11 MARCH 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Nicholas Koumjian Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

A. The first meeting took place at Hill Station where Sam Bockarie was residing. That is his house. That was where the first meeting took place and the meeting took place amongst us the RUF authorities and Ibrahim Bah.

09:34:34 MR KOUMJIAN: Unless I misheard, I believe the witness said Hill Station:

Q. Is that correct, Mr Witness?

PRESIDING JUDGE: I heard Hill Station.

THE WITNESS: Yes, Hill Station.

09:34:45 MR KOUMJIAN: H-I-L-L, capitalised:

Q. Sir, you said it was Sam Bockarie's house. Was Sam Bockarie present?

A. No, Sam Bockarie was not present, but it was in that house that Sam Bockarie resided at the time we went to Freetown.

09:35:10 Q. At the time you had this meeting, to your knowledge was Sam Bockarie in Freetown?

A. He was not in Freetown. He was in Kenema.

Q. Who was present at this first meeting at Bockarie's house with Bah?

09:35:29 A. Issa Sesay was there, Morris Kallon, CO Nya, who is also called Foday K Lansana, Gibril Massaquoi and then they sent for me, I was also present, and some other people.

Q. Thank you, Mr Witness. What happened at the meeting?

A. During that meeting Mr Bah came to talk to us, the RUF, for

09:36:38 us to join hands with the AFRC people whom had called on us for us to work together with them. He said it was that message that he brought from Mr Taylor for us.

Q. What was the reaction, if any, from the RUF members present?

A. Well, we did not do anything because we knew Ibrahim Bah. He had been with us before and we knew him to be a liaison officer who had been with the RUF, so when we saw him, and when he brought the message, we were happy and we received the message according to how he brought it.

09:37:56

Q. Mr Witness, this message from Mr Taylor that you should work - the RUF should work with the AFRC, did the members of the RUF discuss that, or was there any reaction given to General Bah about whether they accepted that?

09:38:20

A. Well, we accepted it because it was not that we went to have another meeting because of the message that he brought. We accepted it. We accepted that the message he brought, we received it and then we took him, the Bah - we took him, the Bah, to JPK's place, that is Johnny Paul Koroma, so that he will also get to know the message that Ibrahim Bah brought.

09:38:51

Q. Where was Johnny Paul Koroma's place that you took Mr Bah to?

A. Johnny Paul Koroma's house was at Spur Road.

Q. When you got to Johnny Paul Koroma's house who was present there?

09:39:15

A. Johnny Paul Koroma, he sent to call the other officers. Those were the SLA officers. They called SO Williams, they called Gullit, Bazzy. They called on all the other authorities who belonged to the AFRC and they were also present there.

Q. What was said at this meeting at JPK's house?

09:39:57

A. JPK and all of us who were there together with Ibrahim Bah, we went to introduce the man to him to tell him that, "This man was the man who has been with us and that it is the Pa who sent him for him to come and talk to all of us." When I say the Pa,

that is Mr Taylor. "So, he brought a message that we should all work hand in hand and that is the reason why Mr Taylor sent him here. So, we brought him so that you will also see him and then he will explain to you the reason why he was sent."

09:41:12 Q. When Mr Bah delivered this message, what was the reaction of those present?

A. Well, everybody was happy for the message. We all accepted it and we all agreed with him.

Q. Did Johnny Paul Koroma say anything?

09:41:43 A. Johnny Paul Koroma himself received the message and he was happy too for the reason being that for the message for which Mr Taylor had sent the man.

Q. You say that the reaction was that those present were happy. Can you explain why they were happy?

09:42:19 A. Well, they were happy because we also needed help and the reason why they also accepted it was because that man will be able to help us to get ammunition because we were fighting and the AFRC also never had enough ammunition that they would use to continue the war.

09:42:54 Q. Was this something that was stated at the meeting: That there was a need for ammunition?

A. Yes, we discussed that one. In fact, that was our main topic that we had in mind.

Q. How long, to your knowledge, did Ibrahim Bah stay in

09:43:25 Freetown on that occasion?

A. Well, after that day, the next morning I didn't see him again. He went.

Q. At the meeting when Bah delivered this message from Taylor, was there any response given to Bah to take back?

took place in February 1998. Prior to the intervention was there fighting in Freetown with ECOMOG and these other opponents that you mentioned?

A. We were fighting against the students. We would attack the ECOMOG at Jui. That was where they were. That was where we were attacking them. They were also based at Lungi from where they were shelling into Freetown. They were bombing Freetown. It was at Jui that ECOMOG had their base, so that was where we used to launch attacks on them. They moved from that position and advanced.

MR KOUMJIAN: Jui, your Honours, is J-U-I. Thank you:

Q. Now, Mr Witness, I want to go to February 1998, the intervention. Can you tell us what happened to you at that time?

A. Well, at that time when we were fighting against the ECOMOG, at that time we were running short of ammunition. The guns, that is the AKs, which most of the fighters had had, there were no ammunitions for them, so we started running away. We pulled out through the peninsula to go to Tombo. That was where we went. We crossed using the fishing boats that the people had there and went to Four Mile, up to Masiaka. That was what we did.

Q. Thank you. Masiaka is spelt correctly. I am sorry to go back, but, Mr Witness, you mentioned the lack of AK rounds and I want to go back for a moment to the Magburaka shipment you told us about. You said that there were two AA guns. What happened to those two guns?

A. Well, one of the guns was with the AFRC people, which they had mounted at JPK's house for the Alpha Jet. One was given to the RUF fighters, which was with Mike Lamin, but he had taken it

rainy season.

Q. After the failure of the Fiti Fata mission to take Koidu Town, were there any subsequent operations?

A. Yes, we had another operation called Operation Spare No Soul.

11:25:25

Q. How did you hear about this operation?

A. I heard about the operation when Morris Kallon left Buedu and came for us to undertake this mission. The mission was for one of the towns in the Kono District.

11:25:53

Q. Which town was the target of the mission?

A. It was Njaima Nimikoro where we were to carry out the mission.

MR KOUMJIAN: Your Honours, the spelling for Njaima Nimikoro. I see Nimikoro is spelt correctly in the transcript,

11:26:24

but Njaima, N-J-A-I-M-A, Njaiama Nimikoro:

Q. Did this mission have a name?

A. Yes, I said it was Operation Spare No Soul.

Q. Who was the commander for this mission?

A. It was Morris Kallon.

11:26:55

Q. Do you know if this mission was successful in taking Njaima Nimikoro?

A. We did not succeed in taking the entire Njaiama Nimikoro. I too, talking here, did not go on that mission, but I sent some of my men who went with a group on that Njaiama Nimikoro mission.

11:27:30

Q. You indicated, Mr Witness, that it had the name Spare No Soul. Where did you hear this name? From which person, or persons did you hear the name?

A. The Spare No Soul name came from Buedu. When Morris Kallon came they went over the air and said it. It was Eldred Collins

who went over the air and said it over the BBC.
Q. Did you hear Eldred Collins on the BBC?
A. Yes, I heard him.
Q. What do you recall Eldred Collins saying about this
11:28:24 mission?
A. He said the mission which the RUF and the AFRC are going to run was Operation Spare No Soul.
PRESIDING JUDGE: Mr Koumjian, I am just watching the time. I think we are up to our limit now on the tape, if this is a
11:28:54 convenient moment?
MR KOUMJIAN: Yes.
PRESIDING JUDGE: Thank you. Mr Witness, we are now going to take the mid-morning break. We will adjourn for 30 minutes and we will come back at 12.00. Please adjourn court.
11:29:11 [Break taken at 11.30 a.m.]
[Upon resuming at 12.00 p.m.]
PRESIDING JUDGE: Mr Koumjian, please proceed.
MR KOUMJIAN: Thank you. Your Honours, it would be convenient now for me to have the witness be shown P-51.
11:59:41 PRESIDING JUDGE: [Microphone not activated]. P-51, that is fine.
MR KOUMJIAN: My mistake. It was under tab 11 of that binder, but it is P-51.
PRESIDING JUDGE: Oh, I see.
12:00:30 MR KOUMJIAN: I am sorry, we have a different document as P-51. P-51 and it has the ERN number 0025572 on the first page:
Q. Actually I can ask you some questions, Mr Witness, about this before it is shown to you. I want to ask you whether you recognise some names and, if you can, can you tell us what you

A. Well I was in charge there, but later I too was replaced. They called me. Something happened and they called me and the command changed again.

MR KOUMJIAN: Okay, first the spelling of Krunbola is K-R-U-N-B-O-L-A:

12:35:56

Q. For how long were you in charge in Kono before you were replaced, approximately?

A. Well, I did not stay long. I did not stay long when he was in command there, because a problem ensued.

12:36:29

Q. Okay, we will come to that. Can you tell us when Superman went to Koinadugu District, do you consider first of all Koinadugu the north?

A. Yes, that is where it is.

Q. And Superman went to the north. Can you tell us if

12:36:51

anything happened at that time?

A. Yes, something happened. When Superman went there his bodyguards and SAJ Musa's bodyguards had a problem and that resulted in some shooting between them, but it resulted - it also resulted in the separation of the two men. Later, Mosquito sent

12:37:34

for Superman to leave that end. Superman was unable to come back, so they sent Rocky CO. They gave him ammunition, and another boy whom they called Senegalese, and they went there to ensure - they sent Rocky CO to go and kill Superman, but when he went he was unable to do anything to Superman, so he joined

12:38:12

Superman.

So, Mosquito became angry and he said a problem had erupted between him and Superman. Superman refused to take command from him, so Mosquito wanted to send troops to go and fight against Superman in that area because the first one had failed. So

during the ensuing argument over the communication set, the operator called me and said, "Your brothers were calling over the communication set". I came to advise Mosquito, that is Sam Bockarie. I told him, "Well, this quarrel, that you are
12:39:02 quarrelling is not good. When you say you are sending troops to go and fight against Superman there ...", I said, "... that was not good. It is not good for us to be fighting against each other. It would be good for us to concentrate on the enemies that we are fighting against".

12:39:18 So Sam Bockarie told me that we will not be able to discuss everything over the radio, but that I should go to Buedu for us to sit together and talk. So, that was why the command structure - that was why the command changed. When I went it was Morris Kallon who was in charged - who was in charge, sorry. Then I
12:39:46 went to Buedu.

Q. Okay, thank you. You gave a long answer and so I want to ask you just a few questions just to clarify and make sure we understand. When you said that they sent Rocky CO and I believe you said Senegalese to kill Superman, who sent them?

12:40:08 A. It was Mosquito who sent them and, when they were going, Rocky CO met me and he had ammunition. He called me. He said, "Big Brother, this is the mission that Sam Bockarie has given me to implement", but he said, "That man is my own brother. I cannot do a thing like that to him, but I am just telling you and
12:40:34 you should keep it in the dark. You should not tell anybody". And I said, "Okay", but when I go - he said "But when I go there I am not going to do it".

Q. Now, you said that you were called by your operator and that Superman and Bockarie were arguing over the communication.

Alpha Jets that was in the air and troubling us and we had a station that was monitoring the movement of the enemy troops that we were fighting against. Especially when they were sending the Alpha Jet, they had a signal that they sent to all stations for us to be on the alert. That was why I was monitoring.

Q. I was going to deal with that later, but perhaps this is an appropriate time. What was the signal that you are talking about that was used for the alert?

A. Well, we had - for the Alpha Jet we had a code name 448 which they send to all stations. They will say "448". As long as the monitoring team is monitoring the ECOMOG troops and the Alpha Jet movement either from Liberia or from Buedu, they would alert us. They would alert all stations.

MR MUNYARD: I don't think that has actually answered the question, which was about a signal. Which signal?

PRESIDING JUDGE: I thought he had said the code name was 448. It was a signal.

MR MUNYARD: That was a code name. That was not a signal, as I understood it. If I have misunderstood then I am happy to have that clarified, but I thought the signal was the radio signal.

PRESIDING JUDGE: Well, perhaps we will make that clear.

MR KOUMJIAN: I believe it is quite clear.

PRESIDING JUDGE: The signal is 448, is that correct? Is that what the witness is saying?

MR KOUMJIAN: I can ask the witness.

PRESIDING JUDGE: Yes, it should come from him.

MR KOUMJIAN:

Q. Sir, when you used the word "signal" and then I asked you

"What was the signal?", what was the signal?
A. The signal was the "448" which was the password that comes to all stations.
Q. What does that mean? When you hear "448" as a field
12:50:46 commander, what does that mean to you?
A. When I hear "448" - when I heard "448" it meant that the Alpha Jet was in the air, so when I have monitored the station and they have alerted all stations "448", whether it was coming to your location or not, because they were not saying - they
12:51:16 wouldn't say it was coming to a specific area, but wherever the RUF and AFRC occupied, that was their target. So, those areas where we had the front lines and where the radio sets were, they would alert everybody to be on the alert when they say "448".
Q. As a front line commander, did these alerts, 448, have any
12:51:44 value to you? Did they help you?
A. It helped us a lot.
Q. Can you explain why hearing the 448 alert when Alpha Jets were in the air would help the front line commanders?
A. Yes, it is good for you who is at the front line to know
12:52:17 about it, so that you will be able to take cover, you and your men, so as to avoid a lot of casualties.
Q. Were the Alpha Jets a threat to the RUF and AFRC forces?
A. Yes, it was a threat to us.
Q. Would the Alpha Jets make any difference in your
12:52:57 operations?
A. Yes, it used to make a difference because it did not allow us to advance the way we wanted to advance.
Q. You have mentioned monitoring teams in various locations. Can you go over those again, where the monitors were and tell us

what you know about what they did? Well, first, where were the monitoring teams?

A. The monitoring teams were in Buedu. Most of the men who were there were operators - were the operators who were SLAs, because their own way of monitoring was different from that of the RUF communication. The Nigerians too, when they are communicating they were not using voice procedures. They had something which was a key that made that sound, so those SLAs had been trained with the Nigerians so they know those sounds, so they were using keys. So, when they are monitoring - when they are monitoring they put the message that they have received and they will put it together and tell the commander. That is the field commander. If it was the Alpha Jets' movement that they monitored, or the movement of ground troops, they would alert all of us to know that their ground troops were moving, or the ground troops are moving - the ground troops are moving and they have an Alpha Jet that is going to give them support.

MR KOUMJIAN: I will attempt, for the record, to describe the sound that the witness made.

PRESIDING JUDGE: Please go ahead, Mr Koumjian.

MR KOUMJIAN: The witness gave a series of long and short what sounded like electronic tones.

PRESIDING JUDGE: Thank you.

MR KOUMJIAN:

Q. Now, sir, you mentioned Buedu. Was there any other monitoring location for the Alpha Jets?

A. Yes, some were in Liberia. They too, at that time, ECOMOG was in Liberia where the Alpha Jets depart from to hit targets in Sierra Leone, so when they are taking off from there they too

will be monitoring them and they will alert us too. They will tell us.

Q. Do you know the names of the monitors in Liberia?

A. I have told you about Memuna. I told you about Tollo. I told you about Ebony.

Q. Thank you. Sir, in your answer a few answers ago you said in addition to alerting on the movements of the Alpha Jets, there were alerts on ground troops that were moving. Did that have any value to you as a front line commander?

A. Yes, you had asked me. I told you it had value to us, the front line commanders, because it would always put us on alert and we would know how to move so that we will not just sit by and allow the thing to take us unawares, because sometimes we will lose manpower. We lost - so when we were alerted we will know how to manoeuvre, or how to take position for it. So, it was value to us.

Q. I just want to make sure, Mr Witness, you understood my question. I am asking you now not about the Alpha Jets, but you also said that you were alerted about the movement of ground troops. So, first, when the alerts came about the movement of ground troops, which troops are you referring to?

A. We are talking about the ECOMOG troops when they were about to move. If we knew that they were moving and that they were coming to hit a particular area, then the commander who was around that area, he will ensure that he and his men were in readiness to meet with them for the battle.

Q. Okay, thank you. Now, I want to go back and you have told us about hearing the argument over the radio between Superman and Bockarie and then your intervention and you said that Bockarie

JUDGE SEBUTINDE: He said "the one we have".

MR KOUMJIAN: Thank you, your Honour.

MR MUNYARD: "Bra" just disappeared off the top of the page, which I think must mean "Bro". I think it is line 20.

13:09:21 MR KOUMJIAN: Thank you:

Q. So, do you want to go back for a moment. When you talked about the advice you gave Mosquito/Sam Bockarie about Superman, can you tell us again what advice you gave to Sam Bockarie about his argument with Superman?

13:09:43 A. When I told him that we should forget about this and that he should forget about Superman, I said we shouldn't have anything like infighting because I wanted us to concentrate on the enemies, but if we started petty conflict amongst ourselves the enemy will take that as an advantage to advance on our

13:10:10 positions. So, I told him that we should forget about those things. So, he listened to me and he agreed. That was the reason why he brought the discussion up when he was trying to get some other people and when I came he said I was lucky to be present and that when we all meet, we sit and discuss it. That

13:10:40 was how it happened.

Q. Then you told us that the next day there was a meeting of commanders; is that correct?

A. Yes, we met.

Q. Where did that meeting take place?

13:10:55 A. Well, we held the meeting in Buedu. That was where we held the meeting.

Q. Okay. Who was present at the meeting?

A. Myself who is speaking, I was there. Mosquito was there. Jungle was there because he was also based in Buedu. We had

other commanders who were also based on that ground, like one SLA he was called Sambebe. He was also present and some other commanders who were in Buedu, we and the late Pa Rogers.

Q. At first you mentioned an SLA and I just wasn't familiar with the name. Can you say the name of the SLA who you said was present and based in Buedu?

A. Sambebe.

MR KOUMJIAN: Taking a guess, it is S-A-M-B-E-B-E:

Q. Who is Pa Rogers?

A. Pa Rogers was the - one of the RUF - he was the RUF Secretary-General who was there and he was the War Council Chairman.

Q. At that meeting - sorry, and then you said Jungle was there. Are you referring to the person who you said was also named Tamba?

A. Yes, that is the person that I am talking about.

Q. What was discussed again at this meeting of the commanders?

A. Well, I have told you that we did - during our discussions we were talking about ammunition because we had run out of ammunition. So, we did not have enough ammunition again to continue our offensive, or to fight, or to even defend our areas, so we discussed that it will be better that this time around we all ensure to write a letter and give it to Brother Jungle to take it to Mr Taylor for him to help us get some ammunition. So, those were the things that we discussed and we all came to the conclusion that we agreed. We told the adjutant, who was Rashid Sandy, to write a letter and he wrote it. He read the letter out to everybody and from there we enveloped it and we gave it to Colonel Jungle to take along. So, Colonel Jungle went with the

letter and after three days Sam Bockarie called us and said he had received a message from the Pa, and that is Mr Taylor, that he himself should go, that is Sam Bockarie, that he should go to Monrovia. So, Sam Bockarie called us and informed us and we also said okay, it is not bad, and he said, "Okay, but since I am leaving I want Issa to come to Buedu and stay here and you, Isaac, you should go to Pendembu and stay there", because that was where Issa was. That was his own area of control. So, I went to where Issa was and then Issa came to Buedu. So, when Mosquito was leaving he said, "I will not go alone. I wanted to go with some other people." So, he went with Rashid Sandy, he went with Pa Rogers and then he went with Lawrence Wohmandia and Eddie Kanneh also.

13:15:11
13:15:36

Q. Mr Witness, do you recall, or can you give us an estimate of when it was that you held this meeting in Buedu where you drafted the letter for Charles Taylor?

13:16:09

A. Well, at Buedu the place where they used to hold meetings, or discussions, it was not actually in the town itself, but it was out of the town going towards Liberia. There was a place that was called Waterworks. That was where we used to hold our meetings.

13:16:42

JUDGE SEBUTINDE: Mr Koumjian, I think the question you asked was when. It relates to a time frame, not where.

MR KOUMJIAN: Yes, your Honour, before I re-ask the question I believe Wohmandia may not be spelt correctly. Our spelling is W-O-H-M-A-N-D-I-A:

13:16:57

Q. Mr Witness, do you recall when the month, or the season, that it was that you held the meeting in Buedu where you drafted the letter to Jungle? I realise it was ten years ago.

to go replace Issa Sesay temporarily in Pendembu. How long were you in Pendembu?

A. I went there and was there let me say for three weeks when Mosquito came back.

14:32:49 Q. How did you find out that Mosquito had come back?

A. Well, when he came they made it possible for us to know through communication.

Q. What were the messages you received about Bockarie's return?

14:33:20 A. Well, Bockarie - the message that I received was that he said he has come and that he was calling the commanders from the other areas to report at Buedu.

Q. Did you then go and report to Buedu at that time?

A. Yes, they sent a vehicle for me and I went to Buedu.

14:33:48 Q. How long was it between when you learned that Bockarie had returned and when you arrived in Buedu?

A. Bockarie arrived, like this evening they told us and - they told us that we should come to Buedu the following morning. The following morning we came.

14:34:19 Q. Mr Witness, if you can help us can you tell us to the best of your recollection when this was that you went to Buedu on this occasion. Can you give us a month or a year?

A. It was in that same November that I have spoken about. It was in that November that I came to Buedu.

14:34:43 Q. So this is 1998?

A. Yes, it's 1998.

Q. When you got to Buedu where did you go exactly?

A. I went and I arrived in the evening because we did not travel during the day because of the Alpha Jet, especially when

we were using vehicles. So I arrived in the evening and went to Sam Bockarie's house.

Q. What happened when you got to Sam Bockarie's house?

A. When I arrived at Sam Bockarie's house we went into his room, the two of us, we sat down there and he briefed me about his return and what he has brought. He told me that he's brought some ammunition, food, medicines.

Q. What did you observe about Sam Bockarie's mood at that time?

14:36:01 A. Well, Sam Bockarie, he was happy. I saw that he was happy. So when we entered his room we started talking and he was telling me how they did things, the result of the invitation that was extended him to by the Pa, he came with some ammunition, he came back so that we can run some missions. He said they went to 14:36:33 Burkina Faso, he brought some pictures of the hotel where they lodged. He showed me the pictures and the swimming pools, the restaurants where they ate. He brought out those pictures and showed them to me and he told me that he brought some ammunition.

So in his room he had a door there leading to a place where 14:37:00 he packed the ammunition. It was a shop like place. So he opened the door leading from his room into the shop. So we entered there and saw the ammunition that he had brought. He showed those ammunitions to me. When I saw the ammunitions I was happy because they were many.

14:37:29 Q. Okay, thank you. Now you said in Bockarie's room, next to his room, there was a shop like place. Before this was Bockarie's house do you know what kind of place this was, what it was used for?

A. Well, that place was owned by people. It's - the house had

a shop.

Q. And do you know, if you don't know or if you don't know just tell us, what kind of shop that was before it became Sam Bockarie's house?

14:38:09 A. Well, that shop, that was where we kept the ammunition. It's a store. That's where we kept the ammunition and the food stuff which he brought. That's where we kept them. It was not owned by Mosquito himself. The house was owned by civilians, but the house had a shop before Mosquito moved into that house. So

14:38:30 he just turned the shop into a store.

Q. Had you been inside that shop area in Mosquito's house before?

A. Yes, I went there,

Q. When you went into the shop, when he took you into the shop

14:38:51 area of his house this time what did you see?

A. I said I saw the ammunition that he'd brought. They were packed from the floor up to the ceiling, that was how the ammunition boxes were packed. The ammunition was plenty at the time that he brought them. So when I saw the ammunitions I was

14:39:17 very happy.

Q. You indicated that the ammunition was packed up to the ceiling. Can you point to something perhaps in this room or give us an idea of the height in comparison to my height or in comparison to something you see in the room as to how high the

14:39:35 ammunition was?

A. Well, the ceiling that was in the house, I can say this one is higher a little. This one is higher a little. But it could be where that - I don't know if that's a speaker, where that speaker is. From down here to where that speaker is. That's how

the boxes were packed.

MR KOUMJIAN: It appears to me, your Honours, that the speaker is about three metres. Two and a half, three metres high.

14:40:21 MR MUNYARD: From here - I suppose it's the same height as this. Yes, I'd agree with that.

PRESIDING JUDGE: We will put on the record that the witness has indicated a piece of machinery on the wall which is approximately three metres from the floor.

14:40:39 MR KOUMJIAN:

Q. Can you give any estimate or did Sam Bockarie tell you how many boxes there were of ammunition in that room?

A. Well, the ammunition boxes that were packed there, he told me they were more than a hundred, but they were mixed because

14:41:01 they were different. He brought AK rounds, RPG and GMG rounds. So it was mixed.

Q. Just so the record is clear, when you say RPG what do you mean?

A. RPG is a rocket. It's a bomb. It's a rocket that we

14:41:25 launch.

Q. Had you ever seen this much ammunition before, you yourself, in Sierra Leone?

A. Well, when we started the war I did not see any kind of ammunition that Bockarie showed to me. I have not seen any - I

14:41:53 had not seen any ammunition that could be up to that quantity.

Q. Now you also mentioned that Bockarie said he brought back medicine. Do you know what kind of medicine he brought back?

A. They brought injections, medicines, tablets, but they were in cartons.

Q. Do you know, and if you don't just tell us, what the injections were for?

A. Well, the injections, they were injections for like when somebody gets injured. Like if somebody gets injured in the front line, for the combat medics to be treating them.

Q. You also mentioned a phone. Can you explain what you mean when you said Bockarie said he brought back a phone?

A. I said food.

MR KOUMJIAN: Sorry, the record had said phone earlier.

PRESIDING JUDGE: It did say phone. I remember seeing that.

MR KOUMJIAN:

Q. Now you've told us quite a bit about Bockarie talking to you about his trip. I would just like you to go over that more slowly. Where did Bockarie indicate he had been on this trip outside of Sierra Leone?

A. He went to Liberia because that was where he had received a call to go. When he called us to inform us, that was why he gave me that assignment to go to Pendembu. But when he went to Liberia, what he told me, when he had gotten those things and brought them, he said Mr Taylor had made another connection for him when he connected him to the Burkina Faso president. So he went there to see the man, the president. So it was he and Mr Rogers who went there.

Q. When Sam Bockarie went to Liberia you said he was looking - trying to obtain ammunition, correct?

A. Yes, in Liberia.

Q. Was he planning on exchanging anything for that ammunition?

A. Yes. The thing that we had heard, I told you that when I

was coming I came along with some people who were in the mining group who brought some diamonds. So those diamonds were the ones he took along and when he came back he told us that the diamonds that he went with, he left them there with Mr Taylor.

14:45:29 Q. Now you said that Mr Taylor had made a connection for Bockarie with Burkina Faso and Bockarie went to Burkina Faso. Did he say who he went with on this trip to Burkina Faso?

A. Yes, he said he went with SYB Rogers.

Q. Okay. And the photographs that he showed you, did he

14:46:09 indicate where they were taken?

A. Yes, he said they took those photographs at the restaurants where they were eating in Burkina Faso and the hotel where they lodged and the swimming pool where they used to go swimming.

Q. Did you see the photographs?

14:46:36 A. Yes, I looked at them and I saw them.

Q. And do you recall now, I realise it's a long time ago, any persons you recognised in those photographs?

A. I saw Sam Bockarie himself. He was on that picture. The late SYB Rogers, he too was on that picture.

14:47:14 Q. Did Sam Bockarie indicate what the result was of his time in Burkina Faso?

A. Well, he said he had gone and seen the Burkina Faso president and they have spoken for us to be able to buy ammunition from there. So they had made those - that arrangement

14:47:44 - they had made that arrangement already. So whenever we want those things he will make sure that he goes there. So that was what he said.

Q. Did Sam Bockarie indicate where the ammunition came from that you saw in the storeroom?

A. The ammunition which he brought, he told me he had brought them from Liberia and that it was Mr Taylor who gave them to him.

Q. After your conversation with Sam Bockarie where he showed you the ammunition what happened then in Buedu?

14:48:45 A. Well, after he had shown the ammunitions to me he told me the plan that he had come with with respect to those ammunitions. He told me that he and Mr Taylor sat together and planned to come and run an operation. He said he sat with the Pa, Mr Taylor, who took out a map and showed the locations where the RUF and the

14:49:26 SLAs, where we occupied. He showed that to him. He came with a plan for us to launch an operation whereby we'll capture Kono, Makeni and advance to Freetown. And we were also to attack Joru. So those were the areas we were to capture. We were also to launch another attack on Kenema. We were to attack Kenema as

14:50:06 well.

He said he discussed with the Pa, that is Mr Taylor, to meet with Superman, that of the two of us one person should attack Joru, when that person would have attacked Joru he should advance on Zimmi. He said he discussed that.

14:50:33 MR KOUMJIAN: Your Honour, if I can just get a clarification. Well, I'll ask the witness:

Q. The interpretation we got is that Bockarie told you he discussed with the Pa, that is Mr Taylor, to meet with Superman and I thought I heard you say something different. When Bockarie

14:50:50 discussed with Taylor what did they say about you and Superman?

A. Bockarie discussed with Mr Taylor for I and Superman, one of us should attack Joru. But Superman was in Koinadugu District, so Mosquito told the Pa, that is Mr Taylor, that Superman was far away from the Buedu end. So I was close to the

place and they said I should attack Joru and advance, when I would have captured Joru I should advance on Zimmi because I was to receive some other people from the NPFL who were to come from Liberia. I was to receive them. I was to receive them in Zimmi, I should be in Zimmi when they came. That was the reinforcement that would have arrived.

Q. Now you indicated that Mr Taylor had told Bockarie that you or Superman should attack Joru and advance to Zimmi in order to receive some NPFL who were to come from Liberia. Do you know why it would be you or Superman who would have been chosen for that assignment?

A. Yes, because the two of us used to be NPFL fighters and we were familiar with the NPFL brothers.

Q. Did Sam Bockarie indicate what the purpose of this attack was going to be? What was the ultimate purpose?

A. The reason for this attack, for this advance on the various places and for us to take those places, you can remember that at that time Foday Sankoh had been moved from Nigeria and he was in jail in Freetown. So we were to attack Kono and take there. We were to attack Freetown in order to free Foday Sankoh and the others who were in jail there. We were also to ensure that we seized power.

Q. Did Sam Bockarie indicate to you in his discussions with Mr Taylor if there was any discussion about how the attack should be carried out in order to free Sankoh?

A. Yes, he said they discussed it. After he had shown those places to him they discussed that we should run that mission to ensure that we free Foday Sankoh and others and on the operation we should ensure that the ammunition is not wasted. We should

make the operation fearful than all the other operations that we had undertaken because we want to make sure that we take Freetown and hold on to power.

Q. Mr Witness, are you telling us now when you talk about the plan for a fearful operation that this is what Bockarie told you he discussed with Charles Taylor?

A. Yes, that was what Sam Bockarie said.

Q. What happened after your private discussion there in the storeroom and in the house with Bockarie?

A. After that, because they had sent for the commanders to come, the following morning the commanders came to Buedu. Then we had a meeting where he told us all I have explained here and what he had brought to show them to the commanders and what the mission was for those ammunitions that he's brought. So just like he told me, that was what he also told the commanders after they had all come, including the SLA commanders who had come. We had the meeting and he explained the same thing that he had briefed me on. He also showed the ammunition to the people.

So when he spoke at the meeting the late Pa Rogers, SYB Rogers that I spoke about with whom he came, he stood and told and thanked Sam Bockarie and he told us that if Sam Bockarie was the rebel leader at the time the war started then the war would have ended quickly because the ammunition which they brought, the man who was Foday Sankoh who was the rebel leader had never brought that quantity of ammunition which they had now brought.

Q. Who was present at this meeting of commanders in Buedu that you just discussed?

A. I was there. Mike Lamin was there. Leather Boot was at that meeting. Akim Turay, Eddie Kanneh and other commanders from

other places, they too came and they were present.

Q. First, Mr Witness, can you tell us what faction Akim Turay belonged to?

A. Akim Turay was an SLA. He was a soldier in the Sierra Leone Army.

14:58:10

Q. What faction did Leather Boot belong to?

A. Leather Boot too was a soldier, an SLA.

Q. What faction did Eddie Kanneh belong to? Who was Eddie Kanneh?

14:58:31

A. Eddie Kanneh was one of the soldiers. He too was a soldier, an SLA.

Q. Can you tell us if you recall any RUF commanders besides Mike Lamin being present at this meeting, and yourself?

A. You had Monkey Brown who was also another RUF commander.

14:59:12

Q. Thank you.

A. Issa Sesay too was there. Morris Kallon was there.

Q. Thank you. Do you recall any other names at this time?

A. Augustine Gbao, he too was there.

Q. Now, sir, you indicated that the plan for your own

14:59:52

assignment was to go and attack Joru and Zimmi to receive NPFL troops. What do you mean at this time in 1998 by NPFL forces?

A. NPFL fighters were those who came from Liberia who were Charles Taylor's men and who were in Liberia. They were the ones who were to join us. But I was to go and receive. That was why

15:00:36

he said I should attack Joru and advance on Zimmi for me to receive them. They were to join us for us all to run the operation.

Q. You did not mention Superman. Was Superman at the meeting?

A. No, Superman was not there. I had told you that Superman

was now in Koinadugu District and there was no space - there was no way he could have left that place to come because ECOMOG were at Koidu Town, they had occupied Koidu Town.

Q. Thank you and that is part of my next question. You talked about an attack on Kono. Can you explain when the plan was to attack the Kono District what was the situation in Kono at the time you had this meeting, what forces were occupying various locations in Kono?

A. In Kono ECOMOG occupied there, Kamajors and you had loyalists, that is the SLAs of former President Tejan Kabbah.

Q. Did these forces occupy all of Kono District or parts of Kono District?

A. Well, they were in Koidu Town itself. They occupied Koidu Town itself. They were in some other areas, but we too had men around them.

Q. Thank you. At this meeting in Buedu that you've talked about was SAJ Musa present?

A. No, SAJ Musa was not there. SAJ Musa and Superman were in that Koinadugu area, so he was not there.

Q. At the meeting was there any discussion of the forces in the north, SAJ Musa and Superman's forces, taking any part in your plans?

A. Yes, we discussed them and we all agreed that we should send - Mosquito should send radio message to them for all of them to join hands so that we can run the operation. But we all decided that Mosquito would not be the best person, but it would be better for Johnny Paul to talk to SAJ Musa, for us to forget about the past, to put all that infighting behind us and run the operation. That was what we agreed upon and sent to Johnny Paul

and Johnny Paul was able to talk to SAJ Musa and others for us all to join hands together to run the operation and they agreed.

Q. How do you know about the communication between Johnny Paul Koroma and SAJ Musa?

15:04:14 A. Well, that was something that we talked about at the meeting and we all agreed that Johnny Paul should do it because he will be the best person and it went on because I too had a radio in my own area. So my radio man monitored it and he told me that the message went, that they've sent the message to

15:04:48 SAJ Musa and others for all of them to join hands in the operation.

Q. Do you know if SAJ Musa gave any response to Johnny Paul Koroma's request that they all join hands?

A. Well, SAJ Musa accepted to run the operation.

15:05:16 Q. Do you know if there were any RUF with SAJ Musa at that time?

A. Yes, I had said it from the early stages that at that place we had some RUF men who retreated from Makeni to that end. So there were some RUF men with SAJ Musa.

15:05:39 Q. Can you remember any names of RUF that you know were with SAJ Musa at the time you had these discussions in Buedu about the national offensive?

A. I told you that the RUF men like one of the senior men who was there, Alfred Brown, I told you about that. He was a radio

15:06:08 man. He was a radio operator. I told you about King Perry and other fighters who were there.

Q. Did you know Alfred Brown yourself?

A. Yes, I know Alfred Brown.

Q. During this period of time in November in 1998 you told us

was the meeting were you in any communication with Alfred Brown yourself?

A. At the time that he was in Koinadugu I did not communicate with him, but at the time that the offensive started when all of us had gone on the offensive in our different areas I communicated with him.

Q. Okay. So when the offensive started you had some direct communications with Alfred Brown, is that correct? On the radio, I mean?

15:07:11 A. Yes, yes.

Q. After that meeting what did you do, after the meeting of all the commanders where the plan was made for the offensive?

A. Well, everybody agreed to run the operation. People had their various targets where they should go and they were to be

15:07:40 supplied with ammunition to go. The only people who were not able to receive the supplies at that moment were the ones who were in the northern jungle in the Koinadugu District. At that moment they were not able to receive any supplies. But those of us who were to go to the various targets, we received supplies.

15:08:06 Q. And can you explain again why those in the northern district could not receive supplies at that time?

A. I think I have said it and I'll say it again. I said because there was no way for us to transport any ammunition to go their way because the enemies who we were fighting, that is the

15:08:32 ECOMOG troops and the loyalists to former President Tejan Kabbah and the Kamajors, were based in Koidu Town. So we had no way of taking any ammunition to them.

Q. After the meeting did you receive ammunition?

A. Yes, I received ammunition to go to my own target.

Q. And do you recall what ammunition you received?
A. Yes, I received AK rounds, RPG and GMG.
Q. Do you recall how many boxes of AK rounds you received, and if you don't recall just tell us?
15:09:30 A. Well, I can recall I received 15 boxes of AK rounds but the 15 boxes which I received, I was to leave five at the other place called Mobai. I was to take it there and leave it there. The 10 was to stay with me.

MR KOUMJIAN: Your Honour, we're checking the spelling of
15:10:02 Mobai but in the meantime - apparently it's spelled correctly on the transcript - we did receive some information that there is a word in Krio that the witness was saying jorbush and that is spelt J-O B-U-S-H. I was talking about what he was saying before the break.

15:10:31 MR MUNYARD: I think he was saying zorbush before the break.

MR KOUMJIAN: Correct, he was - I would stipulate to that.

MR MUNYARD: And I don't personally remember hearing him call it jorbush since the break, but I might have missed that.

15:10:49 PRESIDING JUDGE: He didn't. I don't think he referred to it at all, but rather than go into the semantics, it is a word that we've come across before and we accept that the witness has a different accent so that's as far as I'm prepared to go.

MR MUNYARD: Madam President, I entirely agree. We've all
15:11:09 seen it, amongst other places, in transcripts from other cases.

MR KOUMJIAN:

Q. Now, Mr Witness, you've indicated that you left five boxes in Mobai. Who did you leave those boxes with?
A. The commander who was there, that was where I left them.

troops or the forces who were considered our enemies and against whom we were fighting.

So he started communicating with Sam Bockarie and saying that he was getting pressure and he was calling for reinforcements, but there was no easy way because the other men on the Hastings side were also trying to fight to enter but they didn't make it to enter. So the other men who were inside, they had too much pressure so they decided to retreat.

Q. When you say the men on the Hastings side which men are you referring to?

A. Well, I am talking about Rambo, Rambo's own group. So when those men were receiving this pressure in Freetown Mosquito passed instruction to them telling him that if there was no way to stand the men they should start carrying out some destruction, they should set fire on the Nigerian embassy and other areas. So the men also started carrying out the orders that Mosquito passed to them. So they started setting the houses on fire, but they were - they didn't make it to burn the Nigerian embassy, but the other areas where they set the fire, they were burnt down and they carried out some other destructions.

Q. Mr Witness, could you recognise Gullit's voice?

A. I know Gullit's voice very well.

Q. When you told us about Gullit calling for reinforcements, calling Bockarie for reinforcements, is that something someone told you or is that something you heard yourself on the radio?

A. Well, I heard it over the radio and whilst the instructions were given to the men telling him that they should do it or they should do that, it was not something that they encoded. They were saying it out now so that even the enemy against whom they

were fighting would be afraid.

Q. You said Sam Bockarie gave orders to burn houses and the Nigerian embassy. Is that something someone told you or how did you learn that?

16:12:19 A. I said I heard him when he was passing the order that they should set the Nigerian embassy on fire.

Q. By the way what did Gullit call Bockarie, do you recall?

A. He called him Sir because he knew that the man was chief of defence staff, he knew about his position.

16:12:57 Q. Now earlier in your testimony you talked about 448s. At this time you said the troops entered Freetown on January 6 did you hear any of these alerts, these 448s, over the radio while you were monitoring?

A. Yes, that 448, they were saying it and they were sending it

16:13:33 to the men who were in Freetown and they were alerting them that 448 was around.

Q. Mr Witness, how often did you hear Gullit communicating with Bockarie?

A. Well, they did it frequently. Let's say in half an hour

16:14:06 they would communicate, because it was not just Sam Bockarie but we were all focused on the capital city at that time and all the mission that we had planned to carry out was focused on the capital city, because that was where we wanted, so we all had our attentions focused there so Mosquito was talking to Gullit

16:14:34 frequently.

Q. Now you indicated that the 448s, they were saying it and they were sending it. Who was sending the 448s to those in Freetown?

A. I had told the Court that we had a monitoring team that was

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-532 5710

EXAMINATION-IN-CHIEF BY MR KOUMJIAN 5710

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 26 FEBRUARY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson Ms Carolyn Buff
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Nicholas Koumjian Mr Christopher Santora Ms Shyamala Alagendra Ms Julia Baly Ms Leigh Lawrie Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah
For the Office of the Principal Defender:	Mr Silas Chekera

A. Yes, it was confirmed that he was executed, but the instruction was given by Sam Bockarie on the air.

Q. Was it Massaquoi who told you that, yes, Gullit - that, yes, Moinama had been executed?

10:02:46 A. Gibril Massaquoi said it and other combatants proved that he was executed based on the instruction given by Sam Bockarie.

Q. And when you met with the Office of the Prosecution in January of 2007, specifically 17 January, you told them who carried out the execution. You said it was Alhaji Conteh or

10:03:24 Black Jesus, yes?

A. Yes.

Q. He was the triggerman or the person who actually did the deed, yes?

A. Yes.

10:03:37 MR ANYAH: Madam Court Officer, if you could assist me, please. I will be referring to tab 1, page 21 from the witness's interview with the Office of the Prosecution on 17 November 2003. The ERN number on that page is 00037118 and I will start at line 17.

10:04:26 Q. Mr Lansana, you were asked the question - actually, your Honours, it might be best if I were to start from page 20 for contextual reasons and that will be the last line, line 15, and there's a question posed to you:

"Q. Who was now in charge of the communication in Kangari

10:04:58 Hills?

A. Kangari Hill?

Q. Yeah.

A. One Martin Moinama, who - Martin Moinama was in charge.

Q. And where is Martin Moinama now?

A. Really, I cannot give a specific location of Martin Moinama, but according to other information that I got, he was the one that prosecuted Mr Sankoh in 1990 - the last case that he got, that he was condemned, yeah, he was the one who do the Prosecution. So I cannot tell his whereabouts now and I have not seen him from that time."

This is what you told the Prosecution in 2003?

A. That is what is recorded on this tab.

Q. But you did not tell them that Martin Moinama was dead, true? True?

A. Yes, yes.

Q. Yes you did not tell them, correct?

A. No, no.

Q. Yes or no, did you tell them?

A. No, I did not tell them.

Q. You did not tell them that Alhaji Conteh killed Martin Moinama, true or false?

A. Yes, but I also revealed it to them that Martin was executed by Alhaji Conteh.

Q. You told them this information on 17 November 2003, is that your evidence?

A. Yes.

Q. On the day that this interview was recorded you told them that information, that's what you're telling the Court?

A. Yes.

Q. I am putting it to you that you only mentioned that Martin Moinama was killed when you spoke with them in January 2007, true or false?

A. It was in 2007, yes.

Q. So the first time you told them Alhaji Conteh or Black Jesus killed Martin Moinama was in 2007, right?
A. Yes.
Q. In 2003, however, you did not know the whereabouts of
10:07:33 Martin Moinama, yes?
A. I never had a complete clue on the information that I gave. I mean the information was not actually put through to them that Martin was killed at that particular time.
Q. Well, let me suggest --
10:07:59 PRESIDING JUDGE: Mr Witness, I'm having trouble understanding that answer. The question was in 2003 did you know where Martin Moinama was.
THE WITNESS: No. It was one of the points that I based my information on that I cannot give information or continue to give
10:08:27 information to the Special Court if they wanted me to be a witness, because Martin who had served as Prosecution witness against Mr Sankoh was killed when the troops of the RUF and the junta entered Freetown on January 6 and Martin was recaptured by those troops under Gullit's command and he was executed because
10:08:55 he never had protection. So that was my point of contention, that I would not want to be a witness based on this experience until the security was put in place.
MR ANYAH:
Q. So your evidence to the Court is as a result of the death
10:09:18 of Martin Moinama you were reluctant to be a Prosecution witness, is that your evidence?
A. Yes, very fine, from 2003.
Q. And when they interviewed you on 17 November 2003 when they came to this particular issue of Kangari Hills and Martin Moinama

you told them that it was one of the points of contention you did not wish to speak about. Is that a fair assumption to make?

A. From the initial stage that had been my ground, because I never wanted to be a victim after giving my testimony or anything

10:10:09 that had to do with the war, after giving my information I would not want be a victim because Martin had already been a victim and he was executed after he had given testimony against Mr Sankoh.

Q. But this account of your concerns that you echoed to the Prosecution is not recorded in this interview, is it?

10:10:39 A. This is what I am saying. I said this was a recorded information. I was interviewed and it was only later that this material were written, but it was a tape recording. So --

THE INTERPRETER: Your Honours, the witness is running too fast for me, please.

10:11:04 PRESIDING JUDGE: Pause, Mr Witness, please. The interpreter is having a problem keeping up with you. Please speak more slowly. Please repeat the last part of your answer.

THE WITNESS: Thank you, madam. What I am trying to say with regards this particular interview, I was contesting and

10:11:29 arguing that I will not serve as a witness because Martin Moinama, a radio operator, who served as Prosecution witness in the 1998 trial of Mr Sankoh was executed because he did not have security or protection in Freetown and it was based on this information that I was not in position to serve as a witness at

10:12:26 this moment.

MR ANYAH:

Q. So your evidence is that you told them all of that you have told us now and it is not reflected in this transcript, yes?

A. Yes, this is what I am saying, it was not recorded in this

transcript.

Q. But yesterday I read you another paragraph in tab 5 where you expressed concerns about your security in relation to other prisoners at Pademba Road and the Prosecution did record those concerns. Do you recall that?

10:12:59

A. Yes, I did.

Q. But in the case of your concerns relative to Martin Moinama they did not record that, yes?

A. Yes, it is not recorded as I can see on the script.

10:13:19

MR ANYAH: Madam Court Officer, can we go to tab 16, please:

Q. Mr Witness, I had shown you this document previously from the High Court of Sierra Leone. It is the case of the state or the people in Sierra Leone against Foday Sankoh, yourself and others and we have reviewed it on Friday, I believe, and if you look three lines down from Mr Sankoh's name you see the name "Alhaji Conteh (alias Black Jesus)". Do you see that?

10:13:57

A. Yes.

Q. Black Jesus was one of the defendants in your criminal case in Sierra Leone, yes?

10:14:26

A. Black Jesus was --

Q. He was one of the defendants in your criminal case in Sierra Leone, true?

A. Yes.

Q. Black Jesus was with you at Pademba Road prison, correct?

10:14:44

A. Yes.

Q. I put it to you that the entire story you have told us about the death of Martin Moinama, you heard that story while you were at Pademba Road prison; true or false?

A. False.

MR ANYAH: Madam Court Officer, I would like the documents in tabs 13 and 14 to be displayed, please. Tab 13, page 1:

Q. Mr Witness, these are records kept by the Special Court in this case the first page by the Office of the Prosecution regarding money that they gave to you and on page 1 we see that on 23 January 2007, 97,000 leones were given to you and the reason for the money - your Honours, it's number 3 on page 1 of tab 13?

10:16:44 PRESIDING JUDGE: My page 1 is all blank so maybe it's on - let me have the figures again, please, Mr Anyah.

MR ANYAH: Yes, Madam President. 97,000 leones.

PRESIDING JUDGE: I think that might be on page 2 of ours. Is it broken into two bits, 37,000 and 60,000 leones

10:17:07 respectively?

MR ANYAH: Yes, Madam President.

PRESIDING JUDGE: In that case it's on page 2. Thank you, I've found it.

MR ANYAH: Perhaps you have a different version than I

10:17:16 have. I understand why. I am using an older version and I should revert to the newer version.

JUDGE LUSSICK: I wouldn't bother, Mr Anyah. The page 1 on the version that we have doesn't have any figures on it at all, so you're probably better off starting at page 2.

10:17:39 MR ANYAH:

Q. Mr Witness, the entry on entry 5 says that on 23 January 2007 you were given 97,000 leones and the indication is for medication required for witness, meals and drinks provided to both witness and escort of Pademba Road. That is an accurate

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-275	4736
CROSS-EXAMINATION BY MR ANYAH	4736
RE-EXAMINATION BY MR SANTORA	4763

EXHIBITS:

Exhibit P-83 admitted	4777
Exhibit P-84 admitted	4786
Exhibit P-85A admitted	4788
Exhibit P-85B admitted	4788

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

FRIDAY, 22 FEBRUARY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Christopher Santora Ms Julia Baly Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

A. Yes. Immediately after the departure of the 1,000 manpower that left Koinadugu there erupted a serious misunderstanding between SAJ Musa and Superman and it was based on the information that Sam Bockarie had discussed with Superman during a radio
09:57:30 conversation: That he had deviated from his mission that was given to him from Buedu. At this time SAJ Musa also expressed that he had been informed in the past that Superman was on a special mission to assassinate him and it was based on this conversation that a serious infighting erupted between SAJ Musa's
09:58:28 men and the rest of the RUF in Koinadugu.

Q. Mr Witness, what I am asking you is particularly with relation to any misunderstandings between Superman and Sam Bockarie.

A. Yes. It was during this particular time that Sam Bockarie
09:58:59 accused Superman of not performing his duty and during a specific conversation between Superman and Sam Bockarie, Sam Bockarie told Superman that he knew the reason why he did not carry out his task as he was instructed and that, "It was because of that white Lebanese idiot, I mean the lady that you are carrying presently
09:59:46 with you in Koinadugu." It was based on this insult that Superman became very much annoyed with Sam Bockarie and it became very serious at that point in time.

MR SANTORA: I would ask the witness at this point be shown the document behind tab 14:

10:00:56 Q. Can you take a moment to look at that document, please.

A. Yes.

Q. Do you recognise this document?

A. Yes.

Q. What is it?

these communications done over the national frequency, or were they done over coded frequencies?

A. Coded frequency.

Q. Mr Witness, where were you when the RUF and the AFRC forces attacked Freetown on 6 January 1999?

A. I was in Lunsar.

Q. What were you doing in Lunsar?

A. Our attack stopped at Lunsar and we were waiting for the troops coming from Kono, in order for us to move as a reinforcement for Freetown.

Q. You said earlier you were travelling with Superman. Was he with you in Lunsar, or not?

A. Yes, that was the base for Superman.

Q. Now, throughout the course of your testimony you have said that you listened to the BBC at many occasions. Were you listening to the BBC around the time the troops entered Freetown?

A. Yes.

MR SANTORA: At this point, your Honours, I would ask that the recording under tab 21 be played to the witness.

PRESIDING JUDGE: Mr Anyah?

MR ANYAH: Yes, Madam President. I am just concerned, before the audio is played, whether counsel has sufficiently put to the witness whether he heard a particular radio conversation over the BBC at this time, or that will be the put to the witness after he has heard the subject of the conversation.

PRESIDING JUDGE: Mr Santora?

MR SANTORA: Your Honour, the witness has testified specifically that he was listening to the BBC at the time the RUF and AFRC have entered Freetown.

communicating with CY or Jumbo Blah.

Q. Now, were there any other radio operators present with you in Lunsar during the Freetown invasion?

A. Yes.

12:11:29 Q. Do you know who they were?

A. Yes, Alice Pyne was the operator for Superman in Lunsar.

Q. Now, again after the Freetown invasion you said you moved back to Lunsar and you were still - and you were with Superman. You were still with Superman. Is that correct?

12:12:08 A. Yes.

MR ANYAH: I thought I heard the witness say he went to Waterloo. He was in Lunsar and then went to Waterloo.

PRESIDING JUDGE: I have that after Freetown he was based in Waterloo, later Makeni and back to Lunsar.

12:12:26 MR SANTORA: And I was just referring to when he was back to Lunsar and not - I am not sure if it is an objection, or is it --

MR ANYAH: Well, the question is - and I am reading from lines 64.6 - "Now, again after the Freetown invasion you said you

12:12:46 moved back to Lunsar". It assumes he moved from somewhere to Lunsar. I understood him to say he was always in Lunsar and retreated to Waterloo.

MR SANTORA: I understand.

PRESIDING JUDGE: I don't recall the word "retreat", but

12:13:01 let us not quibble over this. Let us clarify the movement, Mr Santora.

MR SANTORA: Okay, thank you, Madam President:

Q. Mr Witness, during the course of the Freetown invasion you stated you were in Lunsar. Is that correct?

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-275 4521

EXAMINATION-IN-CHIEF BY MR SANTORA [Continued] 4522

CROSS-EXAMINATION BY MR ANYAH 4582

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 14 FEBRUARY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson Ms Carolyn Buff
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Ms Shyamala Alagendra Ms Maja Dimitrova Ms Julia Baly
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah

name of the street.

PRESIDING JUDGE: Pause, Mr Witness.

MR BANGURA:

Q. Mr Witness, you talked about a street in your area. What's the name of that street, please?

A. Bus stop. It was an old bus stop closer to Kissy Mental Home, in that area.

Q. And what happened there?

A. So all of them came and parked the vehicles in which they had come.

Q. Can you remember how many of them?

A. They were more than 40.

Q. And did anything happen when they arrived there?

A. Yes, sir. He went and met us. When he met us, where they had killed the people and where they had amputated my arms --

Q. Mr Witness, who are you referring to when you say "he"? Please give the name?

A. Rambo met us there along with the people he had come with. When he met us there, the commando and the others, all of them saluted him. After they had saluted him Rambo asked the commando, he said, "What are you doing here?" He said, "Why are you killing these people?" He said, "Why are you chopping off these people's arms?" He said, "Is that why you came here?" He said, "I am going to punish you." Then he said, "Release these people, release these remaining people." He told him - at that time he was holding to my one hand, my one arm, that is Rambo, he still held my one arm. He told the commando who had chopped off our arms, whom he had said he would punish, he said, "All of you follow me to the base." We went up there. Look at the church

and there was - look at the Kissy Mental Home. It was in that area that I was. So when we arrived there we met a lot of guns. When we arrived he told them to stand there, that is he told the commando and the other rebels who were there, he put them outside, he told them to stand there. He asked for one Captain Blood. I saw the Pa come out. He asked him, "Where is the doctors?"

THE INTERPRETER: Sorry, correction, interpreter, "Where are the doctors?"

16:20:29 THE WITNESS: And the Pa told him that they had gone out. So Rambo told Captain Blood that, "Have you seen what this man did to these people?" He said, "I was going to punish him." He said, "That was not why he came." Then he took out 100,000, that is Rambo took out 100,000 and placed it in my pocket. He told me 16:21:09 to endure, that was what God ordained. Then he took - he asked one rebel to accompany me. So the rebel accompanied me up to Taylor Street and he returned. At that time I was feeling dizzy. I was not seeing properly and I fell down close to the bathroom. That was where I laid. In the morning of Friday I tried to get 16:21:57 to Helena.

MR BANGURA: Your Honours, Helena is H-E-L-E-N-A:

Q. Yes?

A. So the ECOMOG met me there with their armoured car. They put me in, took me to Ferry Junction. After Ferry Junction they 16:22:29 took me to Connaught Hospital. I was there at Connaught Hospital for 26 days, but when we went there there were no medicines there.

Q. At Connaught Hospital - your Honours, Connaught is C-O-N-N-A-U-G-H-T. At Connaught Hospital were you the only

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-026 3842

EXAMINATION-IN-CHIEF BY MS ALAGENDRA 3842

TF1-101 3897

EXAMINATION-IN-CHIEF BY MR BANGURA 3897

EXHIBITS:

Exhibit P-54 admitted 3823

Exhibit P-55 admitted 3823

Exhibit P-56 admitted 3824

Exhibit P-57 admitted 3825

Exhibit P-58 admitted 3825

Exhibit P-59 admitted 3825

Exhibit P-60 admitted 3825

Exhibit P-61 admitted 3825

Exhibit P-62 admitted 3826

Exhibit P-63 admitted 3826

Exhibit P-64 admitted 3826

Exhibit P-65 admitted 3826

Exhibit P-66 admitted 3827

Exhibit P-67 admitted 3827

Exhibit P-68A admitted 3828

Exhibit P-68B admitted 3828

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Exhibit P-68G admitted	3829
Exhibit P-68H admitted	3829
Exhibit P-68I admitted	3829
Exhibit P-68J admitted	3830
Exhibit P-69 admitted	3830
Exhibit P-70 admitted	3830
Exhibit D-4 admitted	3831
Exhibit D-5A admitted	3834
Exhibit D-5B admitted	3834
Exhibit D-6 admitted	3835
Exhibit D-7 admitted	3836
Exhibit D-8 admitted	3836
Exhibit D-9 admitted	3836
Exhibit D-10 admitted	3837
Exhibit P-71 admitted	3890
Exhibit P-72 admitted	3890

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 13 FEBRUARY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson Ms Carolyn Buff
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Nicholas Koumjian Mr Alain Werner Ms Shyamala Alagendra Ms Leigh Lawrie Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah Ms Elizabeth Duby

they give you money - did you have to pay to travel by car? Was it like a taxi?

A. Yes, yes, I had to hire a car.

Q. You had to pay for that. Did you also - did you get reimbursed for that?

A. Yes, it was refunded.

Q. Did you get a meal allowance for that day?

A. Yes, because the amount they gave me exceeded my transport cost. I knew that it was more than what I spent, so I thought that the rest was a kind of assistance.

Q. What currency were you paid in?

A. Sorry, can you repeat that question, please?

Q. Certainly. What currency were you paid in? What kind of money? Was it Gambian money, or was it United States dollars, or what was it?

A. They gave me some assistance. US dollars, in US dollars.

JUDGE SEBUTINDE: Mr Munyard, I am just concerned and I am seeking guidance from Madam Interpreter. Is the witness using the word "assistance" or "subsistence"?

THE INTERPRETER: In fact it is assistance, help assistance, not subsistence.

MR MUNYARD: Thank you, your Honour:

Q. What was the amount of this assistance, over and above the cost of you having to hire the car?

A. They gave me 100 US dollars.

Q. On top of the money that you had spent hiring the car, is that right?

A. I always paid my transport myself. Since I have left my village, until I arrived, I always paid - I always paid my

Q. Four days later, on 5 March 2007, Mr Haddad gave you 100 US dollars for assistance rendered in the form of information. Do you see that?

A. Yes, yes, I see that.

14:54:49 Q. Pausing there. In other words, you were paid money by the investigators to give them information, do you agree?

A. It is an assistance. It was not a payment. You are using payment. It was not a payment.

Q. Forget the word I used. You were given $100 for giving the

14:55:23 investigators information, weren't you?

A. Yes, yes, they gave it to me because of that. For that.

Q. So, why was it that you told this Court on Monday of this week that you were never paid for giving information to the investigators?

14:55:53 A. I told you not to say that they have paid me. They didn't pay me. It was - it was for assistance. It was not a payment. Don't say that they paid me.

Q. What did they do with the 100 United States dollars on 5 March? How was it - how did it end up in your hands?

14:56:27 A. I am a chief of family. I have wives and kids. I am a married man and I have a family. I have problems.

Q. Mr Camara, I don't think you are understanding. How did the one pounds get from Mr Haddad's hand into your hand?

MR WERNER: US dollars, your Honours.

14:56:49 PRESIDING JUDGE: It is actually dollars [microphone not activated].

MR MUNYARD: I may have slip --

PRESIDING JUDGE: A slip of the tongue, Mr Munyard. You said pounds.

A. Yes, me too, I answered to their questions. That is why I am using the term "assistance".

Q. I don't think you're going to get any answers from that side of the Courtroom, Mr Camara, so don't keep looking over there. Look towards the judges, please. Now let us go to box 7.

14:59:54

THE INTERPRETER: Sorry, can the witness repeat?

PRESIDING JUDGE: Mr Witness, the interpreter didn't catch what you said. Can you repeat it, please.

THE WITNESS: I am not looking at a particular person. I am looking in the room, in the Courtroom.

15:00:33

MR MUNYARD:

Q. Look at the page now, please, box 7. Four days later on Friday 9 March Mr Haddad gave you 50 United States dollars?

A. Yes, indeed.

Q. For assistance rendered by you to them. Do you agree?

15:00:56

A. Yes, I do agree.

Q. And it was in order to reimburse you for your meals, your transportation, your telephone calls and then something called assistance, this time assistance from them to you?

A. Yes.

15:01:27

Q. Do you know what their assistance to you was? How much of the $50 amounted to assistance? If you don't know, just say so?

A. It is exactly what is written there.

Q. Box number 8, please. Six days after that, on 15 March, Mr Haddad gave you another 100 United States dollars. The reason --

15:02:08

A. Yes, that's true.

Q. The reason for it is the assistance rendered by you to them and the money is to cover your transport, your loss of wages and the information that you have given them. Transport we know

about - sorry?
A. Yes.
Q. Transport we know about. You told us yesterday that you had not been in work I think from the time you got back from
15:02:57 Liberia in 2003. So what's lost wages here?
A. Yes, yes, indeed, I was not working.
Q. So you didn't have any loss of wages for which you had to be compensated in March of last year?
A. Why don't you ask Haddad for that what he means by loss of
15:03:33 wages? He would explain it to you. What I know is that they gave me assistance and they made me sign the receipt. They asked me to sign and I signed. And then I have seen on the paper - I have seen the lost wages written there, transport, loss of wages, information. That I have seen. I have seen that on the paper.
15:04:04 I can't say that I haven't seen it.
Q. Did you tell them that you had lost earnings in coming to see them at some point in March of 2007?
A. No, no, I don't - I didn't - I didn't go there for that. I'm a cultivator.
15:04:40 Q. We know that you gave them more information that day because it's recorded there. When you gave them information they always wrote it down, you told us earlier, and so can we assume that they wrote down what you told them on 15 March 2007?
A. Yes, that's what they have written down.
15:05:13 Q. Box 9, please, and I think Madam Court Officer will have to move the page on the screen. We are now on the third page of this document. Wednesday 18 April last year. This is a day when we do have interview notes for, unlike the previous date we have just been looking at, 15 March. On 18 April you were paid 100

United States dollars again and the reason you were paid that money was because you had given them assistance in locating people and in transportation and communication?

A. Yes, yes.

15:06:15 Q. It doesn't actually say there that you were given the money for information, does it?

A. Yes, indeed. Indeed. It's not written there.

Q. Although we know that you did give them information that day because for that particular day we do have interview notes?

15:06:45 A. Yes, it's possible.

Q. Box 10, please. On 24 May you were paid 57.69 United States dollars. This was to cover family assistance to you?

A. Yes.

Q. The reason, what you had done for them, is a number 1,500.

15:07:29 Does that make any sense to you, the 1,500?

A. No, I don't know. They are the ones who know what it means. I don't know what it means.

Q. Box 11, the same day, you are given 38.46 United States dollars, this time for family assistance and transport and the

15:08:04 reason given there is 1,000 and I don't suppose that the 1,000 means anything to you in that box, does it, Mr Camara?

A. That you are talking about I don't - I really don't know, but maybe - I don't know what they have written. I am not used to what they are writing. I don't know their terms. I don't

15:08:42 know what they have written there.

Q. Yes, don't worry about that. I don't claim to know what it means either. But on that day, 24 May, you were given close to 100 United States dollars to cover family assistance and transport and we - just pause for a moment. We know that you

were interviewed by the investigators on 23, 24 and 28 May?
A. No, this was - I didn't say that all these things - occasions were for interviews. I didn't say that. It was not for interviews.
15:09:41 Q. Did you take your family with you when you went to see them in late May last year, or is this simply money that they gave you because you wanted it for your family?
A. No, that was not the case.
Q. No, you didn't take your family with you?
15:10:09 A. No.
Q. So they gave you this money in order for you to spend it on your family?
A. They knew my conditions. They know that I had a family. I have wives, I have kids. They knew my conditions, so they had
15:10:34 asked me about my conditions.
Q. Box 12, please. On Tuesday 12 June you were given another 100 United States dollars, no reason was given, but it was to cover family assistance and your telephone calls?
A. Yes, it was assistance indeed. They have been helping me.
15:11:07 Q. Do you know if you gave them any information in June of last year?
A. No, no, I don't remember. I don't remember having given them any information on that date.
MR MUNYARD: Madam Court Officer, could you turn over the
15:11:28 page, please, and we will look at box 13:
Q. Two days later on 14 June last year you were given 100 United States dollars again also for family assistance?
A. These people, they usually - that's usually what they write when they gave me the assistance, but I don't remember each and

Just let me finish the question. Somebody has recorded here that on 26 September last year you were paid 200 US dollars. Can you remember if that was put into your hand?

A. I am telling you that this is not a big issue. I have got much more than 200. People, brothers have given me much more than this.

PRESIDING JUDGE: Mr Witness, the question is can you remember if that amount of money was put into your hand.

THE WITNESS: No, I don't remember. I don't remember. It's possible, but I didn't put it on record. It's possible, because they have given me assistance on many occasions. I didn't say that it didn't happen. It's quite possible.

MR MUNYARD:

Q. Do you have a bank account, Mr Camara?

A. No.

Q. So are you able to help us with the security aspect of this money. Did you yourself have to spend any money on your personal security or that of your family, or your home, or homes, in October of last year?

A. Unless you ask the person named Swart, you ask him that question. What I know is what I have told you already. They usually gave me assistance and they gave me a receipt to sign and I signed, because normally they were supposed to report to their supervisors when they gave me an amount of money.

Q. I am taking that as the answer no to my last question and I am going to move you on to the box 18. The very next day Mr Morris reimbursed you 43.18 United States dollars for transport?

A. That's possible.

Q. Can you remember what you would have spent 43 United States dollars on for transport?
A. I didn't put things on record. I didn't note those informations. Really I don't remember on which occasion I was
15:30:59 given a specific amount of money. I don't remember all of the different occasions. I know that they used to write it down, so what they have written, it's true. It is not a lie.
Q. Boxes 19 and 20, please, the same page. Box 19 on 5 November and box 20 on 4 December you were paid 100 dollars on
15:31:41 each of those dates for something entitled "Security". Can we assume that you don't know what that security refers to?
A. I can't tell you what it means. You should maybe ask those people who gave me the money. I think they would be in a better position to explain why they gave me that money, but I am not in
15:32:20 a position to explain.
Q. You took the money on these two occasions. Did you spend it on your own security?
A. The amount they gave me, you mean?
Q. Yes.
15:32:45 A. They have given me the money and they wrote down the reason, but the way I use the money they gave me, that was left up to me.
Q. I don't want to be unfair to you. Were you actually given 100 United States dollars in your hand at the beginning of
15:33:07 November and again at the beginning of December?
A. When they came to The Gambia, I was the one who took them to the hotel and they want to go to what is called a cultural area - cultural area and so I had to go there with them. Maybe that's why they have written "Security", because you know they

for me it is just a matter of relations - personal relations.
Q. Thank you. So you have removed the idea that you're being paid security money to show them round as tourists?
A. I didn't tell you that.
15:36:55 MR MUNYARD: Madam Court Officer, can we now turn, please, to the final page and look at box 21 next, Mr Camara.
Q. Do you see that on the screen in front of you?
A. Yes, I see the page.
Q. On 7 January this year you were paid 100 United States
15:37:33 dollars as security for the month of January 2008 and under "Category" it says "Property". Was your property given security measures?
A. No, no, no, I don't remember that. No, no, that's not the case.
15:38:09 Q. So, as far as --
A. My orchard was not fenced and so maybe it was an assistance in that they gave me some kind of assistance for my orchard to have it fenced. I remember talking to them about that.
Q. Are you saying that they gave you the money and you spent
15:38:45 it on fencing your orchard?
A. Yes, yes, yes, to - they wanted to help me to fence my orchard, yes, so that I could protect my property. Yes, I remember having told them that and so they gave me - they just helped me for that.
15:39:24 Q. And quite by chance it happened to cost 100 US dollars to put a fence round your orchard, did it?
A. Yes, that's why they helped me.
Q. And when did you pay this 100 dollars to fence your orchard?

need to know where either of them are?
A. I was in The Gambia. Where else would I be?
Q. Were you at your home or at some other place?
A. [Inaudible] telling me. These people have given me the
15:46:04 assistance, yes. They have given me an assistance. The person
who did this, I don't know that person. I just know that that
person works for the Special Court. I didn't ask for anything.
I told them that I wanted to fence my orchard, but the receipt
itself, I haven't seen the receipt.
15:46:45 Q. Did the person come to your property, your home, to give
you the money, or did you have to travel somewhere to get it from
them?
A. I went to receive the money.
Q. Did you incur travel expenses in going to receive the
15:47:12 money?
A. Yes.
Q. Were you reimbursed for your travel expenses?
A. No, it was a kind - it was an assistance I was receiving.
Q. Assistance in West Africa means financial support, doesn't
15:47:37 it?
A. Yes.
Q. Thank you. We can see here at the bottom of this - well,
below box 21 we can see the total that you are said to have
received according to these receipts and the total is 1,506.18
15:48:07 United States dollars. If you turn back - again Madam Court
Officer. If you turn back to the first page this total only
relates to money you were given on or after 27 February 2007 and
so we have to add to the total $100 for your interview in October
2006 and $100 for your interview in November 2006, don't we?

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-548 3712

CROSS-EXAMINATION BY MR MUNYARD 3712

RE-EXAMINATION BY MR WERNER 3811

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 6 FEBRUARY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Mohamed A Bangura Mr Nicholas Koumjian Ms Kirsten Keith Ms Christopher Santora
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Andrew Cayley

arrived in Koinadugu he prepared an open message. The question was did you know what or how he was received in Buedu - in Koinadugu when he arrived there and your answer was he opened up - he prepared an open message. What do you mean when you said he prepared an open message?

09:36:32

A. What I mean when I talk about open message from Superman to all RUF stations, that was the way how SAJ Musa received it. He received him very well and welcomed him and all the fighters welcomed Superman and the manpower he took to them, so that message was open to all combatants to hear from Superman.

09:37:01

Q. Now, also yesterday we discussed the Fitti Fatta mission and you did say that your side took many casualties from that mission and some of the casualties were sent to Liberia for medical care, is that correct?

09:37:30

A. Yes.

Q. Where in Liberia were they taken to?

A. It was in Monrovia.

Q. Do you know who facilitated this arrangement?

A. It was Sam Bockarie and Mr Taylor.

09:37:53

Q. How did you know this?

A. Like, for example, when those people were wounded his response to Superman was he had made arrangements with Mr Taylor: Whenever we had serious wounded fighters let them be taken to Buedu, so that he will send helicopters to take them from Foya.

09:38:19

Q. In your experience was this the first time that fighters of the RUF, or wounded fighters of the RUF, had been evacuated to Liberia for medical care?

A. No, any time we had serious wounded fighters they would take them to Liberia for treatment. Those who had problems would

be taken to Monrovia, Liberia. The helicopter would take them to Monrovia.

THE INTERPRETER: Your Honours, can the counsel wait for the interpretation.

09:38:56 PRESIDING JUDGE: Mr Bangura, did you hear the interpreter? He asked if you would wait until the interpretation is finished before proceeding.

MR BANGURA: Sorry, your Honour. I am not on the interpreter's channel this morning. I am sorry about that.

09:39:11 THE WITNESS: I am not through.

PRESIDING JUDGE: Please finish your answer, Mr Witness.

THE WITNESS: I will give you one example: It was a senior man, Dennis Mingo, he had a serious accident during the time the RUF attacked UN in Makeni. He was taken to Taylor. Taylor

09:39:39 requested for him. He said he should be taken to Liberia. He himself was taken for a helicopter, by a helicopter. He was taken to Liberia for treatment.

MR BANGURA:

Q. When was this?

09:39:55 A. It was in 2000, year 2000, during the time RUF attacked UN in Makeni.

Q. Thank you. Now, yesterday also we discussed a situation that occurred in Tombodu where Savage was a commander. Do you recall?

09:40:18 A. Yes.

Q. Your testimony was that Savage had been killing civilians who were in his care in Tombodu, is that right?

A. Yes.

Q. And that reports - this practice had been going on for over

Was it the same number that arrived at Rosos?

A. No. Let me just make it clear so that you will understand. During the period of the intervention from Freetown to Makeni not everybody was able to follow us to go to the jungle. For example, back in Kabala some people left their deployment in other villages and they found it difficult to go to the towns and, therefore, they hid themselves in bushes so they were staying there. Therefore, they divided themselves into groups and then when they heard that we were going along attacking areas from Koinadugu to Rosos a good number of the RUF came back and joined us. In fact, the number that we now reported to Gullit, we were more than 500. The number increased to 500 and most of the men who came, they had guns, and we welcomed them to join us. So that was how the number increased.

10:31:28 Q. Thank you. Now, you have said that when you arrived Gullit prepared and sent a message about your arrival. To whom was the message sent?

A. Gullit sent the message to SAJ Musa and Superman and they informed Sam Bockarie. That was how the message was addressed.

10:31:56 Q. Now, did you yourself engage in radio communication during the period that you were at Rosos?

A. Yes, beside Alfred Brown I was the most senior radio officer on the ground. Alfred Brown was just there to supervise the work that we did.

10:32:26 Q. Now, what was going on at Rosos about this time?

A. Say that again. What time are you referring to?

Q. At the time that you arrived there what were the main activities that the troops there were engaged in?

A. After we got to Rosos we didn't meet food on the ground, so

were going to attack us we would hide elsewhere until they pass and we come out again.

Q. Now, in what form was this information passed on to you about ECOMOG air raids?

12:02:17 A. Well, all information about the movement of our enemy troops - and when I say enemy troops that includes the Kamajors, the Sierra Leone army, ECOMOG - that was all coded. For example, when the jet was coming from Freetown or Lungi we had a particular code name for that. We called it 448. So when I 12:02:54 called the other station I said "448", I will call the location of the station and where it will be heading for, but if that jet was attacking my position I will just say "448". That was my location code. The word 448 means jet has moved, or it has attacked our location.

12:03:18 Q. So to be clear, Mr Witness, 448 referred to a possible air raid by the jet - ECOMOG jet. Is that correct?

A. Yes.

Q. And did you get these sort of messages on your way from Koinadugu to Rosos?

12:03:44 A. Yes. Yes, many times I received that message myself and other people who took over after me for a while when I was resting they will get that message. When that message will come, everybody would know. In fact, all the AFRC/RUF combatants had that code. When they heard that code, "448", that meant there 12:04:12 was a jet around and so everybody would run to hide.

Q. Where were these messages coming from?

A. As I was talking about monitoring communication set, we had a particular radio set in Buedu monitored by the AFRC that was the former SLA. That group was monitoring and giving the message

to the transmission. That was the control station in Buedu and they would send it to all stations. That was their responsibility. That 448 information was coming from Buedu, Sam Bockarie's station.

12:04:51 Q. Now, let us come to Freetown. You have testified already that you entered Freetown on 6 January 1999, correct?

A. Yes, it is correct.

Q. Now, can you describe your entry into Freetown. From which end of Freetown did you get into the city?

12:05:22 A. Well, we used the main highway from Waterloo to Freetown, from Kossoh Town - from Hastings, Kossoh Town to Freetown. We entered from the eastern part of Freetown and we entered with heavy firing. We entered Freetown fighting, but before we got to Freetown we divided ourselves into groups.

12:05:52 Q. Hold on, Mr Witness. (Your Honours, Kossoh Town is K-O-S-S-O-H, Kossoh). Yes, you have said you divided yourselves into groups. Which groups did you divide yourselves into?

A. We divided ourselves into fighting groups. That means - you know, Freetown is not a small village. It is a very big city

12:06:23 if we didn't divide ourselves into groups. Every group had a commander, who will lead it. We appointed some areas where the commanders would go like Ferry Junction, that is one point, Ferry Junction covered Upgun, and also State House in Freetown, that was one target, the second target was Pademba Road, which is the

12:06:53 maximum prison in Freetown, and we had the National Stadium and these are the areas I can recall. We divided our groups according to these areas and appointed commanders to go to these areas.

As for me personally, I was in a group with my radio with

been happening and the discussion by Gullit, that was going on through my radio communication set.

Q. Now on this first day that you entered Freetown, was there any communication between the forces - your forces - and Sam Bockarie?

12:17:10

A. Yes, as we entered Freetown we were based and settled, the authorities got settled at State House, they were able to communicate with Sam Bockarie about the situation. Gullit told Sam Bockarie that, "You said we should not enter, but however we have now entered and thanks to God we were able to get State House, Pademba Road and the National Stadium. Our men are still advancing, were still under fighting and we were able to release JS Momoh, Gibril Massaquoi, Hilton Fyle and some other prominent authorities. In response, Massaquoi - I am sorry, Mosquito told Gibril Massaquoi that, "Do as a military man".

12:17:38

12:18:11

Q. Can you just pause. Was Mosquito - you said, "Mosquito told Gibril Massaquoi". Who was Mosquito responding to? Who called Mosquito and who was he responding to?

A. I am sorry, Gullit called Mosquito and told him those whom we had released from Pademba Road. In response, Mosquito said Gullit should - Gullit and others should take great care of those people and Gullit told him that they were under safekeeping at State House. Mosquito said Gullit should provide security and take great care of those people, until he tried by all possible means and dispatch them to Kailahun. So, whatever activities that was going on Gullit used to transmit the message to Mosquito. At that time SAJ Musa was dead. And even myself as a radio man I had my personal radio, because it was my responsibility according to Mosquito to give him all detailed

12:18:44

12:19:10

information about the Freetown operation. That was what I was doing. Any conversation going on between Mosquito and Gullit I used to monitor that. At times I will be at the radio station and I will get information about that and --

12:19:52 THE INTERPRETER: Your Honours, can the witness go over the last bit?

PRESIDING JUDGE: Mr Witness, the interpreter needs you to repeat the last part of your answer.

THE WITNESS: Any information that was going around in
12:20:09 Freetown either by voice or by messages, that is written messages, I used to monitor that and write it down, and any information that Gullit failed to tell Mosquito that was my responsibility to tell him. And from there I was able to give him details, but when SAJ Musa entered Camp Rosos and what
12:20:37 happened around his death and after his death, what actions, why we didn't wait and we entered Freetown. I gave all of these pieces of information to Mosquito.

MR BANGURA:

Q. Mr Witness, apart from the prisoners from Pademba Road whom
12:21:00 you had taken to State House, were you holding any other persons there at State House?

A. Yes, as we were fighting so we were capturing ECOMOG troops, but for the SLA we didn't have much problems with them because some of them were running from the government and coming
12:21:21 to join us with their guns. And for the ECOMOG soldiers, when we captured the ECOMOG we killed them at the front line and those that we would bring to the State House we report them to Gullit and he himself would report to Sam Bockarie. Sam Bockarie would tell him that he had no prison for ECOMOG. No politicians. As a

result, those ECOMOG soldiers were killed under the Cotton Tree. That area there were more than ten or 15 ECOMOG corpses and some other areas, so we never spared ECOMOG.

Q. Now, you have mentioned that - what was the state of - what was the situation regarding civilians in Freetown when you entered?

12:22:12

A. Oh, it was pathetic. Of course I am a member of the RUF, but it was pathetic, but there was no other way to do. The civilians were suffering. They suffered raping, hard labour, execution, amputation, burning of the property. That was how they were in Freetown. And this was effective when the situation changed, when the military situation changed, that when the ECOMOG had had power over us again all those atrocities that I had mentioned became more rampant.

12:22:40

Q. Mr Witness, how long were you at State House? How long did you occupy State House?

12:23:12

A. State House, it was almost a day. Of course, ECOMOG did not drive us there. The air raid was going on. Every two hours we will get a report on the radio that "448". So the 448 always was directed at State House, that ECOMOG had planned to bombard State House because of the massive killing that was going on at Cotton Tree. So, from that point we changed our location. We slept there and the next day we changed our location, but we were beyond State House towards the west. Two days we started retreating.

12:23:38

12:24:05

Q. Now, did you have further communications with Sam Bockarie about the situation?

A. Yes, of course. That was our daily activity. Every morning, every afternoon, every evening we would send situation

clarify that? What exactly were you supposed to do from both sides?

A. Gullit's side, Gullit was to send fighters at a point where they will meet and attack Kossoh Town and Superman, Issa Sesay, 12:38:21 Morris Kallon were to also dispatch fighters to go and attack Kossoh Town so they will clear the route, so that the fighters could come and enter Freetown and join Gullit so we could re-attack and regain all the areas we had lost and even to take over - to take all over the city. That was the plan.

12:38:42 Q. Now, which forces were at Waterloo at this time?

A. The forces which were at Waterloo were Superman's group, including Morris Kallon and Issa Sesay. That was the group which was at Kono and Koinadugu which led - they all came and joined at Waterloo. According to the plan which we had at Buedu, they had 12:39:10 now come and merged. If they had met us there we would have entered Freetown together, we wouldn't have stopped getting Freetown, but our group did not wait.

Q. Now, did you send - did Gullit send troops to Kossoh Town as was ordered by Mosquito?

12:39:33 A. No.

Q. What about the troops waiting at Waterloo? Did they advance to Kossoh Town as was the plan?

A. Yes, those men organised themselves. They attacked Kossoh Town at night until daybreak, but they could not get the town. 12:40:00 But among that group they had one AFRC strong fighter who was Red Lion - sorry, Red Goat, Rambo Red Goat. He was the only man who could garner up to 15 manpower and they bypassed ECOMOG and came to Freetown and joined us.

Q. Now, this fighter who you have just mentioned, Rambo Red

Goat, you say he was an SLA and he had 15 manpower, I assume fighters, is that correct, with him?

A. Yes, he came to Freetown with 15 manpower.

Q. Now, at the time that he left, or up until the time that he left Waterloo and bypassed ECOMOG positions, who was he fighting under?

A. Well, he was with Superman's group.

Q. Now, when this group came into Freetown, did anything happen?

A. Those 15 men that I told you about, they came to Freetown and met us at Kissi Old Road. When they arrived they said from Waterloo they attacked Kossoh Town but they could not succeed, but Rambo, who was Red Lion - sorry, Red Goat, was able to take 15 men to come and join Gullit's group in Freetown, but at that time they met us now on our way going. The day they arrived Gullit passed an order that all those who had motorcycles and vehicles and what you could not - somebody could not carry, let us burn everything. So, everything was put at one place and they were burned. Vehicles and everything was burnt, those that we could not carry. So, when Red Goat Rambo came he said he had not come to return. He said he had come to stay in Freetown. Some men were happy to be with Rambo in Freetown and Gullit himself, who he met there, he gave him the okay to stay. In fact, at that moment only a few of us returned because we were more than 4,000 in Freetown. Most of the people hadn't guns, particularly those who were released from Pademba Road, so most of us, the armed men - a few armed men and a few unarmed men returned to Waterloo. Rambo stayed in Freetown with many other men.

Q. Now, amongst the men that stayed in Freetown with Rambo, do

you recall any of them that you now remember?

A. Yes, I can recall one name: Rambo Red Goat himself.

THE INTERPRETER: Your Honours, the witness has called a name that I need clarification on.

12:43:42 PRESIDING JUDGE: Could you please repeat the name for the interpreter.

MR BANGURA:

Q. Could you go back, Mr Witness?

A. Striker, who was the Red Lion's commander, Red Lion

12:43:55 Battalion Commander.

Q. And what was the size of the force that you said decided to stay in Freetown with Rambo Red Goat?

A. That number was too much. I cannot recall now.

Q. Now, were any orders given to Rambo Red Goat before you

12:44:23 pulled out of Freetown?

A. Yes, of course. Rambo was given an order by Gullit.

Q. Now, the decision to allow Rambo Red Goat to stay in Freetown, was it discussed at all in any communication with Mosquito?

12:44:44 A. Yes, Mosquito told him that as far as that man has said that he is living there and he is able to get manpower, they should leave and they should come back to Waterloo, reorganise themselves and re-attack Freetown. I want to ease myself.

MR BANGURA: Your Honours?

12:45:12 PRESIDING JUDGE: I see. Madam Court Attendant, if you would assist the witness to leave, please.

[In the absence of the witness]

MR KOUMJIAN: Your Honour, could I take advantage of the break and just bring to the Court's attention that we have

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-360 3178

EXAMINATION-IN-CHIEF BY MR BANGURA 3178

CROSS-EXAMINATION BY MR CAYLEY 3280

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 5 FEBRUARY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura
For the Prosecution:	Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova Ms Kirsten Keith
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Andrew Cayley

Q. Apart from Zogoda which other bases did you operate about the same period '95, '96?

A. Well, the other base that I would call which was the first page was Kailahun District, Ngeima. We called there Burkina base which was in the Kailahun District in the eastern part of Sierra Leone. Then the other one I can recall is Libya. Those names we used to call them because we didn't want people to know that we were at this or that area, but amongst ourselves we knew, and therefore Libya was Pujehun District, southern part of Sierra Leone. Then from there we had Gandorhun which was Kono District. We had Peyama which was very close to Tongo. Then we had Kangari Hills, Tonkolili District, northern province. Then we had Bradford which we called Western Jungle. Then we also had Bo Jungle.

MR BANGURA: Before we continue on, your Honours, I will do some spellings here. I see most of them are actually correctly spelt.

JUDGE SEBUTINDE: What about Peyama?

MR BANGURA: Peyama is P-E-Y-A-M-A.

Q. Mr Witness, how long was the RUF able to keep these bases that you have mentioned?

A. Some bases RUF was there from '95, 6 - early 1996. I mean at the end of 1996 some bases were dissolved like Peyama, sorry, Peyama, Gandorhun, Libya, Zogoda, those ends were dissolved at about '96, '97.

Q. Why were these bases dissolved?

A. Because when our leader Foday Sankoh moved away and went on peace talk, while he was on the peace process we were not ready to fight again. So the Kamajors used that as an advantage and

our manpower to the various areas that I have been naming. We had manpower at Kono which was at a diamondiferous area in Sierra Leone. From Kono to Magburaka we had Masingbi, Sewafe, Makali, Matotoka, Magburaka, all those areas that I have named we had
10:33:07 deployments there. It was a mixed group now with the AFRC.

Q. Pause a while. They are all correctly spelled, your Honour. Now you yourself, did you have any particular appointment during that period?

A. Yes. In fact I from start, when I completed my radio
10:33:46 course since 1992 the only job I did was on the radio. I was not entitled to fighting. I was always behind the radio to receive and send messages. So I was at Makeni as the overall signal commander and I covered Kono, Kabala, Makeni itself, Lunsar, Magburaka and all the other areas I have named in Magburaka and
10:34:18 Kono.

Q. Now during this period are you able to tell the Court or give an idea to the Court of how many radio stations that you monitored or that you supervised in these areas that you have mentioned?

10:34:38 A. Yes. One was Makeni itself, Kabala, Lunsar, Magburaka, Matotoka, Makali, Masingbi and Kono.

Q. Now apart from being assigned to supervising radio communication in these areas did you take on any other role or were you assigned to any other duty during that period?

10:35:22 A. Yes, it was at a point in time I used to come to Freetown and receive supplies. Sometimes I came with other commanders to receive supplies. And also I was the one who came to receive our own supply because the signal units on the radios, they always supplied us together with the other fighters. Our own salaries

Q. Which town did you go to when you arrived in Kono?
A. It was Koidu Town itself, which is the headquarters of Kono District, Koidu Town. Kono District has two names. We call it Koidu Town and mostly people call it Kono. Also, for the
11:44:05 district it is Kono, but the two names that the town carries that is Koidu Town and Sefadu. That is how we call that town. The two names belong to the same town, that is Sefadu and Koidu Town. That is the same town. The district is Kono.
Q. Can you describe what happened when you arrived in Koidu?
11:44:32 A. Immediately we got to Koidu there was now communication between the authorities, Issa Sesay, Superman and Sam Bockarie for them to reorganise and base in Kono, for us not to lose Kono. The first message that we monitored, that we received in our message log book, according to Sam Bockarie he said he had
11:45:03 consulted Mr Taylor in Liberia saying that in Kono, as long as we have Kono we will not fail in taking over the rest of Sierra Leone again because we already knew that Kono was one of the prominent diamond mining areas in Sierra Leone. Therefore, all the troops should be on standby there except Issa Sesay, Johnny
11:45:39 Paul Koroma and the securities who were going to escort them to Buedu. Therefore, Issa Sesay should organise Superman as the overall commander for Kono District jungle and Morris Kallon should act as his deputy, and that they should make sure that they hold fast to the ground and should not allow to lose the
11:46:10 ground before he left, but before Issa left he said we were guerillas and anywhere a guerilla was you should make the area fearsome. In the RUF when we talk about making the area fearsome it is a word that carries different meanings. It means we should burn down houses, destroy other properties, killing and construct

communication systems in Sierra Leone.

Q. Now, coming back to the orders which had been given about how - what you were to do in Koidu, you have already mentioned that Morris Kallon subsequently gave specific orders to commanders. Apart from those orders, do you recall anything else to do with Morris Kallon in Koidu at this time?

11:53:07

A. Yes, there are so many things. I can recall some, some of the orders that were given to Kallon and not only Kallon, the orders that were given to Superman. They used to give orders with regards attacks and ambushing and this always happened. They always gave orders, but before the orders were given Sam Bockarie, I can recall, transmitted a message that he had finally had an arrangement with Mr Taylor because we were now in Kono and we should be able to take care of Kono. He said Mr Taylor has told him that they should try and reorganise and re-prepare the airfield at Buedu, so in there they would need civilians to do the work on the field. The RUF sent over 200 to 300 civilians to Kailahun to do forced labour, to work on the field day and night with security escorts. Beside that we also got rid of some civilians for the mining purposes in Koidu Town, in Kono District.

11:53:38

11:54:07

11:54:52

Q. Within Koidu Town, while you were there at this time, do you recall anything else that occurred apart from the fact that houses were burned and civilians were abducted?

A. Yes, in Koidu Town before ever we left there we had another message from Sam Bockarie in which he said he needed money. The arrangement between himself and Taylor has been confirmed and now he needed money, but by then there was a commercial bank in Koidu Town. He passed the order to Superman and he told him that they

11:55:20

correct? It could not be?

A. No, it was not easy. It was not easy.

Q. Thank you. Now, shall we move on to the messages that you received from Sam Bockarie in relation to mining. You - I think the question I had asked before we took the break was when was the earliest period that you received a message from him relating to mining. Can you go over that again?

A. Yes, the first stage was the first time we entered Kono we had a message from Superman - sorry from Sam Bockarie, Buedu, to Superman concerning mining in Koidu Town. The message said we should not lose Kono at all, because it had gone over to Mr Taylor - he had gone over to Mr Taylor for arms and ammunitions and what Taylor told him is he should try and get Kono, he should not lose Kono and from Kono we could get diamonds and we use these diamonds, give it to Taylor and he in return would give us ammunition. That was the first message we got.

From there we came to the bank, moved down to Superman Ground. When Bockarie, Mr Sam Bockarie alias Mosquito, came from Monrovia again, when he brought this ammunition out of this money he still insisted on the same message. At that time Superman had been organising men for this mining and the process had just started when we got to Superman Ground and luckily for us we used to have diamonds.

Q. Tell this Court in what locations you actually carried out mining activities?

A. It was around Koidu Town itself. That is where we started. At that time we were not in Koidu Town itself because ECOMOG was there. It was the surroundings.

Q. Apart from the vicinity around Koidu Town, did you engage

allowed ourselves to hold our meetings in town. At any time we wanted to hold a meeting we will do that at the edge of the town. Where we held that particular meeting the communication radio station was also located very close to their and the field radio, it was very close to where the meeting was held. It was very close to Sam Bockarie's house alias Mosquito.

Q. Mr Witness, can you give the Court an idea of who was present at this meeting? Who were the persons present at the meeting?

15:41:10 A. At the meeting Mosquito was there, Superman was there, Isaac Mongor was there, Mike Lamin was there, Pa Rogers also was there and other authorities on the ground. And most of the battalion and brigade commanders were present.

Q. Now, Pa Rogers does he have - what is his full name?

15:41:56 A. SYB Rogers. I don't know what the initials SYB stand for, but he was SYB Rogers.

Q. Now can you tell this Court what transpired at the meeting?

A. Yes, what I can say what happened in the meeting, after everybody had assembled the first point on the agenda,

15:42:39 Sam Bockarie said he was going to clear the air to the people what actually obtained in the diamond transaction when Issa Sesay went to the diamonds and misused them according to what he came back and said. That was what happened in Liberia.

He first appealed to all - with all combatants and

15:43:04 commanders. He said, "Please, the issue of the diamonds that Issa has returned and spoken about", he said he is pleading with everybody to go back to their stations and resume their normal job. He said he has sent Issa Sesay to Pendembu and he considered that to be part of the punishment for him. He said

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-360 3066

EXAMINATION-IN-CHIEF BY MR BANGURA 3066

4076

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 24 JANUARY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Julia Sebutinde Justice Richard Lussick Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Carolyn Buff
For the Registry:	Ms Rachel Irura Mr Vincent Tishekwa
For the Prosecution:	Ms Brenda J Hollis Ms Leigh Lawrie Mr Alain Werner Mr Nicholas Koumjian
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah

A. Please, sir. Your Honours, I want you to repeat the question, sir.

Q. If any of those names I have mentioned, Akim, Nancy, or Mary, were to come to this Court and tell the Court that they overheard you saying what I have said to Idrissa Kargbo, they would be lying. Is that your testimony?

A. Yes.

MR ANYAH: Your Honours, I would refer the Chamber to the last tab in the set of documents, tab number 12, and these are records of disbursements made by the Office of the Prosecutor to the witness:

Q. Mr Keita, I want to ask you about amounts you have received from the Office of the Prosecutor in this case. The records, starting on page 1, line 1, indicate that on 20 June 2003 you received the sum of $445. That is correct, true?

A. Yes.

Q. On the second row it says that three days later, on 23 June 2003, Corinne Dufka made a payment to you in the amount of $885, correct?

A. Yes.

Q. And we are speaking not of Liberian dollars, we are speaking of United States dollars, correct?

A. Yes.

Q. On the same day, 23 June 2003, a J Barry made a payment to you, or spent $793 to your benefit, true?

A. Yes.

Q. The fourth entry indicates that on 23 June 2003, $57 were paid to cover your hotel costs, correct?

A. Yes.

Q. Also on the 23 June 2003 the records indicate that $322 were paid to cover expenses for you, correct?
A. Yes.
Q. Then we get to 16 July of 2007, the eighth entry, and it is there indicated that the sum of 6,000, I believe that would be leones, was expended on your behalf. Is that correct?
12:38:33
A. Yes.
Q. And then the last page shows that the total amount you have received from the Office of the Prosecutor is $2,502, plus 6,000 leones, is that correct?
12:39:08
A. Yes.
Q. Now, most of these payments came on 23 June 2003, correct?
A. Yes.
Q. And that was a few days before your interview with Ms Dufka on 30 June 2003, correct?
12:39:32
A. Yes.
Q. Besides money that you have received from the Office of the Prosecutor, you have received money from another section of the Court, have you not?
12:39:53
A. Which section, sir?
Q. Have you received any money during the course of your involvement with the Special Court from the witnesses and victims section of the Special Court?
A. Yes.
12:40:10
Q. Can you tell us the total amount that you have received from that section since you have been involved with the Special Court?
A. No.
Q. Has the money been paid to you in United States currency?

A. Yes.
Q. Is the amount you have received less than, or greater than, $1,000?
A. Not even close to it.
12:40:44 Q. Then you have an approximate amount that you can give us. Can you tell us what the approximate amount is?
A. I cannot estimate, sir.
MR ANYAH: Madam President, may I have a moment, please? Madam President, I tender the witness. I have nothing further.
12:41:22 PRESIDING JUDGE: Thank you. Re-examination, Mr Koumjian?

RE-EXAMINATION BY MR KOUMJIAN

MR KOUMJIAN: Your Honour, very briefly, but the document that counsel was last cross-examining on in tab 12 I would like to have that marked for identification and I would like to ask
12:41:40 the witness some questions about that. I have an extra copy I could give to the Usher to put on the screen. Actually, my copy I have just scratched the word "payments" on it. That is the only way it differs, but let me use the copy that is in the Defence binder. I think it is unmarked.
12:42:39 PRESIDING JUDGE: Very well. That will be a document, three pages, headed "Special Court for Sierra Leone: All disbursements for witness" and then a number, and that will be MFI-20.
MR KOUMJIAN: Is it on the screen now?
12:43:07 Q. Sir, I am asking you some questions about the payments that the Defence counsel just asked you about. You were asked about a payment on 20 June 2003 of $445. Do you know the nature of that payment? What it paid for?
A. That was for my affairs.

I N D E X

WITNESSES FOR THE PROSECUTION:

ABU KEITA	2091
CROSS-EXAMINATION BY MR ANYAH	2091
RE-EXAMINATION BY MR KOUMJIAN	2156
TF1-371	2172
EXAMINATION-IN-CHIEF BY MS HOLLIS	2172

EXHIBITS:

Exhibit P-44 admitted	2163
Exhibit P-45 A and P-45 B admitted	2164
Exhibit P-46 A and P-46 B admitted	2164
Exhibit P-47 A and P-47 B admitted	2164
Exhibit P-48 admitted	2165

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

WEDNESDAY, 23 JANUARY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Julia Sebutinde Justice Richard Lussick Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Doreen Kiggundu
For the Registry:	Ms Rachel Irura Mr Vincent Tishekwa
For the Prosecution:	Ms Brenda J Hollis Ms Leigh Lawrie Mr Alain Werner Mr Nicholas Koumjian
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah

did you have any discussion about your bodyguards?
A. The bodyguards, they later changed. He gave me his own bodyguards and then the bodyguards who came with me, he took them over.
Q. How many bodyguards did Sam Bockarie give you?
A. He gave me three bodyguards.
Q. Did you have anything else with you that Sam Bockarie took?
A. He requested for the Yaesu radio that I brought with me and then he took the Yaesu radio that I brought, the one that was assigned to me by Benjamin Yeaten. He requested that I turn it over to him.
Q. Did you do that?
A. Yes.
Q. Can you tell us, when Sam Bockarie came to Buedu with the 300 boxes of ammunition, what was the atmosphere among the RUF present in Buedu?
A. They were very happy and then he called a muster, he called a meeting, and then those of us who were vanguards, he invited us into his house to discuss about the ammunition and then the plan that we should take towards the ammunitions.
Q. Okay. Let us take these slowly. You mentioned several meetings with Sam Bockarie. On that day when Sam Bockarie came back, what was the first meeting he had that you recall?
A. The first meeting, you know it was not with me in particular, but it was the whole RUF. He called Issa Sesay who was in that meeting, Lawrence Wohmandia was there, SB Rogers, Lawrence Wohmandia, Akim, Leatherboot and he said, "That is the material, that is the ammunition, and the operation is that we should take over Kono and Makeni and to terrorise the highway",

he said, because Kono was a strategic area for us to get arms so that the mining will continue.

Q. Okay, where it did this meeting with these commanders take place?

A. The meeting took place at his house and then from there they had a vanguard meeting which was in closed doors in his bedroom. The people who they called vanguards, those were the people who brought the war into Sierra Leone. Those were the ones they called the vanguards.

Q. Okay, thank you. I was going to ask you to clarify that, but let me make sure we understand. When you say the vanguards are the people that brought the war into Sierra Leone, what do you mean?

A. I mean the first people who entered into Sierra Leone with the war, with the RUF. Those were the ones who were called vanguards.

Q. Were vanguards Sierra Leoneans, Liberians, or both?

A. They were a mixture. There were Liberians, there were Sierra Leoneans.

Q. Now, you have explained to us what vanguards are. Perhaps I will take this opportunity, you mentioned earlier the word "honourable", can you explain who were the honourables?

THE INTERPRETER: Your Honours, could counsel go over his question please.

A. Vanguard means -

MR KOUMJIAN: Wait, the interpreter asked me to restate the question.

Q. Can you tell us what the term "honourbles" means?

A. Of the vanguard, or the honourables, or the ones who were

the honourbles, who were honourable, Adams, Suleh. They were the form of people who did the overthrow of the AFRC. Those were the people. But the vanguards were the special forces, the first group that crossed into Sierra Leone with the RUF. Those were the ones that were called the vanguards.

Q. Thank you. This first meeting that Bockarie had at the house after bringing the ammunition, you mentioned some commanders and in your answer you also mentioned - you said it was an RUF meeting and you mentioned Akim and Leatherboot. Akim and Leatherboot were AFRC, they were SLAs, is that right?

A. Yes, but they all worked with the RUF.

Q. Can you explain to us, you said Bockarie said Kono was strategic, did he explain why?

A. He said because we needed to generate funds for the RUF and then the only place where we can get more resources to generate funds was Kono, so we could be able to do mining.

Q. Okay, so after the meeting at the house you said there was a meeting in Bockarie's bedroom of the vanguards, is that correct?

A. Yes.

Q. So were you allowed into that meeting? Were you present for that?

A. No, they never allowed me to attend the meeting, sir. It was only for vanguards and I was not a vanguard.

Q. After the closed door vanguard meeting, was there another meeting?

A. That was a muster parade it was not a meeting, where all the soldiers assembled at the military grounds before Kaisoko's office. That was the time he instructed Issa Sesay that this

mission, that the mission is that there should be no retreat, no surrender, "You should make sure you take over Kono and Makeni", and then he said President Taylor said they should be very vigilant and maintain the ground of the RUF, during that muster parade.

Q. You said it was in front of Kaisoko's office?

A. Not Kasava [phon], it is Kaisoko, the military police commander in Buedu.

MR KOUMJIAN: Thank you, I believe that is K-A-I-S-O-K-O.

Q. Sir, after this meeting was there an offensive?

A. Yes, that was the time we took the offensive against Kono and Makeni, and then myself there was an operation from Segwema, from Bunumbu to Segwema, to Jumo Kafebu, Gbava and Bendu junction.

MR KOUMJIAN: Okay, thank you. It is going to take me a few moments to spell some of these. Jumo Kafebu, J-U-M-O and second word K-A-F-E-B-U. Segwema, S-E-G-W-E-M-A. Bunumbu, B-U-N-U-M-B-U. B-U-N-U-M-B-U.

Q. I believe, sir, did you say Gbava?

A. Gbava, Gbava.

Q. That is G-B-A-V-A. In that offensive do you know if the main town in Kono, Kono Town, or Koindu Town as it is sometimes called, was taken?

A. Officially Kono Town was announced on Christmas day that Koindu has been taken over by the RUF.

Q. So that was Christmas day 1998?

A. Yes.

Q. Just so we have an idea, about how long before Kono Town fell did Sam Bockarie come back with the 300 boxes of ammunition?

would they send the number?
A. Through the radio, sir.
Q. You have told us about Sam Bockarie having a sat phone. Did you ever see anyone else in the RUF with a sat phone?
A. Yes.
Q. Who was that?
A. That was Issa Sesay after Sam Bockarie's regime.
Q. Do you know where Issa Sesay got the sat phone from?
A. He said the sat phone was given to him by Charles Taylor from Liberia.
Q. Sir, after this offensive in the Kono area did you become aware of more fighting occurring somewhere else in Sierra Leone?
A. Yes.
Q. What happened next?
A. The next operation after Kono and Makeni operations, and Freetown, the next one was that we fought in Liberia.
Q. Sorry, you mentioned Freetown so I want to concentrate on that.
A. Okay.
Q. The attack on Freetown. Where were you when the attack on Freetown was happening in January 1999?

PRESIDING JUDGE: You are definitely leading again, Mr Koumjian.

MR KOUMJIAN: I thought it was established that it was January, was the Freetown offensive.

PRESIDING JUDGE: No, the term - in any event, it is not established.

MR KOUMJIAN:

Q. Sir, when did you become aware - let me start all over.

Sir, where were you when the attack on Freetown happened?
A. When the attack on Freetown happened I was in Buedu.
Q. Where was Sam Bockarie?
A. Sam Bockarie was in Buedu. That was the time I told you that he came with these jean trousers and T'shirts and the car.
Q. How did you become aware of what was happening in Freetown?
A. At 3 o'clock we listened to BBC Focus on Africa and one commander spoke from Freetown saying that they were in control of the State House. Sam Bockarie became angry. He called up Issa Sesay and Morris Kallon asking them why they should allow someone to call the BBC while he, the commander, has not called the BBC. Then from there he himself called the BBC when they were in Buedu. He was speaking to Robin White over the satellite phone. He shot and said we were coming around the State House, but we were in Buedu.

JUDGE SEBUTINDE: Mr Koumjian, who is this "he himself called the BBC", is that Issa Sesay?
A. Sam Bockarie, General Sam Bockarie [indiscernible]. He called the BBC from Buedu over his satellite phone.

MR KOUMJIAN:
Q. Did Sam Bockarie maintain any communications with people in Freetown?
A. In Freetown?
Q. In and around Freetown?
A. He was talking to the various commanders over the Yaesu radios. He also communicated with Benjamin Yeaten and Joe Tuah over his satellite phone at night.
Q. Starting with the commanders you mentioned over the Yaesu radios, do you know the names of the commanders he was

communicating with?
A. He was communicating with Issa and Morris Kallon.
Q. Anyone else that you recall him communicating with?
A. Those were the names - those are the names I can remember.
Q. On the Yaesu radios, can you tell us, are all of the commanders normally communicating on the same channel?
A. Yes.
Q. Was there someone in Buedu monitoring those channels?
A. There was a chief signal operator called Zedman. He monitored all the radio channels.
Q. You mentioned that Bockarie was on the satellite phone with Benjamin Yeaten, Joe Tuah - those are the names I recall. Did you hear him talking to Benjamin Yeaten and Joe Tuah during the Freetown fighting?
A. Yes.
Q. Do you know when the Freetown fighting occurred?
A. It started in January. It was on 6 January that they called from the State House saying they were in control of the State House.
Q. What year?
A. That was in 1999, sir.
Q. When Bockarie called Yeaten did you hear any of the conversation?
A. Yes.
Q. After the calls, would Bockarie ever discuss with you what he had talked to Yeaten about?
A. He said he just explained about the operation, how the men were progressing.
Q. Did Bockarie ever indicate whether he got any instruction

from Yeaten, or anyone else in Liberia, during that offensive?

A. Coordinating in which way? I want you to explain, sir.

Q. Let me try the question again because I didn't say coordinating. Did Bockarie ever indicate whether he got any instruction from Liberia during the Freetown fighting?

MR ANYAH: Madam President -

A. He only communicated to Benjamin Yeaten.

PRESIDING JUDGE: Just pause, Mr Witness.

MR ANYAH: I object to the form of the question. Counsel is tacitly, or indirectly, leading the witness with phrases like "instructions" and this has been going on for a while. He could easily just ask the witness what Bockarie told the witness was the nature of these calls.

PRESIDING JUDGE: Mr Koumjian, there have been a few objections to leading. There are implications in some of the wordings you use. Please reword these questions to avoid any form of leading.

MR KOUMJIAN:

Q. What did Bockarie tell you, or what did you hear him say to Benjamin Yeaten?

A. I heard Bockarie and Benjamin Yeaten conversing about the progressive move that RUF has made. I didn't hear any instruction from Benjamin Yeaten to Bockarie to say do this, or do that, at that time.

Q. Thank you. During the fighting in Freetown, in the January offensive, did you play any part in that? What was your assignment?

A. I told you that I was assigned to Segbwema, Bunumbu, just in case any wounded soldier comes, I will take that wounded

should maintain the RUF and to maintain the controlled areas of the RUF.

Q. Who said, just to be clear, who said that the message had come from President Taylor?

A. Sam Bockarie, Sam Bockarie, sir, Sam Bockarie.

Q. Thank you, now it is clear. Did Sam Bockarie pass that message to anyone?

A. Yes. He talked to Issa, Morris Kallon.

Q. Sir, when you were with the RUF did you become aware of any strategies to deal with attacks from jets?

A. Yes.

Q. Can you tell us about those RUF strategies?

A. The strategy was you should not cook during the day time. You should not set fire during the day. You do not launder and hang the clothes on a line. You are not entitled to rear chicken in the town. You are not entitled to keep a dog, because those things, when the jet discovers them they can operate.

Q. Was there any strategy involving radios?

A. The strategy was the monitor - Zedman monitored the radio stations from the Nigerian ECOMOG who were based in Lungi. Also Memunatu and Sita, they monitored from Monrovia. If a jet takes off from Monrovia on the RIA - because Victor Malu, who was the first commander, was staying in Monrovia - so they will call "448", so the radio operator would ring a bell and everybody would escape. That was the only strategy that I knew about.

MR KOUMJIAN: Some of these names we have spelt before. Situ, S-I-T-U, Memunatu, M-A-M-A-N-T-U:

Q. Sir, you said RIA, what do you mean by RIA?

A. The international airport of Liberia.

I N D E X

WITNESSES FOR THE PROSECUTION:

ABU KEITA 1956

EXAMINATION-IN-CHIEF BY MR KOUMJIAN 1956

CROSS-EXAMINATION BY MR ANYAH 2076

4092

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 15 JANUARY 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Teresa Doherty Justice Richard Lussick Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr William Romans Ms Sidney Thompson
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura Mr Vincent Tishekwa
For the Prosecution:	Ms Brenda J Hollis Mr Christoper Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Terry Munyard Mr Morris Anyah

A. Point 50 calibre. It is a gun too.
Q. What did you see on this particular in July 1998? What did you see? 50 calibre what?
A. 50 and bombs - rocket propelled bombs - and mortars.
12:59:32 Q. In terms of 50 calibre did you see ammunitions, or did you see guns? Which was it?
A. I did not see the gun, because we met the gun with them. It was the ammunitions. And 60 millimetre mortars and 82 mortars, the bombs.
13:00:02 Q. You said 60 millimetre mortars?
A. Yes, sir.
Q. And 82 millimetre mortars?
A. Yes, sir, and TNT. It is a bomb. You will fix it for instance on the AK, on the barrel of the AK, the nozzle of the
13:00:27 AK. You can even use that to put down a jet if it is not too far. You can fix it on the nozzle of the AK and shoot at the Alpha jet and it can bring it down.
Q. Mr Witness, how were these materials packaged when you saw them?
13:00:54 A. They would be in boxes. In boxes. Some would be in cans, like sardine tins. Some would be in plastic containers, like the RPG. The tubes would be in plastic containers in a sealed wooden box.
Q. Now, you said that you remember four times when I asked you
13:01:26 about visitors to Sam Bockarie. You have just described what you remember from visitors in July 1998. The other times that you remember, can you briefly describe what those times were?
A. Four times, but I actually saw it on two occasions. The other two occasions I did not see it myself. The guard post

person would bring the information and said that people had brought materials, but when I would come if they met Master - we met Master at the household they were stopped at the house. But the one that Mosquito himself sent, Mosquito would send one MP to
13:02:30 go there to off-load and so I was sent there twice. I saw that twice. I don't want to tell a lie. I am speaking for my God. I saw that myself twice.

Q. Mr Witness, the second time you saw this, who brought the ammunitions?

13:02:54 A. The second one Mosquito himself came at night. When he was coming, he came along with a lot of vehicles with Liberians, trucks. At that time he brought a lot of people.

Q. You say there were people - Liberians. How do you know?

A. My mother hailed from Kolahun. My mother's mother is
13:03:34 connected with the Gbandi people, Kolahun District. In that, our area, if your mother is not a Liberian your father could be a Guinean. Once you are coming from Kolahun, if the person is not a Kissi person he could be a Loma person, or Gbandi person. We are sharing boundaries. We are related. Liberians are related
13:04:03 to Sierra Leoneans. When they talk I will know that they are Liberians, because my motherland is sharing boundary with those people.

Q. The second - this time you were describing, about how long after the first time you just described was this second instance?
13:04:21 How much time passed between the two instances that you personally saw?

A. It was in that same month that Mosquito went and came back. I was there. He met me there. When Mosquito went he came himself. When he was coming he brought some people - Liberians.

THE WITNESS: If you want me to help me it is Lizzi that they call it that way. Omah just as you would say Mr or Madam, Lizzi is what they cut short. They called it Lizzi. As I told you, if a Liberian speaks you would understand if you are from Sierra Leone.

13:19:16

MR SANTORA: Okay, so Lizzi, L-i-z-z-i.

Q. You said she was Foday Sankoh's wife?

A. Yes.

Q. Now, Mr Witness, the second time how were the Liberians dressed; the second time you observed them coming?

13:19:37

A. Some of them had on military uniforms, some in ordinary clothing and they had boots on and they had guns as well and they were entering our own country with their own personal guns.

Q. Can you describe their uniforms?

13:20:07

A. Yes. It was jungle type, but it's a blue one, sky blue, and it was mixed with black, navy blue and green colour. Then they had on the black beret and boots. They had on the trousers.

Q. So, Mr Witness, just to clarify, you said initially - when I asked you how many times you remember Sam Bockarie having

13:20:50

visitors you initially said four times and then you said two times you directly saw visitors. Is that correct?

A. Yes, whatever I say here, even in the world beyond, if they ask me that's the same I will say and I am not telling lies.

Q. Now the other two times you referred to, you personally

13:21:21

didn't observe that. Is that correct?

A. No, but documents used to come. Documents used to come and when that came it would be given to Tom Sandy. At that time the Nigerians I was - the Nigerians were in my custody and in the night I would put them in their cells and lock them up at that

time. What I saw - what I saw - what I witnessed with my own eyes that I recorded is what I am saying to you. I am not speaking here to impress anybody. What I saw - whatever I did during the war I will tell you.

13:22:08 Q. Mr Witness, the Nigerian POWs, who were they?

A. They were ECOMOG soldiers who had been captured alive.

Q. And you said that you saw documents from Tom Sandy. Was that the basis for your information that there were other visitors. Is that correct?

13:22:49 A. The way they made that movement, even if you were a commander when you arrived you would first go to the MP. MP was like the immigration. Just like in Freetown we have the Lungi airport. Even if a minister comes from another country you go through Lungi. So whatever you were going you would go through

13:23:08 MP for clearance before going to your house.

Mosquito, when he was - he wouldn't travel without going to MP. When Issa is travelling he wouldn't go to MP. Mike Lamin wouldn't go to MP. But whoever came to Buedu would go to MP hand, yourself over and then go to Buedu. That is how I know. I

13:23:28 knew by document. It would be written on it first battalion, second battalion. It is second battalion, Lofa County. That was how it was written on the address. From scorpion second battalion, scorpion regiment second battalion, that is how it was written, Lofa County. I am not telling lies. I saw it with my

13:23:53 own very eyes.

Q. Mr Witness, earlier you said you left Buedu on December 16th 1999, is that correct?

A. Yes.

Q. Okay. And you said you went to Kailahun, is that correct?

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-114 1222

EXAMINATION-IN-CHIEF BY MR SANTORA 1222

CROSS-EXAMINATION BY MR ANYAH 1297

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

THURSDAY, 10 JANUARY 2008
9.00 A.M
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Julia Sebutinde, Presiding Justice Teresa Doherty Justice Richard Lussick Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Ms Rosette Muzigo-Morrison Ms Rachel Irura Mr Vincent Tishekwa
For the Prosecution:	Ms Brenda J Hollis Mr Stephen Rapp Mr Alain Werner Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Andrew Cayley

ATU report?

A. He reported to Mr Taylor directly.

Q. Now you have told us that Benjamin Yeaten was the joint chief of staff and during this time period we're talking about he

09:34:11 was based in Lofa County. Could you tell us what other commanders were in Lofa County at that time?

A. I said the navy division was in Foya, the marine division was in Foya, and we had the terrorist in Zorzor and we had a Strike force based in Nimba County and we had the army division

09:34:46 at Tubmanburg, that is Bomi Hills. We had the acting terrorist at Gbatala. That is in Bong County. Then we had White Geese also in Gbarnga.

Q. Thank you, Mr Witness. Now you also testified yesterday that the RUF were invited to assist the militias against the

09:35:14 LURD. Did the RUF come to assist in the fight against the LURD?

A. Yes.

Q. And where did they operate, in what area?

A. They operated in Foya, Kolahun and Voinjama.

Q. Do you recall the names of any of the RUF commanders?

09:35:39 A. The only person that I could recall his name, when Abu Keita came to Voinjama he sent me a written message that he's in good hands and that now he has been just sent forth to assist the Liberian government to fight against the LURD.

Q. Now to your knowledge who did the RUF report to?

09:36:06 A. RUF at that time when they came into Liberian territory to help the government they were reporting to Benjamin Yeaten directly.

Q. Now if you know during this time the RUF were in Liberia assisting in the fight against of the LURD who gave the arms and

ammunition that they used, who gave them the arms and ammunition?
A. Mr Taylor will give the guns to Benjamin Yeaten and Benjamin Yeaten in return will distribute the guns and ammunitions between the RUF and all the other fighting groups in
09:36:49 Lofa County.
Q. Now while the RUF were fighting in Lofa County do you recall where any wounded RUF were taken for treatment?
A. Yes. Some of the wounded RUF fighters were taken to JFK in Monrovia, in the hospital. And now at that time the press people
09:37:20 visited the hospital and some other politicians visited the area and they said on the radio and in the newspaper that the war in Liberia is not true because they are seeing some other citizens from other countries like from Sierra Leone in the hospital and they were accusing the government that they were taking their
09:37:45 Liberian - sending them to Sierra Leone to fight there and now the people they see in the hospitals are speaking Krio, so some people were arrested for that reason. So some people were sent to the battle front to prove actually whether there was war in Liberia or not. That was what happened.
09:38:06 Q. Now you said some people were arrested for that reason. What do you mean?
A. I mean especially the lady who handled the last election that gained the power, the elections commission. They sent people to the battle front to prove actually whether there was
09:38:27 war in Liberia because when they visited the hospital they saw Sierra Leonean people. That means there is no war in Liberia, the war is in Sierra Leone and then Mr Taylor is taking Liberians to go and fight war in Sierra Leone. So they were arrested for that reason. Paul Molrbah arrested people, some of the

politicians, including the last electoral commissioner because they sent people to the battle front to prove that reason.

Q. Are you saying these people were arrested because they were saying that Liberians were being sent to Sierra Leone?

09:39:08 A. Yes, they said they didn't believe whether there was any war in Liberia because they visited the hospital and have seen the Sierra Leonean fighters all over in the hospital.

Q. Now when you were the deputy chief of staff and then acting chief of staff of the army division would you tell us again from

09:39:30 whom you received instruction and direction?

A. I took instruction from Benjamin Yeaten and sometimes Mr Taylor would call me on the direct phone on which he gave me a satellite phone on which he will call me and he will call me directly and he will issue arm and ammunition to me.

09:39:53 Q. And can you recall how often Charles Taylor would contact you directly with instruction or directions?

A. Many times. I can't recall. It is many times. Because almost every two or three days he will call me, he wanted to know the situation at the battle front.

09:40:19 Q. Now to your knowledge the chiefs of staff of these other divisions, from whom did they receive their instructions or directions?

A. The same instruction that I received, they also received the same instruction. Sometimes they received the instruction

09:40:42 from Benjamin Yeaten, sometimes they received their instruction from Mr Taylor directly, because they were all issued phones because so he could call the person directly.

Q. Now during this time that you were deputy chief of staff and then acting chief of staff for the army division were you

I N D E X

WITNESSES FOR THE PROSECUTION:

TF1-406 886

EXAMINATION-IN-CHIEF BY MS HOLLIS 886

CROSS-EXAMINATION BY MR GRIFFITHS 937

4103

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

Monday, 4 June 2007
10:30 a.m.
PROSECUTION OPENING STATEMENT

TRIAL CHAMBER II

Before the Judges:	Julia Sebutinde, Presiding Judge Richard Lussick Teresa Doherty El Hadji Malick Sow
For the Registry:	Mr Herman von Hebel
For the Prosecution:	Mr Stephen Rapp Ms Wendy van Tongeren Ms Ann Sutherland Mr Alain Werner Ms Leigh Lawrie
For the accused Charles Ghankay Taylor:	Mr Karim Khan
For the Office of the Principal Defender:	Mr Charles Jalloh

visited upon Sierra Leone are apparently Sierra Leoneans themselves. The savagery experienced was evidently a part of a national predisposition dormant for many years and then set off without external catalyst. In short, Sierra Leone has only itself to blame.

11:28:07

That is not the view of the Prosecution and it is not what the evidence will show.

The witnesses that we will call and the documents that we will present will prove that the accused is responsible for the development and execution of a plan that caused the death and destruction in Sierra Leone. That plan, formulated by the accused and others, was to take political and physical control of Sierra Leone in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to facilitate that exploitation.

11:28:26

11:28:47

Your Honours will hear in this address that within that overall plan there were, of course, sub-plans and strategies and operations, and the execution of that plan, of course, changed and varied in its tactics due to the unfolding of events and the resistance that it faced. The parties, however, to that plan engaged in a multitude of activities designed to ensure its fulfillment.

11:29:06

The evidence will show that the accused's involvement in the crimes alleged in the indictment took a variety of forms - committing acts, planning, instigating, ordering, aiding and abetting, all in the commission of the alleged crimes, and otherwise participating in the execution of a common plan, design or purpose, what in some courts is referred to as a joint criminal enterprise. Additionally, we allege that he is

11:29:26

4105

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A106
(8)

Kenema S. Leone

00038523

?

Eddie Kanneh

Sam Bockarie

SLB Rogers

?

Sheku Suwale Koroma (Guinea)

P0000615

1480

00009679

was given to the B.F.C Brigadier Issa Sesay. huge quantity of material was given to the B.F.C and he immediately left for Kono. They also held a brum in Kono and succeeded in overrunning the entire Kono district and capture some artillary pieces and huge quantity of Arms and Ammunition. The whole operation was therefore given to the Late Col Rambo who further extended the operation to Tonkolili and advance to Makeni. After the fall of makeni, the Late Col as per instruction went and recieve Bridgadier Superman to join the operation.

They therefore extended the operation to port-loko as far as Waterloo and kamb.a axis.

Furthermore, Col Rambo also tried his level best to link up with the other brothers that entered Freetown, but the Freetown operation was not Co-ordinated as the said Commander Blacks-Sah was not going by the instruction from the High Command. When they retreated from Freetown, the B.F.C met them and told them to present a Comprehensive report pertaining the whole Freetown operation, but they deliberately fail to do so.

According to the Black Guards security information, they brought some diamonds and lot of foreign Currency from Freetown, but they never presented anything to the High Command.

The late Col Rambo even arrested six hundred

Previous

SIERRA LEONE

1998 - a year of atrocities against civilians

Introduction

During 1998 the scale of atrocities against civilians in Sierra Leone has reached unprecedented levels. Several thousand unarmed civilians, including many women and children, have been deliberately and arbitrarily killed and mutilated by forces of the Armed Forces Revolutionary Council (AFRC) and the armed opposition Revolutionary Front (RUF) since February 1998. These atrocities are continuing.

The AFRC, which seized power in a military coup in May 1997 and which was joined by the RUF, was deposed in February 1998 by West African forces deployed in Sierra Leone. The government of President Ahmad Tejan Kabbah, which had been elected in 1996, returned to Freetown in March 1998. Although security has since returned to the capital, Freetown, and much of the south of the country, the scale of human rights abuses committed by AFRC and RUF forces in the north and east of the country has escalated and taken on grotesque forms. From April 1998 reports emerged of civilians suffering mutilations such as crude amputations of their feet, hands, arms, lips or ears. Women and girls have been systematically raped. Hundreds of civilians, in particular children and young men and women, have been abducted by rebel forces. The violence has resulted in hundreds of thousands of Sierra Leoneans fleeing to neighbouring Guinea and Liberia or becoming internally displaced within Sierra Leone. AFRC and RUF forces must respect international humanitarian law and immediately end the gross human rights abuses which they are perpetrating against unarmed civilians.

The international community, including the United Nations (UN), the Organization of African Unity (OAU), the Economic Community of West African States (ECOWAS), the Commonwealth and the European Union (EU), has devoted considerable attention and effort to resolving the political crisis in Sierra Leone and to restoring the government of President Kabbah. It has since repeatedly condemned the atrocities being committed by AFRC and RUF forces. The international community has committed itself to bringing peace and security to Sierra Leone and also to assisting in its reconstruction and rehabilitation. This commitment must include initiatives to help end the gross human rights abuses being perpetrated by AFRC and RUF forces, to prevent further abuses and also to lay solid foundations for the respect and protection of human rights in the future.

The challenges facing Sierra Leone in confronting the widespread and gross human rights abuses which have continued and worsened since May 1997 are difficult and daunting. Sierra Leone's social and economic infrastructure needs to be rebuilt. Its institutions, such as the legal and judicial systems and the army and police, need to be restructured and reinforced in order to ensure protection of human rights. Civil society, including the human rights community, has a crucial role to play. The government of Sierra Leone has to respond to these challenges in a way that ensures that the fundamental human rights of all those in Sierra Leone are protected.

West African forces and a civilian militia who are fighting rebel forces must also respect international humanitarian and human rights law. Forces of the civilian militia have been responsible for extrajudicial executions, torture and ill-treatment, although on a far lesser scale than rebel forces. West African forces have in some cases illegally detained civilians and tortured and ill-treated captured combatants. Concerns have also been expressed about the protection of non-combatants during military operations.

Accountability for the gross human rights abuses which have occurred in Sierra Leone must be established. National reconciliation within Sierra Leone will not be possible if there is impunity for those who have perpetrated human rights abuses. All those charged in connection with the military coup in May 1997 and the period of AFRC rule must be granted trials which conform to international standards of fairness. Recourse to the death penalty will not contribute to the process of reconciliation.

The international community should continue to assist Sierra Leone to respond effectively to the challenges which it faces in ensuring the long-term protection and respect of human rights in Sierra Leone.

The political context

On 25 May 1997 the government of President Kabbah was overthrown in a military coup and the military formed the AFRC, headed by Major Johnny Paul Koroma. President Kabbah had come to power in March 1996 following parliamentary and presidential elections, ending four years of military rule. The AFRC claimed that they had overthrown

the government because it had failed to consolidate peace in Sierra Leone following a peace agreement concluded in Abidjan, Côte d'Ivoire, in November 1996 between the government and the RUF to end the internal armed conflict which began in 1991. It also claimed that the government was undemocratic and that it had promoted tribalism by appointing people mainly from the Mende ethnic group from the south and the east to prominent government positions. A major grievance was the perceived lack of resources accorded by the government to the Sierra Leone armed forces and a favouring of a civilian militia composed of traditional hunters of the Mende ethnic group, known as *kamajors*, which supported the government in the conflict against the RUF. These accusations were strongly denied by President Kabbah, members of his government and their supporters. The AFRC also called for the release and return of the RUF's leader, Foday Sankoh, in detention in Nigeria.

Foday Sankoh remained held, effectively under house arrest, in Abuja, Nigeria. He had been detained by Nigerian authorities on arrival in Nigeria in March 1997, apparently for possession of arms and ammunition. From Nigeria, Foday Sankoh announced his support for the military coup. The AFRC was subsequently joined by RUF forces who arrived in large numbers in Freetown. Foday Sankoh was named as Vice-Chairman of the AFRC and prominent members of the RUF were appointed to the AFRC's ruling council.

The overthrow of President Kabbah was condemned by the international community which demanded the return of constitutional order to Sierra Leone. Negotiations by the international community with the AFRC faltered, a global economic embargo was imposed and military intervention to restore the government of President Kabbah was seriously considered by countries in the region if dialogue and sanctions failed. Following the military coup the OAU gave a mandate to ECOWAS to take necessary action to restore legality and constitutionality to Sierra Leone and subsequently provided strong support for ECOWAS's initiatives to bring peace, security and stability to Sierra Leone. The UN Security Council also expressed its full support for the efforts of ECOWAS to resolve the political crisis in Sierra Leone.

On 23 October 1997 the AFRC signed an agreement in Conakry, in neighbouring Guinea, with representatives of five other West African governments to return power to President Kabbah by 22 April 1998. Implementation of this agreement, however, which included cessation of hostilities, disarmament and demobilization, encountered serious set-backs. Fighting between AFRC and RUF forces on the one hand and the *kamajors* on the other intensified.

In early February 1998, following attacks on its bases outside Freetown, West African forces deployed in Sierra Leone, the ECOWAS Cease-fire Monitoring Group (ECOMOG) [1], launched an offensive on Freetown. Chaos and violence ensued the following week during which there were many civilian casualties. Civilians were killed by AFRC and RUF forces who also looted and destroyed their homes. Reports described soldiers and RUF forces, also joined by Liberian fighters, going from house to house of those they suspected of opposing them and deliberately and arbitrarily killing them. Others died as a result of shelling both by ECOMOG and also AFRC and RUF forces. While fighting continued in Freetown, civilians in Southern and Eastern Provinces were facing an equally desperate situation as they were caught in fighting between the *kamajors* and AFRC and RUF forces. Thousands of people, including women and children, fled into neighbouring Liberia to escape. The humanitarian situation in Sierra Leone, already critical, deteriorated still further with the increase in hostilities.

Although after the ECOMOG intervention and the return of President Kabbah's government comparative calm and the rule of law returned to Freetown and Southern Province, armed confrontation has continued throughout the following months in Northern and Eastern Provinces as ECOMOG forces have fought to defeat remaining rebel forces. Appalling atrocities have been committed against civilians as conflict has continued. Major Johnny Paul Koroma and other prominent members of the AFRC and the RUF, including Sam Bockarie, known as Mosquito, remained with rebel forces in the north and east of the country.

The government of Sierra Leone has adopted a comprehensive program for disarmament, demobilization and reintegration of former combatants which contains clearly defined roles for ECOMOG and the UN Observer Mission in Sierra Leone (UNOMSIL), which was established by the UN Security Council in July 1998. The program is aimed at some 33,000 former combatants of the disbanded national army, the RUF and the civilian militia, known as the Civil Defence Forces (CDF). The government has expressed a particular commitment to demobilizing some 2,500 child soldiers who have fought in the internal armed conflict. Funding was expected from international financial institutions, several UN agencies and important donor nations such as the United States and the United Kingdom. As violence has escalated and offensives by ECOMOG and CDF against rebel forces have continued, however, effective implementation of this program has been prevented.

On 25 July 1998 Foday Sankoh was released by the Nigerian government into the custody of the Sierra Leonean authorities. He appeared in a television interview calling on his fighters to end atrocities against civilians and to surrender to either ECOMOG or UNOMSIL. The government subsequently reiterated a deadline of 8 August 1998 for an amnesty for rebel forces but there was no significant response. Members of the RUF were subsequently reported as claiming that Foday Sankoh had made these statements under duress and continued to demand his release. The RUF threatened to continue their campaign of violence against civilians if he remained in detention. The government announced its intention to prosecute Foday Sankoh for crimes, including gross human rights abuses, committed during Sierra Leone's internal armed conflict. He was brought to trial on 24 September 1998 and convicted and sentenced to death the following month. This prompted further attacks by rebel forces against unarmed civilians in retaliation.

Also in September 1998 rebel forces called on the government to begin negotiations for peace through the UN, the OAU and the Commonwealth Secretariat, the moral guarantors of the peace agreement signed in Abidjan. The Commonwealth Ministerial Action Group on the Harare Declaration (CMAG)[2] on 9 October 1998 called on rebel forces to make an immediate statement accepting the following terms: the recognition of the legitimacy and authority of the government; an unconditional and indefinite cessation of all hostilities; and a willingness to enter into talks to bring about an immediate end to the conflict. At the same time CMAG expressed its grave concern about the humanitarian situation in Sierra Leone, in particular the continuing atrocities by rebel forces, which it condemned unreservedly. The government also responded to the call by rebel forces for negotiations by saying that they should lay down their arms and surrender to UNOMSIL military observers.

President Kabbah repeated calls for rebel forces to surrender on 19 October 1998 and renewed an offer of amnesty for those surrendering. It appeared that the amnesty implied that those surrendering who had not been responsible for crimes would be included in the disarmament, demobilization and reintegration process whereas those who were accused of criminal offences would prosecuted with due process of the law. There was, however, no significant increase in the number of those surrendering.

The West Africa sub-region

Liberia was widely reported to be providing combatants, arms and ammunition to AFRC and RUF forces in Sierra Leone. Liberian fighters were present in Freetown at the time of the ECOMOG intervention and survivors of the gross human rights abuses which followed stated that the armed groups which had attacked them had included Liberians.

In the Vahun and Kolahun areas of Lofa Country in northwestern Liberia, where tens of thousands of Sierra Leonean refugees had fled escalating fighting in eastern Sierra Leone, cooperation between rebel forces and the Liberian military was reported to be witnessed regularly. The RUF second-in-command, Sam Bockarie, was reported to have been in direct contact with Liberian military forces and to have regularly crossed the border into Liberia.

On 12 May 1998 a statement by the United States Department of State referred to *"distressing rumours that RUF and AFRC forces were being assisted in their campaign of terror by other governments. Although we cannot confirm these rumours, it should be clear that any government or other party which is found to be helping the rebels to prolong the tragedy in Sierra Leone will face the strongest condemnation of the United States and the international community."*

On 20 May 1998 the President of the UN Security Council condemned as gross violations of international humanitarian law the atrocities carried out against the civilian population, particularly women and children, by the deposed AFRC and RUF, including widespread rape, mutilation and killings, and called for an immediate end to continuing violence against civilians. The Security Council also expressed grave concern about reports of military support being provided to the AFRC and RUF by other countries and called on all states to observe strictly the provisions of Security Council Resolution 1132 (1997) of 8 October 1997, which had imposed an arms embargo on Sierra Leone, and to avoid any action which might further destabilize the situation in Sierra Leone. Security Council Resolution 1171 (1998) of 5 June 1998 lifted the arms embargo on the government of Sierra Leone. The same resolution prohibited the sale and supply of arms and related *matériel* to non-governmental forces in Sierra Leone. The Security Council subsequently praised the efforts of the UN Secretary-General to stop the flow of arms across the border from Liberia to rebels forces in Kailahun District, Eastern Province. All states were urged to comply strictly with the terms of the UN embargo on sales of arms to rebel forces still fighting in the interior of the country.

In his Fifth Report on the Situation in Sierra Leone to the UN Security Council of 9 June 1998, the UN Secretary-General stated that the deployment of ECOMOG troops at the border with Liberia could help dispel allegations of the influx of arms or the provision of armed assistance to the AFRC and RUF by foreign forces. While welcoming a commitment by the government of Liberia not to allow its territory to be used to destabilize any neighbouring country, the Secretary-General expressed the view that verification of this would improve the security climate throughout the sub-region and improve mutual confidence among countries in the sub-region.

On 22 and 23 June 1998 a Liberian delegation visited Freetown to deliver a message from President Charles Taylor to President Kabbah on ways to promote peace between Guinea, Liberia and Sierra Leone, the three Mano River Union countries. The delegation denied allegations that the Liberian government was supporting AFRC and RUF forces. President Kabbah and President Taylor met in Abuja on 1 July 1998 at a meeting convened by the UN Secretary-General. Agreement was reached on a number of confidence-building measures. A further meeting between President Kabbah and President Taylor took place in Monrovia, Liberia, on 20 July 1998. In a communiqué signed at the conclusion of the meeting both leaders condemned atrocities and human rights abuses committed by combatants in Sierra Leone against civilians, as well as continued rebel activities in Sierra Leone. They reaffirmed their commitment to non-aggression against the territorial integrity of each other's country and pledged to continue cooperation towards peace and security in the sub-region. Both leaders renewed a call to the UN and ECOWAS to deploy observer units on the border between Liberia and Sierra Leone and agreed to coordinate border security activities.

At a UN special conference on Sierra Leone in New York in July 1998 the meetings between President Kabbah and President Taylor were welcomed and the two leaders were urged to continue to work towards improving relations between

their two countries and regional security. The importance of stopping entry of illegal supplies of weapons into Sierra Leone and ending the direct or indirect support of neighbouring countries to rebel forces was stressed.

Relations between the two countries appeared to deteriorate, however, in October 1998 when the government of Sierra Leone was reported to have complained to the international community, including the UN Secretary-General, about the presence of Liberian combatants among rebel forces in Sierra Leone and about preparations for an incursion of Liberian fighters into Sierra Leone. These allegations were vigorously denied by President Taylor. UNOMSIL military observers at that time detected no evidence of an armed incursion from Liberia.

The UN Secretary-General in his Second Progress Report on UNOMSIL on 16 October 1998 expressed deep concern about developments in the situation between Sierra Leone and Liberia and urged both governments to exercise maximum restraint, pursue dialogue and implement the confidence-building measures agreed in July 1998. He also proposed that, should both countries agree, the deployment of ECOMOG forces at the border, subsequently accompanied by UNOMSIL military observers, could help stabilize the situation and restore mutual confidence.

During a visit by Reverend Jesse Jackson, special envoy of United States President Bill Clinton, to West Africa in November 1998 he held meetings in Conakry with President Kabbah, President Taylor and President Lansana Conté of Guinea. The three heads of state on 12 November 1998 stated their commitment to non-aggression and cooperation on security issues within the Mano River Union and also to promoting peace in Sierra Leone and maintaining stability within the sub-region.

In view of the appalling level of violence against civilians which has characterized the conflict in Sierra Leone, including the widespread and gross human rights abuses being perpetrated by AFRC and RUF and their stated intention to attack unarmed civilians, Amnesty International believes that military transfers, including arms, ammunition and combatants, to rebel forces will contribute to abuses of international human rights and humanitarian principles governing the conduct of war.

Recommendations

- **all governments should take all possible measures to end immediately military transfers, including arms, ammunition and combatants, to AFRC and RUF forces;**
- **in addition, the governments of Liberia and Guinea, which border Sierra Leone, should take all possible measures to prevent military supplies, whether they originate in their country or not, destined for AFRC and RUF forces, from entering Sierra Leone across their borders;**
- **effective monitoring of the border between Sierra Leone and Liberia by ECOMOG forces and UNOMSIL military observers could assist in preventing military transfers to AFRC and RUF forces;**
- **governments in the sub-region should use whatever influence they may have on AFRC and RUF forces to bring about an end to the atrocities they continue to perpetrate against civilians.**

International response to the human rights crisis

Following the military coup in May 1997 the international community made strenuous efforts to resolve the political crisis in Sierra Leone. Since the reinstatement of President Kabbah's government in March 1998, serious attention continues to be paid to consolidating the government's position, ending the conflict in the north and east of the country, which is still claiming hundreds of civilian victims, and to assisting rehabilitation and reconstruction of the country. The continuing gross human rights abuses committed by AFRC and RUF forces have been universally condemned, including by the UN, the OAU, the EU and the Commonwealth.

United Nations

On 17 April 1998 the UN Security Council authorized the deployment of a UN liaison unit in Sierra Leone. Resolution 1162 (1998) provided for up to 10 UN military liaison and security advisory personnel in Freetown with a mandate for up to three months. The group was to coordinate closely with ECOMOG to report on the military situation in Sierra Leone and to assist in disarming former combatants. The resolution also welcomed efforts of President Kabbah and his government to restore peaceful and secure conditions, to re-establish an effective administration and democratic process and to embark on reconstruction. The resolution noted the need to promote national reconciliation and encouraged all parties to work towards that objective. All countries and international organizations were urged to provide urgent humanitarian assistance in Sierra Leone and were encouraged to help with its reconstruction and economic and social recovery. A human rights officer was also appointed to assist the UN Secretary-General's Special Envoy to Sierra Leone, Francis Okelo (who was subsequently appointed as Special Representative).

In the UN Secretary-General's Fifth Report on Sierra Leone, the deteriorating human rights situation was emphasized, and it was recommended that the number of UN human rights officers in Freetown be increased.

The UN Observer Mission in Sierra Leone

On 13 July 1998 the UN Security Council established a new peace-keeping operation, UNOMSIL, which expanded the office of the Secretary General's Special Envoy, to monitor the military and security situation in Sierra Leone, as security conditions permitted, for an initial six-month period until 13 January 1999. UNOMSIL would consist of 70 military observers and would be accompanied by a small medical unit and civilian support staff. The civilian staff would advise the government and local police, report on violations of international humanitarian and human rights law in Sierra Leone, and assist the government in its efforts to address the country's human rights needs. UNOMSIL was to be led by the Special Representative of the UN Secretary-General in Sierra Leone. Initially, 40 military observers were to be deployed from July 1998 in Freetown, Hastings and Lungi. Depending on the security situation, a second phase of deployment would take place.

In approving Resolution 1181 (1998), which established UNOMSIL, the Security Council also condemned the continued resistance by remnants of the AFRC and RUF to the legitimate government and demanded that they lay down their arms immediately. It expressed its grave concern *"at the loss of life and immense suffering undergone by the people of Sierra Leone, including refugees and displaced persons, as a result of continuing rebel attacks"*.

Resolution 1181 (1998), in addition to establishing a military and civilian police peace-keeping mission, also mandated the monitoring of human rights and the provision of assistance to the government of Sierra Leone in addressing its human rights obligations [3]. The resolution also gave UNOMSIL military observers a mandate to monitor respect of international humanitarian law during the demobilization process.

By October 1998 the human rights component of UNOMSIL had been increased to seven staff: four international human rights officers, one national human rights officer and two support staff. Subsequent progress reports by the UN Secretary-General on UNOMSIL to the Security Council referred extensively and in detail to continuing human rights abuses in Sierra Leone. The prominence given to the human rights crisis in Sierra Leone in these reports is welcomed and should continue.

In his First Progress Report on 12 August 1998, the Secretary-General reported that *"there is strong evidence of the systematic and widespread perpetration of multiple forms of human rights abuse against the civilian population, including rape. In recent weeks, elements of the former junta have continued to shell population centres such as Koidu and Daru and have used civilians as human shields in their military operations. There have been numerous instances of arbitrary execution, including of women and children, followed in some cases by mutilation of the bodies."*

In his Second Progress Report on 16 October 1998, the Secretary-General stated that *"the continuing conflict in Sierra Leone imposes immense suffering on the people of that country. I strongly condemn the summary executions, torture, mutilation, rapes, looting and other acts of barbarism carried out by former junta elements and call on them to lay down their arms and surrender. I am particularly outraged by the senseless acts of terror perpetrated against children, such as the amputation of limbs of boys and girls as young as six years of age, and support the efforts to bring to justice the authors of these especially abhorrent crimes."*

The UN Secretary-General concluded his Second Progress Report by stating that he would *"examine with great care any realistic proposal to end the armed conflict with minimal loss of life to combatants and to innocent civilians, and to promote lasting peace and national reconciliation in Sierra Leone"*.

Major initiatives have been undertaken by UNOMSIL human rights officers. Continued monitoring and reporting of human rights abuses have been reflected in the UN Secretary-General's reports to the Security Council. A preliminary human rights needs assessment has been developed. Human rights officers have also closely observed trials before the High Court and court martial in Freetown of those charged with treason in connection with the military coup in May 1997 and have intervened with the government in relation to these trials when appropriate. Guidance on human rights reporting to UNOMSIL military observers has been provided and human rights training programs for police officers, prison officials, the legal profession and the media have been developed and implemented. A human rights monitoring network including local non-governmental human rights organizations throughout the country and international non-governmental organizations has also been developed. Training for the network in human rights monitoring and reporting has been planned by UNOMSIL human rights officers, in cooperation with the National Commission for Democracy and Human Rights and a coalition of local groups, the National Forum for Human Rights. Increased cooperation between local human rights groups has been encouraged and it is anticipated that the human rights training program will involve relevant sectors of civil society from all parts of the country.

The role of UNOMSIL human rights officers in human rights monitoring and reporting should be continued for as long as necessary, including until it is clear that the government is implementing international human rights guarantees effectively. In September 1998 UNOMSIL human rights officers also began to provide human rights technical assistance to the government, including assistance in meeting its reporting requirements under international human rights treaties to which it

is a party, such as the UN Convention on the Rights of the Child [4].

The human rights component plays a dominant role within UNOMSIL and is an essential part of the military mandate of the peace-keeping operation. Sierra Leone continues to face a human rights emergency and monitoring and reporting of human rights abuses therefore remain essential. Strategies to develop continued and enhanced support for the UNOMSIL human rights component should be developed by the UN Office of the High Commissioner for Human Rights.

The UN special conference on Sierra Leone

The UN Secretary-General, Kofi Annan, convened a special conference in New York on 30 July 1998 to galvanize the international community's response to the political, humanitarian and human rights situation in Sierra Leone. The purpose of the meeting was to focus international attention on the situation in Sierra Leone and the government's initiatives aimed at resolving the conflict, restoring secure conditions and effective administration throughout the country. The conference brought together representatives of the government of Sierra Leone, intergovernmental organizations, including the UN, the OAU, ECOWAS, the EU and the Commonwealth. The special conference on Sierra Leone specifically sought assistance from the international community for UNOMSIL and for the disarmament, demobilization and reintegration of former combatants, including child soldiers.

At the time of the UN special conference Amnesty International recommended that the international community's commitment to bring peace and security to Sierra Leone and to assist in its reconstruction and rehabilitation include initiatives which would help to stop the gross human rights abuses being perpetrated by AFRC and RUF forces, prevent further abuses and also lay solid foundations for the respect and protection of human rights in the future[5].

The UN special conference strongly condemned the continued resistance of AFRC and RUF forces, and in particular their perpetration of appalling atrocities, and they were called on to lay down their arms and surrender. The Special Representative of the UN Secretary-General in Sierra Leone urged the international community to match their pledges of support to Sierra Leone with concrete action to consolidate its democratic gains. The conference agreed to establish an international contact group to mobilize and coordinate further support for Sierra Leone. The contact group was convened by the government of the United Kingdom in London on 5 November 1998[6]. Those participating included representatives of the government of Sierra Leone, the Special Representative of the UN Secretary-General in Sierra Leone and Lansana Kouyaté, Executive Secretary of ECOWAS. In his opening address to the meeting, Tony Lloyd, United Kingdom Minister of State, Foreign and Commonwealth Office, said that: *"Atrocities are still being carried out by remaining rebel forces. Sierra Leone needs peace, reconciliation and lasting restoration of democracy and human rights ... we hope to boost the efforts of the international community to meet these needs."*

Recommendations

- **the human rights component of UNOMSIL should continue to be supported and strengthened; adequate resources, including additional staff, should be provided to effectively monitor and report on human rights abuses throughout the country, implement technical assistance programs with the Sierra Leone government and provide support and training to Sierra Leonean human rights groups;**
- **the UN Office of the High Commissioner for Human Rights should play a major role in reinforcing and providing support to the human rights component of UNOMSIL;**
- **the human rights component of UNOMSIL should include experts in the area of violence against women, including rape and sexual abuse;**
- **UNOMSIL human rights officers should continue to submit reports of violations of international humanitarian and human rights law to the UN Secretary-General and to the UN High Commissioner for Human Rights; comprehensive reports on the human right situation in Sierra Leone should be made public and submitted to the UN Security Council;**
- **the human rights component of UNOMSIL should have sufficient resources to effectively contribute towards long-term measures for human rights protection and its human rights monitoring and reporting roles should be continued for as long as necessary;**
- **visits to Sierra Leone by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions and the UN Special Rapporteur on torture should take place in order to investigate and report on the gross human rights abuses which continue to be perpetrated;**
- **the international contact group on Sierra Leone should place human rights at the centre of its efforts to coordinate the international community's response to the situation in Sierra Leone and ensure that**

adequate resources are provided to initiatives aimed at the protection and respect of human rights.

OAU and ECOWAS

Immediately after the military coup in May 1997, the OAU Secretary General, Dr Salim Ahmed Salim, condemned it as *"unacceptable to the continent"*. The Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution unequivocally condemned the military coup and called for the immediate restoration of constitutional order [7]. It appealed to the leaders of ECOWAS states to pursue efforts aimed at assisting the people of Sierra Leone in the restoration of constitutional order and to the international community to support those efforts.

The 33rd OAU Assembly of Heads of State and Government meeting in Harare, Zimbabwe, in early June 1997 gave a mandate to ECOWAS to take necessary action to restore legality and constitutionality to Sierra Leone. The specific measures to be taken were to be decided by ECOWAS. The OAU Secretary General reiterated the OAU's strong support for ECOWAS's initiatives to bring peace, security and stability to Sierra Leone at the ECOWAS summit in Abuja at the end of August 1997.

It was under this mandate from the OAU that ECOWAS forces were deployed in Sierra Leone to monitor a cease-fire, to enforce the sanctions and embargo imposed by the UN Security Council and to secure peace in Sierra Leone. Military intervention by ECOMOG remained an option if dialogue between the AFRC and representatives of other ECOWAS countries and sanctions failed.

ECOWAS and ECOMOG have played a dominant role in political developments in Sierra Leone since the military coup, culminating in the removal of the AFRC and the reinstatement of President Kabbah's government in February 1998. ECOMOG forces in Sierra Leone have been widely praised by the international community. At the ECOWAS summit in Abuja in late October 1998 ECOWAS heads of state and government endorsed the extension of ECOMOG's mandate in Sierra Leone and agreed that it should be strengthened, adding that efforts to achieve a lasting solution to the conflict should continue.

Between 10,000 and 12,000 ECOMOG forces were reported to have been deployed in Sierra Leone by October 1998. ECOMOG, which is composed largely of Nigerian forces, also comprises Guinean and Ghanaian troops and further contingents from Côte d'Ivoire, Gambia, Guinea, Mali and Niger were envisaged. ECOMOG headquarters were to be transferred from Monrovia to Freetown. In April 1998 President Kabbah appointed the ECOMOG commander in Sierra Leone, Brigadier-General Maxwell Khobe, as head of internal security in Sierra Leone. He was subsequently appointed in July 1998 as Chief of Defence Staff of the Republic of Sierra Leone Military Force (RSLMF). The national Sierra Leone army had effectively ceased to exist but was to be re-established.

The ECOMOG force in Sierra Leone is generally considered by the international community and within Sierra Leone to be disciplined and its intervention in February 1998 was welcomed by the majority of Sierra Leoneans. During the following months, as atrocities in the north and east of the country escalated, ECOMOG forces evacuated to safety and medical facilities some of the hundreds of victims of amputations and other injuries, saving many lives.

In the following months, however, reports began to be received of human rights violations committed by ECOMOG forces, including illegal detention of civilians, and torture and ill-treatment of civilian detainees and captured combatants. Concerns have also been expressed that the safety of the civilian population might be endangered during ECOMOG operations, especially air strikes, against rebel forces, particularly in Kailahun District, a rebel stronghold. Measures to minimise the risk to civilians during combat must be undertaken during all military operations by ECOMOG forces. The OAU and ECOWAS have a responsibility to ensure that ECOMOG forces in Sierra Leone conform to international humanitarian and human rights law at all times.

As atrocities against unarmed civilians by rebel forces have continued, the need for concerted action by the international community remains. The OAU Central Organ should continue to play a role both in attempts to resolve the conflict in Sierra Leone and also to respond to post-conflict needs, in particular assistance for creating and reinforcing institutions aimed at long-term protection of human rights in Sierra Leone.

The African Commission on Human and Peoples' Rights (African Commission), meeting in Banjul, Gambia, on 22 October 1998 agreed to send its Special Rapporteur on extrajudicial, arbitrary or summary executions, Dr Mohamed Hatem Ben-Salem, to Sierra Leone in November 1998.

Recommendations

- **In view of the continuing gross human rights abuses in Sierra Leone, the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution should consider requesting that the UN Security Council increase the resources of the human rights component of UNOMSIL in order to investigate and document these abuses;**

- **in addition to its Special Rapporteur on extrajudicial, arbitrary or summary executions, the African Commission should also consider a visit to Sierra Leone by its Special Rapporteur on women in order to investigate and report the gross human rights abuses which continue to be committed in Sierra Leone, including against girls and women;**

- **the OAU Central Organ should send a delegation to Sierra Leone to assess the country's post-conflict needs including the establishment of effective structures for the future protection and respect of human rights;**

- **ECOWAS should ensure full compliance of its forces in Sierra Leone to international humanitarian and human rights law; there should be a mechanism to monitor human rights violations and take measures to prevent further violations.**

Human rights violations during the period of AFRC rule

The period from 25 May 1997 until 12 February 1998 was marked by a total disregard for the rule of law and demands from the international community to respect international humanitarian and human rights law. The rule of law completely collapsed and violence engulfed the country.

Hundreds of people who were associated with the government of President Kabbah or his political party, the Sierra Leone People's Party (SLPP), or who were perceived to be opposed to the AFRC were detained without charge or trial, torture and ill-treatment were systematic, and many of those perceived to be political opponents of the AFRC were extrajudicially executed.

On 20 October 1997 Amnesty International published a report which documented the human rights violations systematically committed by the AFRC and the RUF after the military coup [8]. The victims included those associated with the government of President Kabbah, journalists, students and human rights activists. Between October 1997 and February 1998 arrests, torture and killings continued relentlessly. The full toll of those detained, tortured, ill-treated and killed while the AFRC and RUF held power only emerged after they were forced from power.

During the period of AFRC rule, while it was possible to obtain limited information about human rights violations in Freetown, few details of what was happening in the Provinces were accessible. When an Amnesty International delegation travelled to Sierra Leone in May 1998, the extent of the suffering of civilians became evident. Killings, rape and looting were systematic in all parts of the country. Hundreds of people had been deliberately and arbitrarily killed, thousands lost their possessions, homes and livelihoods. Rape of girls and women was systematic throughout the country.

Amnesty International repeatedly called on the AFRC to end the systematic human rights violations which occurred after May 1997 and to adhere to its obligations under international human rights law, in particular the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter)[9]. It called for urgent measures to end arbitrary arrest and detention of those perceived to be opposed to the AFRC and to end torture, ill-treatment and extrajudicial executions.

It is important that there continue to be full and independent investigations into the human rights violations committed during the period of AFRC rule and that the truth of what occurred during those months is established and documented in order to bring those responsible to justice. There should be no impunity for the grave human rights violations committed throughout the period of AFRC rule. Investigation and accountability for these human rights violations will also contribute towards the process of national reconciliation within Sierra Leone.

Arbitrary arrest and detention

Hundreds of political detainees were held incommunicado without charge or trial. It was difficult to assess with any accuracy the number of those detained because of continuous arrests and releases, the failure of the authorities to provide information about detainees and lack of access to places of detention. Detainees were held at the Central Prison, Pademba Road, the police Criminal Investigation Department (CID) headquarters and Cockerill military headquarters in Freetown as well as other military camps, such as that known as the SS camp at the village of Regent in the hills above Freetown.

Throughout the period of AFRC rule journalists were particular targets of arrest, detention and torture. During October and November 1997 the crack-down on the press intensified; at least 20 journalists were detained and many were tortured and ill-treated. They included Jon Z. Foray, editor of the *New Storm* newspaper, who was arrested by soldiers on 11 October 1997. He was taken first to Cockerill military headquarters where he was handed over to the military police and then held in a freight container. Also held in the container was Prince Akpu, a Nigerian journalist who had established a newspaper called *Alpha jet*, and who was arrested around the same time and accused of subversive activities. (Nigerian ECOMOG forces had used military aircraft called Alpha jets in their operations.) Two days later the two journalists were collected by a

senior AFRC member, apparently to be taken to CID headquarters. They were, however, blindfolded and taken to the SS camp. Jon Z. Foray was beaten and stabbed with bayonets by soldiers and sustained a serious injury to his spine. He and Prince Akpu were released on 22 October 1997. With the help of friends, Jon Z. Foray managed to leave Sierra Leone for Ghana where he was admitted to hospital and received two months of medical treatment.

Arrests of journalists continued into November 1997: Dorothy Awoonor Gordon, acting editor of the *Concord Times*, Ibrahim Karim-Sei, editor of the *Standard Times*, and Pius Foray, editor of *The Democrat*, were among those detained and subsequently released without charge.

Sylvanus Kanyako, a journalist working for the *Herald Guardian*, and David Kamara, the newspaper's proprietor, were arrested on 10 January 1998, the day after an article suggested that a prominent member of the AFRC, Sergeant Abu "Zagalo" Sankoh, should be arrested in connection with the looting of the Iranian Embassy in Freetown on 31 December 1997. Sylvanus Kanyako was arrested by soldiers after being identified by an AFRC supporter. He and David Kamara were detained for three weeks. Both men were tortured. Sylvanus Kanyako was tied tightly with his arms behind his back, beaten all over his body and burned with a cigarette. At one point he lost consciousness. He sustained serious injuries to his arms and hands. He was then taken to CID cells where he remained, without any medical treatment, until he managed to escape on 30 January 1998.

On 30 January 1998 Michael Lawson, a university student at Fourah Bay College in Freetown, was arrested. He was apparently accused of passing information to a radio station broadcasting in support of the government of President Kabbah. The radio station, 98.1 FM, had been broadcasting clandestinely since July 1997. Many people suspected of providing information to the radio station, or knowing from where broadcasts were transmitted, had previously been arrested and detained. He was reported to be held at CID headquarters until his release in February 1998 after the intervention by ECOMOG.

Torture and extrajudicial executions

Ill-treatment, torture and extrajudicial executions were systematic throughout the period of AFRC rule. Soldiers and RUF members operated with impunity and created a climate of fear both in Freetown and throughout the country.

On 14 January 1998 a trader, Sama Turay, was shot dead by soldiers on Wilkinson Road in Freetown after an argument. Local residents were forced to hand the body over to soldiers. Residents of the area staged a demonstration along Wilkinson Road the following day in protest against the killing. This demonstration coincided with a visit to Freetown of a delegation headed by the UN Secretary-General's Special Envoy to Sierra Leone, at that time based in Conakry, for discussions with the AFRC on the implementation of the peace agreement signed in Conakry in October 1997.

The demonstration on 15 January 1998 was brutally suppressed; soldiers indiscriminately beat civilians and raided homes in the area around Wilkinson Road. They went from house to house accusing civilians of deliberately discrediting the AFRC during the visit of the delegation. One of the victims was a 25-year-old trader. When soldiers arrived at his stall he was hit in the face with butt of an AK 47 gun and was also badly beaten on his back. He recognized the soldiers who beat him and described them as relatives of Major Johnny Paul Koroma.

Another of the victims was an 18-year-old girl, also living in the Wilkinson Road area, who had joined the demonstration. Three days later six soldiers came to her home. She was raped by all six soldiers who then cut her hair and shaved her head with a broken bottle.

In Kenema, Eastern Province, terror reigned throughout the period of AFRC rule. The town was effectively under the control of the RUF and, in particular, Sam Bockarie. As in Freetown and other parts of the country, rape of girls and women was systematic and at least a hundred civilians were reported to have been deliberately and arbitrarily killed in Kenema. Every house in the town was looted. The homes of those perceived to have been supporters of the SLPP were destroyed.

On 13 and 14 January 1998 several prominent members of the community in Kenema were arrested by members of the RUF under the supervision of Sam Bockarie. They included B.S. Massaquoi, the chairman of the town council, Dr P.B. Momoh, a medical doctor, Paramount Chief Moinama Kamor, a traditional leader, and Ibrahim Kpaka, a businessman. They were arrested at a time of fierce fighting between the *kamajors* and AFRC and RUF forces around Kenema and were accused of supporting the *kamajors*. They were held at the AFRC Secretariat building in Kenema, which had been the local SLPP headquarters, and some were later moved to the police station and army brigade headquarters. They were stripped and repeatedly beaten with sticks, electric cable and strips of tyres and were threatened with death. Their arms were tied tightly behind them. One of those detained sustained a serious head wound and injury to his eye after being beaten on his head with a gun. At least one of these detained died as a result of beatings.

Some of those arrested were released on 26 January 1998 and escaped to safety. B.S. Massaquoi, however, was among those who remained held at army brigade headquarters. He was killed by members of the RUF on 8 February 1998 as news arrived of ECOMOG's offensive on Freetown and as *kamajors* entered Kenema. Dozens of other people were also reported to have been killed. The mutilated body of B.S. Massaquoi and 35 other people were reported to have been found

in mass grave near Kènema on 23 March 1998.

The use of the death penalty by the AFRC

The AFRC resorted to the use of the death penalty in an apparent attempt to be seen to be taking action to impose law and order but in doing so violated international human rights standards. On 25 October 1997 10 soldiers were executed after being convicted of murder and sentenced to death by a military court. A further 17 people were reported to have been executed on 2 November 1997, apparently after conviction by a military court although some reports suggested that summary executions took place without any form of legal proceedings. Another eight people were publicly executed in Koidu on 2 December 1997. According to reports, they had been convicted of armed robbery by a military court, from which there was no right of appeal.

On 28 November 1997 a new decree was promulgated which was retroactive to the time of the military coup and which extended the scope of the death penalty by making death sentences statutory for the offences of looting and commandeering vehicles.

International standards prohibit the retroactive use of the death penalty. The ICCPR states that the death sentence may be imposed only "in accordance with the law in force at the time of the commission of the crime" and also that a heavier penalty shall not be imposed than the one that was applicable at the time when the criminal offence was committed. The Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty state that: "Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission...".

In addition, the ICCPR states that: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes...". The Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council (ECOSOC) in 1994, also state that "... capital punishment may be imposed only for the most serious crimes ... with lethal or other extremely grave circumstances." The UN Human Rights Committee, a body of 18 experts established under the ICCPR, stated in 1996 that: "Extension of the scope of the application of the death penalty raises questions as to the compatibility with Article 6 of the Covenant", which guarantees the right to life. The UN Commission on Human Rights, in a resolution adopted in April 1997, called on all states which have not yet abolished the death penalty "progressively to restrict the number of offences for which the death penalty may be imposed".

Amnesty International urged the AFRC to repeal this legislation and to ensure that all death sentences were commuted and that no further executions took place.

Recommendations

- **investigations into the human rights violations committed during the period of AFRC rule should continue to be undertaken in order to bring those responsible to justice and to provide compensation to the victims of human rights violations;**

- **assistance for documenting the human rights violations which occurred during this period should be provided by the international community.**

Human rights abuses by AFRC and RUF forces since February 1998

Since their removal from power the AFRC and RUF have wreaked a campaign of terror against unarmed civilians and human rights abuses have reached unprecedented levels. Several thousand civilians have been brutally killed or mutilated. Hundreds of others have been abducted from their villages and forced to join their attackers. Members of the AFRC and the RUF again inflicted on unarmed civilians the atrocities which they had endured throughout Sierra Leone's internal armed conflict but now on a much greater scale [10].

The abuses perpetrated by rebel forces of the AFRC and RUF constitute the most egregious violations of international humanitarian law. The Geneva Conventions of 1949 which apply to international conflicts - wars between nations - also contain provisions which apply to internal armed conflicts. Article 3, common to all four Conventions, extends to "armed conflict not of an international character" fundamental rules for the protection of non-combatants which each party to the conflict is "bound to apply, as a minimum". Under the terms of common Article 3, people who take no active part or who have ceased to take an active part in hostilities must be treated humanely in all circumstances. Common Article 3 specifically prohibits: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; the taking of hostages; and outrages upon personal dignity, in particular humiliating and degrading treatment. This prohibition applies not only to government forces but to all parties to internal armed conflicts including armed political groups.

Article 4 of the Additional Protocol II of the Geneva Conventions of 1949 relating to the protection of victims of internal

armed conflicts prohibits violence to life, health and physical well-being, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment, of all those not taking a direct part in hostilities or who have ceased to take part in hostilities. [11]

In the days immediately after their removal from power by ECOMOG, AFRC and RUF forces indiscriminately killed unarmed civilians, looted and burned houses, both in Freetown and other towns. As the rebel forces were pursued eastwards by ECOMOG forces through towns such as Bo in Southern Province, Kenema and Koidu in Eastern Province and Makeni in Northern Province during February, March and April 1998, they were responsible for widespread killings, torture and ill-treatment, including rape and other forms of sexual assault, and abduction. Villages and towns were burnt to the ground, destroying thousands of homes. Koidu, a major town in the diamond-rich Kono District, was almost totally destroyed by AFRC and RUF forces and villages between Njaiama-Sewafe and Koidu were repeatedly attacked.

Several foreign nationals were captured by RUF forces in mid-February 1998. They included Spanish, Italian and Austrian religious brothers working at St Joseph's Hospital in Lunsar, Port Loko District, Northern Province, who were abducted on 14 February 1998. Eldred Collins, a prominent RUF member, was reported to have demanded the release of Foday Sankoh, at that time still detained in Nigeria, in exchange for the release of the hostages. They were, however, released on 27 February 1998. Two staff of the humanitarian organization *Médecins Sans Frontiéres* (MSF), a Canadian and a French national, were also abducted around 14 February 1998 at Rogberi while driving between Port Loko and Lunsar. They were also released after two weeks.

Those perceived to be opposed to the AFRC and the RUF were particularly targeted by rebel forces. They included Catholic priests. As almost all other sectors of Sierra Leonean society, the Catholic Church in Sierra Leone had condemned the military coup. Catholic priests were specifically sought by AFRC and RUF forces after February 1998 and some narrowly escaped death. Their homes were looted and destroyed. Traditional leaders, known as Paramount Chiefs, were also singled out; 44 Paramount Chiefs were reported to have been killed in the months following February 1998.

"Operation no living thing"

An even more grotesque pattern of killing, rape and mutilation became evident in April 1998 and the number of victims increased dramatically. Rebel forces called their campaign of terror against civilians "*Operation no living thing*". As fighting continued between ECOMOG and rebel forces around Koidu attacks on civilians in villages in the area persisted and then spread west and north. Later in April and into May 1998 Alikalia, Yifin and other villages in Koinadugu District, Northern Province, were attacked. Unarmed civilians who were taking no active part in the conflict were killed, their homes burned and their villages destroyed.

Although the exact number of those killed is unknown, it is likely to be several thousand. Most survivors of attacks described hundreds of bodies lying in the bush where they had fled and of several members of their families and communities being killed. More than 200 people were killed during an attack on one village, Yifin, in Koinadugu District, in late April 1998. More than 650 bodies, many of them women and children, were reported to have been buried following fighting in the area around Koidu in mid-June 1998.

With these attacks came reports of mutilations. The arms, hands, legs, ears and lips of victims were deliberately cut off. By early May 1998 some 120 victims of severe mutilations had been admitted to Connaught Hospital in the centre of Freetown; about 60 were admitted on one day alone, 26 April 1998. Four had both arms cut off, another 23 had one arm cut off, and others had deep lacerations on their lower arms, severed tendons or broken bones in their arms after being attacked with machetes. Some had a complete hand, several fingers or ears missing. They were all civilians: farmers, housewives, traders, miners, school students. These numbers swelled in the weeks and months which followed as more victims arrived at Connaught Hospital and other hospitals in the north of the country, including in Makeni and Magburaka. Some of these hospitals lacked the equipment needed to perform war surgery. Connaught Hospital in the centre of Freetown, which had the necessary facilities, struggled to cope with the influx of patients. Between 6 April 1998 and 27 July 1998 an MSF surgical team treated almost 300 patients with amputations, severe mutilations or gunshot wounds at the hospital. The majority of the cases treated were lacerations to the head or neck or amputations of arms, hands, fingers, ears or lips. About a fifth of these victims were children, one aged 18 months. This number represented, however, only a fraction of the number of such victims, many of whom never reached medical help. Between 25 May 1998 and 12 June 1998 International Committee of the Red Cross (ICRC) delegates evacuated 23 people from the north of the country with gunshot wounds, deep lacerations and amputated limbs requiring urgent reconstructive surgery. A helicopter was used to reach areas inaccessible by road because of insecurity and fear of attack by armed groups. Evacuation of wounded civilians continued throughout the following months. According to humanitarian agencies in Freetown, only about one in four victims of mutilations by rebel forces survived their injuries. In June 1998 the ICRC rehabilitated Netland Hospital in Freetown for the surgical treatment of victims of amputations. By the end of September 1998, some 400 victims of amputations were reported to have undergone surgery at Netland Hospital. By October 1998 estimates of the number of victims of mutilations since February 1998 were put as high as 4,000.

Among the thousands of refugees arriving from Eastern and Northern Provinces into Guinea to escape attacks were civilians with similar mutilations. Between April and June 1998 some one hundred refugees were reported to have arrived in Guinea with serious injuries; half of them had suffered deliberate mutilation. By September 1998 a regional

representative of the UN High Commissioner for Refugees (UNHCR) reported that more than 400 refugees in a camp at Kissidougou in Guinea had hands, limbs or ears cut off or were suffering other injuries.

Many of the survivors provided accounts of the violence inflicted upon them. Groups of armed men arrived in their villages, claiming to be ECOMOG, that they had come to liberate the villagers and that they were safe. Forced out of their homes, they realised that they were not ECOMOG troops. Civilians were rounded up, in groups or in lines, and then taken individually to a pounding block in the village where their hands, arms or legs were cut with a machete. In some villages, after the civilians were rounded up, they were stripped naked. Men were then ordered to rape members of their own family. If they refused, their arms were cut off and the women were raped by rebel forces, often in front of their husbands. As well as rape, women and girls also suffered other forms of sexual assault such as having foreign objects inserted into their vaginas. Victims of these atrocities also reported women and children being rounded up, locked into houses which were then set alight.

The UN Under-Secretary-General for Humanitarian Affairs, Sergio Vieira de Mello, following a visit to Sierra Leone, said on 15 June 1998 that the brutal treatment of civilians by AFRC and RUF forces was unlike anything he had seen in 29 years of humanitarian work. Describing the pattern of amputations, lacerations and maiming of civilians, including of children, he said that "*hands are cut off and ears and noses are amputated ... there are no words to condemn this sort of practice ...*".

Villagers from Kondeya, Kono District, fled into the bush when they heard that rebel forces were approaching their village in early April 1998. On 9 April 1998 a group of about 50 rebel forces found them and captured about 120. One of the men was strangled. A baby who was crying was pulled from its mother's back and thrown into a river. They were forced to return to the village where all the houses were burned. Twenty-seven of the captured villagers were then attacked with machetes; some were decapitated, others had their throats cut or their eyes gouged out.

Survivors were often taunted by rebel forces to go to ECOMOG and tell them that the AFRC and RUF were there or to go to President Kabbah to ask for a new limb. One was given a letter and told to deliver it to President Kabbah. Victims who had one or both ears cut off were told that without their ears they could no longer listen to the government or ECOMOG.

In some cases it took victims days or weeks to reach medical assistance. One man who had both arms cut off in April 1998 walked for several weeks from village to village until he was able to find a vehicle to take him to Freetown. Many more, unable to reach a medical centre in time, died as a result of their injuries. Some spent weeks in the bush either attempting to walk to safety or waiting until it was safe to return to their homes. The fate of several thousand people who fled into the bush during attacks on villages remains unknown. Many of those wounded have died in the bush.

An Amnesty International delegation which visited Sierra Leone in May 1998 met some of the victims of these atrocities at Connaught Hospital. One, a farmer aged 40 from the village of Badala, in Koinadugu District, had both hands cut off when the village was attacked on 3 May 1998. Hearing reports of advancing attacks, including those on Yifin and Alikalia, he had previously sent his family to safety in Kabala. At the time of the attack he was preparing food in his compound. Up to 400 men, armed with machetes, AK 47 guns and rocket propelled grenades entered the village. They caught him and asked him where ECOMOG was. When he said that he did not know, he was hit on the head with an AK 47. He was then forced to lie down and both arms were cut off. He was also beaten on his legs. He begged to be killed. The men who attacked him wrote three letters and put them in the pockets of his trousers. He was then told to go to tell President Kabbah that they were coming to Freetown, adding "*No AFRC, no peace*". He lay injured for three days in Badala and arrived at Connaught Hospital four days later. He had no news of his wife and three children. Other villagers, of all ages, from Badala were also mutilated and killed; they included a woman who was raped and then cut with machetes.

Another of the victims, a 15-year-old schoolboy from Koidu who had arrived at Connaught Hospital on 10 May 1998, had suffered severe lacerations to his right ankle in an attempted amputation. He and his family - his parents and six brothers and sisters - had been hiding in the bush for more than two months after being driven from Koidu after it was attacked by rebel forces. They had no food throughout that time other than bananas. On 1 May 1998 the family had heard reports that ECOMOG had arrived in Koidu and they went to enter the eastern part of the town. They and those with them were attacked by rebel forces who accused them of supporting President Kabbah. Almost 50 people were killed. The young boy stayed for four days in a house without food or treatment for his severely injured leg. He was taken first to Makeni by ECOMOG forces and then brought to Connaught Hospital. He did not know what had happened to his family.

Three young women survived an attack on the village of Boima in Bombali District, Northern Province, on 7 May 1998; one had a deep cut to her arm, the other two had been beaten all over their bodies. One of the women had witnessed the killing of several members of her family, including her children. Twelve people, including three of her children, died when their house was set alight. Another child, a girl aged three, was pulled from her back and cut with machetes.

There were many atrocities in villages around Karina, between Makeni and Fadugu, in Northern Province, which were attacked on 7 May 1998. All those who were unable to run away were killed; others had limbs amputated.

In an incident which occurred on 7 May 1998 in Northern Province, a woman survivor recounted that one of her sisters had been killed by having her throat cut and two others were covered in kerosene and burned. Other victims, including children, were wrapped in a foam mattress which was then set alight.

The village of Tumbodu, north of Koidu, was attacked repeatedly during April and May 1998. During one of these attacks, on 11 May 1998, a woman aged in her twenties who was hiding in the bush outside the town was caught and asked for rice, which she did not have. She was forced to carry a heavy load; when she faltered she was beaten. When she reached Tumbodu she was forced to place her legs on a stone which were then cut in an attempted amputation. She suffered deep laceration to both legs and also to her arms. She arrived in Connaught Hospital on 15 May 1998. Her 10-year-old son was abducted by the rebels.

Massenbendu, a village close to Tumbodu, was also attacked on 11 May 1998. One of the victims, a farmer, was in his house when the door was broken down by rebel forces who demanded money; he said that he had none. Rebel forces told him that they were going to kill him because he supported President Kabbah. He sustained deep lacerations to his neck, head and arms. He was taken first to an ECOMOG base at Masingbi and was then transferred to Freetown. Three members of his family - two men and a small boy -were abducted.

Human rights abuses by rebel forces since July 1998

Atrocities declined significantly during July and August 1998 as the rainy season advanced. Despite this decreased level of atrocities concerns remained that rebel forces could mount future attacks against unarmed civilians. In his First Progress Report on UNOMSIL, the UN Secretary-General said that he remained *"deeply concerned about the plight of innocent civilians in the country, who may still be suffering the depredations of the rebel forces or at risk from future attacks."*

Incidents of killing and mutilations continued to be reported. On 27 July 1998 rebel forces, after feigning surrender, attacked Kabala was held by ECOMOG. Rebel forces threatened to use civilians as human shields. No mutilations were reported but a large number of civilians, including children and young people, were reported to have been abducted. Rebel forces held Kabala for about four days before it was retaken by ECOMOG. Some 200 houses had been destroyed, property was looted and money extorted from civilians. All relief goods, medical supplies and logistics for humanitarian efforts had been looted or destroyed. At about the same time, rebel forces attacked a bus carrying civilians about 10 kilometres south of Kabala, killing seven people. Three young boys were also reported to have been abducted.

During attacks on villages in the area of Gbinti, Port Loko District, in early August 1998 victims of killings and mutilations included three women and a two-year-old child who were subsequently admitted to hospital with gunshot wounds, either to the backs of their bodies or their head. Three men were also admitted to hospital with deep lacerations apparently inflicted in attempted amputations.

In late August and during September 1998 an escalation of attacks was reported in Northern Province. Reports began to be received of victims having the initials "AFRC" carved into their foreheads and backs. Around 24 August 1998 there were attacks on villages, including Thawuya and Masunthu, in Kambia District. Several civilians were subsequently admitted to the Government Hospital in the town of Kambia with amputated limbs or severe lacerations. Three had both hands and ears amputated; others had deep wounds to their arms, shoulders and faces. One of the victims was a three-month-old baby with lacerations to the nape of its neck. On 6 September 1998 the town of Kamalu, near Kamakwie, in Bombali District, was attacked by rebel forces. At least 40 civilians, including children, were reported to have been killed in the attack; others were seriously injured with machete wounds. Some of those killed had been first been subjected to torture and sexual abuse; others had been burned alive. A Paramount Chief, Samura Bangura, was reported to have been abducted from Kamalu, together with some 50 others. On 11 September 1998 Fadugu, Koinadugu District, was attacked. According to reports, during that attack eight civilians, including a Paramount Chief, Alimamy Fanna Thoronka II, were burned alive.

Three villages in Kambia District, Yebaya, Kathatinah and Kakula, were reported to have been attacked by around one hundred rebel forces on 12 September 1998, resulting in the deaths of at least 16 civilians. According to witnesses of the attack on Yebaya, at least nine people were killed either by being shot or attacked with machetes. In late September 1998 and early October 1998 more than 50 people were reported to have been killed in attacks in Kambia District, near the border with Guinea, including on the village of Kukuna, and at least 25 civilians were reported to have been mutilated, including by amputations, by rebel forces.

On 8 October 1998 the town of Mange in Port Loko District, some 150 kilometres from Freetown and on the main road to Guinea, was attacked by more than 200 rebel forces in an attempt to gain control of a strategic bridge. Some 25 civilians were reported to have been killed in the attack but the toll was expected to be higher since rebel forces were reported to have set fire to more than 40 homes, in some cases with civilians inside. Most of the town's 15,000 inhabitants fled and many of the wounded arrived at the hospital in the town of Port Loko for treatment. ECOMOG forces maintained control of the bridge after three days of fighting.

There were further attacks by rebel forces on villages in Bombali District during September 1998. Among the victims were two men, Pa Bai Munu and Morlai Munu, from the village of Mabunduka, between Pendembu and Mateboi, some 40 kilometres from Makeni. Pa Bai Munu, a farmer aged over 70, had fled his village for Makeni following an earlier attack during which two other members of his family, including Sorie Kabbie Munu, were abducted by rebel forces. The village was burned. Other members of the same family, Pa Amadu Munu and Pa Santigie Munu, had been killed by having their

throats cut during an attack on Mateboi in May 1998. Pa Bai Munu later returned to a village, Four Road Loko, close to his home at Mabunduka. He, Morlai Munu and about 20 other people were killed when Four Road Loko was attacked on 16 September 1998. According to reports, Pa Bai Munu was tied by the neck and dragged for about 10 kilometres before he was hacked to death and his body mutilated. At least six members of the family had been killed or abducted.

Attacks on villages around Kabala, including Benikoro and Badala, resumed and intensified during September 1998. The town of Kabala itself, earlier attacked and held briefly by rebel forces in late July 1998, was again attacked on 18 September 1998. Some 20 civilians were reported to have been killed and houses burned. Among the victims who were evacuated to Freetown by the ICRC were three children, two of whom were suffering from extensive burns. One of them had hidden with his family in a hut which was set alight by rebel forces; he was the only survivor.

On 24 October 1998, apparently in retaliation at the death sentence imposed on Foday Sankoh the previous day, the village of Alikalia was attacked by some 300 rebel forces. Reports of the attack referred to civilians, including women and children, being shot, decapitated or having their arms amputated. Civilian survivors of the attack on Alikalia were admitted to Connaught Hospital with gunshot wounds and multiple lacerations.

Attacks by rebel forces also escalated in Kenema District from August 1998. Among the villages affected were Mendekelema, Neama and Sandaru, which was completely destroyed, less than 30 kilometres from the town of Kenema. One of the victims of the attack on Mendekelema in late August 1998 had both hands amputated. Survivors of attacks consistently described mutilation, rape, torture, killing and the burning of houses. Entire local communities were displaced from the area, many fleeing to the towns of Kenema, Segbwema and Daru.

Recommendations

- **the international community must continue to condemn in the strongest possible terms the grave breaches of international humanitarian law committed by forces of the AFRC and RUF;**
- **leaders of AFRC and RUF forces must take immediate measures to end human rights abuses committed by their combatants, including deliberate and arbitrary killing of non-combatants, torture, mutilation and rape, and must publicly state their commitment to respecting international humanitarian law;**
- **those in command of AFRC and RUF forces should exert effective control over those under their command in order to prevent torture and killing of non-combatants; those suspected of committing human rights abuses should be removed from any position of authority or duties which bring them into contact with prisoners or others at risk of abuse;**
- **AFRC and RUF forces must respect human rights and the basic principles of international humanitarian law and abide by minimum standards of humane behaviour at all times.**

Children at the centre of the violence

Children have not escaped the violence and brutality of the conflict in Sierra Leone; they have often been the principal victims of gross human rights abuses, including the atrocities in Eastern and Northern Provinces which occurred in the months following the removal of the AFRC and RUF from power in February 1998. They have been deliberately and arbitrarily killed, mutilated and maimed, abducted and forcibly recruited by rebel forces. Among the thousands of Sierra Leonean refugees in neighbouring countries or internally displaced within Sierra Leone after February 1998 were hundreds of unaccompanied children, separated from their families as a result of the violence.

Several thousand children, including babies and very young children, have been separated from their families as a result of seven years of internal armed conflict. Most of those abducted in the earlier years of the war were from Southern and Eastern Provinces. The most common reason for the separation of children from their families was abduction by rebel forces. Others became separated from their parents as a result of attacks on their towns and villages when their parents were killed, abducted or became missing.

Many families have rejected children who had been forcibly recruited into rebel forces and have refused to take them back into their homes. Even in cases where parents are willing to take back their children, the level of resentment and bitterness within their communities sometimes prevents them from doing so.

Significant and coordinated efforts are being undertaken by the UN Children's Fund (UNICEF) together with a coalition of non-governmental organizations to reunite these children with their families and to help their reintegration into their families and communities, often in the most difficult of circumstances.

The work of UN agencies and non-governmental organizations in providing help and protection to children traumatized by

the conflict, including former child combatants, should be supported and reinforced by the international community.

Abduction of children

Large numbers of civilians, in particular children and young men and women, have been abducted by the RUF throughout the years of the internal armed conflict. They have been forcibly recruited to fight or forced to undertake other tasks such as carrying loads, including looted property and food, and cooking. Women and girls have been forced to become the sexual partners of rebel forces. While in the early years of the conflict representatives of the RUF claimed publicly that some of those abducted had joined rebel forces willingly, in most cases captured civilians have been held under duress, threatened with killing or ill-treatment, and have had little option but to cooperate.

Capture and abduction of civilians, including many children, has continued throughout the months since the AFRC and RUF were deposed and has occurred increasingly in Northern Province. In those areas of the country which remained under the control of rebel forces thousands of civilians, including women and children, effectively remained captive, many of them in Kailahun District, a stronghold of the RUF since the beginning of the internal armed conflict. Some estimates put this number as high as 10,000. They were used to carry goods, as human shields or for sexual slavery.

Testimonies of victims of the attacks by rebel forces which occurred in Northern Province from April 1998 invariably referred to the abduction of large numbers of people, including children. When the town of Kabala was attacked by a large group of rebel forces in July 1998, a large number of children were abducted. Njalia Nimikoro, a village some 10 kilometres southwest of Koidu, was reported to have been attacked around 18 August 1998. Nine civilians, including a 10-year-old child were admitted to hospital with gunshot wounds, and a woman and her five children were reported to have been abducted by rebel forces. A few days earlier, on 15 August 1998, rebels in the area around Koidu were reported to have released around 250 captured civilians. Dozens of civilians were reported to have been abducted, however, when three villages in Kambia District were attacked in September 1998.

The abuse of children by rebel forces

Many of those abducted have been trained and forced to fight. When RUF forces joined the AFRC in Freetown following the military coup in May 1997 many of its fighters, some as young as 11 or 12 years and many in their teens, who had previously been abducted arrived in Freetown. Many had spent several years in RUF camps in the bush and had fought in the conflict. In some cases their names had been changed by the RUF. Fear played a significant role in forcing these children to remain with the RUF. Those who attempted to escape were beaten or killed. Former RUF child combatants have recounted summary killing, torture and ill-treatment. These children also relied on the RUF for their means of survival, including food and shelter. As well as being forced to fight, they were used as porters to carry goods and looted property. The use of drugs such as amphetamines was reported to be widespread. Sex was used in a systematic way by the RUF to enslave girls, often very young, and young women. While some later expressed a wish to remain with their partners, most remained under duress. Many had become pregnant and had children, making eventual reintegration into their own communities even more difficult.

The histories of many of the children abducted by the RUF since 1991 emerged when they arrived in Freetown. An 11-year-old boy caught and abducted during an ambush by the RUF near Bo several years earlier had been forced to take drugs and fight. Another boy had been captured in Kailahun District in 1992 when he was six years old and separated from his mother, sister and brother. Six years later he did not know where his family were or whether they were still alive. Another boy had been abducted during an attack in Kenema District in 1992, in which both his parents had been killed, when he was 10 or 11 years old. He had been with the RUF for six years and had been trained to use a gun and fight. A girl, aged 14 at the time of her abduction in 1995, was forced to become the sexual partner of a member of the RUF. She was forced to cook and taught how to use a gun.

Victims and perpetrators of human rights abuses

When the AFRC and RUF were forced by ECOMOG from Freetown in mid-February 1998 many of these children, some of whom had been responsible for killings and torture, were identified as members of the RUF and risked revenge attacks by civilians, placing their safety and lives in jeopardy. Almost 3,000 children associated with the RUF, fearing reprisals from civilians, were reported to have fled from Freetown in a matter of days. There were reports of such children being beaten by civilians before being handed over to ECOMOG troops and one child who had been living on the streets of Freetown was reported to have been burned alive in an apparent revenge attack. ECOMOG troops were also reported to have ill-treated some of these children when they were handed over into their custody.

Recruitment of children by Civil Defence Forces

Large numbers of children have also been recruited into the ranks of the CDF which support President Kabbah and are fighting with ECOMOG against rebel forces. Although the CDF has made a commitment to end initiation of children into the traditional hunters' societies which form the CDF, there were reports that new members, including children between the ages of 15 and 17, were recruited near Magburaka in Tonkolili District, Northern Province, in July 1998. Initiation of children into the CDF was also reported to be continuing in Southern and Eastern Provinces, for example at Daru and

Segbwema, during the following months and children, some as young as seven years, were still seen carrying arms and guarding CDF checkpoints. In early October 1998 Chief Samuel Hinga Norman, Deputy Minister of Defence, during a visit to Sierra Leone by the Executive Director of UNICEF, Carol Bellamy, was reported as stating his commitment to disarming and demobilizing children recruited by the *kamajors*, adding, however, that the conflict in Sierra Leone was not yet over.

Efforts by the international community to meet the needs of children

The Special Representative of the UN Secretary-General for Children and Armed Conflict, Olara Otunnu, visited Sierra Leone in both March and May 1998. During his visit in May 1998, when he travelled to the east of the country, it became clear that one of the most pressing challenges facing Sierra Leone was the "*crisis of the young*": the plight of children affected directly or indirectly by the conflict. He identified five areas requiring urgent action by the international community: demobilization and reintegration of child combatants; resettlement of internally displaced people; tracing the families of unaccompanied children; rehabilitation and support of victims without limbs; and provision and rehabilitation of medical and educational services.

At a meeting with the UN Special Representative during his visit in May 1998, the government agreed not to recruit children under the age of 18 years into a reconstituted national army. The CDF also agreed to stop initiation and recruitment of children under the age of 18 and to begin the process of demobilization of child combatants within their ranks [12]. Both ECOMOG and the CDF agreed to provide special protection to AFRC and RUF child combatants in their custody as a result of surrender, capture or escape. On 5 November 1998 Olara Otunnu again appealed to both the CDF and rebel forces to end the recruitment of child soldiers.

Olara Otunnu called on the international community to respond in a more vigorous and concerted way to the needs of children affected by the conflict in Sierra Leone and urged it to make the rehabilitation of children in Sierra Leone a pilot project for post-conflict reconstruction. Meeting the specific needs of children, young people and women affected by the conflict in Sierra Leone were particularly important in plans for rehabilitation and reconstruction.

In a press conference following his address to the UN General Assembly in October 1998, Olara Otunnu made specific references to the plight of children in Sierra Leone and called for the international community to provide both political commitment and resources. He recommended to the key actors responsible for post-conflict reconstruction programs, such as the World Bank and the United Nations Development Programme (UNDP), that the needs of women and children who had been victims of conflict should be at the centre of such programs.

On 29 June 1998 the UN Security Council strongly condemned the targeting of children in war, in particular their abduction, sexual abuse and recruitment as soldiers, and said that it would pay serious attention to the situation of children affected by armed conflicts.

In his address to the UN special conference, the UN Secretary-General acknowledged the terrible suffering of children in Sierra Leone: "*To an appalling degree, it was children who were, and still are, the victims of war, either as conscripted fighters or as casualties of indiscriminate attacks.*" The Secretary-General welcomed the government of Sierra Leone's decision to offer an amnesty for child soldiers from all combatant groups and efforts to develop a national program to meet the needs of children who had been particularly adversely affected by seven years of conflict.

At the UN special conference the Executive Director of UNICEF referred to the importance of demobilizing and reintegrating into society an estimated 4,000 children still attached to fighting forces which would require an intensive and long-term commitment of resources from the international community. Some 2,500 of these children were being forced to fight with rebel forces; the others had been recruited by the CDF. The safety of all children who had been captured needed to be ensured and ways found to release them and include them in the disarmament, demobilization and reintegration program.

During her visit to Sierra Leone in early October 1998, the Executive Director of UNICEF again urged that all child combatants be disarmed and demobilized: "*the fact that the conflict is (still going) on should not justify recruitment of children*". During discussions with government officials, she sought assurances that the government would abide by its commitments to demobilize child combatants, not to recruit new child combatants and to provide an amnesty for those children who had been fighting with rebel forces. She urged that the process be speeded up. She also called for the release of all child prisoners of war, the number of which is unknown.

The demobilization of soldiers and their reintegration into society - socially, psychologically, politically and economically - is critical to post-conflict reconstruction and rehabilitation. Support for such programs, particularly those for children, is vital. UNICEF and UNOMSIL, with the National Commission for Human Rights and Democracy and ECOMOG, are undertaking a program of registration and interviewing of former RUF child combatants in order to include them into the disarmament, demobilization and reintegration process. The children, once registered, are released from ECOMOG custody into the care of UNICEF. In October 1998 some 60 children, aged from eight to 18, were reported to have been registered in Makeni and another 120 in Bo; registration in Port Loko was due to commence in November 1998.

Recommendations

- **AFRC and RUF forces must end the gross human rights abuses being perpetrated against children, including killing, mutilation, rape and other forms of sexual abuse, abduction and forcible recruitment as combatants;**

- **AFRC and RUF forces should release all children currently held as captives or child soldiers;**

- **immediate measures to end the recruitment of children under the age of 18 by the CDF should be taken and the government should be assisted and supported in the registration of child combatants among the CDF in order to ascertain their exact number and location and to incorporate them into the disarmament, demobilization and reintegration program;**

- **the Sierra Leone government and the international community should fully support and assist relevant UN agencies and non-governmental organizations to identify and address the social, psychological and material needs of children, particularly former child combatants, affected by the conflict in Sierra Leone;**

- **the international community should fully support the proposal of the Special Representative of the UN Secretary-General for Children and Armed Conflict for Sierra Leone to be made a pilot project for a more effective response in the context of post-conflict peace building; this pilot project should coordinate, reinforce, and provide adequate resources for initiatives aimed at the protection of children in Sierra Leone.**

Human rights violations by ECOMOG forces

At the time of its offensive on Freetown which began on 5 February 1998, shelling by ECOMOG forces was reported to have caused a high number of civilian casualties. Shelling continued in densely populated areas of Freetown throughout the week of the offensive, including in areas where medical facilities, such as Connaught Hospital, were situated. More than 600 people with war-related injuries were reported to have been admitted to hospital during that period. The high number of civilian casualties suggested that ECOMOG may have taken inadequate measures to protect civilians during the offensive on Freetown.

Shelling by AFRC and RUF forces was, however, also intensive during that period and some civilians claimed that residential areas in Freetown were being deliberately shelled by AFRC and RUF forces, particularly by those positioned at Fourah Bay College on a hill overlooking Freetown.

Thousands of civilians in rebel-controlled areas, in particular Kailahun District, remain at risk of being caught in hostilities between ECOMOG, fighting with the CDF, and rebel forces. There are fears that the safety of the civilian population might be endangered, especially during air strikes which are reported to be taking place. Measures to minimise the risk to civilians during combat, in conformity with international humanitarian law, must be undertaken during military operations, including aerial bombardments of rebel forces' bases located near or within areas where there are high concentrations of civilians.

In his Second Progress Report on UNOMSIL the UN Secretary-General referred to reports which suggested that "*certain ECOMOG personnel do not consistently ensure full respect for provisions of international humanitarian law, such as those regarding the protection of non-combatants in combat situations and the proper treatment of combatants during surrender or capture. UNOMSIL is encouraging the ECOMOG leadership to raise awareness among all troops to ensure full respect for all relevant aspects of international humanitarian law*".

In the days after it took control of Freetown, several thousand soldiers surrendered to or were captured by ECOMOG forces. In subsequent weeks and months, ECOMOG supervised thousands of military detainees, in particular at Benguema, a military training camp some 25 kilometres from Freetown, but also at military bases at Lungi, Bo, Kenema and Makeni. According to the Attorney-General and Minister of Justice, Solomon Berewa, all military detainees held by ECOMOG remained under the authority of the Sierra Leone government; the role of ECOMOG was to screen those detained, assess whether they were a security risk and whether they could be deployed as part of the ECOMOG force or the eventual reconstituted national army.

It was claimed that AFRC and RUF combatants captured by the CDF were handed over to the police or ECOMOG forces after February 1998. It appeared, however, that CDF forces summarily killed some captured combatants and reports also suggested that ECOMOG forces handed over captured AFRC and RUF forces to the CDF who subsequently killed them.

A significant number of civilians are being detained by ECOMOG forces under the category of "safe custody" in prisons and other places of detention throughout the country. An unspecified number of people are held under ECOMOG "safe custody" at Pademba Road prison. At the Central Prison in Kenema more than 30 people, some apparently accused of collaboration with rebel forces, were reported to be held under ECOMOG "safe custody" in October 1998 without any

referral of their cases to the civilian authorities. There is apparently no legal basis for their detention; it is unclear whether they are held under the provisions of the Public Emergency Regulations which came into effect in March 1998. In October 1998 there were reports that a suspected member of rebel forces had been taken into custody by ECOMOG in Makeni despite substantial evidence that he was innocent.

There have also been reports that those taken into custody by ECOMOG forces have been ill-treated by being beaten and tied tightly. Among the victims in Freetown were children who had been among RUF forces and who were detained shortly after the ECOMOG intervention. During September 1998 there were reports, although few in number, of torture and ill-treatment of both civilian detainees and captured combatants. A number of former RUF child combatants who were registered as part of the disarmament, demobilization and reintegration program claimed that they had been ill-treated while in the custody of ECOMOG.

There have also been reports of acts of violence and intimidation by ECOMOG forces against civilians in Freetown and other parts of the country. On 5 October 1998 at a checkpoint at Magbenteh, about three kilometres from Makeni, a driver was reported to have been beaten and stabbed with a bayonet by a member of ECOMOG during an argument about a search of his vehicle and request for his documents. Sexual assault of women at ECOMOG checkpoints has also been reported in the area around Makeni.

There were several reports of harassment of humanitarian convoys by both ECOMOG and CDF forces in the area of Masingbi and Njaiama-Sewafe during October 1998. For example, the driver of vehicle belonging to a non-governmental organization was reported to have been physically assaulted by ECOMOG forces near Masingbi who also stole property from the vehicle. UNOMSIL military observers have frequently been requested to intervene with ECOMOG and the CDF on behalf of UN agencies and non-governmental organizations.

ECOMOG commanders have expressed a determination to address problems of ill-discipline and were reported to have established a complaints procedure to investigate any allegations of harassment of civilians by ECOMOG forces.

Recommendations

- **all military personnel participating in the ECOMOG force in Sierra Leone must adhere to international humanitarian and human rights law at all times;**
- **all troops participating in ECOMOG should be fully trained in these standards and understand their obligation to adhere to them;**
- **in accordance with international humanitarian law, civilians should not be targeted during military operations by ECOMOG forces; ECOMOG forces must at all times distinguish between the civilian population and combatants and take all necessary measures to protect civilians from the dangers arising from military operations;**
- **the cases of civilian detainees reported to be held "in safe custody" by ECOMOG forces should be reviewed by a civilian judicial authority in order to establish the legal basis for their detention and to determine whether they should be charged or released;**
- **specific mechanisms for monitoring, investigating and reporting any violations of international humanitarian and human rights law by ECOMOG forces should be established;**
- **UNOMSIL military observers should be provided with adequate resources to monitor the respect by ECOMOG forces of international humanitarian and human rights law during both military operations and during disarmament, demobilization and reintegration programs for former combatants;**
- **any allegations of human rights violations by ECOMOG forces, such as extrajudicial execution, torture and ill-treatment, should be promptly and independently investigated and those responsible brought to justice, in accordance with international standards.**

Human rights violations by Civil Defence Forces

The CDF have also failed to respect international human rights and humanitarian law and have been responsible for torture, ill-treatment and extrajudicial executions, although not on the scale of abuses committed by AFRC and RUF forces.

The CDF are composed of traditional hunters and include *kamajors* from the south and east of the country, and *kapras*,

donsos, *tamaboros* from the north. The National Coordinator of the CDF is the Deputy Minister of Defence. Although attempts have been made to register all members of the CDF throughout the country, this has been made difficult because of the lack of a formal structure and control over some of the CDF, continuing recruitment and fighting.

The CDF have killed, tortured and ill-treated both captured AFRC and RUF combatants and also civilians suspected of supporting or collaborating with the AFRC and RUF. In September 1997 four people, including a woman, who were suspected of being soldiers or AFRC supporters were reported to have been summarily executed by being decapitated when the vehicle in which they were travelling from Bo to Makeni was stopped by *kamajors*. In January 1998 *kamajors* were reported to have summarily killed civilians suspected of supporting the AFRC and RUF in two villages near the town of Rotifunk, Southern Province, some 90 kilometres from Freetown.

In February 1998, in the days following the removal of the AFRC and RUF, there were many cases of torture, ill-treatment and extrajudicial executions by the *kamajors*, including in the towns of Bo, Kenema and Koidu. They were often mutilated and many were killed by being burned alive; some had tyres placed around their heads which were then set alight. At least 50 people accused of having supported the AFRC and RUF were extrajudicially executed in Kenema. Black marks on the dirt roads where people had been burned alive were still visible months later. When *kamajors* entered Koidu on 11 and 12 February 1998 they captured and killed AFRC soldiers. Some were decapitated, others were doused with petrol or had tyres placed around them and were burned alive. Such killings also took place in Freetown in the days immediately following the removal of the AFRC and RUF. At least six people were killed by civilians in revenge attacks. They included Mohamed Bangura, also known as Saccoma, who was burned alive, Sheik Mustapha, who was beaten to death, and Musa Kabia.

Several independent sources referred to isolated incidents of extrajudicial execution together with ritual cannibalism by members of the CDF. Ritual cannibalism is not, however, accepted behaviour or policy among the CDF and is rejected as abhorrent by most CDF. It appears to be carried out only by a small number of *kamajors*, in particular in the region around Kenema, who subscribe to animist beliefs. One such incident was reported to have occurred on 27 March 1998 when a boy aged 17 from Kenema was detained by *kamajors* and accused of collaborating with the AFRC and RUF. He was taken to the market place and forced to buy vegetables and other ingredients. He was then reported to have been killed in a cannibalistic ritual. His partially burned body, with the heart removed, was later seen by witnesses. Other incidents of ritual cannibalism were reported to have taken place during April and May 1998 at Panguma, north of Kenema. These incidents must be investigated by the authorities and those responsible brought to justice. Longer-term measures, including increasing awareness and understanding of the cultural basis for this practice, are also needed in order to eradicate ritual cannibalism.

On 28 April 1998 President Kabbah announced that the CDF had been placed under the command of ECOMOG. The following day a *kamajor* leader in Bo was reported to have criticized the growing lawlessness of the *kamajors* and called for the registration of all CDF, who were apparently roaming the streets of Bo. Although nominally under the command and control of ECOMOG, the behaviour of the CDF continued to be undisciplined in the following months, particularly in areas other than their own villages, towns and districts. Reports of extrajudicial executions and torture of prisoners decreased significantly, however, from June 1998, apparently as a result of intervention by the government and ECOMOG, and the discipline of many CDF units improved significantly.

Some incidents of extrajudicial execution, torture and ill-treatment, however, continue to be reported. On 26 October 1998 four captured rebels were reported to have been extrajudicially executed in the village of Romeni, north of Port Loko. At least another 10 were reported to have been killed after being captured during the attack on Alikalia in October 1998.

In late August 1998 a young woman from the area around Kenema who had previously handled goods looted from the World Food Programme (WFP) by rebel forces was reported to have been interrogated by a group of about 20 CDF in the town of Kenema. When she made remarks considered offensive by the CDF, she was stripped and beaten. She was then taken to an unknown destination. Reports were also received in September 1998 of illegal arrest and detention of civilians by the CDF although it is unclear whether this practice is continuing.

Criminal acts, such as looting, confiscation of vehicles and civil disturbance, by the CDF have continued. Civilians have been harassed and money and goods extorted in exchange for permission to pass through checkpoints along major roads. The CDF have imposed their authority through fear and intimidation with the result that many people are afraid to make formal complaints to the authorities about their conduct. During September 1998 there were persistent reports of interference with the delivery of humanitarian supplies.

Little or no action is known to have been taken by the authorities against members of the CDF who have been responsible for illegal arrest and detention, torture and ill-treatment and extrajudicial executions of those suspected of having collaborated with the AFRC which have occurred since February 1998. The CDF appear to act with impunity. There is an urgent need to investigate human rights violations committed by the CDF and bring those responsible to justice.

Recommendations

- **strict chain of command must be enforced over members of the CDF in order to prevent extrajudicial**

executions, torture and ill-treatment, illegal arrest and detention;

- **all reports of extrajudicial executions, torture and ill-treatment, illegal arrest and detention by the CDF should be promptly and independently investigated in order to bring those responsible to justice.**

Refugees and internally displaced people - still at risk

In July 1998 at the UN special conference on Sierra Leone, the UN High Commissioner for Refugees, Sadako Ogata, stated that the refugee crisis in Sierra Leone had been the worst in Africa so far during 1998. On 10 November 1998 she again referred to the plight of Sierra Leonean refugees and internally displaced people when she called on the UN Security Council to respond more effectively to refugee crises in Africa.

As fighting has intensified in the east and north of the country since the intervention by ECOMOG in February 1998, at least 550,000 Sierra Leoneans are estimated to have fled areas affected by conflict. They include hundreds of unaccompanied children. According to UNHCR, since the beginning of 1998, some 210,000 Sierra Leoneans have sought refuge in Guinea and another 57,000 in Liberia. It is also estimated that more than 300,000 have become internally displaced within Sierra Leone during 1998.

The continuing violence perpetrated by rebel forces has not only prevented the return of refugees and internally displaced people to their homes but has also caused a serious humanitarian situation which threatens lives. Both refugees and internally displaced people remain vulnerable to attacks by rebel forces and face acute hardship, disease and malnutrition. The violence and insecurity in areas affected by the conflict has often prevented adequate assistance reaching them.

Refugees in Guinea and Liberia

When fighting between ECOMOG and rebel forces intensified in Kailahun District in April 1998, some 1,000 civilians were reported to be fleeing to Liberia daily. Thousands of refugees also fled into Guinea; 6,000 new refugees arrived during the first week of June 1998. Many, including children, died as a result of malnutrition, diarrhoea and malaria.

The majority of Sierra Leonean refugees were in areas where access was extremely difficult. In both Guinea and Liberia, poor road conditions and the onset of the rainy season, combined with concerns about security by both the Liberian and Guinean authorities, aggravated still further problems of access by humanitarian agencies to refugees in camps near the border, threatening food deliveries and basic medical care, including vaccinations.

Between 15 June 1998 and 10 July 1998 humanitarian agencies were denied access by the Guinean authorities to camps close to the border in the Guéckédou region where more than 150,00 refugees had recently arrived. The Guinean authorities cited insecurity and difficulties in guaranteeing the safety of humanitarian agencies in the area. UNHCR and its partners did not have access to these refugees for more than three weeks. Many of the refugees in this area were already in poor physical condition when they had arrived. In early September 1998 heavy rains disrupted the delivery of relief assistance to some 180,000 Sierra Leonean refugees in camps in the Guéckédou region of Guinea.

In Guinea most camps were near the border with Sierra Leone, leaving refugees close to areas of the fighting and vulnerable to attacks. On 3 July 1998 the refugee camp at Forokonia in Guinea was attacked during an incursion by rebel forces from Sierra Leone. Six refugees were killed and the camp was looted and almost entirely burned.

In early September 1998 UNHCR reported that rebel forces were continuing to brutalize Sierra Leonean refugees in Guinea. Rebel forces had attacked a refugee camp at Tomandu inside Guinea on 1 September 1998, killing at least 10 people - seven women refugees and several Guineans - as they forced other refugees to carry stolen goods back across the border into Sierra Leone. UNHCR sent representatives to the village which had been attacked. They found Sierra Leonean refugees who had previously been abducted by rebel forces, including a girl who said that she had been repeatedly raped and a boy who had the letters RUF carved into his chest and forehead. Witnesses said that rebel forces had raided local food stores killing everyone nearby. Three women refugees were reported to have been shot and seriously wounded when they refused to continue across a bridge into Sierra Leone. UNHCR subsequently moved thousands of refugees from Tomandu to camps further inside Guinea.

Conclusion 22 of the UNHCR Executive Committee states that: "The location of asylum-seekers should be determined by their safety and well-being as well as by the security needs of the receiving State. Asylum-seekers should, as far as possible, be located at a reasonable distance from the frontier of their country of origin". In addition, Conclusion 48: "Condemns all violations of the rights and safety of refugees and asylum-seekers and in particular military or armed attacks on refugee camps and settlements".

On 8 September 1998 the WFP appealed for assistance for more than 200,000 Sierra Leonean refugees in the Guéckédou region, most of whom had fled continuing rebel attacks in Kono and Kailahun Districts. According to the WFP, some 80 per cent of civilians from these areas were either dead or unaccounted for. Several thousand others were believed to be held captive by rebel forces. Refugees were arriving destitute, suffering from exhaustion, malnutrition and

disease.

There was a further large influx of Sierra Leonean refugees into the Forécariah region of Guinea in late September 1998. According to UNHCR, more than 3,000 people crossed the border on 29 September 1998 after rebel forces had killed civilians and burned homes in Kukuna. Concern was expressed that refugee camps in the Forécariah region, close to the border, were vulnerable to incursions by rebel forces from Sierra Leone. Another 2,000 were reported to have also fled their homes and become internally displaced.

Most Sierra Leonean refugees in Liberia, the majority unaccompanied women and children, were based at camps at Vahun and Kolahun in Lofa Country in northwestern Liberia. An unknown number of others were scattered along the border without access to humanitarian assistance. Bad roads and rains hampered access by humanitarian organizations to refugee camps.

The large concentrations of Sierra Leonean refugees in Liberia, in particular at camps in Vahun and Kolahun, contained significant numbers of both active and former combatants. They included rebel forces who regularly crossed the border between Sierra Leone and Liberia. Others were former Sierra Leonean soldiers who feared returning to Sierra Leone because of possible reprisals by the CDF. Also among Sierra Leonean refugees in Liberia were former combatants of the RUF who had voluntarily ceased combat. Conclusion 77 of the UNHCR Executive Committee "calls on States of refuge to take all necessary measures to ensure that the civilian and humanitarian character of refugee camps and settlements is maintained".

In addition to the severe physical hardship encountered by refugees and internally displaced people, there was also concern that refugees returning to Sierra Leone who might be considered to be associated with rebel forces could be at risk of revenge attacks on their return and might become victims of arbitrary detention, torture and ill-treatment or extrajudicial execution.

Internally displaced people

Some 20,000 internally displaced people sought safety from the increasing attacks in Northern and Eastern Provinces from April 1998 at Masingbi, between Koidu and Makeni, swelling the town's normal population of 7,000. During June and early July 1998 up to 300 people arrived daily at Masingbi, decreasing to between 50 and 100 a day during August 1998. The humanitarian situation of internally displaced people at Masingbi remained critical during the following months and there was a high mortality rate as a result of disease and malnutrition. Children under five years were the worst affected. Fears for the safety of displaced people at Masingbi heightened after ECOMOG forces repelled an attack by rebel forces on Masingbi in late October 1998.

With the onset of the rainy season from May, when endemic diseases such as cholera resurface, many civilians caught in areas under the control of rebel forces, forced from their homes and seeking refuge in the bush and with no access to medical assistance were reported to be suffering from vomiting and diarrhoea.

As attacks by rebel forces in both Northern and Eastern Provinces resumed during September and October 1998 entire local communities in Kambia, Koinadugu, Bombali and Kenema Districts were displaced. Attacks by rebel forces on villages in Kenema District in late September 1998 were reported to have resulted in as many as 10,000 people fleeing their homes, half of whom sought refuge in the town of Kenema.

Recommendations

- **all violations of the rights and safety of refugees and, in particular, military or armed attacks on refugee camps and settlements should be condemned; all efforts should be made to protect the safety of refugees in camps and settlements, including location to secure areas and, whenever possible, at a reasonable distance from the border with Sierra Leone;**
- **effective measures should be taken to preserve the civilian and humanitarian nature of refugee camps and settlements;**
- **every effort should be made to ensure the safety of internally displaced people; internally displaced people's camps should be provided adequate protection from human rights abuses;**
- **all efforts should be made to ensure that there is adequate access to refugees and internally displaced people in order to monitor their safety and provide humanitarian assistance;**
- **refugee repatriation programs should include effective monitoring and protection for as long as necessary; international refugee law and protection standards must be adhered to at all times, including the principles of *non-refoulement*, the right to seek asylum and repatriation only on a voluntary basis with international**

supervision.

Accountability for human rights abuses

The government of President Kabbah, since it was reinstated in March 1998, has taken measures to establish accountability for human rights abuses and to bring those responsible to justice. This is essential for achieving justice and moving towards national reconciliation. Such a process, however, must be undertaken in accordance with international standards and must not itself violate human rights. Trials of those accused of human rights abuses must conform to international standards for a fair trial and there should be no recourse to the death penalty.

Impunity contributes to continuing human rights abuses. It is only when those responsible for human rights abuses are brought to justice for their crimes that a clear message is sent that these abuses will not be tolerated or allowed to go unpunished.

The scale of the atrocities committed by the AFRC and the RUF, both before and after they held power, demand that those responsible be brought to justice. This is not incompatible with peace and reconciliation. Peace and security will not be achieved in Sierra Leone until there is an end to impunity. True reconciliation cannot be achieved if the right of victims and their families to truth, justice and redress are ignored.

On 17 June 1998, shortly after a conference on the creation of an international criminal court opened in Rome, Italy, a joint statement by the heads of five UN agencies said that the atrocities being committed in Sierra Leone were a brutal reminder of the urgent need for an international criminal court to try those responsible for war crimes and crimes against humanity. The statement by UNICEF, UNHCR, the Special Representative of the UN Secretary-General for Children and Armed Conflict, the UN High Commissioner for Human Rights and the UN Under-Secretary-General for Humanitarian Affairs urged those participating at the conference in Rome to study carefully the situation in Sierra Leone and to ensure that the statute they adopted would be able to combat impunity, provide justice and contribute to a lasting peace in the country.

The statement added that, despite the willingness of the Sierra Leone government, it was unlikely that the judicial system would have sufficient resources to bring those responsible for human rights abuses to justice, which would raise "*the prospect of yet another round of mindless violence going unpunished*".

The delegation of Sierra Leone to the conference in Rome repeatedly cited its country as evidence of the need for the establishment of a permanent international criminal court. Amnesty International believes that the international community must assist in establishing accountability for the atrocities in Sierra Leone. This assistance should include both political commitment and practical assistance towards the re-establishment of a functioning and effective justice system and the investigation and documentation of past human rights abuses.

At the UN special conference on Sierra Leone, the UN Secretary-General also stressed the need for national reconciliation and for Sierra Leoneans to put the past behind them and put the future first. The process of reconciliation did not, however, preclude accountability for human rights abuses: "*Those responsible for the atrocities and other gross violations of human rights will in time be brought to justice*". The need to pursue policies promoting national reconciliation had to be combined with ensuring that those responsible for crimes and atrocities against civilians were brought to justice. All those accused had to be given fair trials with full respect for due process of the law.

Recommendations

- **those responsible for the gross human rights abuses which have occurred in Sierra Leone since May 1997 must be held accountable for their crimes, in accordance with international standards;**
- **the international community should assist Sierra Leone in establishing accountability for the atrocities in Sierra Leone and bringing those responsible to justice, in accordance with international standards.**

Detentions and trials after February 1998

After ECOMOG forced the AFRC from power in February 1998, some 2,000 people were arrested and detained. A significant number were former combatants who were considered to be prisoners of war. Others were associated or perceived to be associated with the AFRC and RUF. Many of those detained were suspected of criminal offences which included gross human rights abuses such as torture and deliberate and arbitrary killing of civilians. Some of those detained had given themselves up to police and ECOMOG forces as a means of protection from civilians who attacked, and in some cases killed, those closely associated with the AFRC and RUF.

On 10 March 1998, President Kabbah proclaimed a state of emergency, under Section 29 of the Constitution of 1991, which includes provisions for indefinite detention without charge or trial. The Proclamation of Emergency was ratified by

parliament on 26 March 1998. The Public Emergency Regulations, 1998, state that:

"2. The President may, if in his opinion it is necessary, for the purpose of maintaining and securing peace, order and good government in Sierra Leone, make an Order-

(a) directing that any person be detained or continues to be detained and so long as such an Order is in force in respect of any person, that person shall be liable to be detained in such place and under such circumstances as the President may from time to time determine and shall, while so detained, be deemed to be in legal custody".

Although Article 4 of the ICCPR allows the Sierra Leone government to derogate from its obligations under the treaty, it requires that derogation has to be to the "extent strictly required by the exigencies of the situation". Certain rights, including the right to life in Article 6 and the prohibition of torture, cruel, inhuman or degrading treatment or punishment in Article 7, cannot be derogated from. The UN Human Rights Committee which monitors compliance with the ICCPR has stated that "measures taken under Article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that, in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made".

Hundreds of people alleged to have collaborated with the AFRC and RUF have been held without charge under the Public Emergency Regulations. The scope of these regulations raises concern that people could be held indefinitely without charge or trial, in violation of international human rights standards, in particular the ICCPR.

Throughout the months following the return of the government of President Kabbah arrests of those suspected of collaborating with the AFRC have continued, although the scale of arrests has gradually decreased and some of the detainees have been released without charge. It has been difficult to determine at any one time exactly how many detainees are held without charge. At the end of September 1998, however, several hundred people, including some 130 children, were believed to be held without charge in detention in Pademba Road prison and other places of detention in and around Freetown. In some cases detentions appeared to be entirely arbitrary, for example, in cases where people were denounced as collaborators for reasons of personal revenge or settling of scores. In September 1998, 18 women were reported to have been arrested in Freetown after being denounced for having fraternized with members of the AFRC.

Significant numbers of civilians are also being held illegally by ECOMOG forces in "safe custody" without any process of review of their detention by a civilian judicial authority.

Among those released without charge from Pademba Road prison after several months in detention were more than 20 senior police officers, who were reported to have been released on 20 August 1998. More than 270 Sierra Leonean soldiers who had been part of the ECOMOG contingent in Liberia at the time of the ECOMOG intervention in Freetown, repatriated in March 1998 and detained in Pademba Road prison were also released from custody for retraining on 31 August 1998.

Fifty-nine civilians were charged with treason and other offences in April 1998 and were brought to trial before the High Court early the following month. Trials before a court martial of 37 soldiers began in July 1998. Foday Sankoh was brought before a magistrates' court on 4 September 1998 and charged with treason and other related offences; his trial before the High Court began later that month. It was also expected that further trials of both civilians and soldiers would begin in November 1998. The Court of Appeal ruled in 1975 that the death penalty for the offence of treason was discretionary.

The cases of some of the hundreds of other detainees who remained held without charge or trial were to be reviewed by an independent committee of investigation.

The committee of investigation

In late May 1998 the government established an independent committee of investigation to review the cases of the several hundred people arrested for alleged collaboration with the AFRC who remained detained without charge. The purpose of the committee is to review the cases of those detained in order to expedite release or prosecution. The terms of reference of the committee was to advise the government on action to be taken in the cases of: those alleged to have collaborated with the AFRC; civil servants who had resumed work under the AFRC at their own request or on the invitation of the AFRC; and managers and employees of public sector services who allowed the use of funds by the AFRC or others who facilitated payment of public funds.

The committee of investigation is headed by Nasiru Tejan-Cole, a former Director of Public Prosecution, and includes seven other prominent members of the community. It began its work on 17 July 1998 but its hearings were not held in public. Human rights officers from UNOMSIL were, however, allowed to attend. Detainees appeared before the committee in person and were not represented by lawyers. They were invited to comment on statements that they had made to the police after their arrest and were also able to call witnesses. The committee then made recommendations to the government on whether to prosecute or release them.

Amnesty International welcomed the establishment of the committee of investigation by the government as a positive

initiative. While its progress in reviewing cases has been slower than anticipated, the committee is reported to have conducted its work professionally and competently.

By late September 1998 the cases of some 120 detainees had been considered by the committee. More than 70 had been released unconditionally and another 17 were released either on bail or pending further investigations. In other cases the committee concluded that there was evidence of criminal offences. The committee of investigation is continuing its work and has repeated its calls for witnesses of suspected collaboration to provide evidence and cooperate with the committee.

Recommendations

- **the cases of those who remain detained without charge or trial should be reviewed by the committee of investigation with a minimum of delay with a view to either charging or releasing them.**

Trials before the High Court

Among the 59 civilians charged in April 1998 with treason and some also with other offences, including murder and arson, were those who had participated in the AFRC by accepting government posts. The defendants also included a number of former politicians including former President Joseph Saidu Momoh. One of the defendants, Abdul B. Sankoh, died as a result of ill-health on 21 June 1998. Trials in three groups began in early May 1998 before the High Court in Freetown.

The government stated its commitment to ensuring fair trials for those charged, whereas the public mood was one of anger and a desire for swift justice. The trials were open to the media and public and were monitored by UNOMSIL human rights officers, assisted from July until October 1998 by representatives of the International Bar Association. Independent observers concluded that there had been a genuine attempt by the government to conduct fair and transparent trials before the High Court and that the trials appeared to comply to international procedural standards.

On 25 August 1998, 16 defendants in one of the trials were convicted and sentenced to death; the two remaining defendants were acquitted. Among those sentenced to death were Victor Foh, a member of parliament of the All People's Congress (APC) party, Allieu Badara Kamara, AFRC Under-Secretary of State for Information, Christian Kargbo, former Governor of the Central Bank, Hilton Fyle, a journalist and broadcaster, who had formerly worked for the British Broadcasting Corporation (BBC) World Service, Ibrahim Ben Kargbo, a journalist and editor of the *New Citizen* newspaper, Gipu Felix-George, Director General of the Sierra Leone Broadcasting Service (SLBS), and two other SLBS broadcasters, Dennis Ayodele Smith and Olivia Mensah. Olivia Mensah, who was pregnant at the time of her arrest and who gave birth in July 1998, was also convicted of murder.

A second trial concluded on 19 October 1998; 16 defendants were convicted and three acquitted. On 21 October 1998, 11 of those convicted were sentenced to death and the five others were sentenced to 10 years' imprisonment. Those sentenced to death included Claude Victor Campbell, a former Attorney General and Minister of Justice, Ahmed Charrid Dumbuya, former head of the National Power Authority, Brigadier (rtd.) Leslie Modibo Lymon, AFRC Secretary of State for the Interior, and Nancy Steele, a former APC politician.

The third trial concluded on 4 November 1998. Fifteen of the defendants were convicted of treason and were sentenced to death the following day. They included several people who had held ministerial positions during the period of AFRC rule, including Victor Brandon, Secretary of State for Development, Dr Bailah Leigh, Secretary of State for Health, Dr Matilda King, Under-Secretary of State for Health, and Ajibola Manley-Spaine, Attorney General and Minister of Justice. Former President Momoh was found not guilty of treason but was convicted of two counts of conspiracy and sentenced to two five-year terms of imprisonment to be served concurrently. Five other defendants were acquitted.

All those convicted by the High Court have the right to appeal to the Court of Appeal and, if unsuccessful, to the Supreme Court. If conviction and sentence are confirmed on appeal, those sentenced to death may seek the exercise of the prerogative of mercy, under Section 63 of the Constitution of 1991. The prerogative of mercy is exercised by a special committee chaired by the President. All those convicted and sentenced to death have appealed against their conviction and sentence; a date for hearings before the Court of Appeal had not been set by early November 1998.

Following interventions by the international community calling for commutation of the death sentences passed in August 1998, the government responded that the judicial process was continuing, that those sentenced had the right to appeal to the Court of Appeal and the Supreme Court, that it remained committed to due process of the law and that the President would consider exercising clemency in any cases where a death sentence was confirmed at the completion of the judicial appeal procedure.

The trial of Foday Sankoh began on 24 September 1998 and he appeared before the High Court on several occasions during October 1998, pleading not guilty to charges of treason and other offences related to the military coup of May 1997. Sierra Leonean lawyers feared reprisals if they agreed to represent Foday Sankoh and genuine efforts by the government to provide legal representation for him proved unsuccessful. He therefore conducted his own defence.

Under Article 14(3)(d) of the ICCPR, a defendant should be allowed to defend himself through a legal representative of his own choosing and that, if he does not have legal assistance, such assistance should be assigned to him. Article 7 of the African Charter, as interpreted by the African Commission, also includes the right to be defended by a lawyer of the defendant's choice. Safeguard 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, states that: "Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure fair trial, at least to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings." The UN Special Rapporteur on extrajudicial, summary or arbitrary executions reiterated in December 1996, that: "All defendants facing the imposition of capital punishment must benefit from the services of a competent defence counsel at every stage of the proceedings."

On 23 October 1998 Foday Sankoh was convicted on seven of the nine counts against him and sentenced to death. He appealed against his conviction and sentence and requested representation by a defence lawyer for the appeal procedure. The government sought assistance in providing a lawyer for Foday Sankoh from the United Kingdom and other Commonwealth countries.

Recommendations

- **all trials should continue to be open to international observers and to conform to international standards for a fair trial;**

- **all those tried for offences which carry a mandatory or discretionary death sentence should be ensured all appropriate safeguards as guaranteed by international standards, including adequate legal assistance at all stages of the proceedings and the right to appeal against conviction and sentence to a higher jurisdiction.**

Trials before court martial

The trial of 37 soldiers charged with mutiny, failure to suppress a mutiny, treason and conspiracy began on 23 July 1998. The defendants included senior members of the AFRC such as Colonel Abdul Karim Sesay, AFRC Secretary General, Sergeant Abu "Zagalo" Sankoh and Corporal Tamba Gborie who had announced the military coup on 25 May 1997 on state radio. The judicial panel comprised Sierra Leonean army officers and was presided by a Judge Advocate who was a Nigerian ECOMOG officer.

As with the trials before the High Court, the court martial was open to independent observers. In addition to monitors from UNOMSIL and the International Bar Association, an Amnesty International representative observed the early proceedings of the trial before the court martial in late July and early August 1998.

Trials before court martial in Sierra Leone allow no right of appeal against conviction and sentence to a higher jurisdiction. The right of appeal from a decision of a court martial was abolished by statute in 1971. This lack of judicial appeal violates international standards for a fair trial. Amnesty International repeatedly urged the government to allow a judicial appeal from the court martial.

Article 14(5) of the ICCPR states that: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Under the Optional Protocol to the ICCPR, ratified by Sierra Leone in 1996, where rights guaranteed by the ICCPR, including the right to fair trial, have been violated, recourse may be sought from the UN Human Rights Committee.

The Human Rights Committee has concluded that imposition of a death sentence after a trial which violates the provisions of the ICCPR, including Article 14, constitutes a violation of the right to life which is guaranteed by Article 6 of the treaty.

In addition, Safeguard 6 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty states that: "Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory." [13]

The African Charter also guarantees, under Article 7, the right to fair trial. The African Commission has made several decisions which interpret Article 7 of the African Charter to include a right of appeal to a higher jurisdiction. In April 1998 the African Commission, before the execution of 23 people in Rwanda, issued a statement saying that the executions of people who had been denied a fair trial violated Article 4 of the African Charter which prohibits the arbitrary deprivation of the right to life.

As with those sentenced to death by a civilian court, the presidential committee for the prerogative of mercy may meet after judgment has been made to confirm or reduce sentences by the court martial.

In the final stages of the trial, the judicial panel of the court martial refused to accept legal arguments, which had previously been accepted by the prosecution in the case of civilians being tried for treason before the High Court, that the death penalty was discretionary, rather than mandatory, for the offence of treason. It therefore refused to accept evidence in mitigation.

On 12 October 1998 34 of the defendants before the court martial were convicted of treason, murder and collaborating with the enemy and sentenced to death. They included Colonel Abdul Karim Sesay, Sergeant Abu "Zagalo" Sankoh, Corporal Tamba Gborie, Brigadier Hassan Karim Conteh, a former Chief of Defence Staff, Colonel Samuel Francis Koroma, also former Chief of Defence Staff, Squadron Leader Victor L. King, and a woman, Major Kula Samba, who had been AFRC Secretary of State for Social Welfare, Children and Gender Affairs. The three other defendants were acquitted.

Complaints of violations of the ICCPR were submitted to the UN Human Rights Committee on behalf of 18 of those sentenced to death by the court martial. Despite these submissions and appeals for stays of execution and clemency by the international community, including the UN Secretary-General and UN High Commissioner for Human Rights, 24 of those sentenced to death, including those named above, were executed on 19 October 1998. The other 10 had their sentences commuted to life imprisonment by the committee for the prerogative of mercy.

The executions were carried out by a firing squad using automatic weapons and took place in public on the outskirts of Freetown. The executions were reported to have been observed by a large number of people, although not specifically invited, who included the news media. Photographs of the executions were subsequently published. Amnesty International considers that the death penalty in all circumstances is a cruel, inhuman and degrading punishment. The manner in which these executions were carried out, however, was particularly cruel, inhuman and degrading. The graphic publicity subsequently appearing in the news media in Sierra Leone both emphasized and aggravated the brutalizing effect that the executions have on society within Sierra Leone.

These executions violated Sierra Leone's commitments under international human rights law and were condemned by the international community, including the UN and the EU, as well as Amnesty International and other human rights organizations. The UN Secretary-General said on 22 October 1998 that he regretted that the executions had taken place despite his appeal to the government to consider, at the very least, a stay of execution pending review of the proceedings before relevant international monitoring bodies. He added that he hoped that the government would ensure due process of the law in subsequent trials. The UN Human Rights Committee requested the government to explain why it had disregarded the Committee's request for a stay of execution and carried out the executions.

It was reported in late October 1998 that a further 16 soldiers would be tried on treason charges before the court martial; if convicted, they too faced death sentences without the right to appeal to a higher jurisdiction.

Recommendations

- **trials before court martial must conform to international standards for a fair trial, including the right of appeal against conviction and sentence to a higher jurisdiction;**
- **in addition, those tried before court martial for offences which carry a mandatory or discretionary death sentence should be ensured all appropriate safeguards.**

The death penalty - a violation of human rights

All those convicted of treason and other offences relating to the military coup of May 1997 face a possible death sentence. By early November 1998, 42 civilians and Foday Sankoh had been sentenced to death and 24 of 34 soldiers sentenced to death by court martial had been executed.

The anger and bitterness of the people of Sierra Leone against those tried for crimes committed during the period of AFRC rule and the desire for retribution and swift justice was demonstrated by the series of revenge killings which took place in Freetown and other parts of the country after the removal of the AFRC and RUF. Public opinion in Sierra Leone demands that strong action is taken by the government against those responsible for crimes committed during that period, which included gross human rights abuses such as killings and torture. The atmosphere surrounding the trials has been highly charged and support for the death penalty in Sierra Leone is inevitably widespread.

Amnesty International acknowledges the government's responsibility to bring to justice those responsible for such crimes, in accordance with international standards. Amnesty International is opposed to impunity and always encourages governments to investigate human rights abuses and to bring the perpetrators to justice. It is precisely because Amnesty International is concerned that those guilty of human rights abuses should not escape justice that it urges the government to ensure that all trials are conducted fairly.

Amnesty International is, however, unconditionally opposed to the death penalty on the grounds that it is a violation of the

fundamental right to life and the right not to be subjected to cruel, inhuman or degrading punishment as set out in the Universal Declaration of Human Rights and the ICCPR. There is particular concern when those sentenced to death and executed do not receive fair trials.

The scale of human rights abuses committed in Sierra Leone has been horrendous. An argument used in favour of the death penalty is that it is justified retribution for particularly atrocious crimes. The use of the death penalty, however, perpetuates a cycle of violence, bitterness and revenge, instead of bringing reconciliation and respect for human rights. The death penalty is an official form of violence which has a brutalizing effect on society. Violent retribution is not justice but vengeance disguised as justice. A government and people committed to end human rights abuses must rise above vengeance and promote and protect human rights, in particular the right to life.

A difficult and daunting task faces Sierra Leone in achieving reconciliation within its society after the atrocities committed by the AFRC and RUF. Amnesty International, however, does not believe that the use of the death penalty will contribute in any way to the process of reconciliation. On the contrary, it considers that the public executions of 24 soldiers in October 1998 after an unfair trial are incompatible with initiatives aimed at reconciliation within Sierra Leone.

There has been significant progress towards ending the use of the death penalty both in Africa and throughout the world; 19 states in Africa and a majority of states worldwide have abolished the death penalty in law or in practice. The government of Sierra Leone should move in the direction of this trend, rather than against it.

Recommendations

- **the government of Sierra Leone should take steps towards the abolition of the death penalty in law**
- **pending abolition, all death sentences should be commuted and no executions should take place;**
- **the government and non-governmental organizations should initiate and promote open debate on the death penalty among the Sierra Leonean population in order to raise awareness of the human rights issues involved.**

Harsh prison conditions

Conditions in prisons, police stations and other places of detention in Freetown and throughout the country fall far short of international standards for the treatment of prisoners and in some cases amount to cruel, inhuman and degrading treatment. The severity of conditions in Sierra Leone's prisons appears to be attributable to material shortages in a country which faces acute economic problems. Conditions have been further exacerbated by the destruction and damage of prison facilities at the time of the military coup in May 1997.

All places of detention hold numbers of detainees well beyond the capacity for which they were designed. Following the detention of some 2,000 people in the weeks following the removal of the AFRC and RUF from power, conditions in Pademba Road prison and police cells in Freetown became severely overcrowded. In October 1998 some 1,200 detainees were reported to be held at Pademba Road prison, more than three times the capacity for which it was constructed. Most of these detainees were held under the Public Emergency Regulations. Detainees were also held in military camps, including ECOMOG bases at Wilberforce and Lungi barracks.

In August 1998 a local human rights organization, Prison Watch Sierra Leone, reviewed conditions both at Pademba Road prison and the Kingtom Remand Home for children in Freetown. It concluded that generally the diet of prisoners was deficient. With the exception of separate facilities provided for women prisoners, sanitation was poor at Pademba Road prison. Prisoners depended on family and relatives for the provision of clothing. Prison Watch Sierra Leone drew particular attention to the neglect of 24 children held at that time at the Kingtom Remand Home, the youngest of whom was 11 years old. Few received visits from members of their families and most appeared to be children who had lost contact with their families as a result of the conflict.

Conditions are particularly harsh at CID headquarters and also at the Central Police Station in the centre of Freetown. Large number of detainees, accused of criminal offences or of crimes committed during the period of AFRC rule, are reported to have been held for lengthy periods at CID headquarters in small, dark cells with inadequate ventilation and sanitary facilities. Cells at the Central Police Station, which is situated next to the sea, are reported to be extremely damp and subject to flooding. Often detainees have no bedding and have to sleep on the floor. Food and medical care are inadequate. Detainees held in police stations rely on food being provided by relatives and friends.

Conditions in prisons outside the capital are also extremely poor. Food and sanitary provisions are particularly deficient. There is no effective system for providing food to prisoners and those without support from relatives are at particular risk of deprivation. Often there is no space for exercise within the prison. In prisons outside Freetown, for example in Kenema, female prisoners are not segregated from males and minors are held with adult prisoners.

As a result of severe overcrowding, inadequate hygiene and medical care diseases, including malaria, diarrhoea and skin complaints, are rife in Pademba Road prison and other places of detention. Some prisoners and detainees were reported to have died as a result of ill-health. While Pademba Road prison has medical facilities within the prison and a prison doctor, most prisons outside Freetown have no such provision.

Following the detention of hundreds of people alleged to have collaborated with the AFRC and RUF visits were severely restricted and denied altogether on several occasions. The authorities justified these restrictions on security grounds.

Shortly after the removal of the AFRC and RUF a delegation of the ICRC, accompanied by a doctor and a nurse, were authorized to visit all places of detention in areas under the control of ECOMOG, including Pademba Road prison, and visits have since continued.

The government is reported to be reviewing the prison system in Sierra Leone in order to undertake major reforms. Financial assistance from the international community will, however, be necessary to implement improvements to conditions in prisons and other places of detention. Following visits to several places of detention in late October 1998 UNOMSIL human rights officers prepared an analysis of the problems faced by the prison system in order to provide a more coordinated response to the needs of prisons and other places of detention.

Recommendations

- **urgent and effective measures should be taken to ensure that all places of detention in Sierra Leone conform to international standards for the treatment of prisoners, including the UN Standard Minimum Rules for the Treatment of Prisoners;**
- **the health of all detainees and prisoners should be ensured while in custody; adequate medical facilities and treatment, food, washing and sanitary facilities should be provided, and prisoners should have daily exercise in the fresh air;**
- **the international community should assist the Sierra Leone government in ensuring acceptable conditions of detention.**

Long-term measures for the protection and respect of human rights

Establishing accountability for human rights abuses is essential to prevent human rights violations in the future. Also needed are strong and effective institutions within Sierra Leone to ensure that fundamental human rights are respected and protected. This includes the legal and judicial systems, the army and the police, as well as an independent national human rights commission. Civil society, including human rights groups, are also integral to promoting human rights and creating an environment in which human rights are respected.

Despite the exceptionally difficult circumstances that all sectors of civil society, including the human rights community, in Sierra Leone have recently endured, human rights groups have emerged as a committed and active force. Their potential should be acknowledged and their activities supported. A National Forum for Human Rights, which is a coalition of 18 organizations working in diverse areas, has been established.

It is essential that basic institutional reforms are guided by strict adherence to international standards relating to the independence of the judiciary, human rights in the administration of justice and codes of conduct for law enforcement officials. All sectors of Sierra Leonean society, including the human rights community, should be involved in these reforms and should receive education and training on human rights standards and complaints procedures.

The international community, including the UN and international financial institutions such as the World Bank and the International Monetary Fund, should work closely together to promote post-conflict reconstruction and rehabilitation in Sierra Leone which is based on good governance and respect for human rights. International financial institutions should use their influence - official and unofficial - to ensure that the restoration of good and effective governance includes the re-establishment of mechanisms and systems to promote the rule of law and the protection of human rights. This should include assistance towards the establishment of permanent, independent and effective national institutions for the long-term protection of human rights and the rule of law, including an independent judiciary and fair criminal justice system.

Reform of the legal and judicial system

The long-term protection of human rights in Sierra Leone depends fundamentally on an effective legal system which is enforced by an independent, impartial and accessible judiciary with adequate resources. The Sierra Leone government, following its return to power, admitted that the judicial system was entirely inadequate. Courts outside Freetown are not functioning, other than magistrates courts in Bo, Kenema and Makeni, and the traditional court system has collapsed.

There should be a thorough review of existing legal institutions in order to make them more effective in the protection of human rights. These initiatives should be accompanied by a determined government policy to hold those responsible for human rights violations fully accountable.
UNOMSIL, UNDP, other UN agencies and international financial institutions should contribute towards the reconstruction of an effective judiciary and legal system in Sierra Leone. Some initiatives have already been undertaken. UNOMSIL has provided law books to the legal profession and has distributed legal technical documents to lawyers representing defendants in the treason trials. It has also conducted seminars for lawyers to discuss aspects of trial practice and procedure.

Restructuring the armed forces

The Sierra Leone national army, the RSLMF, was effectively disbanded following its participation in the military coup and the period of rule by the AFRC. Programs for disarmament, demobilization and reintegration have commenced but at a slower pace than anticipated.

In May 1998 the government announced plans for the establishment of a new national army. Recruitment and training was entrusted to ECOMOG. During a meeting with the Special Representative of the UN Secretary-General for Children and Armed Conflict in May 1998, the government agreed not to recruit children under the age of 18 years. The government and ECOMOG have also agreed to receive assistance from UN agencies in providing training materials on humanitarian and human rights standards concerning the protection of civilians, particularly women and children.

In early September 1998 President Kabbah announced the government's strategy for the re-establishment of a professional and disciplined Sierra Leonean national army which would comprise 5,000 soldiers, including some of those who had remained loyal to President Kabbah's government after the military coup and who had surrendered to ECOMOG forces after February 1998. Some of these soldiers have already been deployed alongside ECOMOG and CDF forces in those parts of the country still affected by conflict. The international community, including the United Kingdom and the Commonwealth, are providing assistance in training and equipping the new national army. Restructuring, training and equipping the national army should include provisions for the protection of human rights contained in international humanitarian and human rights law.

Human rights training for the police force

Restructuring and training of the police force should also include training in human rights. In August 1998 the government announced its intention to create a police force which would be able to assist Sierra Leone in returning to peace and prosperity and which would eventually remove the need for the deployment of military and paramilitary forces, including the CDF, in towns and villages.

UNOMSIL civilian police advisers should continue to monitor, supervise and train national police and security forces and verify their adherence to international human rights and criminal justice standards. A UN civilian police adviser was deployed in Sierra Leone in accordance with UN Security Council resolution 1162 (1998) in July 1998; Resolution 1181 (1988) provided for the deployment of a further four police advisers. Their role is to assist in restoring the confidence of the government and the people of Sierra Leone in the police force and to advise the government on training and re-equipment needs. UNOMSIL civilian police advisers are working closely with a team of police advisers from Commonwealth countries, the Commonwealth Police Development Task Force, deployed at the request of the government, as well as with UNOMSIL human rights officers.

In his Second Progress Report on UNOMSIL, the UN Secretary-General acknowledged that reform of the police force in Sierra Leone poses great challenges. Parts of the country are without a police presence, since many police officers have been killed or have abandoned their posts as a result of the conflict. Little or no training has been available for several years and the police suffer from inadequate logistical support, lack of equipment and poor conditions of service. Respect for human rights has been emphasized and police training initiatives have begun.

UNOMSIL human rights officers have conducted a series of human rights training workshops for police officers, including at the Sierra Leone police training college and in Bo and Kenema, as part of continuing efforts by UNOMSIL and the Commonwealth to restructure and train the Sierra Leonean police force.

The National Commission for Human Rights and Democracy

Long-term respect for human rights requires national human rights institutions to redress human rights violations. Rarely do they receive the necessary funding. If empowered with political support and resources national human rights institutions are the most sustainable mechanisms for the protection human rights. National institutions, which include government bodies as well as those of civil society such as human rights groups, the media, trade unions and professional organizations, are an important element of post-conflict reconstruction.

A National Commission for Human Rights and Democracy has been established in Sierra Leone and with the return

President Kabbah's government has begun to resume its activities. The National Commission has a crucial role to play within Sierra Leone in building a culture based on the universality, interdependence and indivisibility of all human rights for all people. It should be supported and strengthened and its independence and impartiality guaranteed [14].

An effective national human rights commission, with the power to investigate human rights violations and to institute legal proceedings where appropriate, can play a central role in protecting human rights. It is crucial, however, that the National Commission is supported by the government in bringing those responsible for human rights violations to justice.

An effective national human rights commission is an important mechanism for strengthening human rights protection and bringing about institutional reform. It should not, however, replace or detract from the importance of safeguards provided by an effective legal system.

On 18 September 1998 the National Commission established four committees, composed of prominent civilians, to monitor and report on areas of concern for the protection and respect of human rights. These included the conduct of the police, prison conditions and the situation of women and children. On 10 October 1998 UNOMSIL human rights officers conducted a human rights training session for the committee monitoring women and children which was also attended by members of the National Commission.

The National Commission should continue to work closely with local human rights groups in order to develop a strong and effective human rights movement in Sierra Leone which includes all sectors of civil society.

Recommendations

- **the international community, including international financial institutions, should continue to contribute to institutional reform in Sierra Leone, including strengthening the independence of the judiciary and reforming the military and civilian police force;**

- **the National Commission for Human Rights and Democracy should have the necessary powers, resources, professional competence and guarantees of independence and impartiality to carry out prompt and effective investigations into human rights violations; its findings should be made public and it should include recommendations for bringing those responsible for human rights violations to justice and for providing compensation to the victims;**

- **the National Commission for Human Rights and Democracy should also make recommendations for institutional reform and other preventive measures, such as human rights education aimed at all sectors of society, including military, police and judicial officials.**

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(1) ECOMOG had been deployed under the authority of ECOWAS in neighbouring Liberia since 1990. Immediately after the military coup in May 1997, Nigerian forces already present in Sierra Leone under the provisions of a defence agreement between Sierra Leone and Nigeria were significantly reinforced by ECOMOG forces, who were predominantly Nigerian. ECOWAS is an intergovernmental organization of 16 states (Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo) with its headquarters in Nigeria. Established in 1975, the aim of ECOWAS is to promote cooperation and development and to improve relations among member states.
(2) CMAG is composed of Barbados, Botswana, Canada, Ghana, Malaysia, New Zealand, the United Kingdom and Zimbabwe.
(3) For further information on implementing human rights in international peace-keeping operations, refer to *Peace-keeping and human rights* (AI Index: IOR 40/01/94), published by Amnesty International in January 1994.
(4) Sierra Leone ratified the Convention on the Rights of the Child in 1990.
(5) For further information about Amnesty International's recommendations to the UN special conference on Sierra Leone, refer to *Sierra Leone: The United Nations special conference on Sierra Leone: the protection of human rights must be a priority for the international community* (AI Index: AFR 51/14/98), published by Amnesty International on 24 July 1998.
(6) The contact group included representatives from China, Egypt, France, Germany, Japan, the Netherlands, Nigeria, Norway, New Zealand, Sweden, the United States and the EU.
(7) Countries which are part of the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution are also part of the Bureau of the Assembly of the Heads of State and Government. The Bureau consists of 16 ambassadors and is elected annually. It plays a crucial role in decision-making and planning at the OAU. For further information about the OAU and the African Commission on Human and

Peoples' Rights, refer to *Organization of African Unity: Making Human Rights a Reality for Africans* (AI Index: IOR 63/01/98), published by Amnesty International in August 1998.
(8) For further information, refer to *Sierra Leone: A disastrous set-back for human rights* (AI Index: AFR 51/05/97), published by Amnesty International on 20 October 1997.
(9) Sierra Leone ratified the International Covenant on Civil and Political Rights in 1996 and the African Charter on Human and Peoples' Rights in 1984.
(10) For further information about human rights abuses committed in the internal armed conflict in Sierra Leone, refer to *Sierra Leone: Human rights abuses in a war against civilians* (AI Index: AFR 51/05/95), published by Amnesty International on 13 September 1995, and also *Sierra Leone: Towards a future founded on human rights* (AI Index: AFR 51/05/96), published by Amnesty International on 25 September 1996.
(11) Sierra Leone acceded to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) in 1986.
(12) For further information on the involvement of children in armed conflicts, refer to *"Old enough to kill but too young to vote"* (AI Index: IOR 51/01/98), published by Amnesty International in January 1998.
(13) For further information on international standards relating to the use of the death penalty, refer to *International standards on the death penalty* (AI Index: ACT 50/06/97), published by Amnesty International in August 1997.
(14) For further guidelines on the mandate, composition and functioning of national institutions for the promotion and protection of human rights, refer to *Proposed Standards for National Human Rights Commissions* (AI Index: IOR 40/01/93), published by Amnesty International in January 1993, and the handbook on *National Human Rights Institutions*, published in 1995 by the UN Centre for Human Rights (now the Office of the High Commissioner for Human Rights).

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FIFTH REPORT OF THE SECRETARY-GENERAL ON THE SITUATION IN SIERRA LEONE

I. INTRODUCTION

1. By paragraph 5 of its resolution 1162 (1998) of 17 April 1998, the Security Council authorized the deployment, with immediate effect, of up to 10 United Nations military liaison and security advisory personnel in accordance with paragraph 44 of my report of 18 March 1998 (S/1998/249) to Sierra Leone for a period of up to 90 days, to work under the authority of my Special Envoy, to coordinate closely with the Government of Sierra Leone and with ECOMOG, the Monitoring Group of the Economic Community of West African States (ECOWAS), to report on the military situation in the country, to ascertain the state of and to assist in the finalization of planning by the Government of Sierra Leone and ECOMOG for future tasks, such as the identification of the former combatant elements to be disarmed and the design of a disarmament plan, as well as to perform other related security tasks as identified in other paragraphs of my above-mentioned report.

2. By paragraph 10 of that resolution, the Council requested me to report periodically, including on the activities of those military liaison and security advisory personnel and on the work of the office of my Special Envoy in Sierra Leone, within the reporting time-frame set out in paragraph 16 of resolution 1132 (1998) of 8 October 1997. The present report is submitted in accordance with that time-frame, by which the Security Council requested the submission of a report every 60 days.

II. DEVELOPMENTS SINCE MY LAST REPORT

Action taken by the Government of Sierra Leone

3. Following its restoration on 10 March 1998, the Government of Sierra Leone has acted to consolidate its authority throughout the country as far as possible. On 16 March, President Kabbah, acting with the support of Parliament, proclaimed a state of emergency empowering him to take measures to ensure security and stability. These measures included the right to detain suspects and restrict their movements, the imposition of a curfew and the right to

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requisition property. The Government also announced the expulsion of 22 persons and the deprivation of 10 others of Sierra Leonean citizenship for collaborating with the junta and for economic crimes and immigration irregularities.

4. On 20 March 1998, President Kabbah announced that his new streamlined Cabinet would comprise persons of known competence and integrity. The members of the Cabinet, which consists of 15 Ministers, 11 Deputy Ministers and 5 Ministers of State, have all been confirmed by Parliament, as have the President's nominees for the post of Chief Justice and many positions in parastatal bodies. The President has also appointed a Policy Advisory Committee to guide the Government on crucial issues of national interest and to monitor the functioning of the public institutions.

5. The Government has also taken steps to establish a National Commission for Reconstruction, Resettlement and Rehabilitation, responsible for stimulating and coordinating related donor, Government and non-governmental activities. In accordance with its terms of reference, the National Commission would, in close collaboration with domestic and international funding agencies, draw up a two-year national rehabilitation, resettlement and reconstruction plan involving, inter alia, the repatriation and resettlement of internally displaced persons and refugees.

6. On 27 March 1998, the Minister for Foreign Affairs of Zimbabwe, Mr. Stan Mudenge, led a five-person Commonwealth delegation on a visit to Freetown in order to explore ways in which the Commonwealth could assist Sierra Leone in the task of national reconstruction and peace-building. At the conclusion of the visit, the participants announced that they would urge all member Governments of the Commonwealth to assist Sierra Leone bilaterally in every practicable way in its efforts to achieve national reconstruction and reconciliation, and to contribute to the Trust Fund to support peacekeeping and related activities in Sierra Leone.

7. On 21 April 1998, a three-man team of British police experts visited Sierra Leone to advise the Government on the restructuring of the police force and the improvement of its equipment. The team also discussed the recruitment and role of police advisers and relations between the police and armed forces, among other matters. The United Kingdom of Great Britain and Northern Ireland has also provided the Government with communications equipment for the police.

8. From 4 to 8 May 1998, the Government received a multi-donor joint mission by the World Bank, the United Nations Development Programme (UNDP), the African Development Bank (AfDB), the United Kingdom Department for International Development and the European Union (EU) to discuss a range of development-related matters. The joint mission also discussed the demobilization and reintegration of ex-combatants, as described in more detail in section V below.

9. As described in section III below, on 6 May 1998, the Government instituted, in Freetown, the trials of a number of persons accused of plotting, participating in or collaborating with the coup d'état and the illegal junta.

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10. On 22 May 1998, President Kabbah, in a comprehensive policy statement delivered at the State opening of the second session of Parliament, outlined major national policies his Government intends to pursue. These include: establishing guidelines for development activities, a framework for the creation of a new army and the restructuring and retraining of the police force; improving relations with neighbouring countries; reviving the national economy; strengthening key sectors of activity; and promoting civic education to sensitize Sierra Leoneans to the true meaning of peace and democracy. The President has also called for national reconciliation.

11. From 30 to 31 May 1998, the Minister of Internal Affairs, Mr. Charles Margai, and the Deputy Defence Minister, Chief Hinga Norman, visited Makeni and Kenema and called on all remnants of the Armed Forces Revolutionary Council/Revolutionary United Front (AFRC/RUF) forces to surrender within two weeks, promising them that they would be protected and treated fairly in accordance with the law.

12. On 4 June 1998, at a summit meeting of the leaders of the three Mano River Union countries, President Conteh and President Kabbah of Sierra Leone met at Conakry to discuss mutual cooperation in the subregion and relations between Liberia and Sierra Leone. Liberia was represented by the Vice-President, Mr. Enoch Dogolea.

Action taken by the Monitoring Group of the Economic Community of West African States

13. Following the expulsion of the illegal military junta from the capital, Freetown, in mid-February and the restoration of the democratically elected Government of President Ahmad Tejan Kabbah in the capital, ECOMOG moved swiftly to secure the area around Freetown, as well as the northern and southern provinces of the country, especially the towns of Makeni, Kambia and Kabala in the north and Bo and Kenema in the south. ECOMOG forces also advanced eastwards towards the Kono and Kailahun districts, where the forces of the former junta were concentrated.

14. Though ECOMOG has continued to make progress, it is severely overextended and its advance has been beset by logistical constraints, as well as by fierce resistance from elements of the AFRC and the RUF, the partners in the former junta. In mid-May, however, ECOMOG seized Koindu and Buedu on the eastern border of Sierra Leone with Guinea.

15. As ECOMOG troops approached, armed former junta elements attacked the local civilian population, killing, raping and mutilating hundreds of them, causing tens of thousands of Sierra Leoneans to flee into Liberia and Guinea in the last few weeks and tens of thousands more to flee into the interior of Sierra Leone. Hundreds of patients have been admitted to hospitals suffering from amputation of limbs and ears and severe lacerations. Humanitarian organizations fear that the actual number of victims may be much larger (see sect. III below).

16. ECOMOG is being supported by units of the Sierra Leonean Civil Defence Force (CDF), which is composed of irregular community-based fighters who fought the junta before the restoration of the legitimate Government. The Civil

Defence Force includes Kamajors, who are regionally based rural militia mainly from the south and parts of the east, as well as Tamaboros from the Koinadugu district, Donsos from the Kono district and Kapras, who are mainly from the Tonkolili district in the north. Though many CDF members are hunters who use traditional weapons, others are primarily farmers or students who joined the armed struggle against the junta. They are armed with a wide variety of weapons and often lack formal training and discipline. Though technically under ECOMOG control, their command and control structures are loose and informal.

17. On 4 and 5 May 1998 at Accra, my Special Envoy attended the seventeenth meeting of ECOWAS Chiefs of Staff convened to discuss the situation in Sierra Leone. At the meeting, the Nigerian Chief of Defence Staff, Major-General A. A. Abubakar, outlined ECOMOG's objectives in Sierra Leone as follows: the attainment of peace, the training of a new Sierra Leonean army, and the disarmament, demobilization and reintegration of Sierra Leonean combatants into society, accompanied by humanitarian assistance. The achievement of these objectives would be followed by the withdrawal of ECOMOG.

18. ECOMOG has deployed three brigades and an independent battalion, altogether comprising approximately 12,000 men, in Sierra Leone and has appealed for a further 6,000 to enable it to carry out its functions more effectively. A number of participants expressed willingness, in principle, to contribute forces to ECOMOG's operations in Sierra Leone. However, the countries concerned stressed that they were not in a position to do so without substantial financial and logistical assistance.

Action taken by the United Nations

19. Beginning on 4 May 1998, pursuant to resolution 1162 (1998), eight military liaison personnel were deployed in Freetown under the authority of my Special Envoy. The military officers, who are led by a Brigadier-General from India, are from Kenya (two), the Russian Federation (two), the United Kingdom (one) and Zambia (two). Two police advisers, one from Namibia and one from Kenya, as well as an adviser on planning for disarmament and demobilization, are expected to be deployed shortly. Some vehicles and communications equipment have also been deployed to Sierra Leone for the use of the officers.

20. The liaison officers have begun to travel through parts of the country to assess the situation with a view to finalizing plans for their deployment and for the disarmament of former combatants. The ECOMOG Force Commander, Brigadier-General Maxwell Khobe, has welcomed their arrival and promised his full cooperation.

21. The office of my Special Envoy has also been strengthened by the addition of a political affairs officer and a human rights adviser. In addition, I have taken steps to strengthen the human rights element of the office of my Special Envoy and have approached a number of Governments on an urgent basis to request them to make available suitably qualified trial monitors.

22. From 26 to 29 May 1998, my Special Representative for Children in Armed Conflict, Mr. Olara A. Otunnu, visited Sierra Leone to assess the plight of children affected by the conflict. During his visit, Mr. Otunnu met with

President Kabbah, Ministers and Parliamentarians, as well as with the Force Commander of ECOMOG, the National Coordinator of CDF and representatives of United Nations agencies and non-governmental organizations. He visited Daru, Segbwema and Kenema, accompanied by the Minister for Social Welfare, Gender and Children's Affairs, Mrs. Shirley Gbujama, my Special Envoy, the United Nations Resident Coordinator and the representative of UNICEF.

23. In discussions with the Government, ECOMOG and CDF, important commitments were made to my Special Representative in relation to the rights, protection and welfare of children. It was agreed that a joint task force for the demobilization of child combatants, comprising the Government, ECOMOG, CDF, the United Nations and international humanitarian agencies, would be constituted. The Government agreed not to recruit children under 18 years of age into a new national army. The Civil Defence Force committed to stop recruiting and initiating children under 18 and to begin the process of demobilization of child combatants within their ranks. Along with ECOMOG, CDF also undertook that children captured in or fleeing from areas held by junta elements would receive special protection. President Kabbah directed that a coordination group consisting of relevant Ministries, United Nations agencies and non-governmental organizations, be established to coordinate an effective national response to the needs of children affected by armed conflict. Following their discussion with Mr. Otunnu, an all-party group of Parliamentarians constituted a caucus to serve as parliamentary advocates for the rights, protection and welfare of children affected by armed conflict in Sierra Leone.

24. At the conclusion of his visit, Mr. Otunnu proposed that the international community make Sierra Leone one of the pilot projects for a more concerted and effective response in the context of post-conflict peace-building.

Military and security situation in Sierra Leone

25. The security situation in Freetown continues to be favourable, with a strong but discreet ECOMOG presence and widespread deployment of the Sierra Leonean police. Schools, banks and markets are functioning normally, some international air links to the airport at Lungi have been restored and food and fuel products are widely available. Nevertheless, ECOMOG has continued to recover weapons in house-to-house searches conducted on the basis of information received about the presence in Freetown of former junta members and common criminals.

26. Despite ECOMOG's initial success in driving the elements of the junta rebels back towards the east of the country, several groups of rebels appear to have broken out of the Kailahun district and have moved northwards and westwards in an apparent attempt to re-establish some of their former bush camps in the north. They have been attacking towns and villages, terrorizing local communities and extorting food from them. The situation in the north is now considered unsatisfactory and food convoys have to be guarded by armed escort.

27. Moreover, in the course of their retreat towards the eastern part of the country, former junta elements inflicted extensive damage and engaged in indiscriminate looting and property destruction. In particular, hospitals in most communities lack beds, drugs and equipment.

28. The United States has contributed $3.9 million to ECOMOG over a four-month period through the logistics services company Pacific Architects and Engineers, which provided services to ECOMOG in Liberia. Some vehicles have already been made available. It is anticipated that this assistance will result in further gains by ECOMOG against the former junta forces. However, this contribution is not expected to assist in the deployment of additional ECOMOG forces, for which further contributions, whether bilaterally or through the Trust Fund to support peacekeeping and related activities in Sierra Leone, will be needed.

29. There are reports that many of the fighters supporting the former junta in the east are in fact Liberian nationals. The Monitoring Group of the Economic Community of West African States believes it has identified some of the dead combatants as Liberians after clashes with junta elements and has reportedly captured more than 100 Liberian fighters in the vicinity of Kailahun and in Kono district.

30. On 5 May 1998, President Taylor wrote to me deprecating the "disturbing allegation" that the Government of Liberia was involved in the conflict in Sierra Leone and stressing his commitment to the maintenance of peace in the region. President Taylor informed me that he had proposed to the Chairman of ECOWAS that ECOMOG "cordon off" the border between the two countries, and said he would welcome the concurrence of the United Nations with his suggestion that United Nations monitors be deployed in the border area.

31. On 7 May 1998, the Liberian Government issued a policy statement reaffirming that it would not permit its territory to be used to destabilize any neighbouring country and stating that President Taylor had approved the deployment of an ECOMOG observer unit at the border between Liberia and Sierra Leone in Lofa County, Liberia.

32. The Government of Sierra Leone has welcomed the issuance of the policy statement and has disclosed that a Liberian delegation visiting Freetown to attend the funeral of the late spouse of the President, Mrs. Patricia Kabbah, had met with President Kabbah and discussed the improvement of relations between the two countries.

33. In some parts of the country, misconduct by some members of CDF, arising from their indiscipline and lack of training, has given rise to complaints from civilians.

III. HUMAN RIGHTS

34. Since early May 1998, a human rights adviser has been attached to the office of my Special Envoy. His main tasks have included the observation of the treason trials and, in close consultation with the Special Envoy and the United Nations High Commissioner for Human Rights, examining modalities to increase the capacity of the office to monitor the human rights situation in Sierra Leone and to assist the Government in meeting its international human rights obligations in a sustainable manner. In carrying out its human rights functions, the office will work closely with all relevant elements of civil society, including national and international non-governmental organizations. Both the

Attorney-General and the Chief Justice of Sierra Leone have offered their full cooperation to my Special Envoy and his staff in the exercise of his human rights functions.

35. The main focus of human rights concerns since my last report has been the attacks on civilians by armed, uniformed groups, which are consistently reported to be members of the rebel forces. They have systematically mutilated or severed the limbs of non-combatants around the towns of Koidu and Kabala, in a zone that stretches as far west as Masiaka, south of Port Loko. The scale of the attacks can be estimated from the accounts of victims who have been admitted to hospital. For instance, in the period from 6 April to 21 May 1998, 225 people were admitted to Connaught Hospital in Freetown with war wounds. All but one were reported to be civilians. Of these, a quarter were amputees and half were victims of deep lacerations. The patients report that for every one person who reached the hospital, some five other victims of attacks are either dead or missing. In the same period, there have been some 500 admissions of war-wounded persons to other hospitals in Sierra Leone.

36. Of those victims who have received treatment, most are male, ranging in age from 8 to 60 years. The youngest amputee admitted to hospital is, however, a six-year-old girl, one of whose arms was completely severed. Victims also report that babies have been taken from their mothers' arms and burned alive. There are numerous reports of rape, including one of the multiple rape of a 12-year-old girl. Doctors at one hospital state that lacerations inflicted on one 60-year-old woman are the result of a failed attempt to behead her.

37. The office of my Special Envoy continues to receive information about human rights abuses perpetrated by forces loyal to the junta in the period before the restoration of the Government. From all parts of the country there are reports of extrajudicial killings, rape, arbitrary detention, including for purposes of sexual abuse, torture of children (especially of child-combatants), forced labour and the looting and destruction of residential and commercial premises and property. It will remain important to document these actions with a view to tackling issues of impunity and as an element in the process of promoting reconciliation and healing of society.

38. Information has also been received regarding widespread acts of extrajudicial revenge killings perpetrated against alleged junta collaborators following the restoration of the Government. In just one town, Kenema, there are reports of some 50 revenge killings. Some of those killed were children, with at least one case occurring in Freetown. There are reportedly still many people in hiding for fear of being subjected to revenge attacks. Reportedly some 100 of those hiding in the Freetown area are children. The Government has given assurances that revenge attacks will be investigated and prosecuted.

39. Reports indicate that elements of the Kamajors are responsible for violation of the human rights and rights under humanitarian law of both combatants and non-combatants. This militia force continues to include large numbers of male children. Concerns have been expressed to the Government on these matters and it has indicated that it is taking action to correct the situation (see paras. 22-24 above).

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40. My Special Envoy continues to monitor the implementation of the state of emergency declared by the President on 10 March 1998, under which, inter alia, persons may be detained indefinitely without being charged or tried. There are more than 1,000 such detainees held at Pademba Road Prison in Freetown. The Government has established a screening committee to expedite the process of releasing detainees and bringing others to trial.

41. The Government is prosecuting 59 persons in the regular courts for charges, variously, of treason, murder and arson. Another trial of some 20 people is scheduled to start in the coming weeks, as are a number of courts martial. The civilian trials have, so far, proceeded in conformity with normal criminal procedure. Matters of concern are brought to the attention of the Government. The office of my Special Envoy will continue to observe the trials and will seek to augment its capacity in this regard.

42. On 27 May 1998, a delegation of Amnesty International, which had been studying the situation in Sierra Leone, met with my Special Envoy. The purpose of the Amnesty mission was to examine incidents that had occurred during the period of junta rule, as well as the extent of atrocities currently being committed by the remnants of the junta. Amnesty International is also reviewing the detention and trial in Freetown of persons accused of participating in or collaborating with the junta.

IV. HUMANITARIAN SITUATION

43. The humanitarian situation in Sierra Leone is fluid. In the western area and the southern and eastern provinces (with the exception of Kailahun district), aid agencies have begun to reactivate programmes as they have benefited from improved security and access. In northern and north-eastern Sierra Leone, however, the situation has continued to deteriorate as a result of the activity of the former junta forces described above.

44. The humanitarian consequences of the wave of atrocities are very severe. Government hospitals in Makeni, Magburaka and Kabala and health clinics throughout the north have been overwhelmed by the influx of civilians suffering from amputations and maimings and are hampered by staff shortages and logistical constraints.

45. There has already been an outbreak of measles in two camps in the north and there is a severe risk of further outbreaks of epidemics such as cholera with the imminent onset of the rainy season. Furthermore, the non-governmental organization Action contre la Faim, which operates therapeutic feeding centres in Makeni and Magburaka, has reported a large influx of malnourished children under the age of five. Admissions have doubled during the past week. Malnutrition levels are increasing, and there are indications that the 10 per cent global acute malnutrition threshold, at which an emergency response is required, is being breached. If the security situation in the north continues to deteriorate, there is a serious risk that the harvest will be looted by armed elements, thus further undermining the food security of the rural population.

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46. The Office of the United Nations High Commissioner for Refugees (UNHCR) has reported that refugees from Sierra Leone are continuing to flow into Faranah, Kissidougou and Guéckédou prefectures in eastern Guinea at a rate of 300 people per day. Many new arrivals, particularly children, suffer from malnutrition. UNHCR has documented the recent cases of at least 82 victims of rebel atrocities, including 28 who were mutilated. The refugees come mainly from the districts of Kailahun, Kono and Kenema. The influx is taking place despite reported attempts by the remnants of the junta to prevent people from leaving those areas. At the same time, about 40,000 internally displaced persons have flooded into the towns of Masingbi, Makeni, Kabala and Magburaka. Over the past three months, some 237,000 Sierra Leoneans have poured into Guinea and Liberia, bringing the total number of Sierra Leonean refugees in the two neighbouring countries to 530,000 people since the start of the conflict in 1991.

47. On 2 June 1998, UNHCR issued an urgent appeal for $7.3 million to help refugees who have fled from the rebel forces. The amount is designed to cover relief assistance to new arrivals in Guinea and Liberia until the end of the year. This followed a visit to Freetown from 2 to 3 June 1998 by the Assistant High Commissioner for Refugees, Mr. Soren Jessen-Petersen.

48. The humanitarian response to the crisis in the north has been severely constrained by the difficulty of access owing to security risks. Road travel from Freetown to Makeni and Koidu is restricted, since agencies are reluctant to travel by road for fear of attacks. Furthermore, many aid agency staff were threatened by AFRC/RUF elements during the period of the ECOMOG intervention and no relief agency has deployed international staff permanently up-country since then.

49. Nevertheless, the United Nations Children's Fund (UNICEF), the World Health Organization (WHO) and the non-governmental organization Médecins sans Frontières have sent medicines, bedding and plastic sheeting to the north. The International Committee of the Red Cross (ICRC) and Médecins sans Frontières have offered to coordinate the joint distribution of medical supplies to hospitals in Makeni, Magburaka and Kabala. UNICEF has delivered supplies to Kenema and supported efforts by the local authorities to immunize more than 400 children against measles, and the World Food Programme (WFP) is providing assistance to health institutions.

50. From 5 to 6 May 1998, the Humanitarian Assistance Coordination Unit also co-sponsored a workshop for community leaders in the Bo district concerning the code of conduct that governs the activities of relief workers. The workshop was planned in response to incidents of the commandeering of vehicles by Kamajors and ECOMOG in the area. Non-governmental organizations have since reported that the Kamajors have facilitated the safe passage of relief supplies and it is now intended to conduct similar workshops in other parts of the country, including Kenema.

51. An inter-agency mission led by the United Nations Humanitarian Coordinator on 19 May 1998 to Daru and Segbwema found the situation in the south-east of the country, which had been inaccessible for some months for security reasons, more favourable than expected in some respects. However, large numbers of

unaccompanied children were identified who are in need of family-tracing services, feeding and health care.

52. Mr. Sergio Vieira de Mello, Under-Secretary-General for Humanitarian Affairs, will visit Sierra Leone from 10 to 12 June 1998 in order to observe at first hand the ongoing humanitarian programmes and the current difficulties faced by the humanitarian community.

V. DISARMAMENT AND DEMOBILIZATION

53. Both the Abidjan Agreement of 30 November 1996 between the Government of Sierra Leone and RUF and the Conakry Agreement of 23 October 1997 between ECOWAS and AFRC contain provisions for the disarmament and demobilization of Sierra Leonean fighters and their reintegration into society. In his statement at the State opening of Parliament, President Kabbah called on all remnants of the AFRC/RUF to surrender, offering them assurances that they would be treated humanely in accordance with the Geneva Convention and its additional Protocols. The President also indicated that elements of the Conakry Agreement and the Abidjan Agreement would be taken into consideration in the implementation of the disarmament and demobilization programme. The prompt implementation of such a programme is regarded as essential to the stability of Sierra Leone and of the subregion in general.

54. Following the removal of the junta by force by ECOMOG in February and the subsequent ECOMOG action throughout the rest of the country, the Abidjan Agreement and the Conakry Agreement are considered to have been effectively superseded. However, in the parts of the country that have now been brought under Government control, some aspects of those instruments that govern the disarmament and demobilization of former Sierra Leonean fighters might still be applicable. These include the following categories: members of the former Republic of Sierra Leone Military Forces (RSLMF), including members of AFRC, the country's former army, which has now effectively been dissolved; members of RUF; members of CDF; and child soldiers.

55. Both ECOMOG and the Government have developed plans for the disarmament and demobilization of former combatants and for their reintegration into society. Pursuant to the recommendations of the joint mission described in paragraph 8 above, the Government has adopted a comprehensive framework for the disarmament, demobilization, reinsertion and reintegration of ex-combatants and their families. The plan envisages the establishment of a Sierra Leone veterans assistance board to be chaired by President Kabbah, which would, in close cooperation with ECOMOG, the United Nations and donors, supervise the disarmament and demobilization of an estimated 32,000 former combatants in three phases, provisionally over the next 19 months. A small executive secretariat will be charged with the implementation of the policies of the Board in close coordination with ECOMOG and the United Nations.

56. The demobilization process will begin with a rigorous registration process to ensure that eligible ex-combatants receive identification documents. The first priority is the demobilization of some 5,000 to 7,000 former members of the Republic of Sierra Leone Military Forces already disarmed by ECOMOG and

assembled in camps around Freetown, i.e., at Wilberforce Barracks, Benguema Training Centre and Lungi. ECOMOG has recently reported that the numbers of men at each camp have fallen, apparently because some of the men have been provisionally released. Units of CDF in parts of the country deemed secure by the Government and local authorities will also be demobilized in phase I and will undergo a similar and registration exercise. Some CDF units have already returned to their communities of origin in preparation for the disarmament process, though many CDF fighters have also recently been moved up to the Daru area, apparently to join the offensive against the former junta forces at Kailahun. On 25 March 1998, President Kabbah formally requested the international community to provide food for the maintenance of the 7,000 ex-combatants for a two-month period.

57. Preliminary estimates indicate that there are some 1,000 disabled soldiers, 500 female ex-combatants and about 2,500 children. Under the plan, all adult ex-combatants will receive the same reinsertion assistance, the level and nature of which will be determined by the Sierra Leone Veterans Assistance Board, in consultation with donors. The reinsertion assistance will be provided in instalments in order to provide a transitional safety net to ex-combatant families, to encourage them to remain in their areas of resettlement and to monitor their reintegration progress. Furthermore, the Government intends to provide a community-based social and economic reintegration assistance to assist ex-combatants to return to sustainable and productive lives in their communities. Particularly vulnerable groups of ex-combatants, such as child soldiers and the disabled, will receive specialized assistance.

58. The Government intends to proceed with the disarmament, demobilization, reinsertion and reintegration process as far as possible, notwithstanding continuing fighting in some parts of the country. The rapid demobilization of the encamped RSLMF will reduce the security and cost burden borne by the Government and ECOMOG in maintaining the camps. Insofar as adequate reinsertion and reintegration assistance and effective monitoring systems are put in place as planned, the Government is confident that this process will contribute to national reconciliation and reconstruction.

59. Though the plan envisages specific phases, provisionally scheduled to culminate in January 2000, these depend in part on the willingness of those who are still resisting ECOMOG's advance and terrorizing civilians in the north to surrender. It is not clear at this time whether these men, who appear to include the most violent and ruthless supporters of the former junta, intend to surrender or, if so, under what circumstances this might take place.

60. Another important aspect of the plan that remains to be clarified concerns the source of the funding. The plan is not accompanied by a cost estimate, but an earlier Government assessment of the likely costs arrived at a figure of some $14 million. Since that estimate was arrived at in respect of a more modest operation, the likely cost of the current exercise is likely to exceed it. No commitment has yet been made by donors for the funding of the exercise. However, the Government believes it has made some progress in identifying sufficient funds to continue to feed the surrendered soldiers for the next two months or so.

/...

61. On 5 June 1998, my Special Envoy convened a meeting of United Nations agencies, non-governmental organizations and donor representatives to discuss the coordination of international support and contributions to the disarmament, demobilization and reintegration of the 7,000 ex-combatants.

62. On 12 June 1998, the World Bank, which participated in the multi-donor joint mission mentioned in paragraph 8 above, will send two consultants to Sierra Leone to discuss with all participants the further refinement of the plan, including practical arrangements to make it operationally effective. These arrangements are expected to include the provision of strong technical assistance to the executive secretariat of the Sierra Leone Veterans Assistance Board.

VI. PROPOSED ACTION TO BE TAKEN BY THE UNITED NATIONS

63. In the complex and volatile situation currently prevailing in Sierra Leone, the priority task is to promote stability and security by disarming and demobilizing as many former combatants as possible, as soon as possible. The plan adopted by the Government on the advice of the multi-donor joint mission provides a useful basis to accomplish this goal, though much remains to be done in terms of identifying sources of funding and determining the precise roles to be played by the international community. In general terms, I would envisage that, under the overall authority of the Government, my Special Envoy would ensure that the various donors continued to coordinate their activities closely. Within that framework the United Nations Development Programme (UNDP), working through the United Nations Office for Project Services, and in close cooperation with donors and implementing partners, would carry out the arrangements put in place for disarmament and demobilization prior to the May 1997 coup.

64. In this context, I intend to convene a high-level conference in the near future in order to mobilize assistance for the disarmament, demobilization and reintegration process, and for the reconstruction, rehabilitation of Sierra Leone. The conference would also address the need to provide logistical and other support to ECOMOG in order to improve its capacity to carry out its peacekeeping role, as well as for emergency and humanitarian needs.

65. Moreover, I believe the United Nations could render immediate assistance to Sierra Leone by deploying a limited number of unarmed military observers to assist in tasks of pressing importance. Such a deployment at this stage could lend much-needed impetus to a fragile but vital process, which deserves the support of the international community. It could also assist my Special Envoy to avert further bloodshed among civilians and combatants alike - both ECOMOG and Sierra Leonean - by helping to encourage the surrender of former junta elements in the event that this appeared to be possible. Finally, a more visible United Nations presence could serve to bolster the confidence of the Government and people of Sierra Leone in the commitment to their cause of the international community and encourage more substantial donor support for disarmament, demobilization and longer-term rehabilitation and development.

66. I have therefore developed a concept of operations for a United Nations peacekeeping observer mission, initially for a six-month period, whose immediate objectives would be the following:

(a) To monitor the military and security situation in the country as a whole with a view to assisting the Government and ECOMOG in the subsequent implementation of disarmament and demobilization phases as outlined in the Government's plan;

(b) To monitor the demobilization of former combatants already disarmed by ECOMOG and concentrated in secure areas of the country. This would involve collaboration with ECOMOG in its activities, including the provision of security and arms collection and destruction;

(c) To assist in monitoring respect for international humanitarian law at disarmament and demobilization sites;

(d) To monitor the voluntary disarmament and demobilization of members of CDF in their home regions and to monitor progress in the creation of a new national army;

(e) To observe, as security conditions permit, the situation in the north and east of the country, with a view to assisting in the disarmament and demobilization of surrendering former junta forces;

(f) To continue to provide my Special Envoy for Sierra Leone with regular information concerning the military and security situation in the country as a whole.

67. The mission would be known as the United Nations Observer Mission in Sierra Leone (UNOMSIL) and would be led by my Special Envoy, Mr. Francis G. Okelo, who would be designated Special Representative for Sierra Leone. The Chief Military Observer would be Brigadier-General Subhash C. Joshi (India), who is currently the team leader of the small military liaison cell deployed to Sierra Leone pursuant to resolution 1162 (1998). UNOMSIL would subsume the office of my Special Envoy and its staff and the related cost estimates will be issued shortly as an addendum to the present report.

68. The activities described above would require up to 70 officers, as well as a medical unit of up to 15 persons, with the necessary equipment and civilian administrative support staff.

69. In view of the volatile security situation outside the capital, the deployment would take place in phases, with the first group of approximately 40 military observers being deployed, starting during the month of July 1998, to Freetown, Hastings and Lungi. The timing of subsequent deployments would then depend on the security situation, the progress of implementation of the Government's disarmament and demobilization plan and the availability of the necessary logistical equipment and resources. In this connection, I would call on the Government of Sierra Leone to be prepared to make available to the mission such premises and services as they can. At this stage, I would provisionally anticipate that the second phase of deployment would then take place in August-September, with the final phase beginning in October.

70. The observers would be deployed at each of the three camps where former Republic of Sierra Leone Military Forces are now being detained, i.e.,

Wilberforce Barracks, Benguema Training Centre and Lungi; at the three ECOMOG Brigade headquarters at Hastings, Makeni and Bo; and at a headquarters location to support the Chief Military Observer. During the next phases, subject to the considerations identified above, observers could be deployed outside the immediate area of Freetown, including to the home regions of CDF members returning to undertake voluntary disarmament and demobilization as and when they considered their home communities sufficiently secure.

71. The mission would be provided with adequate air support in order to ensure mobility and security, as well as casualty and medical evacuations. A boat would also be required to facilitate travel and communications between Lungi and Freetown.

72. Should the Security Council agree to these measures, I will establish security arrangements for United Nations personnel with the Chairman of ECOWAS and conclude a status of mission agreement with the Government of Sierra Leone.

73. The deployment described above would require a commensurate expansion in the size of the office of the Special Representative, including information and political officers, as well as the necessary administrative and support staff.

74. I would also propose to increase to four the number of human rights officers attached to the office of my Special Envoy. These officers, under the direction of the Special Representative, and in close cooperation with the United Nations High Commissioner for Human Rights, would have a monitoring role and the task of addressing the country's long-term human rights institution building needs.

75. An increase in the number of civilian police advisers from two to five would also be required. These officers would advise the Government and local police officials on police practice, training and recruitment, in particular on the need to respect internationally accepted standards of policing in democratic societies. They would also monitor the progress of the restructuring of the Sierra Leonean police force.

76. At this point, it is difficult to assess whether an expansion of the mission might be needed six months from now and, if so, what form it might take. My recommendations on this matter will depend on ECOMOG's progress in restoring security throughout the country. If the presence of United Nations personnel in areas of continuing insecurity is considered desirable in order to reduce bloodshed by encouraging armed elements to surrender, or if areas of Sierra Leone now secure come under threat from hostile elements, thought must be given to ensuring the security of United Nations personnel. Although ECOMOG is a capable force and has indicated it would guarantee the security of the observers, it is also a potential target of attacks by the remnants of the junta. Unarmed military observers under its protection might not be regarded as neutral by hostile armed elements and their safety might therefore be jeopardized.

77. For those reasons, I could envisage the possibility, at a future stage, of recommending the deployment of a highly mobile unit of armed United Nations troops, operating in close cooperation with ECOMOG but independent of it, to

protect observers in locations where their security might be at risk, but where their neutral presence may be helpful in encouraging armed elements to surrender. However, I do not believe that the time is ripe to make such a recommendation to the Council at this stage.

78. The deployment of ECOMOG troops at the border with Liberia could help lay to rest allegations of the influx of arms or the provision of armed assistance to the junta by foreign forces. I commend the Government of Liberia for its policy statement reaffirming that it will not permit its territory to be used to destabilize any neighbouring country. Verification that this was the case would, in my view, improve the security climate throughout the entire subregion and improve mutual confidence among its member countries. I hope there will be further discussions between the Heads of State of the subregion on these matters.

79. I therefore intend to pursue with President Taylor his proposal for the deployment of a small contingent of United Nations military observers at the border with Sierra Leone, in order to assist in verifying that Liberian territory is not being used to destabilize Sierra Leone and that foreign forces are not assisting the remnants of the former junta there. I will also discuss the matter with President Kabbah and with the Chairman of ECOWAS and revert to the Council in due course.

VII. OBSERVATIONS AND RECOMMENDATIONS

80. Since my last report, the situation in Sierra Leone has in some respects improved considerably. Since its restoration on 10 March 1998, the Government has moved rapidly to reassert its authority throughout much of the country. President Kabbah has nominated a compact Cabinet of acknowledged experts in their fields, all of whom have been confirmed by Parliament, as well as a Chief Justice.

81. However, in the eastern part of Sierra Leone and parts of the north, the remnants of the former junta continue to resist ECOMOG forces and attack Sierra Leonean civilians. I join with the Council in deploring the continued resistance to the legitimate Government, in calling on the supporters of the junta to lay down their arms, and in condemning the mutilations, rapes, looting and other atrocities carried out by junta elements against the civilian population. I also align myself with the commendation expressed for ECOWAS and ECOMOG in the presidential statement adopted on 20 May 1998 (S/PRST/1998/13) for the important role they are playing to restore peace and security in Sierra Leone, and support the call for Member States to provide technical and logistical support to assist ECOMOG to continue to enhance its ability to carry out its peacekeeping role and contribute to bringing an end to the atrocities being committed against the people of Sierra Leone. In this context, I welcome the logistical assistance provided by the United States. I am also grateful for the contribution made by the United Kingdom, and invite other Member States to make contributions to the Trust Fund to support peacekeeping and related activities in Sierra Leone.

82. It is clear that there are a significant number of victims of rebel atrocities who remain in the bush or who are otherwise unable to receive medical attention. I applaud the efforts of United Nations humanitarian personnel, ECOMOG and the non-governmental organizations in locating and aiding victims. However, more must be done as a matter of urgency, including the provision of additional medical and surgical capacity, including hospital beds. In the longer term, the agencies and the non-governmental organizations concerned will need to offer support in the form of prosthesis services for all amputees and psycho-social treatment of traumatized victims and their families. In this context, I welcome the intention of ICRC to dispatch a surgical team to Sierra Leone to augment local medical facilities.

83. I call on the Government of Sierra Leone to continue to show the necessary resolve to adhere to international human rights standards and its own distinguished legal traditions in ensuring that those accused of the gravest crimes against the State and its people receive fair trials. I am aware that the Government has held to this course so far in the face of strongly voiced public contempt for the accused.

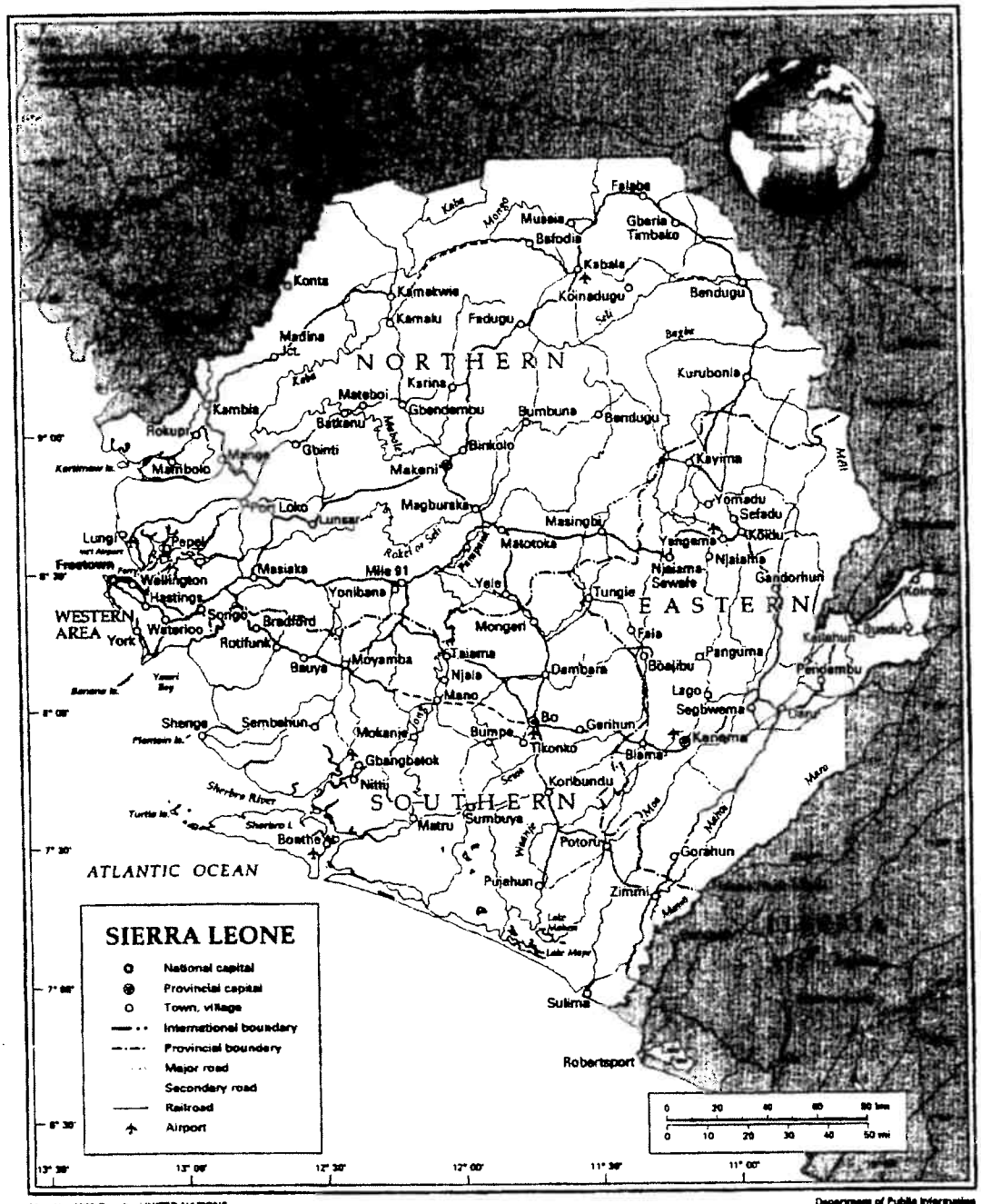
84. I express my appreciation to those Member States and others who have contributed to the flash appeal for humanitarian assistance and for various humanitarian projects.

85. I recommend that the Security Council establish an observer mission in Sierra Leone, to be known as the United Nations Observer Mission in Sierra Leone (UNOMSIL), with the mandate and concept of operations described in paragraphs 66 to 71 above and with the necessary augmentation of civilian and civilian police staff as set out in paragraphs 73 to 75 above.

86. During the six-month period of the mandate, I would keep the situation closely under review and would make further recommendations to the Council concerning a possible extension or expansion of the mission as the circumstances permitted.

87. I support the recommendation of my Special Representative for Children in Armed Conflict that Sierra Leone be made one of the pilot projects for a more concerted and effective response in the context of post-conflict peace-building.

88. Finally, I wish to express my appreciation to my Special Envoy and to all United Nations staff in Sierra Leone for their efforts over the past several weeks.



Map No. 3802 Rev. 2 UNITED NATIONS
January 1997

Department of Public Information
Cartographic Section

Date:- 15 Jan, 1999. It was agreed that the men in Freetown and the men at our point where to do joint operation on Jui and Kosso town. The Freetown men schedule to attack Jui and we to attack Kosso town, that night we attacked Kosso town clear the enemies but the Freetown men never turn up, therefore the enemies with the support of the Alpha Jet drove us from Kosso town .

Date:- 18 Jan, 1999. The Guinean troops from Port Loko entered vehemently at Waterloo with sporadic shelling and firing. Infact Two (2) Alpha Jets escorted the troops consisting of five (5) War Tanks, Two (2) Armourd Car, One (1) 40 Barrel Missile and serries of AA one Barrel and Twin Barrels. they occupied Waterloo from that evening onto the morning around 0300 hrs.

PROBLEMS:- For the main while the only problems thier at the front line are;- (1) We have not yet connected physically with our brothers in Freetown.
(2) Menpower indeed to be engaged on this Urban Warfare.
(3) The stratigic positions of the enemies mainly Port Loko, Lungi, Jui, Kabala are delaying our progress. These problems are to be looked into kindly and to find fast solution.

00025495

SUGGESTION:-

We suggested that as we are on Urban gaurrile Warfare, that we use mainly artilary weapons.

That we speedily recruits abled and gallant men as population matters.

All Units to be active especially at the frontline especially Units like IDU, G5, G4, and S4.

That Tombo Road should be engaged wile fighting force-enemies are at Tombo.

That monitary group should be formed, should assess and bring in situation report from at the Flanks Waterloo, Port Loko, Mile 91, and Kabala.

That the commanders should give chance to we the securities to be reached to you with processed situation report.

All Front lines to be re-inforce with correct combat medics.

RECOMMENDATION;-

Anyway the morale of the soldiers especially to the point I have visited is high. Bravo to Colonel Boston Flomo, Major Barkar, Lieut.ColVictor, Lieut.Col Amara Sallia (Alias Peleto) and all Black Guards. Only the regards for one another is lagging but I pray that we will put this together fastly I beg sir, that you look into my problems and you rectify it with General Sam Bockarie ie; the conflicting position between Ben Kenneh and me.

Best regards. 21-01-99

Signed:---------
Lieut Raymond Kartewu
Black Guard Adjutant.

Approved 21-01-99
Major Christ A. Mannah
Overall I.O./ Commander.

A157

REVOLUTIONARY UNITED FRONT OF SIERRA LEONE RUF S/L

DEFENCE HEAD QUARTERS 00009658

26TH SEPTEMBER 1999

TO -- THE LEADER OF THE REVOLUTION , RUF S/L.
FROM -- MAJOR GENERAL SAM BOCKARIE
SUBJECT -- SALUTE REPORT.

The Leader Sir,

Before leaving the ground in November 1996, you placed me in command as the Battlefield Commander of the RUF S/L and instructed me to take command in your absence and to maintain the ground by any means necessary.
In that light, I have acted in the capacity you saw fit to entrust me with and done all in my power and wisdom to maintain the ground until your return to Sierra Leone.

Upon your departure I initiated contact with ULIMO as per your instructions in a bid to buy materials to repel the vicious attacks of the Kamajohs at a time when there was a peace document in place and we were not expecting to fight. At first ULIMO arrested me thinking that I had come to them to surrender. Later I was able to convince them to release me and we commenced a mutually beneficial relationship. I used the $ 7,000 USD to purchase vitally needed materials that gave us the stance to fight and challenge the SLPP Government until they were ousted by the AFRC coup. The efforts of the civilians most be highlighted as they provided Agricultural Produce which I traded for materials during the same period.

It came as a surprise to learn that the Leader had been arrested in Nigeria and an even bigger surprise when Captain Philip Palmer and others announced a change in the Leadership of the RUF. I was able to lure them to the Sierra Leone and Guinea border crossing of Nongowa and pretending that i was in support of their actions, I was able to Lure them across the river into RUF zone. I arrested all of them and obtained statements from them implicating the Kabba Government in the arrest of the Leader and indicating a greater international conspiracy to change the leadership of the RUF. These statements will be presented to you as evidence.

1531

Meanwhile in Bradford in the Western Area Jungle, Superman had killed two of Colonel Mohamed Tarawallie's bodyguards whilst others had run for fear of being killed. Commanders from all fronts were outraged by this act and were about to move to Bradford to arrest the situation when the AFRC overthrew the Government of Tejan Kabba on 25th May 1997 and called on us to join them a few days later.

On receiving instructions from the Leader calling on the RUF to join the AFRC I decided to put the Bradford issue to rest until the return of the Leader and instructed Superman to head the advance team to Freetown from the Western Area Jungle, later to be joined by Colonel Isaac and others from Kangari Hills. After insuring that our security was paramount, Brig. Issa and I entered the city to implement your instruction to join the AFRC and ensure that the security of the nation was paramount.

Thus began the marriage of uneven and unequal partners between the AFRC and the RUF.

The RUF was assigned the Ministries of Agriculture under MR SYB Rogers, the Ministry of Trade and Industry under Major Eldred Collins, the Ministry of Energy under Colonel Lawrence Wormandia, the Deputy Ministry of Education under Major Benda, the Deputy Ministry of lands and the Environment, under Brig. Peter Vandi and the Deputy Ministry of Health ,under Lt. Col. Fabai. I was offered the Ministry of Transport and Communication but declined the appointment as I had not received any instruction from the Leader to accept a political appointment and because I saw it necessary to concentrate on military issues.

Sir, within the marriage a diamond was sold by a Lebanese businessman with a commission given to the government, out of which an amount of nine million Leones (LE 9000000) was given to Colonel Superman for the entire RUF movement which he embezzled.
I decided to investigate him in my capacity as the commander you left in charge. Superman deliberately refused my order and went to the extent of challenging me. I was annoyed but was advised by the War Council Chairman Mr. SYB Rogers to wait for your return to the ground.

On the 2nd of June 1996, our forces led by Superman captured over three hundred Nigerian ECOMOG soldiers and held them under the terms and conditions of the Geneva Convention, as POW's.
It was the hope of every RUF officer and combatant that these POW's would be used to negotiate the release of the Leader from Nigeria. To our dismay all three hundred and some, POW's were released without our consultation. This followed meetings between the AFRC High Command and the Nigerian ECOMOG High Command. On one occasion I was unwittingly in an office in which a meeting between the above mentioned

parties was to be held and I was asked to leave the room as nothing concerning me or the RUF were going to be discussed.
To make matters worse, no attention was paid by the AFRC to secure your release from Nigeria.

I as the Military High Command of the RUF was left floating without any military appointment as was the case of all RUF senior officers.
I advised that we attack and remove the enemy from Lungi and Jui but was instructed not to do so by J P Koroma.

In Freetown, I was met by MR Steve Bio and Gibril Massaquoi who informed me that MR Bio had been sent to me with instructions from the Leader and that he was to assume the office of Administrative Head of the RUF. This request was denied by me as I did not trust them and had began to suspect a clandestine bond between the two.
Soon after, I was summoned to the State House where J P Koroma showed me an Intelligence report alerting of a plot by certain members of the RUF and SLA to overthrow his Government. He instructed me to investigate and arrest the situation.
Meanwhile, unknown to either of us, Steve Bio and Gibril went to Kenema and tried to persuade Brig. Issa to back them in convincing me to support a coup led by Steve Bio. Colonel Issa kept them on hold and looked for a safe way of relaying this security information to me.

By this time, there had been three attempts on my life in Freetown, our men were being killed without any action taken by the authorities and the enemy were re-enforcing their positions around the Capital . In addition I had just been briefed by the Head of State that certain members of the RUF were planning to overthrow his Government. The last thing that I wanted was to be arrested by the AFRC as it would have caused serious problems for the RUF.
I left Freetown and went to Kenema. Upon my arrival in Kenema I was briefed by Brig. Issa on the intentions of Steve Bio and Gibril. I briefed Brig. Issa on the situation in Freetown and instructed him to effect the arrest of MR Steve Bio and Gibril and to turn them over to the AFRC for investigation. They remained in the custody of the AFRC when we retreated from Freetown .

Dr S S Banya had also met us with a view of convincing us to overthrow the AFRC Government in favor of the SLPP. They were arrested by me and turned over to the AFRC government on charges of Treason. Again without our consent they were released.

Brig. Issa was instructed to go to Freetown to ensure that security was paramount for the AFRC Government and civilians of Freetown.

1999?

On 31 January 1997 the Late Abu Sankoh (PLO1) and the Late Honorable Tamba Gborie looted the Iranian Embassy at Murray Town. They later called on Brig. Issa and offered him a set of chairs. Not being aware of the source of the chairs and the fact that it was indeed the Late Tamba Gborie who was instrumental in welcoming the RUF and meeting the demands of the RUF when the Government was doing every thing to discourage us, Brig. Issa accepted the gift in good faith.
Without any investigation into the issue, J P Koroma ordered that it be announced on National Radio that Brig. Issa had looted the Iranian Embassy and that as a result he was suspended from the Supreme Council of the AFRC. His arrest was ordered and it was announced that the RUF had planned a coup.
This situation led to the heightening of tension in Freetown between the RUF and the AFRC and an ultimate breakdown in its marriage.

The AFRC made available 50 Million Leones to the RUF monthly, though only for a couple of months. This and other monies received were used for providing rations to our troops and assisting all deployment areas. The civilian populace were not forgotten and special consignments were dispatched by me to Kailahun.
All financial reports and returns will be presented by Lt. Col. Kennedy who was in charge of all logistics. Kennedy you might recall Sir, is one of your senior bodyguards and served as G-SO1 (LOGISTICS) during our stay in Freetown.

Before Gibril was arrested he exposed to the AFRC, information on materials that the RUF held in stock. Unknown to me and the rest of the RUF High Command, Gibril and the AFRC made arrangements for the stock to be moved in place for their use. They then took control of the entire load leaving the bulk of it stashed away at the residence of J P Koroma and fled the city whilst our troops fought the enemy from house to house with nearly empty magazines and no support fire. In the end Freetown fell and the majority of soldiers, both RUF and SLA retreated safely from the Capital.
We also rescued J P Koroma and his family and under the escort of Brig. Issa and Brig. Mike he was brought to Kailahun as was advised by your brother. His mother-in-law had to be carried on a hammock the duration of the journey. On his arrival in Kailahun I gave-up my bedroom for J P Koroma and sought his permission to enter in order to go through my drawers.

The enemy had succeeding in demoralizing our troops and soldiers both RUF and SLA raced for the Moa River in retreat and with the intention of crossing as refugees into neighboring countries. Sensing that this would greatly deplete our fighting force, I instructed that strong gates be placed

along the Moa crossings and threatened to open fire on anyone attempting to cross . I further instructed that defensives be set in Kono and ahead and to put an effective halt to the retreat.

I immediately set about establishing a Defence Headquarters in Kailahun. It was from this DHQ that I intended to organize a stance and a counter-offensive and from where command and control would be maintained. Later when J P Koroma arrived in Kailahun, he appointed me to take over command for both the RUF and the SLA as Chief of Defence Staff with the rank of Brigadier General. In order to motivate the most senior officers, I took it upon myself to appoint Brig. Issa as Battlefield Commander and Colonel Mingo as Battle Group Commander. All this was done especially to encourage Colonel Mingo and ensure smooth operation.
After our Freetown invasion in January 1999 I was again promoted by J P Koroma to the rank of Major General , Issa was promoted to Brigadier and Mike to the rank of Brigadier and other SLA officers were also promoted.

Sir, during this period I had been in contact with various diplomats and other international agencies such as the UN, Commonwealth, OAU, ECOWAS and even the Sierra Leone Government , with a view of effecting your release and a negotiated settlement of the Sierra Leonean crisis. These bodies lent deaf ears to my propositions as they thought that the Kabba government would be able to achieve military victory.

Back at headquarters I renewed my contact with ULIMO and tried to secure materials from them. It was out of these materials that I gave Superman a good quantity to attack and capture Kono. This move I thought would pressure the government into abandoning their mock trial against you and provide us with the ground necessary to move the war and the movement forward.
Superman used the materials to attack Kono and was able to control parts of Koidu Town. Though they were able to raise the ammo dump, they then concentrated on looting and later withdrew leaving the enemy to re-occupy the town. Even prior to that, all instructions to maintain the ground were not implemented.
With the captured materials from Kono, Superman went to the Kabala axis to join SAJ Musa.I instructed him to send some materials to which he agreed . Later he refused to dispatch the materials and refused to grant permission to the receiving officer to return to me.

A special forum of Vanguards was held to brief them of happenings since ~~the Freetown retreat and other important issues. It was in this forum~~ that I learnt that Superman had a mixed- Lebanese girl with him who was deterring his concentration on military issues. It was reported that she would sit on his lap during meetings with officers and publicly flirt with one another . This information concerned me greatly and in the presence of all

Vanguards I instructed Superman to report for briefing. I told him that he should not be moving with his woman on a military operation such as the one he was on as it was obvious that his priority was not his military duties. In this light, I instructed him to prepare within 72hours and to report to DHQ . He agreed to report but later sent a long message denouncing my command and refusing to come to my call. He said that he would stay where he was and would take no instructions from me until the arrival of the leader.
The War Council Chairman and other senior officers joined me in trying to convince him to report but he refused, resorting to molesting Pa Rogers and Brigadier Isaac on set, whilst all stations were monitoring. Indeed he remained in his location, threatening any soldier attempting to comply with my instruction for all loyal forces to the RUF leadership and High Command to leave his location for the closest operational area.

Prior to this, diamonds mined from Kono were given to Brigadier Issa In order for him to make contact and delivery to a business associate of . yours. At his transit point, whilst awaiting General Ibrahim, Brigadier Issa reports that he had gone to a near by tea-shop and on his way back to the hotel he realized that the diamonds were missing from his pocket. His claims of the diamonds dropping from his pockets were substantiated by live broadcasts over radio announcing that diamonds had been found on the streets of the city.
Colonel Jungle was with Brig. Issa and are both in a position to better explain the events surrounding the loss of t e diamonds. I was discouraged at the loss as I had planned against revenues generated from the proceeds, however, in light of the confirmed radio broadcast on the loss of diamonds a short distance from where Brig. Issa's hotel was and the fact that the situation on the ground was such that a firm grip had to be taken of the situation and the Brig. Was a very able commander, in fact the most cooperative and effective in implementing military orders and duties, I decided to refer the matter to you on your arrival whilst assigning him to the front-line at a time when the enemy were bent on flushing us out of even our Kailahun base.

During your absence, many contacts were made to sympathizers to promote the image of the movement, details of which will be presented to you in a manner so as not to cause any breach of security. Out of these contacts I was able to get the basic needs and facilitate our military move to Kono and onwards past Machine.
The entire move was under the command of the Late Boston Flamoh (Rambo) and supervised by Brig. Issa. When Rambo captured Makeni, I Convinced Brig. Issa on set to call on Superman to join in operations in-order to ensure that the objectives of the RUF were placed in priority.

As usual Brig. Issa was supportive and I called Superman on set and instructed him to join in the operations. I told Superman that I had forgiven him and that the past was behind us and that we were all brothers in arms. Superman accepted the call and vowed to give his fullest cooperation. To have made this call was not an easy thing for me as Superman had been asked to provide manpower for the Kono - Makeni operations, yet another order that he defied and still I was forced to exercise maturity and instructed Rambo to go and receive Superman and to continue normal operations with him. Rambo willingly complied with the order and went to meet Superman, providing vehicles for all his men. They then returned to Makeni and put the barracks under control.
Whilst the Late Rambo was busy checking captured materials for proper accountability, Superman took the opportunity of diverting captured materials for his own use .
Brig. Issa who had taken supervised the Makeni and had given instructions for the barracks to be put under full Military control whilst he was informed of the fact that Superman had illegally taken materials from the barracks and was in possession of these materials. When approached on the issue, Superman claimed that I, General Mosquito and Brig. Issa were using Rambo against him with the aim of destroying him. Brig. Issa insisted that the materials be handed over as Superman had not only misused large amounts of ammo in his failed attempt to capture Kono but had also refused to give account of materials captured when the Koidu Town ammo dump of ECOMOG was captured.
Superman continued to refuse and Brig. Issa accompanied by Brig. Kallon entered his house and arrested all materials found. He invited Superman to the HQ in Makeni so as to make plans for moving the operation to Lunsar. Superman asked to enter his bedroom to prepare for the move and took that opportunity to escape. Superman later returned and again was allowed to join the operation.

At this point I instructed the Late Rambo to advance to Port Loko whilst Superman was to secure the Freetown highway. Rambo was successful in capturing part of the town and in capturing a large quantity of materials. Superman then suggested that as he knew the terrain well, he should take over that axis and move to capture Lungi. Thinking that he was sincere we agreed and Brig. Issa gave him the opportunity to equip himself from the ammo dump for the mission.
Upon taking over at Port Loko, Superman made no effective move to capture Lungi and also lost the valuable ground of Port Loko.

Meanwhile the troops that entered Freetown had been cut off from the rear and were being encircled leaving them no way out. I was able to coordinate their operations over set and got them to combine their forces and bulldoze from the side accessing them to the mountains through which they took a bye-pass to join our troops at Benguema and Waterloo as JOI was

occupied by ECOMOG . This is how the troops that entered Freetown were able to retreat . Still they sustained heavy causalities including Steve Blo, the SLPP Chairman Manakpaka and many others.

On learning that Gibril Massaquoi had been rescued from prison and had joined in the operation, I contacted him 'on set' and gave him advice and encouragement for smooth operations. Another attack of Freetown was planned but was never implemented due to the actions of Gibril, Superman and some other SLA soldiers.
Later, I was to instruct Brig. Issa to get Gibril to report to DHQ for proper briefing as he had been with you in prison and had information as to your condition. I was also of the conviction that Gibril would collaborate with Superman to go against the command that you left on the ground. I instructed Brig. Issa to assure Gibril that all was forgiven and that I held no grudge for him.
Gibril refused to come to my call, saying that he was going to operate with Superman. Superman was asked to enforce the order for Gibril to report but he also was defiant and said that he Superman was not going to make Gibril do what he himself would not do. They went on with words of insult to me and the High Command and said that they were not taking orders from me or Kailahun.
I sent Brig. Issa to the ground to invite Gibril to report to DHQ. On arrival Gibril was invited to report and he complied by entering the vehicle. At this point Superman ordered his men to open fire on Brig. Issa which they did, thus affording Gibril with the opportunity to not only escape but to take up arm against his superior command in the person of Brig. Issa, who was able to escape unhurt. Gibril and Superman went with their men to the home of Brig. Issa and commanded all the materials that had been sent there by me for use in the planned re-attack of Freetown. They vandalized the house, looting all personal properties and government funds amounting to nine thousand U.S. Dollars (9000USD).
The two, together with their men then left and based themselves in Lunsar,with the threat that ant person, including me, that tried to get to them would be killed.
I dispatched a team headed by Colonel Isaac, Major Benda, Lt. Col. Moriba, Major Jackson your bodyguard commander and Lt. Col. Sam Kpulleh, with explicit instructions to go and investigate the issue and ensure that they contain the situation and report back to me at DHQ.
I was later informed that the delegation had not been given an opportunity to investigate and were under serious armed threat by both Gibril and Superman. In time, Lt. Col. Moriba and Lt. Col. Kpulleh returned to DHQ whilst the other three stayed behind and also began to put up acts of insubordination against the High Command.
The enemy had taken this moment of internal turmoil to make advances against our positions at Benguema, Waterloo and Mile 47. The enemy then moved for Gberay Bridge. Again Superman pleaded for the opportunity to

move to repel the attack on Gberay Bridge. As enemy pressure was mounting, I gave the go-ahead to for him to take up the said operation. Superman failed to move to Gberay Bridge and instead attacked Makeni late at night with the aim of killing Brig. Issa and Rambo. The home of Rambo was attacked by Superman . The attack caught Rambo off guard as he was fast asleep. He was captured shot many times and it is reported that he was even stabbed to ensure that he did not survive the attack, remarking that he Rambo was the 'Iron Jacket' to me General Mosquito and Brig. Issa and that he would die that night in the hands of Superman.

After killing Rambo, they attacked the home of Brig. Issa, launching a RPG rocket at the house. They opened fire entering the house. Brig. Issa was able to escape through a door from his bedroom leading to the back of the house. He was spotted as he maneuvered towards the bushes and another RPG rocket was launched behind him. The explosion caused a small rock to enter the toe of Brig. Issa and against day-break was able to make his escape to Makali where he dialogued with you on set while you were still in the custody of the SLPP in Freetown.
In that attack, Gibril, Superman and their men killed and wounded many soldiers, both RUF and SLA who were performing various military duties on the ground.

The next morning Superman mobilized an armed force headed by Gibril, to re-attack Brig. Issa at Makali, having been alerted as to his location through his dialogue with the Leader. They also planned to attack Mile 91 with a view of taking command at both grounds. Again Brig. Issa was able to escape and moved to Kono. Gibril chased him as far as Makali, vowing to kill him as he had done Rambo and to display his head in Makeni .
I have as evidence, a video cassette recording of the public display of the Late Rambo's body. The same cassette will help to shed light on the death of Rambo and the conspiracy and action of Gibril and Superman to kill the High Command of the RUF and assume its offices and command.

After Makeni had been captured and raised by Superman and his troops, he called a meeting at the Town Hall and confidently told the people that he was acting in compliance with instructions received from the Leader and that he had taken effective command of the RUF and that I, Major General Sam Bockarie was no longer High Command of the RUF and that he Brig. Superman was taking over from Brig. Issa in Makeni.
Superman went on to accuse me on air of hijacking the Leadership of the RUF, sighting my call for all Signal Stations not to respond to your call, as proof of my betrayal. A charge that I not only deny but take particular offense to.
Superman later went 'on air' proclaiming that he was going to advance to Kono and further still to Kailahun where he would kill me and display my head. He went on to name his assignation list.

To contain the situation I issued materials to Brig. Kallon and instructed him to take command of Magboroka and to use the opportunity to search for Brig. Issa as he was MIA as a result of Superman's' ambush of him immediately after Issa had dialogued with you on air. Kallon took command of Magboroka and was soon under the attack of Superman and Gibril. This time they did not only use RPG's and GMG's but launched mortar bombs and fired Anti-Aircraft Guns against Magboroka. Kallon was however able to repel, only for Superman to re-attack, this time capturing the Town. Three days later Brig. Kallon launched a successful counter-offensive re-capturing Magboroka. Since then the ground has been under our control but has come under a series of attacks by Superman leading to loss of life and injury to numerous soldiers and civilians.

We attacked Makeni twice with a view of re-taking command of the said ground. This because of the strategic location of the Township and the fact that Makeni was under command and control and law and order was in effect when Brig Issa was in command. Civilians moved freely, knowing that their security was paramount. These same civilians were now crying to be rescued. We were in full occupation of the Township when you instructed us to withdraw and await your arrival upon which the issue would be settled. Your order was immediately enforced and troops loyal to the RUF High Command left on the ground by the Leader, were ordered by me to withdraw. The truth is Sir, that at that time the people of Makeni, including the soldiers needed to be rescued. Living conditions were dismal and it is reported that at the time Superman was getting married at a costly ceremony soldiers were suffering and in some cases dying as a result of inadequate drugs.
Till this day Superman and Gibril are contrary to my command and continue to flaunt the direct command of the Leader. They still do not submit all reports to me for my necessary information and action and onward movement to the attention of the Leader. They reserve the mandated line of command only for messages against me or to paint themselves pretty.

When we first retreated from Freetown I contacted the Government of The Ivory Coast and in particular the Foreign Minister, MR Amara Esse . I also contacted the guarantors of the Abidjan Peace Accord to impress on them the fact that our Leader was still illegally being held by the Nigerian Government and that a negotiated settlement was the only way in which peace and security could return to Sierra Leone. I even contacted the Government of Tejan Kabba in Freetown to convince them to release you and to threaten that if they continued to exercise the military option, we the RUF would push for total military victory and would escalate the war to a point beyond imagination. All this talk fell on deaf ears as even the international media refused our calls. With our capture of Kono and the

raising of four mechanized battalions of the Nigerian ECOMOG force, our phones began to ring with calls from the worlds' elite press, and the very people who only a few weeks back were ignoring our calls, assuming that we were going to be flushed as Tejan Kabba had vowed, were now virtually begging to talk. I knew that the heat was on Kabba.
Our attack of Freetown put Kabba in a position where he was forced to talk, as I had earlier promised he would. He fled the city as did his Cabinet, the latter with a view of re-grouping in Conakry and launching a counter-offensive as they had done when ousted by the AFRC. On learning that his political strong-men such as Despond Luke and others were in Conakry, I obtained their various hotel-room numbers and systematically called each on the telephone claiming that I was also in Conakry with a squad of my best commandos and that we were on our way to the hotel. Within fifteen minutes of my first call the hotel had been sealed off by Guinean security forces, with tanks and armored-cars on every intersection. Desmond Luke and party beat a hasty retreat to secret 'safe-houses' and all boarded flights for different destinations the next day. This brought to a screeching halt the SLPP political stance during our Freetown attack and occupation.
We now had the edge over Kabba and his Government and asked for talks to take place under the auspices of the OAU Chairman , President Blais Cainpore. This on the grounds that it was in effect ECOWAS that had been fighting us and thus no troop contributing Member State could impartially host such talks. This basic premise for moving us to the table was eagerly accepted by MR Francis Okello , MR Moses Anafu of the Commonwealth Secretariat and even the Government of President Kabba.
After the initial joy of hearing your voice on set for the first time in a long time, military instincts alerted me that you were under duress and that slowly the Kabba Government would use you to diffuse the explosive state of affairs and move us from our position of strength and seek to move the Talks from our neutral ground of choice.
In my opinion this would not only cause us to loose our military edge but would have put your life in danger.
In view of this, I took the painful but necessary step of instructing all Signal Stations to monitor but not to respond to 'on air' calls from the Leader explaining to all the reasons for such an order.
In due cause, as a result of violations of this same order, the talks were moved from Bokina Fasso to Lome.

THE MILITARY FRONT

On the Military Front, the ground has not only remained intact but huge gains were made against the enemy.
As mentioned earlier in my report, four mechanized battalions of the Nigerian Army were raised at Kono resulting in the capture of a wide

assortment of arms and ammunition as well as armored cars. War- tanks were also captured and burnt.
We successfully took the war from Kailahun to Freetown, putting military pressure on the SLPP Government and the International Community to effect your release.
Huge amounts of arms and ammunitions were also captured by Brigadier Issa from the Guineans including a 40 Barrel Missile and its bombs. The overall G-4 Commander is in place to report on all materials captured and on stock at hand.

Within the Military Structure of the RUF , promotions were encouraged as the only due reward for Military accomplishments.

There was widespread recruiting and training of combatants to provide a beefed-up fighting force.

The Medical unit has been enhanced with regular supply of drugs and dressing materials and the infusion of new talent has resulted in an efficient unit that now handles complex gynecological cases and performs Hernia and Appendix operations to both soldiers and civilians.

A Tanks and Armored Division has been established within the Artillery Unit to utilize captured equipment from the enemy.

Daru Barracks remains under siege with Iron-Gate defensives on all approaches to the Township.

NOTE See appendix 1 for Military Structure.

THE POLITICAL FRONT

Our move to capture Kono earned marked gains for the RUF in the political front. The International Press was effectively used to educate the world as to the aims and objectives of the RUF.

The Government of Tejan Kabba was forced to negotiate with us, a move they had consistently refused to make, vowing instead to execute the Leader and flush the RUF out of Sierra Leone.

The UN and other International Organizations were also forced to talk to us.

After much Military pressure from us and diplomatic pressure from the on-looking world, the Leader was released to Togo where along with a

delegation from within the RUF on the ground in Sierre Leone a Peace Agreement was reached between the RUF and the SLPP Government.

CIVILIANS AND NON-MILITARY ISSUES 00009670

Knowing the love and respect that the Leader has for civilians, I have ensured that the status of civilians and in particular civilians behind RUF Lines has never been compromised.
They are still represented on the War Council and continue to enjoy full rights and privileges .
A Free Primary School System was launched in the Kailahun District to address the educational needs of our children. This program has been a huge success and has spread to other Districts.
The RUF and civilians behind its Lines have maintained a program of self-sufficiency and have recorded the highest production ever of rice, palm-oil and produce.

Proceeds from the sale of Agricultural Produce was used to provide much needed rations and materials for soldiers and civilians alike.
With the diamond rich ground of Kono under our control a mining unit was setup headed by Lt. Col. Kennedy who is in place to give account of all proceeds from mining operations.

Sir, I most respectfully ask you to look into the numerous complaints of both Gibril and Superman. From the execution of Vanguards in Pujehun to the killing of the bodyguards of Colonel Mohamed Tarawallie, on to the killing of Colonel Boston Flomoh (Rambo), this terrible duo have reeked havoc on the RUF. They continue to flaunt my orders and have extended the same acts of gross insubordination to the Leader.
I hasten to remind you Sir that whilst I along with Brig Issa and other loyal forces have always obeyed your orders to the letter, this duo have rejected your orders and challenged the authority of the Leader and his Military High Command.
The actions of Gibril and Superman has gone great lengths to worsen the relationship between the RUF and the SLA by the indiscriminate killing of SLA soldiers during their attacks on the RUF High Command and in their bids to capture ground, and by inciting SLA soldiers against my command. The setbacks resulting in the actions of this duo are magnanimous and have far reaching consequences.
I must also mention Sir, that all troops loyal to the Leader and the High Command of the RUF are in full readiness to take Military action against Gibril and Superman and have only halted their action to await your arrival and handling of this situation.
Sir, having obeyed all instructions given by you to me and after dillgently working to maintain the ground at all cost , I will not be pacified unless just

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00009671

and appropriate military action is taken by you. I along with a vast majority of our troops have borne the brunt of abuse and molestation, sabotage and cold-blooded murder, all in an effort to maintain the ground as per your instructions. Now that you are back and in full control of the RUF we anxiously await a speedy resolution of this problem.

Most Respectfully yours,

MAJOR GENERAL SAM BOCKARIE.
RUF S/L

N/B

Sir More report will follow upon your arrival on the ground.

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AUTOPSY NO. 1

ON THE ALLEGED BODY OF A SPECIAL COURT INDICTEE

DATE: 2ND JUNE 2003

AUTOPSY COMMENCED AT 10:15 am

DECEASED'S NAME:	SAMUEL BOCKARIE ALIAS MOSQUITO (MASKITA)
AGE:	APPROXIMATELY 40YEARS
SEX:	MALE
ADDRESS:	PAYNESVILLE, LIBERIA
OCCUPATION:	UNKNOWN
DATE OF DEATH:	6TH MAY (TUESDAY) 2003
TIME OF DEATH:	UNKNOWN
PLACE OF DEATH:	BOUALEH, NIMBA COUNTY, LIBERIA
DATE EMBALMED:	7TH MAY, 2003

PHYSICAL EXAMINATION: DONE IN LIBERIA ON THURSDAY, 8TH MAY, 2003 AT 4PM.

Note: The above information was supplied by Dr. Anthony Quaye, Chief Pathologist of Liberia, who attended the post-mortem examination as representative of the Liberian Government.

LABORATORY SERVICES
DR.S.O.KOROMA
DATE 6:02
CONNAUGHT HOSPITAL

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00007756

REVOLUTIONARY UNITED FRONT OF SIERRA LEONE

DEFENCE HEADQUARTERS

27TH SEPTEMBER 1999

TO: THE LEADER OF THE REVOLUTION

FROM: BRIGADIER ISSA H SESAY
BATTLEFIELD COMMANDER RUF S/L

SUBJECT: SALUTE REPORT

Sir,

After working on the Draft document of the Abidjan Peace Accord, you returned behind RUF Lines to consult with the Military High Command and all combatants on the Accord and its implications. While in the Kailahun District, we received reports that Colonel Mohamed Tarawallie had been destabilized by Kamajohs and SLA troops at your former base of Camp ZOGODA.
On hearing this news , I and other senior officers convoyed from Gaima to Buedu with the leader.
The next-day ,before returning to Abidjan to conclude documentation and signing of the Accord, you instructed that General Sam Bockarie (Mosquito) take over as Battle Group Commander of the RUF.

From Abidjan, the Leader instructed that men should be sent across the Moa River to receive those of our troops who were fortunate enough to have successfully retreated from ZOGODA and to actively go in search of Colonel Mohamed Tarawallie. The [illegible] implemented in full and though we were able to [illegible] soldiers and civilians that had retreated from ZOGO[illegible] were unable to locate Colonel Tarawallie.

From Abidjan, we received further instruc[illegible] General Mosquito was to take effective command on the ground in your

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absence and to assume the assignment of Battle Field Commander, RUF S/L.
I was to assume the duties and responsibilities of Battle Group Commander and together we were to work to maintain the ground, by any means necessary.

General Mosquito was able to make positive contact with ULIMO and make all necessary arrangements to buy materials from them. The money that you had left with us on the ground (7000USD) was utilized to buy materials from ULIMO and with these materials, we were able to resist enemy advances in the Kailahun District.

It became obvious to us on the ground that the Abidjan Accord was nothing but paper, as the Kamajohs were being used against us with vicious attacks on our positions.
It was not long before we heard that the Leader had been arrested in Nigeria, and as we were trying to understand the circumstances of your arrest and implications to the RUF, we learnt that Phillip Palmer, Faia Musa and other members of the External Delegation were now claiming leadership of the RUF.

General Mosquito contacted Palmer telling him that since this was the action that they had taken, it was necessary for them to come back behind our Lines and brief the Military High Command and combatants accordingly. Palmer and others eventually agreed to meet us at the Nongowa Crossing Point. There, amidst drumming and dancing to receive them, the General was able to persuade all of the Coup-plotters, including the Sierra Leone Ambassador to Guinea, Lt. Col. Djabi to cross-over into RUF zone. They were promptly arrested and their statements revealed an international conspiracy, to which they were party, aimed at changing the leadership of the RUF. They have since been in custody until your recent instruction to release them.

Soon after, we received information that Superman, who was operating as Battalion Commander for the Western Area Jungle, had arrested the bodyguards of Colonel Tarawallie and had executed two of them, namely Emanuelle and Victor without consulting with and obtaining such instructions from the Military High Command left on the ground by the Leader.
An investigation was launched and before action could be taken against Superman, the SLPP Government was overthrown by the AFRC on the 25th of May 1997.
A few days later General Mosquito was instructed to move and join our SLA brothers in Freetown,

In accordance with the Leaders instructions, General Mosquito postponed action against Superman and instructed him to lead the advance team from Bradford to Freetown, whilst Colonel Isaac and Brigadier Kallon were to move to join the SLA Forces in Makeni. After ensuring that the security of the High Command was paramount, the General and I moved to Freetown.

Once in place in Freetown we assessed the security situation and deployed our troops in all strategic areas of the Capital and indeed the entire country. In accordance with the instructions of the Leader we took all instructions from Chairman J P Koroma and maintained the same sense of discipline and loyalty that we had developed growing within the ranks of the RUF.

Lt. Col. Gibril Massaquoi arrived in Freetown from Nigeria where he had been under detention with the Leader. He briefed us informally that he had been arrested together with the Leader but that he had escaped, all with the knowledge and consent of the Leader. A few days later Gigril would present a document to Chairman J P Koroma that he, Gibril alleges, was given to him by the Leader.
In the document, it was instructed that no member of the RUF was to accept any Ministerial position or participate in politics in any way. It also endorsed the promotion of Gibril to the rank of a full colonel .
These events were reported to General Mosquito as he had not been in Freetown when Gibril arrived.

On the arrival of Steve Bio in Freetown, he became very closely associated with Lt. Col. Gibril and both seamed to be on their own agenda.

I left Freetown for Kenema in-order to distribute rations and morale boosters to the troops, as well as to organize the various deployments. Whilst waiting for my Jeep to be repaired, a vehicle pulled-up with Steve Bio and Lt. Col. Gibril within.
Gibril greeted me and introduced Steve Bio to me. Though I knew Steve from a brief meeting in Abidjan at the signing of the Peace Accord, I had never really talked to him or knew much about him.
They then began to discuss the AFRC and complained about the way in which the RUF was being marginalised and treated with disrespect. We were in a public place and I advised that such talk from them was not to be done around civilians. On this advise, we, including Major Eddie Bockarie (who was with me) walked to a point out of the earshot of others. Gibril went on to say that our meeting was not a coincidence and that they had searched the entire town for me as they had an important issue on which they

had to brief me. Mr. Bio then stated that he had come with a special mission and was seeking my support in launching a coup. I listened as both he and Gibril went into details of the numerous grievances held against the AFRC. He said that the AFRC had refused to share power with us and had even marginalised us in the military. I told them that the instructions that we had received from the Leader called on us to join and take all orders from Chairman J P Koroma. Steve Bio responded saying that I should disregard all that as we were all young men and that this was an operation that was necessary for the four of us, Gibril, Steve, General Mosquito and myself to undertake and assume command of the Government and State. I asked them if they had already discussed this with General Mosquito as they had just left him in Freetown. Gibril replied that they had left the General in Freetown but that he was afraid of General Mosquito and could not summon the courage to approach him on such an issue. In fact it was this very reason that had made it necessary for them to search for me in Kenema. Knowing that if I could be convinced, they were close to getting General Mosquito's support.

The two of them left Kenema that night for Bo. At around 0400HRS the following morning General Mosquito arrived in Kenema. I immediately informed him of my previous day's discussions with Gibril and Steve Bio. I told the General that they were asking us to overthrow the very Government that the Leader had instructed us to join and secure. I told General Mosquito that since that dialogue I had been thinking of a secure way of informing him and was very relieved that he was in Kenema. The General was shocked to hear this and in turn informed me that he had been called to the State House in Freetown where he was informed by Chairman J P Koroma that some members of the RUF were planning a coup together with other SLA officers. The General informed me further that he had been given the instructions to investigate the situation and report back to him. That day I moved to Bo and Gibril and Steve joined my convoy to Freetown. On arrival in Freetown I asked them in the presence of Brig. Mike Lamin, Col. Isaac and other security personnel to repeat their statements made to me in Kenema. They repeated the same statements and they were detained and turned over to Army Headquarters at Cockerill.

On new- years- eve, I left home in search of a pharmacy that was still open for business as I was in poor health. I met the Late. Honorable Gborie who informed me that he had chairs for me and had been trying to get a hold of me for two days. I thanked him sincerely and accepted his gift. Despite all the allegations and testimonies against the character of this man, I say with no hesitation that he welcomed the RUF with all his heart. On

numerous occasions he would provide rations and boosters to our troops and every RUF problem was his problem. I accepted his gift in good faith only to be notified on SLBS Radio the following day that I had looted the Iranian Embassy and as a result , I had been removed from the Supreme Council and that my arrest had been ordered.

Knowing that while we the RUF were securing the Government of the AFRC, they were killing our soldiers with no action being taken and that the RUF High Command had been targeted for elimination, and knowing that I was innocent and the measures taken against me, extreme, I refused arrest and maintained the integrity of the High Command of the RUF.

In general, we were not trusted or respected by the AFRC even though they had called on us to join them. Our troops were the only ones committed to their assignments whilst the AFRC High Command rejected our war plans and strategies referring to us as 'blood-thirsty, bush-colonels'.

It became apparent to us in Freetown, that Lt. Col. Gibril had leaked information to the AFRC pertaining to Military Equipment belonging to the RUF that the Leader had kept in a safe place. Before we could confront Gibril and arrest the situation, he and the AFRC had arranged for the equipment to be delivered to them. They took delivery of the equipment without the concern or consent of the RUF High Command and stored the equipment where we had no say or access to it. When we retreated from Freetown a large quantity of the said equipment was left in storage at the residence of Chairman J P Koroma.

Due to the lack of command and control, shortage of issued materials to our front-line troops and the total lack of support of the SLA soldiers, the enemy were able to move us from Freetown and ousted the AFRC Government.
I retreated first to Waterloo and then to Masiaka . By then, the ECOMOG Force had taken Bo and Kenema and it was agreed that I should attack Bo and begin to organize to move to attack Freetown. I was successful in capturing Bo but sustained an injury that forced me to retreat back to Mile 91 and then to Makeni in search of good medical treatment.
Whilst in Makeni, I went to visit J P Koroma who was in hiding in his village. J P Koroma asked me to arrange and supervise the movement of his entire family to Kailahun as ECOMOG were advancing and the Clandestine Radio 98.1 FM, had accounted that he was in hiding in his village.

I contacted General Mosquito and the order was given to escort the Former Head of State to our Kailahun base.
First, we had to open the road to Kono. This was done in conjunction with Superman and Brig. Mike Lamin. Having put Kono under our Control ,we attacked Gandohun with the intention of opening the road from Koidu-Geya to Sandialu but failed in our attempts. We were then ordered by General Mosquito to enter the Jungle and use the cover of the Jungle to secure J P Koroma and his family to the banks of the Moa River. Across the Moa, General Mosquito had sent vehicles ahead of us and we all reported to Buedu.
All hospitalities were extended to J P Koroma and his family and General turned over his bedroom to J P Koroma and his wife.

J P Koroma appointed General Mosquito as Chief of Defence Staff, with overall command over both the RUF and the SLA and promoted him to the rank of Brigadier General. General Mosquito called on me and informed me that since he had been made Chief of Defence Staff for both the RUF and the SLA by J P Koroma he wanted to turn over his assignment of Battle Field Commander to me and asked me to turn my assignment of Battle Group Commander over to Superman. The General said that he was doing this to draw Superman within the High Command structure of the RUF in a bid to encourage him. I accepted and assumed the assignment of Battle Field Commander and Superman assumed the assignment of Battle Group Commander.

One morning, the Chief Security Officer to the former AFRC Chairman J P Koroma informed me that his boss was planing to escape to Ghana along with his entire family. The CSO further told me that J P Koroma had a parcel of diamonds that he was planning on selling once out of the country.
This information came as a surprise to me and found it hard to believe that at a time when we were trying to put the fighting-men under command and control and provide the necessary logistics to halt our retreat and move forward, J P Koroma would keep diamonds for his own use and flee, leaving us with a problem that he had created.
Accompanied by Brig Mike Lamin and the CSO to J P Koroma I asked the latter to present the diamonds for the use of the Revolution. He complied and the matter was settled.

While in Buedu, Captain Michael Comber of the Mining Unit reported with a parcel of diamonds from Kono.
The parcel was placed in my care by General Mosquito with the instructions to move with it to a transit point where I would be met

by General Ibrahim and together we were to travel to a business associate of the Leader for arrangements and procurement of Military Equipment.
I arrived at the transit point and booked into a hotel.
On the evening of my third day at the hotel, Colonel Jungle and I went across the street to a tea-shop. Whilst there, it started to rain and Jungle and I ran from the shop across the street to the hotel. As we climbed the steps to enter, I touched my pockets, as I had gotten accustomed to doing since the parcel was put in my care.
To my shock and dismay, my pockets were empty. I screamed and put my hands on my head and cried. Jungle and I then retraced our steps from the tea-shop to the hotel. We searched in the rain on our hands and knees. Staff from the hotel helped us in our search, all to no avail. For the first time in my life I contemplated suicide. I above all knew the importance attached to the materials that the diamonds were to facilitate for the movement. How could I ever look my commander in the eyes and tell him that I Issa, who could be trusted with the security of the Nation, could not secure a small parcel of diamonds. As the days went by, I grew frustrated and could not eat or sleep.
Four days after the loss, Jungle and I were sitting on his bed when we monitored National Radio announcing that diamonds had been discovered on the very same street that I had suffered my loss.
Jungle and I cried knowing that the mentioned diamonds were the property of the RUF. Till this day, people still prospect this area thinking that diamonds are underground.
General Mosquito dispatched Lt. Col. Moriba to meet me and escort me back to DHQ.
On arrival, I was met by an enraged General Mosquito who angrily chastised me for the loss. I was ordered to ' fall-out ' and for over a week, the General would not talk to me or even respond to my curtsies.
Finally one morning, I was summoned by the General and instructed that I should leave Buedu and make my base at Pendembu from where I was to coordinate all Front-Line Operations.
I complied with his order and stepped-up operations against the enemy at Daru. I also launched successful Jungle Missions to Joru and Niama.

General Mosquito left on a trip to secure materials for the Movement and on his return I was issued a liberal quantity of ammunition and instructed to cross the Moa River and re-capture Kono from the enemy. Prior to this, the same instructions had been given to Superman who misused the materials given to him and failed to capture the target.

On arrival in Kono I called the Brigade Commander, Rambo and other senior officers and together we arranged a forum in which general security issues were discussed and a war-plan was made for the attack of Koindu Town.

I instructed Brig. Kallon to move to Gold Town and 'cut-off' the enemy. I led the troops in the attack of Koidu Town, attacking the enemy at 0600HRS. They put up a strong resistance using their four Mechanized Battalions deployed to defend Kono and its diamonds. Our troops proved too aggressive for them and after fourteen hours of heated combat we captured Koindu Town. The Nigerians retreated to Bumpe. Very early the next morning we attacked their positions at Bumpe and raised them from the town. The enemy were forced to retreat through the road leading to Massingbi where they fell in Kallons ambush. All in all. The enemy lost four war-tanks, armored cars, and a multitude of heavy artillery pieces personal rifles and huge amounts of ammunition. They also suffered heavy casualties the likes of which they have never experienced in the history of ECOMOG. They were forced to retreat on foot with not even a bicycle being able to pass our defenses.

Our Forces moved for Massingbi, Rambo and Kallon moving with the advance team whilst I moved to repel a Kamajoh Attack at Nimikoro. Our forces had by then captured Massingbi and Magborolka and were advancing to attack Makeni.
I joined them, taking with me all needed Military Materials for the attack. We quickly put the Township under our Military Control.
General Mosquito called me 'on set' and instructed that we allow Superman to join in the operations. The General explained that though Superman had earlier refused his orders, he Mosquito was man enough to put it behind him and accept Superman back, referring to him as ' a brother in arms.'
Rambo proceeded to a village beyond Binkolo where Superman had been in hiding and brought him to Makeni.
That morning the two of us met and had polite discussions.
Together we attacked the Barracks and captured it .
At that point, I received information that the enemy were moving to attack Ijiama-Swafe and I moved to put the situation under control.
Upon my return to Makeni, Rambo and Kallon reported that all Military Equipment in their care had been reported to the G-4. They reported that Superman on the other hand had taken the Materials he collected to his house. Accompanied by Kallon, I went to Superman's house and confronted him with the issue. I informed, him that it was proper procedure to report all captured Military Materials to the G-4 who would then file a comprehensive report to DHQ and issue the said Materials upon instructions. I asked that

Superman present the Materials so as to ensure proper accountability. Superman led Kallon and I into the house and showed us where he had kept the Materials. I instructed that it be moved and reported to the G-4.

Two days later General Mosquito again asked for understanding and allowed Superman to rejoin the operations.

* Rambo was instructed to advance and attack Port Loko which he did, deploying his forward defensive at the Port Loko turn-table, leading to Kambia. Rambo shared the town with the enemy for seven days.
Superman, pleaded that eventhough Rambo had done well, he as Battle Group Commander knew the ground well and should take over the ground . He said that he had received Intelligence that the Leader had been moved to Lungi and wanted to advance as far as Lungi and rescue the Leader.

* At this time our forces Freetown were under enemy ' cut-off ' from the rear and were in danger of being boxed-in and either captured alive or killed.
Rambo was withdrawn from his operation in Port Loko and instructed to open a through- way to connect with our men in Freetown.
Rambo then attacked and captured Masiaka, advanced and captured RDF, and attacked the Guineans at Waterloo, engaging them in combat for four days and four nights.
* The Guineans wrote us a letter asking for their safe passage back to Guinea, saying that they were taking their hands out of the war.
I replied, denying their request. I told them that if they wanted ' safe passage ' they should leave behind all their Military Equipment.
A few days later I monitored the sound of heavy bombardment from the direction of Port Loko. On inquiring, I was informed that our troops had dissolved the ground and that the enemy were advancing towards Gberay Junction. I asked for Superman and was informed that he was in Lunsar and not on the ground that he had asked for and been given.
The Guinean convoy bulldozed all the way to Masiaka where my position was also bulldozed. Their mission was to rescue the Guineans at Waterloo. Upon reaching Waterloo they joined forces and made a 'U-turn', bulldozing my ambush for a second time at RDF. The Guinean convoy consisted of over four war-tanks, eight armored vehicles, a Forty Barrel Missile , four Anti-Aircraft Guns and countless other mounted weapons and over eight trucks full of personnel. As they moved they bombarded and assaulted, clearing a path for themselves.

I was extremely annoyed at my position being bulldozed and issued strong orders for an ambush to be set ahead of them. They fell in the ambush and my Bodyguard commander led a team of less than a squad of men in the capture of the Forty Barrel Missile and a large quantity of its bombs.

I moved to Escort the Missile to our rear and on my return, Superman asked to join Rambo at Waterloo. He sighted the fact that as the SLA Commanders had operated with him before he would be able to consolidate them and exercise command and control over them . Taking into consideration his status as Battle Group and the logic behind his explanations, I gave the OK for Superman to join Rambo in Waterloo.
At Waterloo Superman incited SLA Commanders and soldiers against Rambo and generally did his best to cause a break-down in command on the ground.

A few days later` General Mosquito on hearing that Lt. Col. Gibril had been rescued and had joined operations at Waterloo, called me and asked me to inform Gibril that he was welcome back and that no ill-feelings were borne against him. Gibril was to also report to DHQ to brief the High Command and all on the condition of the Leader as they had been in prison together.
Superman , monitoring the dialogue on field-radio responded that He would not allow Gibril to come to the call of the High Command.
A few days later, I received information from the Waterloo Front-Line that Superman and Gibril had retreated to Lunsar and had moved with a good number of men. As a result, the enemy had advanced and were now at Yams Farm.
I informed Rambo who was at my location on a Medical Pass .
Rambo asked for ammunition to be given to him so that he could collect the Force from Lunsar and move to stop the enemy advance at Yams Farm. I arrived at Lunsar with only eight bodyguards and met Rambo and Gibril discussing. Gibril greeted me and we exchanged pleasantries. I told him that General Mosquito wanted him to report to DHQ not to face any charges but to give account of the state and condition of the Leader as they had been in prison together. Gibril complied and entered my vehicle. At that moment, Superman and his men came from the back of the building, opened suppressive fire and launched RPG rockets against my position. Gibril left my vehicle and joined Superman in attacking me. I managed to escape with my life but they had killed two RUF soldiers assigned to me as bodyguards.
I got in a vehicle with Major Kolo Mulba and escaped through Gberay Junction, Masiaka, Mile 91 to Magboroka.

Meanwhile, Superman and Gibril moved to Makeni and attacked my residence. They shot at my house, tied and beat up RUF soldiers and raised my compound. They entered my house, beating up my wife, undressing her and taunting her with rude and abusive remarks before she was able to escape under gun-fire.
Mr. E T Samara and others rescued from prison in Freetown, were staying with me in Makeni and were also molested and raised. RUF Military Materials given to me by the General for a planned re-attack of Freetown were looted along with 9,000 USD also RUF property.
That same day Superman and Gibril attacked the home of Brig. Kallon. The entire house was raised and his wife was stripped off all her clothing and made to sit on the ground. Her suckling- child was snatched from her and repeatedly banged against a wall. This resulted in serious injuries to the child.

I reported the incident to General Mosquito who asked me to exercise restraint and he dispatched a Delegation headed by Col. Isaac to calm the situation down and investigate the incident. The Delegation obtained statements from me and proceeded to Lunsar to get a statement from my attackers. Superman and Gibril refused to co-operate and issued threats against the Delegates.

During this impasse the enemy had advanced to Gberay Junction. General Mosquito instructed that in the interest of the Revolution, we should put our differences aside temporarily and act to repel the enemy. Along with Kallon, Rambo and Brig. Isaac, four trucks of armed men were mobilized and we joined the Force at Lunsar and moved for Gberay Junction. Four of Rambo's men were killed in that attack by ' friendly fire ' from the rear suggesting foul-play.

Again the enemy moved against our positions advancing towards Mile 91. I sent Rambo, equipping him with a Single Barrel BZT. He met and joined Col. Bai Bureh and they were able to push the enemy past Moyamba Junction to Tiama Junction where they deployed our troops.
Rambo proposed an attack of BO and it was arranged that Kallon would hit Yele.
Kallon was dispatched to DIIQ to receive logistics for the said mission. Two days later I made a day's trip to Matotoka as the area was under Kamajoh threat. On returning to Makeni, Rambo visited me to inform me that he had repaired the BZT Weapon and wanted to move to capture Bo the next morning. He left my house at around 2100HRS and I stayed up past mid-night. I stayed awake and at 0110HRS I heard heavy firing from outside. I entered my ' living-room ' and my bodyguards were running from the direction of the firing. Some of them had been shot. I exited the house through a

back entrance and ran for cover. A RPG rocket was launched against me and I was hit in the toe by fragment from the blast. I ran as guns blazed behind me. I got to a safe place and spent the night. The next morning with the aid of civilians, I escaped to Makali. The hunt was on for me and I had to bye-pass major towns on my way. At Makali I was at the Signal Station monitoring the Network when the Leader called. I responded and reported that I was faced with a serious problem. Not wanting to let the enemy know that there was serious in-fighting going on within the RUF, I could not go into details. At the end of my dialogue with the Leader I was attacked again by Gibril. They took me by surprise as I had been very careful not to disclose my location. The people of Makali, including the Paramount Chief Pa Alimamy Kanu, will testify that Gibril led the attack. He raised the town shooting and wounding people on the ground. He swore that he would kill me and take my head to Makeni where he would put it on display.

Away from my ground at Makeni, Superman took the opportunity of calling a meeting at the Town Hall where he informed those assembled that General Mosquito and I had collaborated to hijack the leadership of the RUF and sighted the Generals advise not to respond to the call of the Leader on field-radio as proof. He informed the meeting that he had received instructions from the Leader to take full command of the RUF and to arrest and execute both General Mosquito and I, Brig. Issa.

By then I had maneuvered to Kono, after spending five days in the bush as a result of the attack on me in Makali.
Kallon moved to Magboroka to take command and was able to repel numerous attacks from Superman and Gibril.

Upon receiving instructions from the Leader, through the General, calling for Kallon to take command at Makeni. I mobilized Kallon and the said operation was undertaken. We were allmost in control of the entire Township when the General informed us that that the Leader wanted us to abort the operation and for Kallon to return to Makeni.
A Military Order was passed and we withdrew the force to await the arrival of the Leader on the ground.

Sir, if my Report is centered on the activities of Superman and Gibril it is not so merely because of their attacks on me but rather because of the negative results their ' out-law ' actions have brought to the Movement.

Superman sought the advise of ULIMO General Boplch and SLA Brig. Mannie. Both strong critics and self-confessed enemies of the RUF. Superman placed Former President J S Momoh in the hands of Mannie who arranged for Momoh to escape to Guinea. Mannie refused to hand Momoh over to me stating that Momoh is SLA property and not RUF.
He incited SLA soldiers to go against RUF Command and together with Gibril sought to sabotage the progress of the movement thus delaying the release of the Leader.
Superman killed Rambo in cold blood and made several attempts on my life in a bid to eliminate the RUF High Command left on the ground by the Leader.

Sir, it has not been easy controlling my emotions and harder still controlling the men who witnessed the cold-blooded killing of Rambo.
General Mosquito, I Brig. Issa and other senior officers have obediently taken all orders from you and at this time we await most anxiously your arrival when we look to have the matter resolved by you.

Lastly Sir, the vast majority of the men are in ' high spirit ' and remain loyal to the Leadership of the RUF. They have fought hard and longed for the return of the Leader.
As Battle Field Commander I pledge my loyalty to the Leader and ask that he moves earliest, to look into the internal-affairs of the RUF.
The High Command, officers, combatants and civilians of the RUF are on the ground and on full-alert awaiting the ' last-order ' of the Commander In Chief of the RUF S/L, Corporal Foday Saybana Sankoh.

Militarily Yours,

Brigadier Issa H Sesay
Battle Field Commander
RUF S/L

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Revolutionary United Front Of Sierra Leone
(People's Army Of Sierra Leone)
Ops. Segbwema.

Date: 31st August 1999

To: Cpl. Foday Saybana Sankoh
RUF/SL.

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From: Major Francis M. Musa
District I.D.U. Commander
Kailahun.

Sub: Brief comprehensive report on all salient activities that took place in the absence of the leader from the 24th. March, 1996 to the 31st, August, 1999.

The leader, Cpl. Foday Saybana Sankoh left Zogoda on the 24th. March, 1996 for the Abidjan (Ivory Coast) Peace Talk. Brigadier Moris now Kallon now, took over command at Zogoda in the absence of Lt. Col. Mohamed Tarawally. Seventy-two hours later, Lt. Col. Mohamed Tarawally arrived and took over command from Co. Moris Kallon as instructed by the leader before he left for Abidjan.

Lt. Col. Mohamed Tarawally started fine but later he was wrongly advised by his bodyguards and late Capt. Daniel Wankeh (Rambo, who was bodyguards commander to the leader). For instance, all kinds of civilians and standbys were now entering in and going out of Zogoda without proper security. The Camp Lion Training Base became a ground of revenge rather than for ideology. Lt. Titesu, Pujehun District I.D.U. Commander was killed in Balaka at the Camp Lion Training Base sometimes in July, 1996. All those who were involved including Major Junior Vandi, Major Muyepeh, late Capt. Cobra, etc. were all demoted and removed from the training base to other areas of assignments. The lethergic or delaying attitude of Lt. Col. Mohamed Tarawally in responding to instructions sent by the leader made the Kamajors to over-run our positions from the end of 1996 to early 1997.

While the peace talk was going on in Abidjan in 1996, Kamajors together with soldiers loyal to Tejan Kabba continued to attack our positions with flimsy excuses that they were returning to their villages, defend and harvest their agricultural produce. The instruction given to Lt. Col. Mohamed Tarawally by the leader to evacuate Zogoda and send some people to Pujehun and the rest to Kailahun was delayed until the enemies over-ran Koribondo Jungle, Bandawor, Zogoda, Kenema by-pass, Across Moa, etc. A good number of both civilians and soldiers including good brothers like Capt. Augustine Koroma, Capt. Papa, Capt. Long By-pass, Lt. Shalelow, Lt. A.B. Dundas, etc. died in this incident. All our positions were over-run by the enemies with the exception of the Kailahun axis, Western jungle, Peyama axis and Pujehun axis. Later on, Pujehun axis fell to the enemies. This was as a result of the lack of materials and disunity between the very citizens of this area - both civilians and soldiers. Thanks be to God and Major-General Sam Bockarie, because when he observed the cruel determination of the enemies to massacre us, he instructed that Peyama jungle must be dissolved. This was done, as everybody crossed over to Burkina to put effort together to defend the original land of the RUF/SL rebels in Sierra Leone. At this Juncture, the RUF/SL could only boast of the Western jungle and the Kailahun axis. A very big praise to Brigadier Denis Mingo and others who upheld this jungle upto the time the AFRC took over on the 25th. May, 1997.

Again, a very big thank you and praise to Major-General Sam Bockarie, Brigadier I. H. Sesay, Brigadier Peter B. Vandi, other devoted soldiers and civilians. If it were not the co-operation of these mentioned people under the commandership of Major-General Sam Bockarie, the enemies would have finally flushed us out of Sierra Leone. This was the time Capt. Palmer, Fayia Musa, Deen-Jalloh and

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Dr. Barrie had told the SLPP government alot about the RUF/SL They disclosed to the government that we are lack of ammunition, that we depend on the arms and ammunition we capture from the enemies. So they advised the Tejan Kabba government to concentrate on Kamajors wit with single barrels, knives and sticks to fight us, thinking that when we are suppressed, we would have accepted their government and betrayed the RUF/SL. Thanks to the Lord Almighty, with the help of Major-General Sam Bockarie, Brigadier I.H.Sesay and Brigadier Peter B. Vandi, these betrayers (coup plotters) were rounded up at the Sierra Leone-Guinea border somewhere around Koindu. tha The information previously given to the enemies about the RUF/SL by these coup plotters triggered the enemies to suppress us in Ngiema axis attacking our positions including Ngiema HQ. twice or thrice every week. They used single-barrels, sticks and knives with limited automatic rifles to fight us, and hence we captured nothing from them anytime they were ki killed or pushed back. Major-General Sam Bockarie who was gifted by God worked very hard to save the movement. He sacrificed his life, went to Foya, contacted the Liberian soldiers and established strong relationship between the RUF/SL and the Liberian soldiers. Devoted soldiers and civilians freely offered cocoa beans, coffee beans, pistols, single-barrels, X-Bass tape, presentable dressings, etc. to the movement to be exchanged for ammunition. This ammunition was what we used to fight the enemies and with-held the Burkina axis until the AFRC took over the reigns of government of Sierra Leone from Tejan Kabba on May 25th. 1997 (Sunday) and called upon the RUF/SL.

We joined the brothers on May 29th., 1997. The following key positions were offered to the RUF/SL. Vice president - Pa Foday Sankoh, Minister of Trade and Industry - Major Eldred Collins, Minister of agriculture and Forestry - Mr. A.A. Vandi, Minister of Energy and Power - Major Lawrence Moriandia, Minister of Lands and Mines - Mr. S.Y.B. Rogers, deputy Minister of Education - Major P.S. Beinda and deputy Minister of Lands and Mines - Brigadier Peter B. Vandi. Very minimal positions in the army were offered to the RUF/SL. Lt. Col. Johnny Paul Koroma was wrongly advised by prominent military men who were Kamajors and Tejan Kabba supporters. The RUF/SL was treated with infinitesimal dignity. Most advise given by our own authorities by them were not adhered to. Little attention was paid to security information from the RUF/SL securities. Recommendations were never attended to. On the whole, the brothers had no confidence in us. However, we accepted everything in good faith because we were instructed by our leader to take all orders and instructions from Lt. Col. Johnny Paul Koroma. This enabled the Tejan Kabba government supported by the Nigerian led ECOMOG and the Sandline International from Britain to overthrow the AFRC government in February, 1998. Tejan was to come together with the RUF/SL leader to Freetown on April 22nd. 1998 to regain presidency but the enemies did not wait for this time. The Nigerian led ECOMOG with British mercenaries attacked freetown in February 1998 and this extended to all the provinces and towns. Two displeasing incidents that took place while the we were in Freetown included the alleged misusing of nine million leones (le.9,000,000) by Brigadier Superman and the used of about forty-five million leones (le.45,000,000) on marriage ceremony by Major Eldred Collins.

Considering our military strength and the pressure that was put on us by the Nigerian led ECOMOG, we withdrew into the bush(parts of Kailahun and Kono districts) to re-organise ourselves and regain strength. We still continue to thank and praise Major-General Sam Bockarie, Brigadier I.H.Sesay, late Col. Boston Flomo(Rambo), Brigadier Superman, Brigadier Moris Kallon, Brigadier Peter B. Vandi and many others who stood firm and made sure that the enemies did not overcome us. The rampant promotion of soldiers served as incentives that motivated the combatants to double-up their efforts. The consultation, co-ordination and co-operation amongst senior officers and other ranks brought about the recapture of Joru jungle, Kono, Makeni, Magbeuraka, Segbwema, Tongo Field, Western Jungle, Freetown and many other places from the end of 1998 to early 1999. This drew the attention of the Western and Tejan Kabba to call for cease-fire,

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see the RUF/SL rebel leader and sign the Lome Peace Accord, will lead to every lasting peace in this country as we can see for ourselves now.

During our withw withdrawal into the bush, security divulged that some former SLA soldiers were in possession of diamonds and foreign currencies which they wanted to use only to satisfy their personal needs. Some of them even wanted to escape with these wealth and left us struggling. Infact a good number of them with or without wealth escaped to Liberia and Guinea. Since in RUF/SL diamonds and foreign currencies are government properties, authorities decided to collect diamonds and foreign currencies in possession of individuals so that they could be used in the interest of the movement with priority to arms and ammunition. Some important items like mini satellite, Radio Freedom, etc. were acquired for the used of the movement. Small-small diamonds which only the higher authorities and the miners will account for, were collected from the minings done in Kono and Tongo Field but the proceeds according to my understanding were all used in the interest of the movement. In the course of promoting the Movement, diamonds were also collected from Lt. Col. Johnny Paul Koroma himself. Rather unfortunate some of these diamonds and foreign currencies got missed in the hands of Brigadier I.H.Sesay in Liberia when he went to cater for ammunition for the movement. This is the number one grivance of Brigadier Superman, that Brigadier I.H.Sesay was not queried when he lost the diamonds and the foreign currencies but he missed the nine million leones in Freetown, he was brought to quarterdeck. To be frank enough, Brigadier I.H.Sesay was the only strong man under Major-General Sam Bockarie at that time who helped to put situation under control as the enemies were seriously pressing us. Taking Co. Issa off from whatever he was doing at that time and brought him for investigation would have done more harm than good because something worse than the lost of the diamonds and the foreign currencies would have occured. Moreover, the collection of diamonds from some former SLA soldiers, money and diamonds from people who were in Kono when the former SLA soldiers (some of them) broke the bank in Kono, the failure of the authorities to provide Lt. Col. J.P.Koroma with vehicle and communication set may be responsible for the indifferences that cropped-up between the men in the Western jungle and we on this side. Above all, they were expecting that we were going to subdue ourselves to them in our own territory like we did when we in Freetown which resulted to our retreat into the bush.If we have subdued ourselves to these guys, we would have moved from the "frying pot to the fire". The above points triggered the former SLA brothers presenting in the Western jungle to incite Superman to disobey Major-General Sam Bockarie with unwanted unwarranted excuse that Major-General Sam Bockarie insulted and condemned his Lebanese woman. This problem escalated to a point that Brigadier Superman either all by himself or through giving orders killed Col. Bosten Flomo(Rambo) by shooting him.

Although about 90-95% of the SLA brothers including Col. Akim Turay, Lt. Col. Soriba, Lt. Col. Dumbuya, Lt. Col. Bakarr, Major Leather Boot and many others are loyal to this movement but out of observations, the balance 5-10% are power conscious, materialistic and so can be incited by the politicians. Moreover, it will take some of them time to get get use to some of the rules and regulations(ideology) binding the RUF/SL movement.Since we joined together with the brothers, crimes rates have maximally have increased.

Hence as you have come as our leader to join us all to make Sierra Leone a better place to live, you have to set your eyes air, to wipe out all forms of corruptions and in the interim, you and all of us should be concerned about your security as the politicians would want to prevail on these power and material hungry men to do any thing to distort your good good intention for

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WELCOME AND GOD BLESS ALL SIR.

31-09-99.

Signed: Maj

Major Francis M. Musa
District I.D.U. comander
Kailahun.

cc:
Chief of Defence Staff
Battle Field Commander
War Office
File.

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ECONOMIC COMMUNITY OF WEST AFRICAN STATES

REPORT OF THE COMMITTEE OF FOUR ON THE SITUATION IN SIERRA LEONE

ABUJA, AUGUST 26, 1997

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THE SITUATION IN SIERRA LEONE

On 25 May, 1997, a section of the military in Sierra Leone violently overthrew the legitimate government of President Tejan Kabbah. This was an unfortunate event for Sierra Leone. The coup d'etat was tragic in nature and consequence for, upon seizing power, the elements broke into prisons and threw open the gates thus releasing all sorts of criminals and convicts. The rebellious RUF members were invited by the coupists from their bases in the jungle into Freetown. In the general mayhem which ensued, massive looting of property, murder and rape became the order of the day. Vital national assets were not spared as they too were vandalised and looted.

This situation also threatened the stability and security of the neighbouring countries and indeed the entire sub-region. Hundreds of refugees fleeing from the situation in Sierra Leone constituted additional burden on the economies and societies of neighbouring countries, especially Guinea. This situation also posed a special threat to peace in Liberia for which our sub-region had laboured for several years.

REACTION OF THE INTERNATIONAL COMMUNITY

The *coup d'etat* in Sierra Leone took place on Africa Day when the leaders of the continent were gathered in Harare, Zimbabwe on the eve of the 33rd Ordinary Summit of the OAU. The leaders roundly condemned the seizure of power and called for the immediate restoration of constitutional order to the country. They urged the international community not to recognise the illegal regime in Sierra Leone and called on the leaders of ECOWAS to take the lead in restoring constitutional order to the country. The Secretary-General of the UN who was in Harare endorsed the OAU position, including the restoration of the legitimate government. This was reinforced by a statement by the President of the UN Security Council, two

days after the coup, which unequivocally condemned the *coup d'etat.*

Meanwhile, in our sub-region, the Chairman of ECOWAS had commenced measures aimed at resolving the Sierra Leone crisis. His consultations with the leaders of the sub-region resulted in the convening of a meeting of ECOWAS Foreign Ministers in Conakry on 26 June, 1997. The meeting reviewed the situation in Sierra Leone and recommended ways and means of achieving a speedy restoration of constitutional order to the country. It identified three objectives to be pursued by ECOWAS in Sierra Leone. These were:

(i) the early reinstatement of the legitimate government of President Tejan Kabbah;

(ii) the return of peace and security; and

(iii) the resolution of the issue of refugees and displaced persons.

The Foreign Ministers recommended a combination of three measures to be applied in the pursuit of these objectives. These were dialogue, imposition of sanctions/embargo; and the use of force. Furthermore, the Foreign Ministers established a Ministerial Committee of Four, comprising the Foreign Ministers of Nigeria, Guinea, Cote d'Ivoire and Ghana, to be joined by representatives of the OAU and ECOWAS Secretariats. This Committee was charged with implementing the recommendations and decisions on Sierra Leone.

BRIEFING OF THE CHAIRMAN OF ECOWAS

After the Conakry meeting, the newly established Committee of Four on Sierra Leone submitted a report to the Chairman of ECOWAS in Abuja on 6 July, 1997. The Chairman endorsed the recommendations of the Foreign

Ministers and considered it appropriate that ECOWAS position should be conveyed to the Secretary-General of the UN and the UN Security Council, by the Committee of Four.

VISIT TO NEW YORK

On 11 July, 1997, members of the Committee visited New York and briefed the Secretary-General of the UN and the UN Security Council on ECOWAS perspectives on the gravity of the situation in Sierra Leone as well as the need for prompt and concerted action by the international community. The Foreign Ministers restated, in clear and unequivocal terms, the need for the illegal regime to comply fully with the demands of ECOWAS, the OAU and the international community and return power to the legitimate government of President Tejan Kabbah. Following the briefing of the Security Council, a meeting of the Council was convened, at the instance of the ECOWAS Ministers, on the situation in Sierra Leone. At the end of the Council's deliberations, a Presidential Statement was issued which expressed deep concern about the continuing crisis in Sierra Leone and reiterated its view that the attempt to overthrow the democratically elected government of President Kabbah was unacceptable. The Council also welcomed the mediation efforts of ECOWAS and expressed full support for the objectives of these efforts, as set out in the Final Communique of our meeting in Conakry on 26 June, 1997.

DIALOGUE AND NEGOTIATIONS WITH THE ILLEGAL REGIME IN SIERRA LEONE

In accordance with the mandate given to the Committee of Four, we established contact with the elements in Sierra Leone and invited the leader, Major Johnny Paul Koromah, for a meeting in Guinea. However, in their

response, the regime in Freetown indicated a preference for Cote d'Ivoire rather than Guinea as venue for the proposed meeting. The Committee of Four had no difficulty with this proposal. They recognised that Cote d'Ivoire was not only a member of the sub-region but also of the Committee of Four on Sierra Leone. Indeed, Cote d'Ivoire had been actively engaged in the search for peace in Sierra Leone which culminated in signing of the Abidjan Peace Agreement of 30 November, 1996 between the Government of Sierra Leone and the Revolutionary United Front (RUF).

The first meeting with the illegal regime in Sierra Leone took place in Abidjan from 17-18 July, 1997. Major J.P. Koromah was not present but he was represented by a 12-member delegation led by Mr. Alimamy Pallo Bangura. The delegation included politicians such as Dr. Karefa Smart, Dr. Abbass Bundu, some RUF members and a section of the Sierra Leonean military. The Committee of Four presented to the Sierra Leonean delegation, the contents of its mandate, endorsed by the Chairman of ECOWAS, the OAU and the UN Security Council, including the early reinstatement of the legitimate government of President Kabbah. For their part, the Sierra Leonean delegation presented their views on the situation in their country. They expressed their readiness to work towards the early restoration of constitutional order.

Discussions were held in an atmosphere of cordiality and frankness. The representatives of the illegal regime agreed with the views expressed by the Ministers for the resolution of the Sierra Leone crisis. They were however concerned that any solution proffered, should be such that would preserve the dignity of all sides. Consequently, the meeting decided:

(i) to resolve all issues related to the Sierra Leone crisis peacefully, in the best interest of the people of Sierra Leone, the sub-region, Africa and the international community as a whole;

(ii) that all hostilities should cease and therefore a ceasefire be immediately established throughout Sierra Leone while all efforts are deployed towards the peaceful resolution of the crisis;

(iii) to work towards the early restoration of constitutional order including the reinstatement of the legitimate government of President Kabbah; and

(iv) to allow the Sierra Leone delegation sufficient time to return home and hold further consultations with the regime in Freetown in order to facilitate a consideration of the detailed modalities for the return of constitutional order to their country.

From 29-30 July, 1997, the second meeting between the Committee of Four and the representatives of Major J.P. Koromah was held again in Abidjan. This time, the composition of the delegation of the illegal regime, had changed substantially from what it was at the first meeting. Some of the politicians were dropped and the ranks included more RUF members. The Ministers requested the delegation to present their proposals on the modalities for the restoration of constitutional order in their country. Regrettably, the representatives of the regime reneged on the agreement reached at the first meeting on the question of the reinstatement of President Tejan Kabbah. Moreover, while the meeting was in progress, the Foreign Ministers were alerted to an announcement by the illegal regime in Freetown to suspend the constitution of Sierra Leone and remain in office illegally until the year 2001. The implication of this announcement was not lost on the Ministers. They therefore considered that further dialogue with

the representatives of the illegal regime, at that point, would serve no useful purpose. Accordingly, the Ministers decided to recommend to the Chairman of ECOWAS the formal introduction of the regime of sanctions and embargo, which are a part of the measures earlier agreed, to ensure the early and full implementation of the mandate of the Committee of Four.

The Chairman of ECOWAS has since asked for a full-scale application of sanctions and embargo against Sierra Leone, while not foreclosing the option of returning to negotiations, as a way of resolving the crisis peacefully. The Chairman has also renewed his call for the support of the international community for the ECOWAS initiative in Sierra Leone.

ACCRA MEETING

The Foreign Ministers of the Committee of Four convened in Accra, Ghana from 14-15 August, 1997 to review the developments in Sierra Leone in the aftermath of the abortive meeting of 29-30 July, 1997 in Abidjan. At that meeting, they were informed of the new initiatives on Sierra Leone being undertaken by the President of Guinea, H.E. General Lansana Conte and which had the potential of facilitating the peaceful resolution of the crisis in line with the ECOWAS objectives. The initiatives involved a proposed meeting between President Lansana Conte and the leader of the illegal regime in ~~a Guinea~~ Sierra Leone. The facilitator of this process was the former Head of State of Sierra Leone, Major-General Joseph Momoh. Under the circumstances, the Ministers decided to adjourn for a few days and to reconvene in Abuja on 25 August, 1997, in order to allow time for the ~~final~~ initiative to take place.

Meanwhile, it was agreed that details of sanctions and embargo to be applied against the regime in Sierra Leone should be prepared in readiness for submission to the Chairman of ECOWAS, before the commencement of the Summit of the Heads of State and Government of ECOWAS scheduled for Abuja, from 28-29, August, 1997.

CONCLUSION

The situation in Sierra Leone remains a matter of serious concern to our sub-region and our organisation. However, in order to keep our efforts and interests focussed and productive, there is need to take appropriate measures to counter the various machinations of the regime in Sierra Leone who seem more interested in hanging on to power at all cost rather than seek a peaceful negotiated solution to the crisis.

In pursuit of our overall objectives in Sierra Leone, the support of the international community, including the OAU, the Commonwealth and the United Nations, remains important. It is necessary therefore that we keep in close contact with these organisations and institutions, in particular, the UN Security Council. It is noteworthy that the final communique of the meeting of the ECOWAS Foreign Ministers in Conakry and the declaration issued by the Committee of Four at the end of their first meeting in Abidjan with representatives of the illegal regime from 17-18 July, 1997, have been adopted as documents of the Security Council. The Security Council is actively seized with the matter. We express our profound appreciation to members of the international community which have all refrained from according recognition to the regime in Sierra Leone.

Furthermore, whilst the use of force remains an available option to ECOWAS in resolving the crisis in Sierra Leone, sanctions and embargo will first, have to be vigorously applied. The details of sanctions and embargo which were prepared in Accra from 14 to 15 August, 1997, have been prepared, taking into consideration the experiences in other countries where sanctions have been similarly applied. There can be no doubt that in the application of sanctions and embargo, some measures of force may be required. In consideration of this, together with the need to assure peace and security in Sierra Leone and the sub-region, consideration should be given immediately to the extension of the present mandate of ECOMOG, to cover the situation in Sierra Leone.

Nevertheless, in line with our original intention and position, we must keep the door open for the regime in Sierra Leone to carry out realistic negotiations if and when they decide to do so. The application of sanctions should be seen as part of the pacific measures to be taken by ECOWAS against the illegal regime. The main interest of ECOWAS in this case is mainly to ensure the return of peace and stability to Sierra Leone.

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ECONOMIC COMMUNITY OF WEST AFRICAN STATES

SIXTEENTH MEETING OF ECOWAS CHIEFS OF STAFF

ABUJA, 26-27 AUGUST, 1997

FINAL REPORT

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The sixteenth meeting of Chiefs of Staff of ECOWAS Member States was held at the Executive Secretariat Headquarters on 26 and 27 August, 1997.

2. The Chief of Defence Staff of the Federal Republic of Nigeria, Major-General A.A. Abubakar chaired the meeting.

3. The following Member States were present:

- Republic of Benin
- Burkina Faso
- Republic of Côte d'Ivoire
- Republic of The Gambia
- Republic of Ghana
- Republic of Guinea
- Republic of Liberia
- Republic of Mali
- Republic of Niger
- Federal Republic of Nigeria
- Republic of Sierra Leone

4. Also present, following an invitation extended to him was Major-General Shami, the Chief Military Observer of the United Nations Observer Mission in Liberia (UNOMIL).

5. The meeting adopted the following agenda proposed by the Executive Secretariat :

OPENING SESSION

1. Welcome statement by General A.A. Abubakar, Chief of Defence Staff of the Federal Republic of Nigeria
2. Other statements

A200

CLOSED SESSION

3. Security situation in the sub-region
   - Memorandum of the Executive Secretariat
   - Report of the ECOMOG Force Commander
   - Report of Chief Military Observer, UNOMIL
   - Report of the Committee of Four on Sierra Leone

4. Discussions
   - Review of Performance in Liberia
   - Restructuring and training of the Liberian Armed Forces
   - Extension of tenure of ECOMOG in Liberia
   - Extension of ECOMOG's mandate to Sierra Leone
   - Embargo / Sanctions on Sierra Leone
   - Status of Forces Agreement between ECOWAS and Liberia
5. Any other matters
6. Adoption of report

The sixteenth meeting of the ECOWAS Chiefs of Staff commenced with a welcome address by Major-General A.A. Abubakar, Chief of Defence Staff of the Armed Forces of the Federal Republic of Nigeria.

In his address, he conveyed to the meeting the sincere greetings and best wishes of the Head of State, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, current Chairman of ECOWAS, General Sani Abacha for successful deliberations.

Major-General A.A. Abubakar recalled that at the occasion of the 19th Summit of the Authority of Heads of State and Government held in Abuja last year, where the state of collective security and stability in the sub-region was

reviewed, the meeting's primary concern was with the slow progress in the realisation of durable peace in Liberia, particularly in the aftermath of the renewed violence of April 1996.

He however observed that despite of all obstacles placed on its way and by dint of total commitment, dedication and perseverance, ECOWAS has succeeded in putting in place a democratically elected civilian government under the presidency of Mr. Charles Ghankay TAYLOR, and has established peace, security and order throughout Liberia.

Major-General A.A. Abubakar, on behalf of ECOWAS Chiefs of Staff, congratulated President Charles Taylor on his election as the 21st President of Liberia wishing him divine guidance in the formidable task of building a virile and prosperous nation.

He stated that the ECOMOG experience has been hailed as a new initiative in sub-regional conflict resolution the world over.

He paid a well deserved tribute to the ECOMOG High Command and to all the brave men and women under the able leadership of the Force Commander, Major-General SVL Malu and his predecessors for their courage, sacrifice and professionalism in the face of difficulties.

At this juncture, a moment's silence was observed in honour and memory of all those who made the supreme sacrifice by laying down their lives in order that their Liberian brothers and sisters may live a fulfilling life.

The Chairman recalled the recommendation made at their 13th and 14th meetings for the restructuring and training of the Armed Forces of Liberia, Police and security agencies, as part of the revised schedule of the Abuja Agreement.

For this reason he stated,, an ad hoc committee had been set up to provide the necessary framework. He expressed the hope that the report of that committee which would be rendered in the course of the meeting would be considered frankly, to enable Chiefs of Staff to come up with resolute ideas on how to conduct the tasks set out.

The Chief of Defence Staff noted with regret the events in neighbouring Sierra Leone involving the violent overthrow of the legitimate government of President Tejan Kabbah on 25 May 1997 which poses a serious security threat to sub-regional peace and is capable of reversing the gains that have been made in Liberia.

He observed that with the intransigence of the illegal regime of Major J.P. Koromah who has not only reneged on an initial agreement to work towards early reinstatement of President Kabbah but has also announced the regime's intention to remain in office till the year 2001, it becomes necessary for the meeting to review the situation in Sierra Leone.

He stated that from all indications, peaceful resolution through dialogue had failed and the next option without recourse to the use of offensive action, was the enforcement of santions/embargo on the regime through an economic blockade.

He implored the meeting to proffer solutions on how best to conduct whatever mission might be assigned to ECOMOG to ensure the restoration of democracy in Sierra Leone and subsequent relative peace in the sub-region.

In conclusion, Major-General A.A. Abubakar stressed the need for closer ties, cooperation and consultations between the Armed Forces of the Member States, as the future and destiny of all within our sub-region are indeed interwoven.

The Chief of General Staff of the Armed Forces of Niger, Colonel Moussa Djermakoye, expressed his gratitude to His Excellency General Sani Abacha, current Chairman of ECOWAS and Commander-in-Chief of the Armed Forces, and to the military authorities. He paid tribute to the Federal Republic of Nigeria for its commitment and leadership role, a testimony to the importance that country attaches to the ideals and solidarity of the sub-region. He thanked all the Chiefs of Staff of Member States for their peace initiatives in Liberia. The Chief of General Staff of the Armed Forces of Niger expressed his appreciation to the ECOMOG Force Commander, General Victor Malu, for the able manner in which the assignment was executed.

Colonel Djermakoye presented a brief background to the Liberian crisis and outlined the various actions undertaken by ECOWAS in that country. He recalled, in particular, the decision taken on 17 August 1996 by the Heads of State and Government to strengthen ECOMOG. In this connection, he informed the meeting that his country had dispatched a contingent of 320 (three hundred and twenty) men to Liberia.

The Chief of General Staff of the Armed Forces of Niger expressed the wish that the meeting would draw lessons from the joint deployment of the sub-region's armed forces in Liberia. He, specifically underscored the need to capitalise on the experience of ECOMOG in order to evolve a common strategy for effective action against the banes of society such as religious fundamentalism, ethnic strife and power struggles which were likely to cause conflicts.

Colonel Djemarkoye listed the factors which had paralysed the actions of ECOMOG and retarded the accomplishment of its mission. He was of the opinion that ECOMOG should consolidate peace before disengaging totally from Liberia where the newly-restored peace still appeared to be fragile.

Finally, he touched on the distressing situation in Sierra Leone following the military coup d'état of 25 May 1997 and appealed to the junta for a return to democratic rule.

Delivering a statement, His Excellency, Mr. Joe Blell, the Sierra Leone High Commissioner to Nigeria, representing the legitimate Government of Sierra Leone headed by Ahmad Tejan Kabbah, expressed his country's appreciation and gratitude to ECOMOG. He praised the efforts made by the ECOWAS Ministers of Foreign Affairs of the Committee of Four on Sierra Leone to return his country to democracy and the rule of law. He reiterated his country's support for ECOWAS objectives in Sierra Leone and reminded the meeting that without peace in Sierra Leone, the recently-won peace in Liberia would continue to be threatened. He therefore called on ECOWAS to act decisively in Sierra Leone and put an end to the crisis.

LT-Gen. Prince C. Johnson II, the Chief of Staff of the Armed Forces of Liberia, in his statement expressed deep appreciation for the reception and hospitality accorded to his delegation since their arrival in Abuja.

He reflected on the genesis and the extent of the work done by the Chiefs of Staff; the financial, human and material resources invested in the Liberian crisis over the past seven years in the search for peace in Liberia and in the sub-region as a whole.

He also pledged the whole-hearted support of the Government and people of Liberia for all decisions taken, by the body.

On the issue of security in Liberia, Lt.-Gen. Prince C. Johnson II stated that Liberia depends largely upon ECOWAS through ECOMOG for its security until the Armed Forces of Liberia is restructured and re-armed to assume its constitutional role of protecting life and property.

He informed the meeting that the President and Commander-in-Chief of the Armed Forces of Liberia had expressed concern about security in Liberia, largely because of intelligence reports received in Liberia which indicate that:

a) The Kamajors fighting the military junta in Sierra Leone have retreated along the Liberian border areas to launch their attack, with the threat of a possible spillover effect into Liberia;

b) Ex-combatants of the just-ended Liberian crisis are being armed to fight for the Kamajors. Furthermore, security is being undermined by the rising incidence of armed robbery in the city of Monrovia and its environs.

For all these reasons, he stated, it had become imperative that the Armed Forces of Liberia be restructured as soon as possible to enable the army join ECOMOG in its task of providing security in Liberia.

In conclusion, the Liberian Chief of Staff, pledged the support of the Armed Forces of Liberia to all decisions taken by ECOWAS, OAU and the UN to restore the elected Government of Sierra Leone to power.

CLOSED SESSION

Prior to the commencement of its deliberations behind closed doors, the meeting was briefed on the situation in Sierra Leone by Hon. Chief Tom IKIMI, Minister of Foreign Affairs of the Federal Republic of Nigeria and Chairman of the Ministers of Foreign Affairs of the Committee of Four on Sierra Leone. Present at the briefing were other members of the Committee of Four, namely the Foreign Ministers of the Republics of Côte d'Ivoire, Ghana and Guinea and the representatives of the ECOWAS Secretariat. Also present was H.E. Ambassador Kalomoh, the Special Representative of the Secretary-General of the United Nations in Liberia.

Chief Tom Ikimi began by thanking the Chiefs of Staff for permitting the Foreign Ministers of the Committee of Four to brief them on the situation in Sierra Leone. This, he said, was necessary in order to properly acquaint Chiefs of Staff to enable them make appropriate recommendations to the Heads of State.

Chief Ikimi observed that the coup d'état of 25 May 1997 had very peculiar characteristics. It was not only very bloody but was followed by massive looting and widespread vandalisation of public and private properties. The putschists opened up prisons and let out all categories of hardened criminals. They also invited the elements of the RUF into the city of Freetown, thereby disrupting the peace and tranquility of that city. These RUF elements had since assumed and taken over the role of the national army.

It was worth noting that the coup took place on OAU Day and on the eve of the OAU Summit. The OAU therefore wasted no time in condemning the coup. It called for the immediate reinstatement of the legitimate government of Ahmad Tejan Kabbah; urged on the world to support ECOWAS and declared that none of its Members should recognise the junta in Sierra Leone.

Thereafter, following consultations by the ECOWAS Chairman and his colleagues, a meeting of Foreign Ministers was held in Conakry on 26 June 1997. At the end of its deliberations, the meeting agreed to pursue the following objectives:

1) early reinstatement of the legitimate government of President Ahmad Tejan Kabbah;

2) the return of peace and security; and

3) the resolution of the issues of refugees and displaced persons.

These objectives were to be achieved by a combination of three measures, namely dialogue, imposition of sanctions and enforcement of an embargo, including the use of force. In order to increase the effectiveness of the above meansures, the Ministers recommended prior consultations at the highest level.

The Ministers also established an implementation committee comprising the Foreign Ministers of Côte d'Ivoire, Ghana, Guinea and Nigeria.

These proposals, Mr. Ikimi said, were endorsed by the ECOWAS Chairman and the UN Security Council. To date, no government had recognised the junta in Sierra Leone. The OAU, UN, Chief Ikimi said were in constant consultations with ECOWAS.

The Committee of Four immediately decided to implement the first option of dialogue. The first meeting with representatives of the junta was held in Abidjan where some modalities to achieve the objectives were agreed upon. A second meeting with the junta on 29 and 30 July 1996, also in Abidjan, however ended in failure following the announcement by the junta of its intention to stay in office until the year 2001.

Subsequent attempts at dialogue taken by some ECOWAS States also failed, leaving ECOWAS with no other option but to implement sanctions and total embargo.

Chief Ikimi ended by calling on Chiefs of Staff to make appropriate recommendations on modalities for the imposition of the embargo / blockade within international standards.

Upon the departure of the delegation of the Committee of Four on Sierra Leone, the meeting continued its deliberations behind closed doors.

Giving a situation update on ECOMOG operations, Major-General Victor Malu, the ECOMOG Force Commander provided the meeting with a progress report on the Liberian peace process, which had culminated in the holding of transparent, free and fair elections and the subsequent inauguration of His Excellency, Charles Ghankay Taylor as the 21st President of Liberia.

His report dwelt extensively on ECOMOG's contribution towards the successful conduct of the electoral process and its new role of creating an enabling security atmosphere to consolidate the peace process.

Since the completion of the disarmament exercice, ECOMOG had continued its efforts at creating the necessary environment for the return to normal political activities, social order and lasting peace and tranquility. Its cordon and search operations had led to retrieval of over 6000 weapons, most from obscure places such as graves and swamps. All in all, ECOMOG had recovered from the beginning of the disarmament exercise, about 35,000 weapons including: machine guns, assault rifles, bombs, artillery guns, anti-aircraft guns, anti-tank guns and rocket propelled guns. It had also recovered over 4 million assorted small ammunition.

Upon creation of a conducive environment, ECOMOG next switched its energies to assist in the electoral process. It provided the necessary security to IECOM, presidential aspirants, other party functionaries, ballot boxes during and after the elections, registration, voting and counting centres, as well as to others and electoral officials.

In the area of transportation, ECOMOG assisted in the movement by road and air of election materials, lifting of IECOM officials, international observers, ballot boxes etc...

ECOMOG also provided assistance in the area of communications. In the area of man-power and logistics support for ECOMOG, Major-General Malu reported that ECOMOG had received, after the disarmament exercise additional troops from Benin, Burkina Faso, Ghana, Mali and Niger, thereby increasing its total strength to about 11,000 all ranks. Côte d'Ivoire also provided a medical team, and certain members of the international community provided logistics support.

The Force Commander continued by defining the post election role of ECOMOG as:

i) aiding and supporting the Government to maintain and consolidate the peace by providing necessary security;
ii) conducting military operations to rid Liberia of arms;
iii) protecting VIPs and key installations
iv) restructuring and training of the armed forces, police and other security agencies.

To achieve these objectives ECOMOG personnel were redeployed in adequate numbers, all over the country and along the Liberia/Sierra Leone border to prevent any spill over effect. In addition, a National Security Council, with the President of Liberia, as Chairman was constituted. The Council, the meeting was informed, meets regularly and constantly monitors the security situation in the country. The ECOMOG Force Commander is a member of the Council.

The 20 miles embargo zone along the Liberian coast was lifted to allow ships to come in without hindrance and without the hitherto required war risk insurance.

On the important issue of the restructuring of the AFL, the Force Commander reminded delegates that the Liberian crisis had factionalised the Liberian army,

necessitating its complete restructuring together with the police and other security agencies. He emphasised the need to have a disciplined, well equiped armed forces that would be capable of carrying out its functions. Major-General Malu called on the meeting to make appropriate recommendations that would successfully guide the conduct of this vital and important exercise.

The restructuring of the armed forces was behind schedule and so a decision should be taken on the matter without further delay. When formulating appropriate proposals, Major-General Malu said, the meeting should bear in mind that the presumption that ECOMOG troops would remain in Liberia for 6 months after the inauguration of the elected government was not correct; as contributing countries had different timetables for their troops. Whatever the case, Major-General Malu cautioned, it was unlikely that a trained National Army would be in place before the six-month period expired. He therefore called on the meeting to make appropriate recommendations so that an acceptable level of ECOMOG troops is kept in Monrovia for the training and restructuring exercise, and even beyond.

Major-General Malu proposed the training of an army of brigade strength. He also proposed that 4 ECOMOG battalions with a strength of about 600 men each would be ideal for a stay beyond the 6 months approved, in addition to 2 training battalions.

The Force Commander called for a gradual and programmed withdrawal of ECOMOG troops that would not threaten the security of the country and new government.

Although the Executive Secretariat's memorandum dwelt on Liberia and Sierra Leone, the Acting Executive Secretary, Mr. Mahamadou Ouhoumoudou

presented issues relating only to Liberia as the situation in Sierra Leone had already been reported upon by H.E. Chief Tom Ikimi.

Mr. Ouhoumoudou reported on the successful end of the disarmament exercise which paved the way for the conduct of elections. Members of the Independent Elections Commission (IECOM) were appointed and conducted into office on 2nd April 1997. The Supreme Court was restructured.

IECOM prepared an electoral package consisting of the special elections law, an electoral package, and elections budget and a code of conduct for contending political parties.

The elections law provided for a single constituency for the whole of Liberia while a budget of $4.7m was approved for the elections.

Following extensive and detailed preparations, elections were held on 19 July, 1997 at which Liberians showed their eagerness and determination to put an end to their ugly past by turning out in large numbers to vote. The exercise was conducted under a peaceful atmosphere and at the end, it was declared by both local and international observers to have been free, fair and credible.

The elections results, as released, declared the NPP of Mr. Charles Taylor the overall winner.

Mr. Ouhoumoudou called for the articulation of appropriate modalities to ensure the conduct of free, fair and transparent elections in all Member States of the ECOWAS sub-region. The Liberian example, he said, should be a model and a lesson for all.

He concluded by stating that ECOWAS would continue to collaborate with the Government of Liberia to consolidate the peace as well as help in the reconstruction and rehabilitation of the Liberian society.

On his part, Major-General Sikandar Shami, the UNOMIL Chief Military Observer briefed the meeting on the post disarmament deployment of ECOMOG and UNOMIL personnel throughout Liberia. Additional troops for ECOMOG enabled it to deploy to 48 locations all over the country; thus necessitating an increase of UNOMIL's presence from 10 to 16 sites.

The strategic deployment of both ECOMOG and UNOMIL personnel provided the requisite atmosphere for elections.

Major-General Shami went on to inform the meeting of the relatively peaceful and voluntary disarmament exercise except for an incident in Kanweakehn where a group of ex-fighters had surrounded and threatened the UN compound there. However, as this first challenge to ECOMOG's authority since the end of official disarmament exercise was quickly controlled through prompt and effective action by the local ECOMOG commander, it sent the correct message throughout Liberia.

With the successful completion of the disarmament exercise, both ECOMOG and UNOMIL shifted focus to the conduct of the elections. While ECOMOG provided security and logistics support, the UN Military Observers (MILOB's) assisted in preparing grounds for the observation and verification of the electoral process. They provided necessary and vital information on the terrain Infrastructure, population shifting patterns, customs and other local conditions in the hinterland of Liberia. This information, which was shared with IECOM officials and ECOMOG became the basis for the planning of the 1997 elections.

He gave further concrete examples of the high degree of cooperation and collaboration between ECOMOG and the MILOBs during the preparations for the elections.

Major-General Shami paid tribute to officers and men of ECOMOG under the able command of General Malu.

The Chief Military Observer also reported on the very important issue of humanitarian assistance and the manner in which the various UN agencies, USAID and the EU coordinated their efforts to provide basic necessities of life to over 15,000 ex-combatants and civilian war victims. Food was provided, schools reopened and the agricultural sector assisted.

Major-General Shami concluded by expressing satisfaction of the success of the Liberian peace process. He emphasised that this has been the first ever joint operation by the United Nations and sub-regional organisation in which the sub-region had the primary responsibility for ensuring peace keeping. In spite of the fact that there were no guidelines to fall back on, with experience, a close-knit partnership had evolved that definititely enhanced the Liberian peace process. The elections were universally adjudged as having been free, fair and credible.

The leader of the delegation from Ghana representing the Chief of Staff of the Ghana Armed Forces who was said to be unavoidably absent, extended warm felicitations from the Chief of Defence Staff and from all the officers, men and women of the Ghana Armed Forces.

He stated that the Ghana Armed Forces were happy that after seven years of destruction of life and property, the Liberian crisis had come to an end adding that Ghana was indeed proud to be part and parcel of the Force that made possible the restoration of peace and security to Liberia, proving the skeptics wrong.

In this regard, he commended the Force Commander Major-Gen. Malu and all the officers and men of ECOMOG for the excellent job done and thanked the Chiefs of Staff of the ECOWAS Member States for their support for ECOMOG.

He thereafter stated that in furtherance of the Abuja II Accord, Ghana was committed to assist in the consolidation of peace and the restructuring and training of the Armed Forces in Liberia and other security services of Liberia and that Ghanbatt 13 which was launched in February this year in fulfillment of their pledge made at the last meeting will be retained, whilst Ghanbatt 12 will be rotated with Ghanbatt 14 between 22nd September and 10th October 1997.

Finally, he added that ECOMOG Ghanbatt is ever-prepared to undertake any tasks that would facilitate the consolidation of peace and the nurturing of the nascent democracy in Liberia.

OUTCOME OF DELIBERATIONS

In their consideration of the various reports before them, the Chiefs of Staff devoted particular attention to the following:

- evaluation of ECOMOG performance in Liberia
- restructuring and training of the Liberian Armed Forces
- extension of the ECOMOG mandate in Liberia
- sanctions and the Agreement between ECOWAS and Liberia on the status of ECOMOG Forces Agreement

The Chiefs of Staff held constructive discussions on each of these items. Below is a summary of their deliberations.

EVALUATION OF ECOMOG PERFORMANCE IN LIBERIA

The Chiefs of Staff expressed satisfaction at the achievements of ECOMOG Forces in Liberia. They declared that they had followed with pride the activities of the West African force and congratulated the Force Commander, General Victor Malu.

The meeting reiterated its gratitude to the Heads of State and Government of ECOWAS, to Member States and to international organisations whose support made it possible to implement the ECOWAS Peace Plan.

RESTRUCTURING AND TRAINING OF THE LIBERIAN ARMED FORCES

The Chiefs of Staff recalled the different agreements which had provided for the restructuring and training of the Liberian Armed Forces and defined the role ECOWAS was expected to play in that regard.

They noted, however, that it had not been possible to restructure and train the forces before the installation of the elected government, due to the large number of assignments given to ECOMOG as part of the preparation and organisaiton of the elections.

The Chiefs of Staff agreed that the aim of the restructuring exercise would be to establish a truly national army comprising Liberians from all ethnic groups in the country.

They were also of the opinion that the elements of the Liberian armed forces to be trained would include not only recruits but also future instructors. They felt that while the officers might need to go to neighbouring countries which have qualified instructors and adequate training facilities, the recruits could be trained locally. This is all the more feasible since, given its current situation, Liberia needs only a modest force about the size of a brigade. In that connection, the service

chiefs observed that the team of instructors must come from anglophone countries, to facilitate communication with Liberians whose official language is English. However, any francophone country which so desired could provide support for the training programme.

The Chiefs of Staff were of the view that the restructuring and training of the Liberian armed forces would serve to ensure security and consolidate peace in Liberia, and would thus constitute the second part of ECOMOG's mission in that country.

EXTENSION OF THE ECOMOG MANDATE IN LIBERIA

The Chiefs of Staff recalled that the understanding up till now had been that ECOMOG would withdraw from Liberia six months after the swearing in of the elected President.

They acknowledged the delicate nature of a withdrawal which could not be assessed in all its ramification on account of the numerous problems which still need to be addressed within the framework of beefing up security and consolidating the peace in Liberia. The Chiefs of Staff agreed that following ECOMOG intervention during its first mission, extension of its mandate had become an imperative on account of recent political developments in Liberia. They were of the opinion that the length of ECOMOG continued stay should be determined bearing in mind its new duties of strengthening security and keeping the peace; the tasks devolving from these objectives and the resources available.

AGREEMENT ON ECOMOG STATUS OF FORCES

The Chiefs of Staff expressed the view that rather than signing the Status of Forces Agreement with the Government of Liberia, it is the Memorandum of Understanding that should be looked into.

EXTENSION OF ECOMOG'S MANDATE TO SIERRA LEONE

The Chiefs of Staff agreed that a final settlement of the Liberian conflict of necessity demanded a definitive solution to the Sierra Leonean crisis. Having being informed by the Chairman of the Committee of Four, the Honourable Minister of Foreign Affairs of the Federal Republic of Nigeria, Chief Ikimi, that the phase of dialogue with the junta in Sierra Leone had failed, the Chiefs of Staff concluded that implementation of the other measures envisaged for achieving ECOWAS objectives had become inevitable. In this regard, they noted that ECOMOG's mission in Sierra Leone would be possible and effetive only if its scope of operation and mandate were duly extended to cover that country.

SANCTIONS

The Chiefs of Staff took note of the two types of sanctions proposed by ECOWAS to force the junta to restore the legitimate government of President Ahmad Tejan Kabbah. They pointed out that no distinction could be made between an embargo and the use of force because both of these would give rise to closely inter-related problems. According to them, extreme poverty and other socio-economic factors would inevitably lead to the appearance of numerous factions, putting Sierra Leone at risk of disintegration. Under such conditions, the Chiefs of Staff stated, they were convinced that application of the embargo would inevitably lead to the use of force. Their conviction was corroborated by available reports which indicated that the illegal regime in Freetown would be unable to

withstand an embargo, if effectively applied. For this reason, the Chiefs of Staff requested a full briefing on the status of forces in Sierra Leone. Having obtained this information, the Chiefs of Staff decided to recommended imposition of an enforced embargo for four weeks after which an evaluation would be carried out and appropriate recommendations made to the Heads of State and Government. The service chiefs recognised that Member States must show firmness, real cohesion and sincerity. These conditions must be fully met if the sanctions agreed jointly were to succeed.

RECOMMENDATIONS

At the end of their meeting, the Chiefs of Staff made the following recommendations to the Ministers of Foreign Affairs:

i) a) ECOMOG should be authorised to restructure and train the Liberian armed forces.

b) Funds and logistics for this exercise should be sought from ECOWAS Member States and friendly countries.

ii) a) ECOMOG's mandate in Liberia should be extended by at least one year.

b) The ECOMOG Force Commander should be instructed to prepare a detailed time table for the orderly withdrawal of ECOMOG forces from Liberia.

iii) ECOMOG's field of operation should be extended to Sierra Leone and its mandate expanded to include the strict enforcement of the sanctions recommended.

iv) a) ECOMOG should be mandated to enforce the embargo for a a period of four weeks initially.

b) At the end of that period, the Committee of Four should assess the level of application of the sanctions and, if necessary, make appropriate recommendations to the Heads of State and Government on further actions to be taken.

c) In order to ensure the effective and successful application of the embargo Member States should contribute troops and equipment as necessary.

ANY OTHER MATTERS

The Executive Secretariat submitted to the meeting a memorandum which it has received from the Liberian Government calling for the lifting of sanctions imposed on the parties to the Liberian conflict by ECOWAS and the United Nations Security Council.

Having considered this request, the Chiefs of Staff expressed the view that since Liberia's security was being ensured by ECOMOG, there was no immediate need for the country to import military hardware. They pointed out that since the embargo decided upon by ECOWAS and the United Nations concerned the supply of arms, amunition and military hardware, it was neither necessary nor expedient to recommend that this measure should be lifted.

The Executive Secretariat also submitted to the meeting a memorandum concerning an ECOWAS special documentation project on the peace process in Liberia. The project which involved the production of an authoritative report on the peace process in Liberia, was considered favourably by the Chiefs of Staff who expressed the desire to see it through and therefore recommended to the Community decision-making bodies to adopt the measures contained in it.

Finally, the representative of the legitimate Government of Sierra Leone, Ambassador Joe Blell, proposed the establishment by ECOWAS of a conflict prevention and resolution unit. The meeting called on the Executive Secretariat to examine the issue.

ADOPTION OF REPORT

This report was adopted after amendments.

CLOSING SESSION

In his closing remarks, General Abdulsalami Alhaji Abubakar expressed gratitude to the Chiefs of Staff and their representatives for the quality of their contributions to the discussions and for the frank manner in which they had addressed the issues. On behalf of His Excellency General Sani Abacha, Head of State, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, he commended all those who had contributed to the restoration of peace to Liberia, despite the limited resources at the disposal of their countries. He requested the Chiefs of Staff to convey the gratitude of the Chairman of the Authority to their troops and Heads of State for the invaluable contribution each had made to the peace process in Liberia.

The Chairman of the 16th meeting of the Chiefs of Staff prayed that peace would reign in Liberia and in the whole of the sub-region.

General Abubakar expressed the hope that the friendship which had existed between the Chiefs of Staff all through the Liberian crisis would continue to grow. He called on the Chiefs of Staff to reflect on ways of strengthening the solidarity and fraternal relations between the armed forces of Member States not only in the

military field but also in the areas of sporting activities and the training of officers and men.

He thanked UNOMIL for the assistance which it had given to ECOMOG towards the effective implementation of the peace process in Liberia.

Finally, General Abubakar wished all participants a safe journey back to their respective homes.

DONE AT ABUJA THIS 27TH DAY OF AUGUST, 1997

MAJOR-GENERAL ABDULSALAMI A. ABUBAKAR
CHAIRMAN

FOR THE MEETING

ECONOMIC COMMUNITY OF WEST AFRICAN STATES

COMMUNAUTE ECONOMIQUE DES ETATS DE L'AFRIQUE DE L'OUEST

SIXTEENTH MEETING OF ECOWAS CHIEFS OF STAFF

SEIZIEME REUNION DES CHEFS D'ETAT MAJOR DE LA CEDEAO

ABUJA, 26-27 AUGUST 1997 / 26-27 AOUT 1997

LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS

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COTE D'IVOIRE	GENERAL TANNY E. JOSEPH AMARA ESSY COLONEL DIABAKATE SOUMAHILA TRAORE AMADOU BAH ROBERT MINGUI KEFFA EMILE AIDARA ABDOULAYE	SECRETAIRE GENERAL DU CONSEIL NATIONAL DE SECURITE MINISTRE DES AFFAIRES ETRANGERES SOUS-CHEF DES OPERATIONS AMBASSADEUR, DIRECTEUR AFRIQUE, ASIE ET MOYEN ORIENT ADMINISTRATEUR CIVIL/C.N.S. AMBASSADEUR CHEF DE DIVISION
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UNITED NATIONS

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FOURTH REPORT OF THE SECRETARY-GENERAL ON THE SITUATION IN SIERRA LEONE

I. INTRODUCTION

1. The present report is submitted pursuant to the presidential statement issued by the Security Council on 26 February 1998 (S/PRST/1998/5), by which the Council requested me to submit detailed proposals concerning the role of the United Nations and its future presence in Sierra Leone. It covers the developments in Sierra Leone since the issuance of my third report on 5 February 1998 (S/1998/103).

II. IMPLEMENTATION OF SECURITY COUNCIL RESOLUTION 1132 (1997)

Action taken by the Economic Community of West African States and the Economic Community of West African States Monitoring Group

2. On 5 February 1998, the Economic Community of West African States (ECOWAS) Committee of Five on Sierra Leone came to New York to brief the members of the Security Council and myself on the situation in Sierra Leone. The Chairman of the Committee of Five, the Foreign Minister of Nigeria, Chief Tom Ikimi, said an impasse had been reached in the implementation of the Conakry Agreement. He pointed out that the junta had raised three issues which, in its view, stood in the way of the implementation of the Agreement, namely, the release of Corporal Foday Sankoh, the proposed exemption of the Republic of Sierra Leone Military Forces from the disarmament process and the composition of the ECOWAS Monitoring Group (ECOMOG) which consisted primarily of Nigerian troops.

3. Minister Ikimi noted that because of this impasse, ECOMOG had been unable to deploy in Sierra Leone to carry out the disarmament and demobilization of the Sierra Leonean combatants, and it had therefore not been possible to deploy United Nations military observers alongside ECOMOG.

4. Minister Ikimi requested my support in launching a high-level effort to support ECOWAS through the establishment of a group of friends of Sierra Leone, and expressed the view that the Security Council should endorse the 22 April 1998 deadline for the restoration of constitutional authority and the full implementation of the Conakry Agreement of 23 October 1997.

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5. I reaffirmed to the Committee of Five the desire of the United Nations for close cooperation between the United Nations and ECOWAS, and stated that ECOMOG needed to develop a concept of operations on the basis of which the United Nations could finalize its own deployment plan. ECOMOG should also compile a statement of its own logistical requirements in order to attract the necessary support from potential donors.

6. On the same day, responding to an attack by junta forces on their position at Lungi, ECOMOG launched a military attack on the junta, which culminated approximately one week later in the collapse of the junta and its expulsion by force from Freetown after heavy fighting. The fall of the city on 13 February, which was accompanied by widespread looting and some reprisal killings, led to the flight or capture of many soldiers and leaders of the junta. ECOWAS has assured me that the International Committee of the Red Cross (ICRC) has been allowed to visit prisoners detained by ECOMOG in Freetown. However, some of the former leaders of the Armed Forces Revolutionary Council (AFRC), including its Chairman, Johnny Paul Koroma, are believed to be still at large. Acting in concert with the local Kamajors and other traditional hunter militia (known as the Civil Defence Unit), ECOMOG has subsequently taken control of the towns of Bo, Kenema and Zimmi in the south of the country, and Lunsar, Makeni and Kabala in the north. ECOMOG has also reported the capture of Daru, which would mean that the remnants of the junta have now been dislodged from every major town except for Kailahun. Following scattered fighting in the latter part of February, the country now appears to be quiet. A number of foreign aid workers and missionaries taken hostage by armed elements in February were later released unharmed. However, press reports in mid-March indicated that Revolutionary United Front (RUF) members in Kono had murdered civilians and taken 200 hostages, reportedly including foreign nationals.

7. On 18 February, accompanied by the Executive Secretary of ECOWAS, Mr. Lansana Kouyaté, Minister Ikimi visited Sierra Leone to assess the situation on the ground. They interviewed some former junta soldiers now detained by ECOMOG and visited the State House complex and the Parliament buildings. Many of the government buildings were found to have been looted and were in poor condition, and a number of unexploded bombs were scattered about. However, the ECOWAS team, which was enthusiastically greeted by crowds, found that in many respects life had returned to normal in the capital. As noted below, my Special Envoy also visited Freetown on the same day.

8. From 25 to 27 February 1998, the Committee of Five met in the margins of the meeting of the Organization of African Unity (OAU) Council of Ministers held in Addis Ababa to review the situation in Sierra Leone. The Committee issued a communiqué, which was subsequently circulated as document S/1998/170.

9. On 4 March 1998, the members of the Committee of Five returned to New York and met again with members of the Security Council and with me. Chief Ikimi briefed me on his visit to Freetown on 18 February and his subsequent meeting with President Tejan Kabbah in Conakry. Following this meeting, it was announced that President Kabbah would return to his country on 10 March 1998.

10. ECOMOG has also prepared a detailed list of logistical requirements for its operations in Sierra Leone. During the visit to New York of the Committee of

Five, Chief Ikimi requested the assistance of the United Nations and the international community in ensuring that these requirements could be met. That request was reaffirmed by the Chairman of ECOWAS, General Sani Abacha, in his statement at the ceremony held to mark the return of President Kabbah to Freetown on 10 March.

Action taken by the United Nations

11. On 18 February 1998, a few days after ECOMOG had established control over most of the city of Freetown, my Special Envoy, Mr. Francis G. Okelo, led a security and humanitarian assessment mission to the capital and to Lungi comprising United Nations and non-governmental organization officials. The mission determined the most immediate needs of the population. Mr. Okelo handed over a quantity of medicines donated by the World Health Organization (WHO) to local hospitals and began preparations for the re-establishment of a United Nations presence in Freetown. A few days later, the World Food Programme (WFP) delivered 857 metric tons of food to Freetown by ship.

12. Early in February, pursuant to a request by members of the Security Council for a technical assessment of the humanitarian situation in Sierra Leone since the coup d'état of 25 May 1997, an inter-agency mission travelled to the subregion. Its report is contained in document S/1998/155. Further information on the humanitarian situation in Sierra Leone can be found in section III of the present report.

13. Pursuant to the statement issued by the President of the Security Council on 26 February, I have initiated the necessary action to establish a Trust Fund for Sierra Leone. Contributions would help finance logistical assistance to ECOMOG, rehabilitation assistance to the Government of Sierra Leone and activities, including disarmament, demobilization and human rights.

14. On 7 March 1998, my Special Envoy reopened the United Nations office in Freetown, which had been closed shortly after the 25 May 1997 coup d'état and was temporarily relocated in Conakry, Guinea. The office is now being strengthened to comprise civilian political and humanitarian officers, a military adviser and, in due course, human rights and civilian police advisers and public information personnel. The function of the office is to liaise with the Government of Sierra Leone, ECOWAS, ECOMOG and the United Nations and its agencies, as well as non-governmental organizations, and to act as the overall authority for all United Nations activities in the country. My proposals for deploying military liaison personnel as part of the United Nations presence on the ground can be found in section IV of the present report. My Special Envoy will also temporarily retain a small office in Conakry, but he expects to be fully established in Freetown by the end of March, thus paving the way for the return of all United Nations agencies to Sierra Leone.

Action taken by the Government of Sierra Leone

15. On 13 February 1998, President Kabbah called a meeting in Conakry of potential donors, including the European Union, Germany, the United Kingdom of Great Britain and Northern Ireland and the United Nations, to discuss his Government's priorities; the nature of the assistance the international

community could provide; and the urgent provision of humanitarian assistance. The President announced that he had created a task force to prepare the ground for the resumption of work by his Government, to assess damage to the infrastructure and to prepare for the resumption of education. President Kabbah identified the immediate priorities of his Government as the provision of humanitarian supplies and petroleum products, the reactivation of international aid programmes and the disarmament and demobilization of former combatants. Three other areas that required special attention have been identified as the training and restructuring of the police force, the creation of job opportunities for young people and the construction of low-cost housing. President Kabbah also indicated that he intended to streamline his administration and appoint technical experts to cabinet positions.

16. Following the removal by ECOMOG of the military junta from power, President Kabbah issued a statement announcing his intention to submit proposals to Parliament concerning the rebuilding of his country. The President also spoke out against the reprisal killings, which, in some cases, had accompanied the seizure of control from the junta.

17. On 10 March 1998, accompanied by General Sani Abacha, Chairman of ECOWAS and Head of State of Nigeria, as well as the Heads of State of Guinea, Mali and Niger, President Lansana Conteh, President Alpha Oumar Konare and President Ibrahim Bare Mainassara, and the Vice-President of Gambia, President Tejan Kabbah returned to Freetown to resume his office as Head of State of Sierra Leone. He was greeted by large and enthusiastic crowds. Mr. Ibrahima Fall, Assistant Secretary-General for Political Affairs, delivered on my behalf a message of congratulations to the President stating that his return represented the accomplishment of a major objective not only of the people of Sierra Leone, but also of ECOWAS, OAU, the United Nations and the entire international community. I expressed my deep regret at the violence, loss of life and property and immense suffering undergone by the people of Sierra Leone since the coup d'état and extended my condolences to the families of those who lost their lives in opposing it. Furthermore, I informed the President that the United Nations looked forward to working closely with him in helping his Government to reassert its authority and strengthen its capacity throughout the country.

18. In a statement made at the ceremony marking his return to Sierra Leone, President Kabbah declared his intention to embark on the process of national reconciliation and reconstruction of the country, to form a broad-based Government and to appoint a policy advisory committee. In his first meeting with my Special Envoy after his return, President Kabbah stressed the need for an early deployment of United Nations military personnel, the urgent provision of humanitarian assistance and the prompt establishment of the Trust Fund for Sierra Leone.

Military and security situation in Sierra Leone

19. Freetown is now fully under the control of ECOMOG and is increasingly secure. Some unexploded ordnance and landmines have been found, but these are not a threat to security. The peninsula on which the capital stands has also been secured. With the capture of almost every other major town in the country,

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and through its deployment further into the countryside in the north, south and east, ECOMOG has established itself successfully across most of the country.

20. Nevertheless, the fact that many of the senior junta leaders, including the former Chairman of the AFRC, Johnny Paul Koroma, have not thus far been apprehended, as well as the continuing violence inflicted on civilians during their retreat from ECOMOG forces by RUF and other armed elements, indicate that the security situation in Sierra Leone is still a source of concern. Though ECOMOG has begun to collect weapons in Freetown, a major disarmament, demobilization and reintegration exercise will be needed to ensure security.

21. ECOMOG has also developed a concept of operations for its deployment throughout Sierra Leone that sets out the preliminary planning for the disarmament and demobilization of Sierra Leonean combatants. In summary, the tasks ECOMOG has set for itself include:

(a) Deployment throughout Sierra Leone;

(b) Manning of selected entry points by land, sea or air in order to ensure that no arms, ammunition or war matériel are brought into the country;

(c) Disarmament of ex-combatants at designated sites;

(d) Establishment of road blocks to check the movement of arms and ammunition and to assist in extending protection to refugees and internally displaced persons;

(e) Conducting patrols to create an atmosphere conducive to freedom of movement and the restoration of established authority;

(f) Providing security for key individuals, United Nations personnel, including military personnel, and non-governmental organizations.

22. The plan calls for the deployment of 15,000 troops in four sectors: western, northern, southern and eastern. The western sector, comprising Freetown and the airports of Lungi and Hastings, is further subdivided, and would support the deployment of seven battalions, an air force detachment and an artillery brigade. This appears to be an ample level of force for the protection of the capital and its airport.

23. In the northern sector, ECOMOG would deploy a brigade headquartered at Makeni, with battalions located at Port Loko, Magburaka and Kabala. In the south, ECOMOG will locate its brigade headquarters at Bo and deploy battalions at Moyamba, Pujehun and Kenema. Naval assets would also be required. The eastern sector is described as strategic in view of its mineral resources, the presence of heavy RUF and Kamajor concentration, and the border with Liberia. ECOMOG therefore considers that operations in the east could prove difficult and risky and demand a robust approach, alertness and deployment in strength. Battalions would be located at Yengema, Zimmi and Kailahun.

24. ECOMOG would also establish a disarmament committee which would be charged, inter alia, with selecting disarmament sites; setting standards and guidelines

for disarmament; conducting the disarmament, coordination of resources and cooperation with other organizations; classifying and transporting recovered weapons and ammunition; disseminating information about the process and providing security for all participants. A ceasefire violations committee and a humanitarian services committee would also be created.

25. My Special Envoy and his staff are actively discussing with the Government and with ECOMOG the further elaboration and implementation of its concept of operations, which provides a suitable basis for the possible subsequent deployment of United Nations military personnel, subject to the authorization of the Security Council. I will revert to the Council with further recommendations on such deployment following a further assessment by my Special Envoy.

Other action taken pursuant to resolution 1132 (1997)

26. Since my previous report, a number of States have written to me, in compliance with paragraph 13 of resolution 1132 (1997), concerning the steps they have taken to give effect to the provisions contained in paragraphs 5 and 6 of the resolution relating to the sanctions imposed by the Council on Sierra Leone. The latest list of those States can be found in a separate report to the Security Council contained in document S/1998/112.

27. In a letter dated 9 March 1998 addressed to the President of the Security Council (S/1998/215), the Chargé d'affaires a.i. of the Permanent Mission of Sierra Leone to the United Nations conveyed a request from his Government for the convening of an urgent meeting of the Security Council to consider the lifting of the sanctions imposed on the importation of petroleum and petroleum products into the country in paragraph 6 of resolution 1132 (1997). On 16 March, the Council adopted resolution 1156 (1998) terminating, with immediate effect, the prohibitions on the sale or supply to Sierra Leone of petroleum and petroleum products referred to in resolution 1132 (1997).

III. HUMANITARIAN SITUATION

28. A number of United Nations humanitarian assessment missions have now been undertaken to Freetown, Kambia, Bo, Kenema and Makeni. These missions determined that the current humanitarian situation in Sierra Leone remains serious. The primary health care system has been devastated by lack of supplies, looting and the exodus of medical personnel at all levels. Widespread neglect of water and sanitation facilities has increased the exposure of hundreds of thousands to disease. The normal distribution of food to vulnerable groups has been disrupted, affecting children in particular. Many children have also suffered exposure to acts of violence by being sent into battle as combatants. The public education system has collapsed; all schools have been closed since the coup d'état last May. The combination of fighting and looting has led to extensive damage to housing and infrastructure in the provincial towns. The number of internally displaced people has increased, and the welfare of some 14,000 Liberian refugees remains a matter of concern, as many fled from their camps during the recent fighting. The majority of Sierra Leoneans who took refuge in Conakry during the fighting in Freetown have returned. However, some 24,000 Sierra Leoneans have arrived in Liberia since mid-February and the

influx continues, albeit at a reduced rate. A further influx of 3,000 refugees from the Kailahun area, still not under ECOMOG control, has been registered by the Office of the United Nations High Commissioner for Refugees (UNHCR) at its camp in Kissidougou, Guinea.

29. United Nations agencies prepared a consolidated inter-agency flash appeal, which was launched on 3 March 1998. Through this appeal, I am seeking financial contributions from Member States in the amount of $11.2 million to meet priority humanitarian needs in Sierra Leone over the next three months. Priority needs include support to agriculture through the provision of seeds and tools, the re-establishment of basic health and education services, the resumption of food aid distributions and the provision of assistance and protection to the most vulnerable groups affected by the current conflict. The flash appeal complements the 90-day programme of the Government of Sierra Leone, which serves as a framework for action following the restoration of democratic civilian rule in the country.

30. The full deployment of ECOMOG and the restoration of the legitimate Government is expected to provide increased opportunities for the humanitarian community to accelerate its activities in response to the humanitarian crisis in Sierra Leone, and will also encourage the return to their homes of internally displaced persons. It is hoped that the international community will contribute generously to the humanitarian programme outlined in the flash appeal, in order to provide the crucial assistance needed to sustain lives and to promote stability in Sierra Leone.

31. Medium-term tasks, such as the assisted repatriation of Sierra Leonean refugees and reintegration of ex-combatants, are not covered in the flash appeal. However, United Nations agencies are already re-establishing their offices in Freetown and are eager to restart their social and economic development programmes, important components of which must be the re-building of the capacity of the Government of Sierra Leone to deliver services, stimulate economic recovery and promote national reconciliation and reconstruction.

Commencement of the repatriation of refugees

32. At the request of President Kabbah, and with the help of a donation of $120,000 from the Government of Japan, UNHCR has begun to prepare for the repatriation from Conakry of up to 5,000 Sierra Leonean refugees, including 200 civil servants who fled Freetown after the May coup d'état and who will be engaged in the administration of the country.

33. ECOMOG control of major towns in southern Sierra Leone is also likely to encourage the early repatriation by road of Sierra Leonean refugees from Liberia. It is further expected that the removal of the junta could lead to the repatriation of the 400,000 Sierra Leonean refugees in the West African subregion.

34. Of the total caseload of Liberian refugees in Sierra Leone, some 2,800 have thus far been re-registered with UNHCR, about half of them requesting repatriation. UNHCR has begun making arrangements for them to be repatriated by sea.

United Nations Development Programme mission to Sierra Leone

35. A multi-unit mission to Sierra Leone dispatched by the United Nations Development Programme (UNDP) has proposed four projects for immediate implementation following their approval by the Government. These are:

(a) A start-up project for the demobilization of various categories of combatants;

(b) Support for national institutions to enable a rapid return to normal functioning;

(c) Resettlement with emphasis on quick-impact micro-projects, reconciliation and youth development;

(d) Awareness-raising in order to help the country come to terms with the problems it faces and to promote national reconciliation and peace-building.

36. The mission is also assisting the Government to prepare a document for a donors' consultation proposed to be held in Brussels on 31 March 1998. UNDP plans to close its Coordination Office in Conakry by the end of March if the security situation continues to stabilize, and to return the staff of its Country Office to Freetown.

IV. OBSERVATIONS AND RECOMMENDATIONS

37. The developments that have taken place in Sierra Leone since the submission of my last report should be seen as positive in the context of the wider situation in which they transpired. The removal of the junta by the action of ECOMOG has opened the way for the re-establishment not just of the legitimate Government, but also of civil order, the democratic process and the beginnings of economic and social development. The return of President Kabbah to Freetown on 10 March therefore presents the people of Sierra Leone and the international community with a challenge and an opportunity which must be grasped with a sense of urgency. We must not let slip the chance to restore Sierra Leone to the ranks of democratic nations and to help strengthen the stability of the subregion.

38. I commend the consistent diplomacy of ECOWAS and, in particular, its Committee of Five on Sierra Leone, and the contribution made by ECOMOG officers and men to the removal of the military junta. I call on ECOWAS and ECOMOG to continue their efforts to bring peace to Sierra Leone in accordance with the relevant provisions of resolution 1132 (1997) and of the Charter of the United Nations. Sierra Leoneans committed to the democratic system also played their part in maintaining a stubborn resistance to the illegal regime. These included not only the members of the Civil Defence Forces, but also countless unarmed civilians who persistently withheld their cooperation from the regime and denied it legitimacy. I salute the courage of the Sierra Leonean people and honour the memory of those who died opposing the junta.

39. I also congratulate President Ahmad Tejan Kabbah on his resumption of his responsibilities as Head of State of Sierra Leone following his return. The United Nations should give his Government every possible assistance in its efforts to promote national reconciliation among his people and to strengthen the authority and capacity of his Government.

40. As I stated in my message to the annual summit meeting of the Organization of African Unity at Harare, and in the special message which was delivered by my Special Envoy, Mr. Ibrahima Fall, on the occasion of President Kabbah's return, Africa can no longer tolerate or accept as faits accomplis coups d'état against elected Governments or the illegal seizure of power by military cliques.

Strengthening the office of the Special Envoy

41. In order to take full and prompt advantage of the changed situation, I wish to propose a comprehensive set of measures to assist the Government and people of Sierra Leone in both their immediate and longer-term needs. As a first step, I intend to strengthen the office of my Special Envoy in Freetown. In order to contribute to the restoration of respect for the rule of law, civil order and human rights in Sierra Leone, I have consulted with the United Nations High Commissioner for Human Rights concerning the possible deployment of human rights observers. In the meantime, a human rights officer will be attached to the office of my Special Envoy at an early date.

42. I am also considering attaching to the office two civilian police officials to advise the Government on police training and procedures in a democratic society. An additional political officer and a military adviser would assist my Special Envoy in his consultations with ECOMOG on the development of planning for disarmament and demobilization, while a humanitarian officer would facilitate the coordination of activities of the United Nations and non-governmental organizations in Sierra Leone and advise my Special Envoy on all issues involving non-governmental organizations. The office will also require a public information programme to disseminate information among the population about its activities, in particular in connection with the disarmament and demobilization of ex-combatants and their reintegration into society.

Deployment of military liaison personnel

43. I also recommend the deployment to Sierra Leone of up to 10 United Nations military liaison officers, whose functions would be as follows:

(a) To liaise closely with ECOMOG and to report on the military situation in the country;

(b) To ascertain the state of and to assist in the finalization of planning by ECOMOG for future tasks such as the identification of the former combatant elements to be disarmed and the design of a disarmament plan.

44. Should the Security Council decide to authorize the deployment of these military liaison officers, as well as the military and civilian police advisers, as indicated in my third report (S/1998/103, para. 35), the costs relating

thereto should be considered an expense of the Organization to be borne by Member States in accordance with Article 17, paragraph 2, of the Charter of the United Nations and the assessments to be levied on Member States should be credited to the special account to be established for Sierra Leone. The related cost estimates will be issued shortly as an addendum to the present report.

45. The military liaison team would complement the role of the military advisers who will, under the authority of my Special Envoy, continue to assist the Government of Sierra Leone to resolve issues related to the disarmament process. The military advisers will also be instrumental in assisting the Government of Sierra Leone in the development of planning for bilateral programmes to restructure and rebuild appropriate security forces for Sierra Leone in the future. In view of the importance of such retraining, I appeal to potential donors to show generosity in providing bilateral assistance.

46. The presence of United Nations military liaison officers, perhaps later supplemented by human rights observers, could also assist in the process of national reconciliation in Sierra Leone. Their close cooperation with ECOMOG in the countryside and their impartial reporting to my Special Envoy would reassure former combatants that they can surrender their weapons in safety.

Provision of humanitarian assistance

47. The provision of humanitarian assistance must also proceed expeditiously. The plight of Sierra Leoneans deprived of food, medical care and shelter by the recent fighting and the abuses of junta rule is acute, and it must be addressed as a matter of urgency with all the resources available to the aid agencies. While I remain deeply concerned about the humanitarian situation in many parts of the country, I am encouraged by news that humanitarian needs are beginning to be addressed. Food aid and emergency medical supplies have entered the country through the port of Freetown and have been delivered to some provinces by plane, helicopter and overland in a prompt and coordinated manner.

Contributions to the Trust Fund

48. I call on Member States to display generosity in contributing to the Trust Fund for Sierra Leone which, with the encouragement of the Security Council, I have established. My appreciation goes to the Government of the United Kingdom, which has already announced its readiness to contribute £2 million, and has been actively assisting in the provision of aid to Sierra Leoneans. I also urge all Member States to provide generous assistance to ECOMOG to enable it to meet its logistical requirements and to fulfil its mandate in Sierra Leone.

49. The events that have taken place in Sierra Leone over the past year carry a warning that similar crises may arise and challenge the international community to consider how it should respond to them. Democracy in Sierra Leone may have deep roots, but it is a fragile plant and must be nurtured. The international community must maintain its vigilance and support, not least in the prompt provision of emergency bilateral and multilateral aid. Assistance for the laudable efforts of ECOWAS and the logistical requirements of ECOMOG as it continues its deployment through the countryside will also be required. I trust that such support will be forthcoming.

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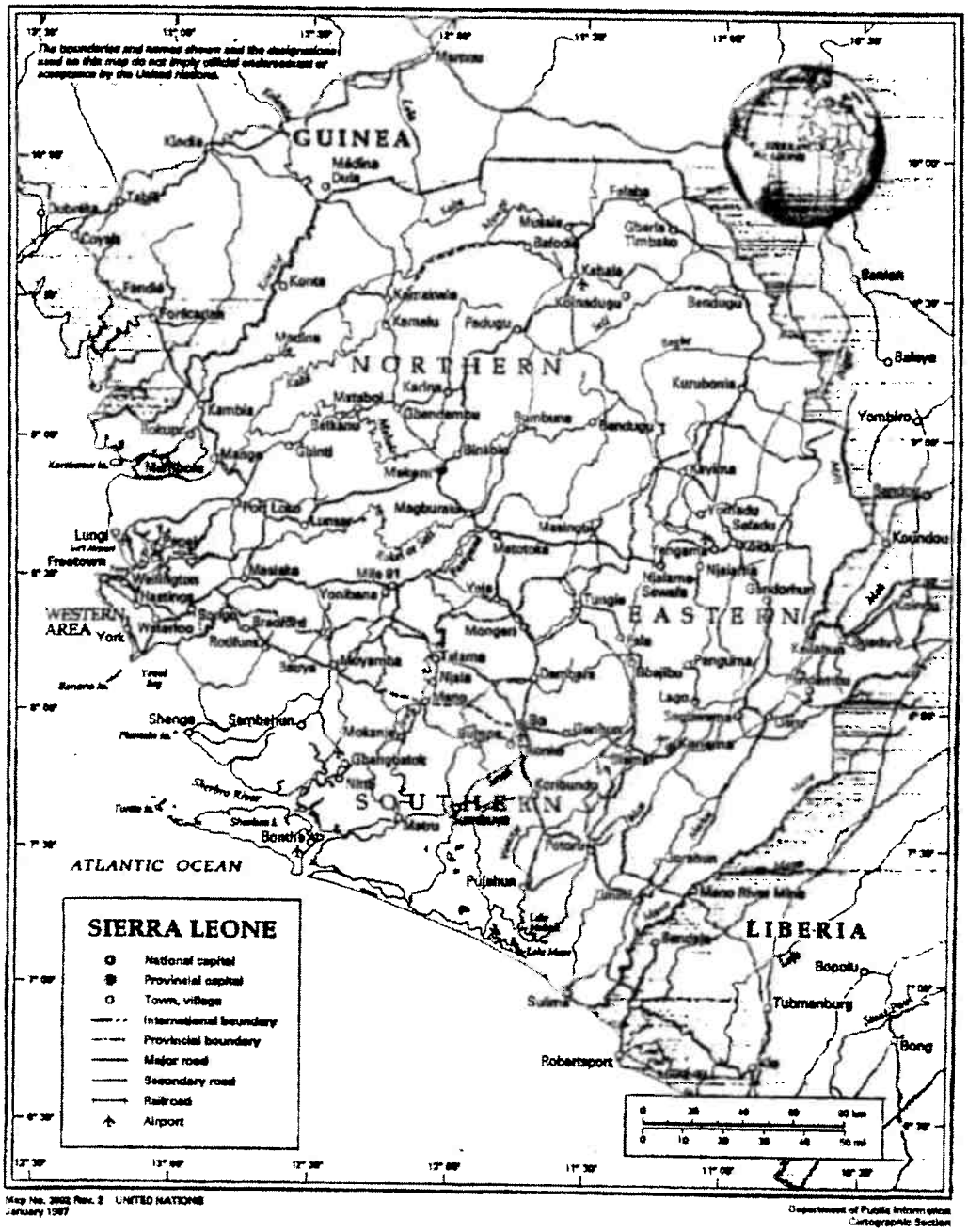
The boundaries and names shown and the designations used on this map do not imply official endorsement or acceptance by the United Nations.
GUINEA
LIBERIA
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NORTHERN
EASTERN
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SOUTHERN
Freetown
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Yengema
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Bonthe
Pujehun
Zimmi
Sulima
Robertsport
Bopolu
Tubmanburg
Bong
SIERRA LEONE
National capital
Provincial capital
Town, village
International boundary
Provincial boundary
Major road
Secondary road
Railroad
Airport
Map No. 2602 Rev. 3 UNITED NATIONS
January 1997
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The US embassy cables:
The documents

US embassy cables: Rising concern about the Charles Taylor prosecution case

guardian.co.uk, Friday 17 December 2010 21.30 GMT

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Tuesday, 10 March 2009, 12:51
CONFIDENTIAL SECTION 01 OF 02 MONROVIA 000188
SIPDIS
EO 12958 DECL: 03/10/2019
TAGS PREL, PGOV, UNSC, PHUM, KCRM, LI
SUBJECT: PRO-TAYLOR ELEMENTS STILL A FORCE TO BE RECKONED WITH
Classified By: Ambassador Linda Thomas-Greenfield for Reasons 1.4 (b) a nd (d).

Summary

A US ambassador warns that a cash shortfall could jeopardise the case against the former Sierra Leone president, stirring up old resentments in Sierra Leone and Liberia. Key passages highlighted in yellow.

1. (C) Summary: The recent remarks by Special Court for Sierra Leone prosecutor Stephen Rapp suggesting Charles Taylor may go free because of budgetary reasons caused alarm within the GOL and has emboldened Taylor supporters. Communication inside the Taylor camp remains intact, and those in leadership roles continue to be active and unrepentant. Should Taylor be acquitted in The Hague or given a light sentence, his return to Liberia could tip the balance in a fragile peace. *The international community must consider steps should Taylor not be sent to prison for a long time. We should look at the possibility of trying Taylor in the United States.* End Summary.

RAPP'S COMMENTS RAISE CONCERN WITHIN THE GOL

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2. (C) Chief Prosecutor Stephen Rapp's ill considered announcement in the press February 24 that Charles Taylor may walk free because of a supposed budget shortfall for the Special Court for Sierra Leone, where Taylor is presently on trial, made

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headlines in the local press, and raised anxiety here about Taylor's imminent return. The GOL was alarmed enough that President Sirleaf called Ambassador on February 28 to raise her concerns. Sirleaf pointed out that Liberia's stability remains fragile, and such remarks reverberated throughout the country, as people are still traumatized by Taylor and the war.

3. (C) The press accounts out of The Hague have also emboldened the pro-Taylor factions here, including his extended family members, financiers and National Patriotic Party (NPP) loyalists, raising their hopes that Taylor might be acquitted soon. Despite their rhetoric about "moving on," they have thus far refused to appear before the Truth and Reconciliation Commission (TRC) to account for their activities, and those on the UN Sanctions lists continue to request delisting on the basis they have done nothing wrong rather than demonstrating what they have done to provide restitution for their activities.

GOL TREADING CAREFULLY WITH TAYLOR FACTIONS

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4. (C) The government itself is caught in the middle. There is quite little the GOL can do legally to arrest, prosecute or freeze assets of those who were close to Taylor, even if the political will were there, which remains an open question. The TRC has recommended a domestic war crimes court be set up, but under statute an Independent National Commission on Human Rights (INHCR) would implement the recommendation, and the Legislature (some of whom had close ties to Taylor) has thus far failed to establish the INCHR. The Legislature has also refused to pass any law that would allow the GOL to freeze assets of those on the UN sanctions list, and the Supreme Court has ruled that any confiscation of property can be done only after a trial.

5. (C) The Accra Comprehensive Peace Agreement (CPA) of August 2003 that ended the 14-year civil war, did not require the NPP to disband and in fact permitted the NPP to participate in the transitional government and in the 2005 elections. The NPP now holds seven seats in the Legislature (which may be one reason the legislation is being blocked). As well, none of Taylor's properties have been seized by the government and they remain in good shape and remarkably free of squatters, as no one dares to take the risk of retribution.

COMMUNICATIONS AMONG TAYLOR SUPPORTERS REMAIN STRONG

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6. (C) *The pro-Taylor forces still have the ability to organize themselves.* An NPP rally in December 2008 gathered a sizeable crowd, and Taylor supporters in June 2008 succeeded in preventing FBI investigators from entering Taylor's residence "White Flower" to obtain evidence for the Chucky Taylor trial in Florida. The most recent example was their effort on March 7 to disrupt the International Women's Colloquium. Taylor remains popular within many rural communities, especially in Bong, Lofa and Nimba counties, and is seen as someone who was able to unite Liberia's different ethnic groups. We also suspect there is some sympathy within the Americo-Liberian

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population who saw him as their deliverance from their losses following the 1979 coup. While we do not suggest they would want Taylor to return, we are sure that they do no want too many rocks to be turned over.

7. (C) Although we do not have any direct evidence to support the belief that pro-Taylor factions are behind much of the

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armed robbery on the premise that crime will keep the government weak and the country unstable, the GOL is certainly convinced of this, and has taken steps to counteract the threat. The most recent act was to put Taylor-era head of police Paul Mulbah into the LNP as an "advisor" that some accuse (and the government denies) was in order to placate the Taylor people in advance of the March 7-8 International Women's Colloquium. That the Taylor crowd can still motivate such a reaction in the government is a testament to their influence.

8. (C) Lines of communications within Taylor's faction, the National Patriotic Front of Liberia (NPFL) remain intact. To be sure, the disarmament of the factions following the CPA has been extremely successful, and we have thus far been unable to confirm the existence of any large weapons caches, despite the persistent rumors. But the reintegration of the ex-combatants is far from complete. Former NPFL commanders Roland Duo (the only senior Taylor supporter to have testified before the TRC), Christopher "General Mosquito" Vambo and Melvin Sogbandi (none of whom are on the sanctions lists) remain in contact with the ex-combatants, and would have the capability to organize an uprising or even criminal activity.

9. (C) Certainly, the same is true for the other factions, the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL). While apparently unarmed and not active in Liberia, we continue to receive reports that LURD is recruiting ex-combatants for militias in Guinea and MODEL is doing the same for Cote d'Ivoire.

THREAT OF TAYLOR'S RETURN ADVANCES THEIR CAUSE

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10. (C) XXXXXXXXXXXX

11. (C) The threat of a return of Taylor strengthens their hand and for now they see no need to give in at all. However, if Taylor is put away for a long time, the government may feel a bit bolder in recovering assets and bringing Taylor backers who committed war crimes to justice.

12. (C) The international community has just a few tools to pressure the Taylor people into accepting the new reality. The UN sanctions appear to have the intended effect of keeping them somewhat marginalized and fearful of further attempts to strip them of their ill-gotten gains. However, we have regularly heard of travel outside Liberia of those on the travel ban list without prior approval.

NEXT STEPS FOR THE INTERNATIONAL COMMUNITY

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13. (C) However, the best we can do for Liberia is to see to it that Taylor is put away for a long time and we cannot delay for the results of the present trial to consider next steps. All legal options should be studied to ensure that Taylor cannot return to destabilize Liberia. Building a case in the United States against Taylor for financial crimes such as wire fraud would probably be the best route. There may be other options, such as applying the new law criminalizing the use of child soldiers or terrorism statutes.

14. (C) The peace in Liberia remains fragile, and its only guarantee is the robust and adaptable UNMIL presence. The GOL does not have the ability to quell violence, monitor its borders or operate independently to fight crime. A free Taylor could tip the balance in the wrong direction. THOMAS-GREENFIELD

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The US embassy cables:
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US embassy cables: The protracted case against Charles Taylor

guardian.co.uk, Friday 17 December 2010 21.30 GMT

Wednesday, 15 April 2009, 15:00
CONFIDENTIAL THE HAGUE 000247
DEPARTMENT FOR S/WCI - WILLIAMSON/DOHERTY, L - DONOGHUE,
L/UNA - BUCHWALD, L/AN - OHAHS
EO 12958 DECL: 04/15/2019
TAGS PREL, PGOV, KAWC
SUBJECT: SCSL'S TAYLOR TRIAL MEETS KEY MILESTONE, BUT SCSL STILL FACES SERIOUS HURDLES
REF: A. REF: A) 2008 THE HAGUE 00021 B. B) 2008 THE HAGUE 00226
Classified By: Legal Counselor Denise G. Manning per reasons 1.5(b, d).

Summary
US officials wonder why a special court judge might be interested in slowing down the prosecution case against the former Sierra Leonean president. Key passages highlighted in yellow.

-- SUMMARY: SCSL MEETS A KEY MILESTONE, BUT FACES UNCERTAINTY IN TERMS OF TIMING, FINANCES, AND COMPLETION ISSUES --

1. (SBU) On February 27, 2009, the Special Court for Sierra Leone (SCSL or Court) took another step toward completing its work when the Prosecution rested its case against former Liberian President Charles Taylor -- the last SCSL case at the trial stage. The Court could potentially complete its work before the end of 2010. A number of open issues, however, may affect timing, including the start date and length of the Taylor Defense case. Timing may be particularly important given expected funding shortfalls and the possible loss of courtroom space this coming September. Additionally, the current Registrar, Herman von Hebel (Netherlands), has resigned effective June 1, and his successor will inherit a host of difficult issues and a complex transition during the final days of the Court,s operations.

--BACKGROUND: A SMALL COURT WITH SEVERAL FIRSTS --

2. (U) A Trailblazing Court. The hybrid SCSL, created in 2002 through an agreement between the United Nations and the Government of Sierra Leone (GOSL) and funded entirely by voluntary contributions, has jurisdiction over those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone after November 30, 1996. Although established almost ten years after the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), the SCSL is poised to complete its work before these tribunals. The SCSL has also been the first internationalized criminal tribunal to: 1) issue an indictment for an African head of state (Liberian President Charles Taylor); 2) enter convictions for the crime of recruiting and using child soldiers; and 3) successfully prosecute forced marriage as a crime against humanity and intentional attacks on U.N. peacekeepers as a serious violation of international humanitarian law.

3. (U) Last Trial Standing. In 2003, the SCSL indicted Charles Taylor, the leader of the National Patriotic Front of Liberia from 1989 to 1997 and the President of Liberia from 1997 until the 2003 indictment. The indictment alleges Taylor,s deep involvement in the Sierra Leone conflict including his role in arming, training and acting in concert with the RUF and in trafficking the Sierra Leonean &blood diamonds8 that fueled and financed the fighting. The SCSL charged Taylor with eleven counts, including, inter alia, terrorizing the civilian population, unlawful killings, sexual violence, abductions and forced labor, and conscripting child soldiers.

))TIMING: TAYLOR TRIAL'S LINK TO CLOSING SCSL))

4. (SBU) Status of Trial. As the only ongoing SCSL trial, the Taylor trial is the linchpin to the SCSL completing its work. From April 6-9, 2009, the Court held the &judgment of acquittal8 hearing, with Defense arguing for acquittal on all of the charges. (Comment: In the &judgment of acquittal8 hearing, the Court considers whether Prosecution Qacquittal8 hearing, the Court considers whether Prosecution has presented any evidence that could sustain conviction on the charges, acquitting only if Prosecution has presented &no evidence8 to sustain the charge. End Comment.) In this hearing, Defense acknowledged that crimes had occurred in Sierra Leone but argued that the Prosecution had failed to 1) present evidence linking Taylor to those crimes and 2)establish that Taylor had been part of a joint criminal enterprise (JCE) because, if a JCE existed, it existed before November 30, 1996, the date at which the temporal jurisdiction of the SCSL begins. The Prosecution responded to these arguments by summarizing Taylor,s responsibility for the crimes and pointing to Taylor,s liability for JCE crimes committed after November 30, 1996, even if the planning of the JCE took place before that date. (Comment: The Court will most likely not issue its Rule 98 decision in April, especially since the Judges may recess through May. An acquittal does not seem likely. End Comment.)

5. (SBU) Next Up: Defense Case. A contact in the Registry has indicated that Defense will likely request three months to prepare for trial and four months to present its case. If the Court grants this request, the Defense case may start at the end of August. However, the same Registry source predicts that the Trial Chamber may order Defense

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to begin its case as early as June, working through July and August with a possible recess in September. One wild-card factor, however, is the Defense,s pending interlocutory appeal arguing that the Prosecution failed to properly plead the JCE theory of liability. The Trial Chamber may not schedule the Defense case before the appeals decision so the Defense knows which mode(s) of liability it must defend against. (Comment: Currently, the Registry,s budget milestone document projects an October 31 trial termination date, a March 2010 judgment, sentencing in April 2010, and the conclusion of appeals in October 2010. If, however, the Defense case starts in August, the timeline could be pushed back by approximately two months. End Comment.)

6. (U) Spill-Over Timing Effects. A delay in the timing for the Taylor trial may create additional challenges. First, the International Criminal Court (ICC), the location of the Taylor trial, has informed the SCSL that it will need its second courtroom as of September 2009. (The ICC scheduled its second trial to start September 24th, and will likely need the courtroom prior to September 24th for pre-trial work). Back-up options explored by the Registry include finding other space or working during gaps in the ICC schedule. Second, according to Registry sources, each additional month of trial time costs approximately one million dollars.

))THE JUDICIAL FACTOR))

7. (C) *Judges Slowing Things Down? Further muddying timing predictions, Court employees have intimated that the Trial Chamber could work more expeditiously.* The Taylor Chamber consists of three judges who take turns presiding: Justice Richard Lussick (Samoa), Justice Teresa Doherty (Northern Ireland) and Justice Julia Sebutinde (Uganda), along with an alternate judge, Justice El Hadji Malick Sow (Senegal). A couple of Court employees have grumbled that when the last Prosecution witness testified on January 30, 2009, the Court still had 11 outstanding motions, some over a year old. Additionally, one Chamber contact believes that the Trial Chamber could have accelerated the Court,s work by excluding extraneous material and arguments. Moreover, *contacts in Prosecution and Registry speculate that Justice Sebutinde may have a timing agenda. They think she, as the only African judge, wants to hold the gavel as presiding judge when the Trial Chamber announces the Taylor judgment. Reportedly, her next stint as presiding judge begins in January.*

8. (SBU) Expedited Appeals? The Appeals Chamber, with one empty seat, consists of President Renate Winter (Austria); Vice President Jon Kamanda (Sierra Leone); Justice George Gelaga King (Sierra Leone); and Justice Emmanuel Ayoola (Nigeria). President Winter reportedly has indicated that the Appeals Chamber intends to expedite any Taylor trial Qthe Appeals Chamber intends to expedite any Taylor trial appeals. Up for election in May, Winter may not, however, preside over the Appeals Chamber for any Taylor trial appeals, reportedly she will step down after the RUF appeal if she is not re-elected President.

))DEFENSE STRATEGY: WHO ME?))

9. (SBU) Drama-Bound Defense Case. A British Queen,s Counsel, Courtenay Griffiths, heads Charles Taylor,s top-notch and quick-tongued defense team, which reportedly

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finds itself in the midst of identifying and proofing witnesses. All signs indicate that Taylor himself will take the stand as their first witness possibly staying in the box for 6 to 8 weeks, and based on Defense,s actions to date, the Defense team will likely argue that although the crimes may have occurred, Taylor has no link to the crimes.

))AN IMMINENT BUDGET CRISIS))

10. (C) Funding Shortfall. The Registry fears that the Court will run out of money as early as next month, although an expected Canadian USD 6 million contribution would keep the Court financed until early July 2009. In a marathon campaign, Registrar Von Hebel attended 250 meetings in 15 months to drum up funds from potential donor countries, but with, according Von Hebel, little traction, due to donor fatigue, the difficult economic situation, and contributions going to other tribunals (e.g., the Special Tribunal for Lebanon (STL) or the Extraordinary Chambers in the Courts of Cambodia). Von Hebel wants to make another run at the Arab countries of Saudi Arabia, Qatar, Kuwait, and the United Arab Emirates. He also believes that a letter from U.N. Secretary General Ban Ki-Moon asking countries to contribute might help open wallets. According to Von Hebel, when Ban sent out a similar letter in 2007, a number of countries made first-time donations. In addition, a couple of traditional donor countries have advised him they may need a similar letter in order to donate this year.

11. (U) Cost-cutting Measures: Concerned about the looming financial crisis, the Registry has undertaken cost-saving measures, reducing staffing costs by downsizing, incorporating liquidation clauses in contracts, and encouraging The Hague staff to use leave during the break between prosecution and defense cases. The Registry also plans to hand over the Freetown facilities to the GOSL in July 2010, reserving some space for its own continued use. Finally, Registry may look to consolidate the Appeals Chamber and the Taylor trial operations in The Hague, after the Appeals Chamber finalizes the RUF appeal.

12. (SBU) Help from Washington. The Registry may also seek USG,s assistance on financial issues. First, it may press the USG not to reduce its FY2009 contribution by 2 million, but to stay at last year,s level of 9 million USD. (Comment: The extra sum would not solve the Court,s immediate financial problem, since the USG generally contributes in the fall. End Comment.) Second, the Registry may ask for USG political support in the form of demarches to Arab countries, impressing upon the targeted Arab countries the critical nature of the SCSL,s financial situation.

))COMPLETION HICCUPS AND ISSUES))

13. (SBU) Registrar Musical Chairs. On April 8, 2009, the Court announced Registrar von Hebel,s resignation, effective as of June 1, 2009. Von Hebel will assume the Deputy Registrar position at the newly established Hague-based STL. (According to Embassy contacts, STL offered Von Hebel the position at the insistence of and to placate the Dutch, who believe the Dutch ICTY Registrar had been treated unfairly when the ICTY President unexpectedly declined to renew his contract). Given that the STL Registrar Robin Vincent (U.K.) recently resigned, Von Hebel may eventually step into Vincent,s shoes. Von Hebel is also tying up as many SCSL loose ends as possible, including signing

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a sentence-enforcement agreement with the Government of Rwanda. In terms of a successor Registrar, a Registry contact believes that the current Deputy Registrar Binta Mansaray (Sierra Leone) will surface as a strong candidate.

))COMMENT: RESIDUAL ISSUES))

14. (SBU) A Larger Role for The Hague? Although currently headquartered in Freetown, Sierra Leone, the Registry has toyed with the possibility of locating any Residual Mechanism Qtoyed with the possibility of locating any Residual Mechanism) or parts thereof) in The Hague. For instance, Von Hebel believes that the Court may need to move its archives out of Sierra Leone in order to properly maintain and secure them. The City of The Hague has indicated its willingness to provide archiving facilities in connection with the ICTY,s closure. Some have also suggested combining some or part of the SCSL,s residual functions with those of The Hague-based ICTY and the Arusha-based ICTR. A combined residual mechanism might prevent duplication, but it would also face significant hurdles, given SCSL,s structural differences, e.g. funding, oversight mechanism and applicable legal framework. Furthermore, GOSL desires will be key, since a joint GOSL-UN agreement created the Court.

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Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **10 July 2012**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v .THOMAS LUBANGA DYILO

Public

Decision on Sentence pursuant to Article 76 of the Statute

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9. On 7 June 2012, the legal representatives filed their submissions on the defence request to introduce additional evidence.[16] The prosecution filed its submissions on this issue on 8 June 2012.[17]

10. The Chamber issued an Order on the defence request to provide the Chamber with additional evidence during the sentencing hearing on 11 June 2012,[18] granting leave to the defence to: (i) call two additional witnesses (D01-0039 and D01-0040) via a video-link with the DRC; (ii) rely on two documents when questioning witness D01-0040;[19] and (iii) introduce an additional document relevant to the time spent by Mr Lubanga in detention in the DRC.[20]

11. The sentencing hearing was held on 13 June 2012, during which the Chamber heard the evidence of witnesses D01-0039 and D01-0040. Thereafter the Prosecutor, the legal representatives of victims and the defence made their oral submissions. Following these submissions, Mr Lubanga made a statement to the Chamber.[21] The evidence of the two additional witnesses and all the oral submissions are considered below, where relevant.

II. The jurisprudence of other courts in relation to sentencing regarding child soldiers

12. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the *ad hoc* tribunals are in a comparable position to the Court in the context of sentencing. However, the

[16] Réponse des représentants légaux du groupe de victims VO1 à la requête de la défense ICC-01/04-01/06-2892 du 4 juin 2012, 7 June 2012, ICC-01/04-01/06-2893.
[17] Prosecution's Response to « Requête de la Défense sollicitant l'autorisation de présenter des éléments de preuve supplémentaires lors de l'audience sur la peine prévue le 13 juin 2012 », 8 June 2012, ICC-01/04-01/06-2894.
[18] Order on the defence request to present evidence during the sentencing hearing, 11 June 2012, ICC-01/04-01/06-2895.
[19] ICC-01/04-01/06-2895, para. 22.
[20] DRC-D01-0001-0136.
[21] ICC-01/04-01/06-T-360-Red2-ENG. Transcripts are referred to hereinafter as "T-".

should not exceed the factual circumstances identified in the Confirmation Decision supporting each of the legal elements of the crimes charged.[43]

29. The legal framework applicable to the sentencing stage of the proceedings, applying Article 21(1) of the Statute, is set out in Articles 23, 76, 77, 78 and 81(2)(a) of the Statute and Rules 143, 145 and 146 of the Rules, and it is to be noted that none of these provisions limit the factors that are properly to be considered during sentencing to those described in the Confirmation Decision. Instead, Article 76(1) of the Statute establishes that when considering the "appropriate" sentence, the Trial Chamber "shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence". Pursuant to Article 76(2) of the Statute, the Chamber "may on its own motion, and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence [...]". In the judgment of the Chamber, the evidence admitted at this stage can exceed the facts and circumstances set out in the Confirmation Decision, provided the defence has had a reasonable opportunity to address them.

30. As set out above, during the preparation stage of the trial, the Chamber indicated that it would hold a separate sentencing hearing in the event of a conviction and, for reasons of efficiency and economy, it ordered that evidence relating to sentence could be admitted during the trial.[44] The defence has had a sufficient opportunity to challenge the evidence and the allegations relevant to the sentence as advanced during the trial. In addition, the Chamber has provided the defence an opportunity to respond to all the submissions and evidence that have been

[43] See ICC-01/04-01/06-2842, paras 2 to 8.
[44] T-99-ENG, page 39, line 11 to page 40, line 4; Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, para. 32; Decision on judicial questioning, 18 March 2010, ICC-01/04-01/06-2360, para. 38.

relied on for the purposes of sentence following Mr Lubanga's conviction.[45] The Chamber requested written submissions on: (i) the procedure to be adopted for sentencing and the principles to be applied by the Chamber;[46] and (ii) the relevant evidence presented during trial, the aggravating and mitigating factors, and the sentence to be imposed on Mr Lubanga.[47] This has ensured that he has had adequate notice of the matters that may be taken into consideration by the Chamber at this stage of the proceedings.

31. Moreover, the defence has been provided with adequate time and facilities, including the opportunity to identify and introduce evidence relevant to sentence.

2) Standard of proof

32. The prosecution argues that the Chamber should not follow the jurisprudence of the *ad hoc* tribunals when they decided that the relevant aggravating factors need to be established by the prosecution beyond reasonable doubt and they must be directly related to the offences that resulted in a conviction.[48] The prosecution submits that it is open to the Chamber to make findings as to the aggravating and mitigating factors on the basis of a "balance of probabilities".[49] The defence argues that the aggravating factors must be proved beyond a reasonable doubt.[50]

33. It is for the Chamber to establish the standard of proof for the purposes of sentencing, given the Statute and the Rules do not provide any guidance. Since any aggravating factors established by the Chamber may have a significant effect

[45] See William Schabas in Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court, Observers' Notes (2008), page 1414.
[46] See ICC-01/04-01/06-2868, ICC-01/04-01/06-2864 and ICC-01/04-01/06-2869.
[47] ICC-01/04-01/06-2881, ICC-01/04-01/06-2880 and ICC-01/04-01/06-2882.
[48] ICC-01/04-01/06-2868, para. 25.
[49] ICC-01/04-01/06-2868, para. 25.
[50] ICC-01/04-01/06-2891-Red, para. 50.

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Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: **ICC-01/04-01/06 (OA4)**
Date: **14 December 2006**

THE APPEALS CHAMBER

Before: **Judge Georghios M. Pikis (Presiding)**
Judge Philippe Kirsch
Judge Navanethem Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006

The Office of the Prosecutor
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in accordance with internationally recognized human rights; first and foremost, in the context of the Statute,[81] the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.[82] The Statute itself makes evidence obtained in breach of internationally recognized human rights inadmissible in the circumstances specified by article 69 (7) of the Statute. Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.

38. The decision of the European Court of Human Rights in the *Case of Teixeira de Castro v. Portugal*[83], a case of entrapment by undercover agents, provides an example of serious breaches of the rights of the accused by the investigating authorities, rendering the holding of a fair trial impossible. The following passage from the judgment puts the matter in perspective as to the implications that such conduct may have on the holding of a fair trial. Improper conduct by the investigating authorities and the use of evidence resulting therefrom "in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial."[84] In another passage the European Court of Human Rights recorded: "The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offences, from the most straightforward to the most complex."[85]

39. Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*[86], it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory

[81] See articles 64 (2), 67 (1), 68 (1) and (5) of the Statute.
[82] See *Nowak M.*, U.N. Covenant on Civil and Political Rights, CCPR Commentary (N.P. England, Airlington, 19993), page 244.
[83] Judgment, 9 June 1998, Application no. 44/1997/828/1034, *available in* HUDOC database *at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en .
[84] At paragraph 39.
[85] At paragraph 36.
[86] [2005] 3 All ER 435 (a civil action).

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of the courts [...]" Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.

D. The validity of the findings of the Pre-Trial Chamber

40. Two grounds of appeal are directed against the validity of the decision of the Pre-Trial Chamber in that it adopted an unduly restrictive approach to the relinquishment of jurisdiction for violations of the fundamental rights of the accused.[87] To this, the Appeals Chamber cannot agree. As may be discerned from the principles identified in the decision of the Pre-Trial Chamber as relevant to stay of proceedings, a broader standard was adopted than the one warranted in law in that it failed to require the specific consideration of whether a fair trial remained possible in the particular circumstances of the case. The findings of the Pre-Trial Chamber to the effect that the appellant was not subjected to any ill-treatment in the process of his arrest and conveyance before the Court sidelines the importance of the precise ambit of the test applied as a guide to the resolution of this appeal.

41. The other complaint is that the Pre-Trial Chamber applied the wrong standard in reviewing the efficacy of the process leading to the arrest and surrender of the suspect, allegedly ignoring or paying inadequate attention to the supervisory role of the Pre-Trial Chamber under article 59 (2) of the Statute.[88] The appellant's argument is that the Pre-Trial Chamber is charged under this article to review the correctness of the decision of the Congolese authority to sanction the enforcement of the warrant of arrest. No such role is cast on the Court. The enforcement of a warrant of arrest is designed to ensure, as article 59 (2) of the Statute specifically directs, that there is identity between the person against whom the warrant is directed and the arrested person, secondly, that the process followed is the one envisaged by national law, and thirdly that the person's rights have

[87] See first ground of appeal, Defence document, paragraphs 6 to 21; third ground of appeal, Defence document, paragraphs 36 to 44.
[88] See third ground of appeal, Defence document, paragraphs 36 to 44.

Cour
Pénale
Internationale

International
Criminal
Court

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Original: **English**

No.: **ICC-01/04-01/10**

Date: **16 December 2011**

PRE-TRIAL CHAMBER I

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA

Public Redacted version

Decision on the confirmation of charges

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criminal responsibility for group members making non-essential contributions in ways not intended by the Defence's primary supporting authority.[652]

274. Furthermore, the Defence argument, if accepted, would create results at odds with common sense in circumstances where persons who lack the intent to commit any crimes themselves contribute to group crimes with knowledge of the group's intention to commit those crimes. The Chamber notes that, unlike the jurisprudence of the *ad hoc* tribunals,[653] article 25(3)(c) of the Statute requires that the person act with the *purpose* to facilitate the crime; knowledge is not enough for responsibility under this article. Unless the requisite superior-subordinate relationship exists to charge responsibility under article 28 of the Statute, 25(3)(d) liability is the only other way a person can be held criminally responsible for acting merely with knowledge of the criminal intentions of others.[654] Therefore, if command responsibility does not apply and 25(3)(d) liability were limited only to persons outside the group, all such persons who knowingly make non-essential contributions to crimes could be convicted if they are outside the group, but could not be convicted when making identical contributions from inside the group. Such an outcome would create results which run contrary to any literal, systematic or teleological interpretation of the principles established in the Statute for individual criminal responsibility.

275. For these reasons, the Chamber finds that the correct interpretation of 25(3)(d) liability is that it must apply irrespective of whether the person is or is not a member of the group acting with a common purpose.

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[652] The Chamber also notes that another respected commentator analysed Professor Cassese's position on 25(3)(d) liability and concluded that the "outside contributor" interpretation is ultimately unconvincing. Jens David Ohlin, 'Joint Criminal Confusion', 2 New Criminal Law Review 406 (2009), pp 410-16.

[653] ICTR, Appeals Chamber, *Prosecutor v. Seromba*, "Judgement", 12 March 2008, ICTR-2001-66-A, para. 56; ICTY, Appeals Chamber, *Prosecutor v. Blaškić*, "Judgement", 29 July 2004, IT-95-14-A, paras 45-46; ICTY, Appeals Chamber, *Prosecutor v. Vasiljević*, "Judgement", 25 February 2004, IT-98-32-A, para. 102 (the requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator). *See also* ICTY, Appeals Chamber, *Prosecutor v. Aleksovski*, "Judgement", 24 March 2000, IT-95-14/1-A, para. 162; ICTY, Trial Chamber, *Prosecutor v. Krnojelac*, "Judgment", 15 March 2002, IT-97-25-T, para. 90 (the aider and abettor need not share the *mens rea* of the perpetrator).

[654] *See* articles 25 and 28 of the Statute.

International Criminal Court
Pre-Trial Chamber I - Courtroom 2
Presiding Judge Sanji Mmasenono Monageng, Judge Sylvia Steiner,
and Judge Cuno Tarfusser
Situation in the Democratic Republic of Congo - ICC-01/04-01/10
In the case of the Prosecutor versus Callixte Mbarushimana
Confirmation of Charges Hearing
Tuesday, 20 September 2011
The hearing starts at 9.09 a.m.
(Open session)

COURT USHER: All rise. The International Criminal Court is now in session. Please be seated.

COURT OFFICER: Good morning, your Honours, Madam President. We are in open session.

PRESIDING JUDGE MONAGENG: Good morning, everybody.

Court Officer, please read the case out.

COURT OFFICER: Situation in the Democratic Republic of the Congo, in the case of the Prosecutor versus Callixte Mbarushimana, case reference ICC-01/04-01/10.

PRESIDING JUDGE MONAGENG: Thank you.

The composition of the Chamber remains the same, and I will now invite the Prosecution to inform us of any changes in their composition.

MR. STEYNBERG: Good morning, Madam President, your Honours. The Prosecution team is the same as it was yesterday.

PRESIDING JUDGE MONAGENG: Thank you very much.

Rome Statute. I also decided to intervene, since this is the first case, the first confirmation hearing, where this provision will be the object of analysis, i.e., in other words, the Court will set the precedent which is very important for the future international criminal law and it's very important, I shall add, for the legitimacy of this Court.

My presentation will be divided into three sections. First of all, I will make some general remarks on the genesis of this subparagraph (d). I will then try to delimitate subparagraph (d) from subparagraph (a) and subparagraph (c) of Article 25, para 3, in order to then - and that will be the most important part and the main part of my presentation - apply subparagraph (d) to the charges before us.

I will not talk about evidence here. I will make a strict legal analysis, taking into account the Prosecution case, i.e., the case as it was presented by the document of charges and as it was a little bit amended, I must say, in Friday's and yesterday's hearing. I have studied carefully the transcripts and I will explain to you why I think that this case has a little bit shifted.

So let me start with my introductory remarks. As you know, Article 25(3)(d) of the Rome Statute was a compromise when we negotiated this provision in Rome and I was part of the German delegation in Rome and I was participating in the working group of general principals which negotiated, among others, this provision. It represents a compromise between those States' delegations which tried to oppose or opposed any form of anticipated or organisational/collective responsibility and it tried to strike a compromise between this position and the position of

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ENGLISH
Original: French

APPEALS CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Fausto Pocar
Judge Theodor Meron

Registry: Adama Dieng

Judgement of: 3 July 2002

THE PROSECUTOR
(Appellant)
v.
Ignace BAGILISHEMA
(Respondent)

Case No. ICTR-95-1A-A

JUDGEMENT
(REASONS)

Office of the Prosecutor:
Carla Del Ponte
Norman Farrell
Sonja Boelaert-Suominen
Mathias Marcussen

Counsel for the Defence:
François Roux
Maroufa Diabira

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chain of command.[79] The Prosecution submits that there is no indication that the Trial Chamber focused on the test of effective control.[80]

50. Under Article 6(3), a commander or superior is the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the commission of a crime by a subordinate after the crime is committed".[81] The power or authority to prevent or to punish does not arise solely from a *de jure* authority conferred through official appointment.[82] Hence, "as long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control." [83] The *effective control* test applies to all superiors, whether *de jure* or *de facto,* military or civilian.[84]

51. Indeed, it emerges from international case-law that the doctrine of superior responsibility is not limited to military superiors, but also extends to civilian superiors. In the *Čelebići* case, it was held that:

> [...] the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise *a degree of control over their subordinates which is similar to that of military commanders.*[85]

In this respect, the Appeals Chamber notes that the *Musema* Trial Judgement, which took into consideration the Rwandan situation, pointed out that "it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration."[86]

52. Hence, the establishment of civilian superior responsibility requires proof beyond reasonable doubt that the accused exercised effective control over his subordinates, in the sense that he exercised a degree of control over them which is similar to the degree of control of military commanders. It is not suggested that "effective control" will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander.

53. In the instant case, the Trial Chamber relied on the *Čelebići* Trial Judgement, which was affirmed by the ICTY Appeals Chamber, in holding that:

> [...] for a civilian superior's degree of control to be "similar to" that of a military commander, the control over subordinates must be "effective", and the superior must have the "material ability" to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by the "the trappings of the exercise of *de jure* authority". The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence.[87]

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER I

Before: Judge Erik Møse, Presiding
Judge Asoka de Z. Gunawardana
Judge Mehmet Güney

Registry: Mr Adama Dieng

Decision of: 7 June 2001

2001 JUN -7 A 9:52
07/06/2001
ICTR
JUDICIAL RECORDS/ARCHIVES
RECEIVED

THE PROSECUTOR
VERSUS
IGNACE BAGILISHEMA

Case No. ICTR-95-1A-T

JUDGEMENT

The Office of the Prosecutor:

Ms Anywar Adong
Mr Charles Adeogun-Phillips
Mr Wallace Kapaya
Ms Boi-Tia Stevens

Counsel for the accused:

Mr François Roux
Mr Maroufa Diabira
Ms Héleyn Uñac
Mr Wayne Jordash

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punish the perpetrators. But the Chamber believes that the claim that Judith's murder was public knowledge in Mabanza *commune* lacks sufficient foundation. The record reveals only that Witness Z said that Judith was the wife of a "medical doctor" at the Rubengera medical centre.[1160] Witness Y testified that Judith and her husband were family friends. The husband helped the witness when his children became ill.[1161] In his statement to investigators the witness said that Judith's husband was a "medical assistant".[1162]

987. Moreover, Witness Y testified that "I did not speak with [the Accused] about this matter [the two killings] because his level was not the same as mine and there was no chain of communication between himself and myself."[1163]

988. In summary, the indicium of the Accused's contemporaneous presence in the vicinity of the crime in the case of Judith, together with the indicia of geographical location, time and *modus operandi* in relation to the killings of both Bigirimana and Judith, combined with the fact that no more than two people were killed in a period when attacks on civilians were alleged to be common – telling though these indicia may seem when taken in combination – are in the Chamber's assessment nevertheless not sufficient to prove that the Accused had the requisite *mens rea*. The findings in *Celebici* and *Aleksovski* were made on a much firmer foundation.

989. It follows that the Prosecution has failed to prove beyond reasonable doubt that the Accused is responsible as a superior for killings committed in connection with the Trafipro roadblock by Rushimba and Witnesses Y and Z. Therefore the Accused is not liable under Article 6(3) for the murders of Bigirimana and Judith.

[1160] Transcripts of 8 February 2000 p. 66.
[1161] Transcripts of 7 February p. 41.
[1162] Defence Exhibit No. 64.
[1163] Transcripts of 7 February 2000 p. 60.

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge Patrick Robinson** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Liu Daqun**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**14 December 2011**

Théoneste BAGOSORA
Anatole NSENGIYUMVA
v.
THE PROSECUTOR

Case No. ICTR-98-41-A

JUDGEMENT

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Richard Perras

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Hassan Bubacar Jallow
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Inneke Onsea
Renifa Madenga
Abubacarr Tambadou
Evelyn Kamau
William Mubiru
Aisha Kagabo
Ndeye Marie Ka

II. STANDARDS OF APPELLATE REVIEW

15. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.[37]

16. Regarding errors of law, the Appeals Chamber has stated:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[38]

17. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[39] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[40]

18. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by the Trial Chamber:

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[41]

19. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting

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[37] *See, e.g., Munyakazi* Appeal Judgement, para. 5; *Muvunyi* Appeal Judgement of 1 April 2011, para. 7; *Renzaho* Appeal Judgement, para. 7.
[38] *Ntakirutimana* Appeal Judgement, para. 11 (internal citation omitted). *See also, e.g., Munyakazi* Appeal Judgement, para. 6; *Setako* Appeal Judgement, para. 8; *Muvunyi* Appeal Judgement of 1 April 2011, para. 8.
[39] *See, e.g., Munyakazi* Appeal Judgement, para. 7; *Setako* Appeal Judgement, para. 9; *Muvunyi* Appeal Judgement of 1 April 2011, para. 9.
[40] *See, e.g., Munyakazi* Appeal Judgement, para. 7; *Setako* Appeal Judgement, para. 9; *Muvunyi* Appeal Judgement of 1 April 2011, para. 9.
[41] *Krstić* Appeal Judgement, para. 40 (internal citations omitted). *See also Munyakazi* Appeal Judgement, para. 8; *Setako* Appeal Judgement, para. 10; *Muvunyi* Appeal Judgement of 1 April 2011, para. 10.

chosen because, as the only General in active service present in the Crisis Committee, Ndindiliyimana was the highest-ranking officer.[1224]

514. The Prosecution responds that the Trial Chamber properly assessed the evidence before it.[1225] In particular, it submits that not only was the Trial Chamber entitled to rely on circumstantial evidence, but the totality of the evidence also included direct evidence and established beyond reasonable doubt Bagosora's *de jure* and *de facto* control over the Rwandan Armed Forces.[1226] In addition, it contends that Bagosora's propositions are irrelevant and unclear, and in no way support his claim that they establish another logical conclusion.[1227]

515. The Appeals Chamber recalls that a Trial Chamber may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence only if it is the only reasonable conclusion that could be drawn from the evidence presented.[1228] If there is another conclusion which is also reasonably open from the evidence, and which is consistent with the non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn.[1229]

516. As such, the question is whether no reasonable trier of fact could have found that the only reasonable inference from the evidence was that Bagosora exercised effective control over the Rwandan Armed Forces.

517. With respect to his argument that the emergency nature of the situation could also imply a lack of effective control, the Appeals Chamber recalls its finding above that such an argument is flawed. To the contrary, it was specifically because of the emergency situation, which resulted from a temporary breakdown of the usual power structure in Rwanda and the absence of the Minister of Defence, that Bagosora had more power than he would normally have had in his role as *directeur de cabinet*.[1230] Furthermore, the fact that there were a series of meetings and that steps were quickly taken to address the emergency situation clearly refutes Bagosora's suggestion that there was no one in control. In the absence of any substantiation, the Appeals Chamber also dismisses

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[1224] Bagosora Appeal Brief, para. 58, *referring to* Trial Judgement, para. 2025. *See also* Bagosora Appeal Brief, para. 122; Bagosora Reply Brief, para. 13.
[1225] Prosecution Response Brief (Bagosora), paras. 53-62.
[1226] Prosecution Response Brief (Bagosora), paras. 53-55. *See also ibid.*, paras. 60, 67, 73, 92.
[1227] Prosecution Response Brief (Bagosora), paras. 56-62.
[1228] *Nchamihigo* Appeal Judgement, para. 80, *citing Stakić* Appeal Judgement, para. 219. *See also Karera* Appeal Judgement, para. 34; *Ntagerura et al.* Appeal Judgement, para. 306.
[1229] *Karera* Appeal Judgement, para. 34; *Ntagerura et al.* Appeal Judgement, para. 306.
[1230] *See supra*, Section IV.A.3(c), para. 465.

convicted Bagosora for criminal conduct with which he was not charged.[1678] Thus, Bagosora's conviction based on the defilement of the Prime Minister's corpse must be reversed.[1679]

729. In light of the foregoing, the Appeals Chamber need not address the parties' remaining contentions. The Appeals Chamber underscores that the desecration of Prime Minister Uwilingiyimana's corpse constituted a profound assault on human dignity meriting unreserved condemnation under international law.[1680] Such crimes strike at the core of national and human

[1678] The Appeals Chamber notes that even if the Bagosora Indictment were considered to be merely vague, no curing took place. The Prosecution's post-indictment communications generally referred to the insertion of a bottle into the Prime Minister's body, without indicating whether the act was perpetrated before or after the Prime Minister's death. *See* Prosecution Pre-Trial Brief, Appendix A, Witnesses DA *and* DDF pp. 33, 55. At no point during the trial did the Prosecution allege that its case concerned the treatment of the Prime Minister's body after her death. An examination of the trial transcripts shows that relevant witnesses reported viewing the Prime Minister's assaulted body without testifying to the timing of the sexual abuse on her body. *See* Witness AE, T. 16 December 2003 pp. 42, 43; Witness DA, T. 18 November 2003 p. 49. The Appeals Chamber further notes that, in its Closing Brief, the Prosecution generally referred to the Prime Minister's genital mutilation, without discussing the details of the incident, limiting itself to stating that the evidence of witnesses observing the Prime Minister's mutilated dead body or learning of the mutilation afterwards put Bagosora on notice of the propensity of soldiers to commit acts of sexual violence. *See* Prosecution Closing Brief, paras. 155, 156. The Appeals Chamber also underscores that the broad and indeterminate scope of "other inhumane acts" makes it particularly important that charges brought and convictions entered under this rubric be set out with the utmost clarity, in order to respect the due process rights of the accused.

[1679] The Appeals Chamber notes that the Trial Chamber's conviction was entered solely on the basis of mistreatment of the Prime Minister's corpse, and that no reference is made in the Trial Judgement to allegations of sexual or other assault on the Prime Minister prior to her death. In this circumstance, the Appeals Chamber will not address the Prosecution's submission regarding potential evidence related to events prior to the Prime Minister's death.

[1680] In this regard, the Appeals Chamber notes that, in 1994, many domestic criminal codes, including the Rwandan criminal code, explicitly criminalised acts degrading the dignity of the corpse or interfering with a corpse. Any review of customary international law regarding this issue would need to take into account the large number of jurisdictions that criminalise degrading the dignity of or interfering with corpses. *See, e.g.*, Botswana, *Penal Code* (1964) Ch. 08:01, s. 138; Canada, *Criminal Code*, R.S., 1985, c.C-34, s. 182(b); Costa Rica, *Codigo Penal* (1971), art. 207; Ethiopia, *Penal Code*, (1957), art. 287(b); Germany, *Strafgesetzbuch* (*StGB*), 1998, s. 168 (this section was added in 1987); India, *Penal Code* (1860), s. 297; Kenya, *Penal Code* (1970) Ch. 63, s. 137; Japan, *Penal Code* (Act No. 45 of 1907), art. 190; Lithuania, *Criminal Code as amended* (1961), art. 335; New Zealand, *Crimes Act 1961* No. 43, art. 150(b); Nigeria, *Criminal Code Act* (1990), (Ch. 77), s. 242; United States of America (Oregon State), (1971), *ORS.166.087*; Pakistan, *Criminal Code* (1860), s. 297; Rwanda, *Décret-loi N°21/77 du 18 août 1977 instituant le Code pénal*, art. 352; Switzerland, *Code pénal suisse du 21 décembre 1937*, art. 262; Uganda, *Penal Code Act 1950* (Ch. 120), s. 120; Vietnam, *Penal Code* (1985), s. 246. Humanitarian law also prohibits the maltreatment of corpses. *See, e.g.*, The Laws of War on Land, Institute of International Law, Oxford, 9 September 1880, art. 19; Manual of the Laws of Naval War, Institute of International Law, Oxford, 9 August 1913, art. 85; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906, art. 3; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, art. 3; Convention (X) of the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907, art. 16; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, art. 16; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977, art. 34(1); Yves Sandoz, Christoph Swinarski and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Dordrecht: Martinus Nijhoff Publishers, 1987), para. 1307. The prohibition and criminalisation of maltreating corpses also extends to domestic military law. *See, e.g.*, regarding prohibition: Jean-Marie Henckaerts and Louise Doswald-Beck, eds., International Committee for the Red Cross, *Customary International Humanitarian Law*, Vol. II (Practice) (Cambridge: Cambridge University Press, 2009) ("ICRC Study on Customary International Humanitarian Law"), pp. 2663-2667, *referring to*: Australia, *Defence Force Manual* (1994), s. 998; Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), sec. c; Netherlands, *Military Manual* (1993), p. VI-2, s. 1817(1); Philippines, *Military Instructions* (1989), ss. 2, 4; Spain, *Royal Ordinance for the Armed Forces* (1978), art. 140; Switzerland, *Basic Military Manual* (1987), arts. 194(2), 200(f); United Kingdom, *Military Manual* (1958), s. 380; United Kingdom, *Law of Armed Conflict Manual* (1981), Annex A, p. 47, s. 15. *See, e.g.*, regarding criminalization: ICRC Study on Customary International Humanitarian Law, pp. 2665-2667, *referring to* Australia, *War Crimes Act*

identity. However, the Appeals Chamber finds, Judge Pocar dissenting, that Bagosora was not charged on this basis, and thus cannot be held legally responsible for this act.

730. Accordingly, the Appeals Chamber, Judge Pocar dissenting, concludes that the Trial Chamber erred in finding that Bagosora was guilty of other inhumane acts as a crime against humanity based on the defilement of the Prime Minister's corpse. The Appeals Chamber therefore reverses, Judge Pocar dissenting, Bagosora's conviction for other inhumane acts as a crime against humanity entered under Count 9 of the Bagosora Indictment with respect to this incident. It will consider the impact, if any, of this finding in the appropriate section of this Judgement.

(1945), s. 3 (xxxv); Ecuador, *Naval Manual* (1989), p. 6-5, s. 6.2.5; Italy, *Wartime Military Penal Code* (1941), art. 197; Netherlands, *Military Criminal Code as amended* (1964), art. 143; New Zealand, *Military Manual* (1992), s. 1704(5); Nigeria, *Manual on the Laws of War* (undated), s. 6; Switzerland, *Basic Military Manual* (1987), arts. 194(2), 200(f); Switzerland, *Military Criminal Code as amended* (1927), art. 140(2); United Kingdom, *Military Manual* (1958), s. 626(b); United States, *Field Manual* (1956), s. 504(c); United States, *Instructor's Guide* (1985), pp. 13, 14; Bangladesh, *International Crimes (Tribunal) Act* (1973), s. 3(2)(e); Ireland, *Geneva Conventions Act as amended* (1962), s. 4(1) and (4). Furthermore, in several trials following the Second World War, accused were convicted on charges of mutilating dead bodies. *See, e.g., Kihuchi and Mahuchi case*, United States Military Commission at Yokohama, Japan, 20 April 1946; *Trial of Max Schmid*, United States General Military Government Court at Dachau, Germany, 19 May 1947, United Nations War Crimes Commission Law Reports, vol. XIII, pp. 151, 152; *Takehiko case*, Australian Military Court at Wewak, 30 November 1945. *See also Yochio and Other case*, United States Military Commission at the Mariana Islands, 2-15 August 1946; *Tisato case*, Australian Military Court at Rabaul, 2 April 1946; Law Reports of Trials of War Criminals, prepared by the United Nations War Crimes Commission, 1949, Volume XV, p. 134.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 18 December 2008

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

JUDGEMENT AND SENTENCE

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889. The Chamber finds beyond reasonable doubt that Rwandan soldiers killed 17 Rwandan nationals at *Centre Christus* in the Remera area of Kigali. However, the Prosecution has not established the specific unit that conducted the killings. The Chamber has found elsewhere that Bagosora had authority over the Rwandan army at the time of the attack (IV.1.2). He was also aware of the killings at *Centre Christus*, in particular of Father Mahame.

890. Witness ET heard that Father Mahame was on a list as early as 1992. His evidence on this point is hearsay and, furthermore, does not clearly demonstrate the basis and reliability of his source's information. However, it is clear that Mahame was identified on a list of suspected accomplices by the CDR party in September 1992.[1016] Furthermore, the circumstances of the attack, described above, indicate that this was a targeted killing. Bearing in mind the evidence of other such killings on the morning of 7 April (III.2.5.5; III.3.3; III.3.6.1; III.3.6.5) the Chamber is satisfied that Mahame was previously identified as a target for arrest or killing by the military as well. This conclusion is further bolstered by the fact that Bagosora was personally informed about Mahame's killing on the night of 7 April along with the victims of other political assassinations.

891. The Chamber is not persuaded that the Prosecution has shown a connection between the attack at *Centre Christus* and Kabiligi and Ntabakuze. Consequently, there is no need to revisit the Ntabakuze Defence arguments concerning alleged insufficient notice.

892. Turning to other killings in the Remera area, Prosecution and Defence evidence suggests that both parties to the conflict perpetrated killings there. While the evidence about RPF crimes is largely second-hand, the Prosecution has presented direct evidence from Witness CW that Bagosora personally incited the killings of Tutsis at dawn on 7 April. The witness claimed that he observed Bagosora address local *Interahamwe* leaders from a distance of 4.5 metres while hiding in a bush. Witness CW's basis of knowledge for identifying Bagosora was the witness's familiarity with his role as a military officer as well as Bagosora's previous visits to Remera. His evidence about Bagosora's previous participation in meetings with the *Interahamwe* in the area was vague and inconsistent.[1017] The Chamber, therefore, has doubt about his ability to identify Bagosora, in particular bearing in mind that he was hiding and afraid for his life.

893. Furthermore, Witness CW asserted that the alleged meeting occurred at dawn as it was becoming light. On the morning of 7 April, Bagosora held a number of meetings with MRND political officials at the Ministry of Defence, the United States Ambassador at his residence, and military officials at ESM, beginning at 7.00 a.m. (III.3.2). While the witness suggested that the meeting occurred around 5.00 a.m. in the morning, the Chamber notes that he placed it after the communiqué was broadcast urging the public to remain at home.[1018] Other evidence suggests that this communiqué was broadcast around 6.30 a.m.,[1019] placing

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[1016] Prosecution Exhibit 29B (CDR party communiqué No. 5 (22 September 1993)), pp. 1-2 Father Mahame is listed as number 14 under the heading of persons suspected of recruiting for the "*Inyenzi-Inkotanyi*".
[1017] *See* T. 8 October 2004 pp. 39-44. In particular, Witness CW said that he saw Bagosora "more than twice" (p. 40) , "regularly" (p. 40), "two or three times" (p. 42), "frequently" (p. 43). He confirmed that he told Tribunal investigators that Bagosora came "several times a week" (p. 42). The witness also then claimed that he did not mention the number of times per week that Bagosora came and that he did not say "several times per week" (p. 43).
[1018] T. 8 October 2004 pp. 7, 44-45.
[1019] Reyntjens, T. 15 September 2004 p. 24.

would leave his troops in this tense situation. Witness DBN's indication that some persons had houses in the area appeared speculative. There is no indication that Nsengiyumva had a house there, and this was rejected by Witnesses OME-1 and DM-23.[1608] Neither is there any information that Nsengiyumva had to attend a meeting in Kigali-Rural, which was the other possible explanation suggested by Witness DBN.[1609]

1461. According to Witness DBN, the entire operation at Masaka hill, from the soldiers' departure until their return, took only 40 minutes, and in any event less than one hour. The soldiers returned to the same meeting at the *Joli Bois* before it had ended. This would have given limited time for the operation, in view of his testimony that it would take 15-20 minutes to travel the distance to Masaka hill, driving at a fast speed. The Chamber has taken into account that it would not require much time to throw grenades at refugees in a coffee field but still considers it noteworthy that the operation was purportedly so brief.[1610]

1462. Witness DBN was unable to name a single soldier who allegedly participated in the operation, except for the driver. His evidence about the involvement of soldiers in the killings at Masaka hill is uncorroborated hearsay. No-one actually observed Nsengiyumva or the operation at Masaka hill. This said, Witness ICC-1 testimony that he did not hear of Nsengiyumva's involvement in the attack carries limited weight. The witness did not see the event itself but heard that *Interahamwe*, called the "Zulus", had carried out the killings.

1463. Having assessed the totality of the evidence, and in particular the lack of corroboration of Witness DBN's testimony, the Chamber finds that the Prosecution has not proven beyond reasonable doubt that Ntabakuze provided Nsengiyumva with 30 members of the Para Commando Battalion to kill Tutsi civilians at Masaka hill.

1464. The Chamber has previously held that Ntabakuze and Nsengiyumva had adequate notice of this allegation. In view of its finding it does not deem it necessary to reconsider the Defence submissions about lack of notice for this allegation.[1611]

4.1.7 Kiyovu Roadblock, April - June

Introduction

1465. The Bagosora Indictment alleges that, from the night of 6 to 7 April 1994, soldiers, including the Presidential Guard, set up roadblocks where militiamen joined them, or established their own where Tutsis were killed. The Nsengiyumva Indictment states that, between 8 April and mid-July 1994, Nsengiyumva ordered militiamen to eliminate Tutsis. It is also alleged that crimes of sexual violence were perpetrated at roadblocks. In support of

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[1608] The Chamber has taken into account that Witness OME-1 was related to Nsengiyumva.

[1609] It is also unusual that Ntabakuze would convene a meeting of significance, relating to the evacuation of the camp, without any of his company or platoon commanders present (who, according to the witness, was in combat positions). It is recalled that in the final event, Camp Kanombe did not fall until May 1994. *See* T. 6 April 2004 p. 1.

[1610] Witness DBN first said that the meeting ended around 9.20 a.m. He also indicated that the operation at Masaka hill lasted for 40 minutes from 8.50 or perhaps 9.00 a.m. and that the attackers came back just as the meeting concluded. The Chamber does not consider this discrepancy material, as the witness clearly gave estimates.

[1611] Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, paras. 39-41; Decision on Nsengiyumva Motion For the Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006, paras. 26-28.

1, a Hutu Rwandan army officer, testified that he saw Kabiligi arrive in Kigali between 20 and 25 April.[2160]

Deliberations

1975. Kabiligi's alibi for the period of 28 March to 23 April 1994 can be divided into three distinct parts. The first part includes the period that he was in Cairo, Egypt from 28 March until his departure for Saudi Arabia on 8 April. The second part concerns the period from 9 to 13 April where the Kabiligi Defence has provided no indication as to Kabiligi's whereabouts, except to intimate that he remained outside of Rwanda. The third part relates to the period from 14 to 23 April when Kabiligi was allegedly in Nairobi, Kenya.

(i) 28 March to 8 April 1994

1976. With respect to the first part of the alibi, the Prosecution accepts that Kabiligi was in Cairo from 28 March until 8 April 1994 when he departed Egypt on a flight to Saudi Arabia.[2161] This is also confirmed by documentary evidence from the Egyptian government as well as the military training academy Kabiligi attended there.[2162] The Chamber notes that the testimony of Kanyarushoki suggests that Kabiligi might have been in Cairo as late as 10 April. However, Kanyarushoki acknowledged that he was not certain about the dates in particular when confronted with documentary evidence from the Egyptian government confirming Kabiligi's date of departure. In view of the evidence, the Chamber considers that Kabiligi has established the first part of his alibi.

(ii) 9 to 13 April 1994

1977. The Kabiligi Defence provided no indication of Kabiligi's whereabouts between 9 and 13 April 1994 in either its notice of alibi or its Closing Brief. Witnesses LAX-23 and DELTA, who attested to Kabiligi's arrival in Nairobi on 14 April, simply asserted that he was coming from Cairo, only implying that he had not yet returned to Rwanda. However, Witness LAX-23 clearly stated that he did not know where Kabiligi was in the days before arriving in Nairobi. Taking into account the time needed for return travel, the Prosecution also considers it "reasonable to conclude that Kabiligi first returned to Rwanda on or about [9 or 10 April]".[2163] The Chamber accepts that Kabiligi has a reasonable explanation of his activities until this time. However, the Defence did not provide one for his time between 10 and 13 April.

1978. This said, the Prosecution evidence of Kabiligi's activities in Rwanda during this period is limited. It refers primarily to the evidence of Prosecution Witnesses CE and Ruggiu who attested to Kabiligi's arrival at Camp Kigali after the death of President

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[2160] T. 23 February 2006 pp. 3, 70-71 ("Mount Rebero fell on the 19th and Kabiligi arrived later. I believe it was one or two days after the fall of Mount Rebero, but not after five days."); Nsengiyumva Defence Exhibit 140 (personal identification sheet).
[2161] Prosecution Closing Brief, paras. 665-666.
[2162] *See* Kabiligi Defence Exhibit 134 (alibi documents), containing Prosecution Exhibit 232 (Egyptian government letters) and KABRIGA-05 (Egyptian military academy documents).
[2163] Prosecution Closing Brief, para. 687.

Habyarimana.[2164] Witness CE, a soldier, recalled seeing Kabiligi and hearing soldiers cheer his arrival at Camp Kigali in a military jeep "a few days" after the death of the President.[2165] Ruggiu, a journalist with the RTLM, recalled seeing Kabiligi arrive between 14 and 17 April by helicopter near the officers mess at Camp Kigali.[2166] Although the witnesses provided different dates for Kabiligi's arrival, the Prosecution contends in its Closing Brief that these two witnesses "materially" corroborate one other.[2167] There is, however, no convincing way to explain the significant discrepancy between their testimonies about Kabiligi's arrival, and it appears that they are referring to separate incidents at different times.

1979. The Prosecution also submits that, given Kabiligi's senior position in the G-3 office of the army staff, it is unreasonable to assume that he would delay his return to Rwanda by several weeks.[2168] In light of Kabiligi's authority over the aviation squadron as well as the existence of helicopter flights as early 7 April, the Prosecution argues that Kabiligi could have easily facilitated his return to Rwanda.[2169] It suggests that Kabiligi may have returned multiple times, implicitly arguing that Witness CE saw him during the second part of the alibi and that Ruggiu was referring to a later arrival during the third part of the alibi.[2170] These submission are more consistent with the witnesses' varying accounts of Kabiligi's arrival.

1980. The Prosecution did not present any other evidence of Kabiligi's presence in Rwanda between 9 and 13 April, which is surprising given the resumed hostilities and his role as G-3 on the army's general staff. Furthermore, the Chamber heard extensive evidence from a number of soldiers stationed at Camp Kigali in connection with the killing of the Belgian peacekeepers (III.3.4).[2171] Indeed, the sheer contrast between the limited evidence related to Kabiligi's whereabouts during this period – only Witness CE's testimony – and the overwhelming evidence of the activities of Bagosora, Ntabakuze and Nsengiyumva, discussed elsewhere in this judgement, is significant.[2172] In the Chamber's view, the exceedingly limited nature of the evidence of Kabiligi's presence in Rwanda between 9 and 13 April is important, in particular bearing in mind his rank and role in the army. It suggests

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[2164] Prosecution Closing Brief, paras. 668-672. As further corroboration, the Prosecution also suggests that Witness AAA saw Kabiligi and Prefect Tharcisse Renzaho at a prefecture security council meeting in mid-April 1994 (III.4.1.11). *See* Prosecution Closing Brief, para. 673, citing T. 14 June 2004 pp. 17-21; T. 15 June 2004 p. 85. However, as the Kabiligi Defence notes, leaving aside other credibility concerns, Witness AAA conceded in cross-examination that this meeting occurred after 25 April. *See* Kabiligi Closing Brief, paras. 519; T. 15 June 2004 p. 85 ("I cannot recall the dates. It was the end of April, so it's between the 27th and the 30th of April. But these are not specific dates. I would say that – I am giving you an approximation. I would say that it took place towards the end of April. Q. In any case, you are saying at the end of April. Can we agree that the meeting took place after the 25th of April? Would that be correct? A. Yes, we could agree on that. It was starting on the 25th and perhaps in the days that followed.").

[2165] T. 13 April 2004 pp. 28-29; T. 14 April 2004 pp. 5, 7-8; Prosecution Exhibit 205 (personal identification sheet).

[2166] T. 16 June 2003 pp. 49-50; T 17 June 2003 pp. 30, 38-39.

[2167] Prosecution Closing Brief, paras. 1012(a), 1359(c).

[2168] *Id.* paras. 687 (m-n), 688.

[2169] *Id.* paras. 687 (o-q, t), 690-691.

[2170] *Id.* paras. 672, 686.

[2171] For example, the Chamber heard from Prosecution Witnesses XAF, CE, AH, DA, KJ and XXJ as well as Bagosora Defence Witnesses RO-3, RO-6 and RN-1, who were at Camp Kigali after the death of President Habyarimana.

[2172] Furthermore, there is evidence that Ntabakuze communicated with the G-3 office in connection with the arrival of refugees at Sonatube junction on 11 April 1994. However, it is notable that the office's deputy Lieutenant Colonel Kanyandekwe was involved in the radio exchange, not Kabiligi (III.4.1.1).

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Theodor Meron**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**18 March 2010**

SIMON BIKINDI

v.

THE PROSECUTOR

Case No. ICTR-01-72-A

JUDGEMENT

Counsel for Simon Bikindi	**Office of the Prosecutor**
Mr. Andreas O'Shea	Mr. Hassan Bubacar Jallow Mr. Alex Obote-Odora Ms. Dior Fall

8. The Appeals Chamber heard oral arguments regarding these appeals on 30 September 2009. Having considered the written and oral submissions of the parties, the Appeals Chamber hereby renders its Judgement.

II. STANDARDS OF APPELLATE REVIEW

9. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.[16]

10. Regarding errors of law, the Appeals Chamber has stated:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[17]

11. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal interpretation and review the relevant factual findings of the Trial Chamber accordingly. In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[18]

12. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber:

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[19]

13. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting

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[16] *Zigiranyirazo* Appeal Judgement, para. 8. *See also Karera* Appeal Judgement, para. 7; *Muvunyi* Appeal Judgement, para. 8; *Milošević* Appeal Judgement, para. 12.
[17] *Zigiranyirazo* Appeal Judgement, para. 9. *See also Karera* Appeal Judgement, para. 8; *Muvunyi* Appeal Judgement, para. 9, *citing Ntakirutimana* Appeal Judgement, para. 11 (citations omitted).
[18] *Zigiranyirazo* Appeal Judgement, para. 10. *See also Karera* Appeal Judgement, para. 9; *Milošević* Appeal Judgement, para. 14.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan, presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

Registrar: Adama Dieng

Date: 30 September 2011

THE PROSECUTOR

v.

Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-T

JUDGEMENT AND SENTENCE

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Michel Croteau
Philippe Larochelle
Prosper Mugiraneza
Tom Moran
Cynthia Cline

to security.[311] Mugiraneza Defence Witness RWQ, an MRND and *Interahamwe* member who Witness GJQ testified had received grenades, denied ever possessing grenades, other than as part of his duties as a member of the Rwandan military.[312]

202. Prosecution Witness GJQ was the sole witness to accuse Mugiraneza of weapons distribution in 1991. His evidence was hearsay. He only learned of Mugiraneza's alleged role in 1992 when he joined the *Interahamwe*. Further, he offered no further testimony or details as to when in 1991 the distribution occurred. While Witness GJW corroborated Witness GJQ that Colonel Rwagafilita distributed weapons, Witness GJW did not implicate Mugiraneza in this activity and his evidence was hearsay as well.[313] Last, Witness GJQ's testimony that *Interahamwe* would walk around public places with grenades[314] was undermined by Prosecution Witness GTF. This witness owned a shop close to the Kibungo roundabout in 1994 and testified he did not see any *Interahamwe* armed with rifles, grenades or pistols before the President's death in Kibungo.[315]

203. The Chamber considers the Defence evidence denying the allegation is self-serving.[316] However, it is of the view that the uncorroborated hearsay testimony of Witness GJQ, whose evidence implicating the Accused has been treated with caution (*see* II.6.1), is not an adequate basis upon which to base findings beyond reasonable doubt. As such, the Prosecution has not proven beyond reasonable doubt that Mugiraneza distributed grenades in 1991 that were used in 1994 to kill Tutsis.

2.3 Weapons Distribution at *Hôtel Tourisme*, Gitarama, 1993

204. The Prosecution led evidence through Witness GHU of an alleged weapons distribution at a joint MRND/MDR-Power meeting in Gitarama at the *Hôtel Tourisme* between November and December 1993. Nzabonimana introduced Bicamumpaka to the audience of around 500 persons as a prominent MDR member. Nzabonimana told the crowd to know its enemy, "none other than the *Inyenzi*, and the *Inyenzi* are the Tutsis". Subsequently, Nzabonimana and Bicamumpaka distributed rifles and grenades to those present, including to several *Interahamwe*.[317] It was the second time Witness GHU had seen Bicamumpaka.[318]

205. In contrast, Witness VF-1, who Witness GHU testified was present and received weapons, denied ever having possessed weapons or meeting Bicamumpaka or Nzabonimana.[319] Bicamumpaka also denied having ever distributed weapons to *Interahamwe*

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[311] Mugiraneza, T. 22 May 2008 pp. 7-8.
[312] Witness RWQ, T. 2 June 2008 pp. 8-10, 21-22, 36-37.
[313] Witness GJW, T. 22 March 2004 pp. 52-56; T. 23 March 2004 p. 36; T. 24 March 2004 pp. 14-20, 26-27.
[314] Witness GJQ, T. 14 March 2005 pp. 10, 24-25.
[315] Witness GTF, T. 14 October 2004 pp. 14, 31, 41, 51-52, 57; Exhibit P79 (Witness GTF's Personal Information Sheet). Witness GTF testified to having been in detention three months for crimes not related to the genocide. He was found not guilty and released.
[316] The Chamber considers Mugiraneza's denial to be self-interested. Furthermore, although Witness RWQ expressly contradicted Witness GJQ's evidence, the Chamber is mindful of Witness RWQ's possible interest in distancing himself and the Accused from the alleged distribution of weapons.
[317] Witness GHU, T. 4 March 2004 pp. 5-9, 17-20, 22-23.
[318] Witness GHU, T. 4 March 2004 pp. 4-6, 11-12, 21. *See also* II.3.2.
[319] Witness VF-1, T. 18 October 2007 pp. 6-7, 18. Witness VF-1 was a Hutu and MRND member in 1994. Witness VF-1, T. 18 October 2007 pp. 6, 17-18; Exhibit 3D160 (Witness VF-1's Personal Information Sheet).

691. The Chamber has also considered evidence from Mugenzi, Bizimungu and former Minister André Ntagerura that telephone communication in Kigali had been disrupted.[1022] There is other evidence that travel between the two prefectures was also difficult. Specifically, the driving distance between Kigali and Rukara commune was significant.[1023] Additionally, there is evidence tending to suggest that roadblocks could have impeded travel and that some of the area was under RPF control.[1024] In the Chamber's view, this evidence raises further questions about whether Mugenzi was aware of what was occurring at Rukara Parish when he sent his car and driver to pick up his mother in Kigali on 7 April 1994.

692. It is also reasonable to conclude that, once in the company of Mugenzi's family, Mugenzi's security detail would have acted on their orders alone. Given all of the above, it is not unlikely that Mugenzi lacked knowledge about attacks on Rukara Parish or the details of what his security personnel were doing once having gone to assist his family.

693. Finally, the Chamber does not consider that Witness LEL's uncorroborated hearsay evidence provides a sufficient basis for it to conclude beyond reasonable doubt that Mugenzi sent security personnel, whether they be soldiers or gendarmes, to rescue Vestine Ugiranyina and her husband's niece, Claudine, knowing that attacks on Tutsis had occurred or were going to occur at Rukara Parish. Furthermore, the evidence fails to establish that Mugenzi gave orders to any category of assailants participating in the attack, or that any were his subordinates. Based on the foregoing, the Chamber need not address notice challenges.

6.5 Killings at the Saint Joseph Economat, 15 April 1994

Introduction

694. The Indictment alleges that, from 7 April 1994, massacres of the Tutsi population were perpetrated by militiamen, military personnel and gendarmes on the directives or to the knowledge of authorities, including the four Accused. Specifically, the Prosecution alleges that Colonels Rwagafilita and Nkuriyekubona, who were in charge of the massacres in Kibungo, ordered Witness GJQ to kill people who were hiding at the Economat on 15 April. It submits that government officials, including Prosper Mugiraneza, were aware of this

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[1022] For example, Mugenzi testified that there were no mobile phones in Rwanda in 1994. He also testified that telephones outside Kigali were broken down as the central system of Rwandan telephones had been blown up in the first week of the war and were only restored after the war. Mugenzi, T. 9 November 2005 pp. 53-54. Bizimungu testified that on 8 April 1994 most lines of communication from Kigali were cut and a couple of days later all lines of communication were out because the RPF had bombed telecommunication systems in Kigali. Bizimungu, T. 4 June 2007 pp. 44-45. Former Minister André Ntagerura testified that from 6 to 7 April 1994 the RPF destroyed the central telecommunications system in Kigali, cutting off all communication with other prefectures and the outside world. Ntagerura, T. 19 February 2007 p. 22. *But see* Makeli, T. 30 October 2007 p. 25 (agreed that by 23 April 1994, phone lines in Kacyiru and Remera were not working but those close to Radio Rwanda in Kigali were).

[1023] Former Minister André Ntagerura testified that, under normal conditions, travel from Kigali to Kigarama would take about 1 hour and 20 minutes. Ntagerura, T. 19 February 2007 p. 20. Paul Mujyambere testified that the drive from Kigarama to Rukara is about 30 kilometres. Mujyambere, T. 6 May 2008 p. 7; *see also* Exhibit 1D24 (Administrative and Roads Map of Rwanda); Exhibit 1D39(A) (Administrative and Roads Map of Rwanda).

[1024] Defence Witnesses WFQ1 and Antoine Nyetera testified that the Kigali-Kibungo road was impassable because of its location in a zone of combat controlled by the RPF. Witness WFQ1, T. 4 October 2006 pp. 48-49; Nyetera, T. 26 September 2006 p. 13.

testified that the last time he was in Kibungo was 3 April, which is corroborated by Witness GJQ's evidence.[1053]

712. Considering the uncorroborated hearsay evidence provided by Witness GJQ, as well as the Chamber's reservations about the witness generally, there is reasonable doubt that Mugiraneza was in contact with Rwagafilita during the planning and execution of the Economat massacre. Consequently, the Prosecution has failed to establish beyond reasonable doubt that Mugiraneza was involved in, or had knowledge of, the massacres occurring at the Economat in Kibungo on 15 April 1994 or the killing of injured persons on 18 April. In light of this finding, the Chamber need not consider objections related to insufficient notice.[1054]

7. KIGALI PREFECTURE, 6 – 12 APRIL 1994

7.1 Meeting and Distribution of Weapons in Kabuga, 6, 7 and 9 April 1994

Introduction

713. The Indictment alleges that from late 1990 to July 1994, all four Accused conspired amongst themselves and others to exterminate Tutsi civilians and eliminate members of the opposition. A component of this plan included the distribution of weapons to militiamen and certain civilians with the intent to exterminate the Tutsi population and its accomplices. More specifically, the Prosecution alleges that, on 6 April 1994, Bicamumpaka and others met at Joseph Sebisogo's house in Kabuga and Bicamumpaka ordered the *Interahamwe* to hunt down and kill Tutsis. Bicamumpaka returned to Kabuga on 9 April with weapons, which he gave to *Interahamwe* leaders to distribute. Following this, the massacres of Tutsis in Kabuga intensified once more. The Prosecution relies on the testimony of Witness GHY. The Prosecution, relying on the testimony of Witness GHT, further alleges that, on 7 April, Bicamumpaka brought weapons to Kabuga, distributed them to the *Interahamwe* after which massacres of Tutsis in Kabuga intensified.[1055]

714. Bicamumpaka's Defence argues that there was no notice for these allegations. Furthermore, it contends that Witnesses GHY and GHT are unreliable. Bicamumpaka was at home with his family in Kigali on 6 and 7 April 1994 and on 9 April he was present at the swearing-in ceremony of the Interim Government, held meetings with the diplomatic core in Kigali, and attended two cabinet meetings. He denies travelling to Kabuga at any point between 6 and 9 April. Bicamumpaka's Defence relies on the testimonies of Bicamumpaka, Witnesses Abubakar Nduwayezu, Jean Rwagatera, OK-3, TK-1, OG-3, TF-2 and LD-1, and Prosecution Witness DCH.[1056]

[1053] Mugiraneza, T. 27 May 2008 pp. 12-13; Witness GJQ, T. 16 March 2005 p. 50.

[1054] The Chamber recalls that evidence relating to events occurring in Kibungo prefecture was only admitted to be considered against Mugiraneza for the allegations of conspiracy to commit genocide and complicity in genocide. Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004 (TC), 4 October 2004, p. 14.

[1055] Indictment, paras. 5.1, 5.19, 5.22, 6.10, 6.16, 6.18, 6.35-6.36; Prosecution Pre-Trial Brief, paras. 136 (p. 30), 197-198 (p. 43), 283 (p. 56); Prosecution Closing Brief, paras. 123, 148, 251, 254, 362-364, 376-378, 846, 870, 889-890, 934-941, 957-1004; Prosecution 21 November 2008 Document, Item Nos. 76-77; Prosecution Closing Arguments, T. 1 December 2008 pp. 4, 12, 61-62.

[1056] Bicamumpaka Opening Statement, T. 13 August 2007 pp. 12, 17; Bicamumpaka Closing Brief, paras. 22, 65, 67, 239, 261, 305-362, 394, 401, 692-697, 798; Bicamumpaka Closing Arguments, T. 3 December 2008 pp. 65-66; T. 5 December 2008 pp. 28-31.

760. Turning to the merits of Witness GHY's testimony about this allegation, the Chamber first recalls that in contrast to what the Prosecution alleges, Witness GHY only testified to Bicamumpaka's presence at a meeting attended by *Interahamwe*. She did not give any evidence that Bicamumpaka ordered Tutsis to be killed at this meeting. Moreover, her testimony that Bicamumpaka was at the meeting is based entirely on her neighbour's out-of-court statements, which are second-hand and thus of limited probative value.

761. Turning to the Defence evidence, Bicamumpaka denied having attended the meeting at Sebisogo's house on 6 April 1994 testifying that he remained at home in Kigali with his family from late afternoon on 6 April to 2.00 a.m. on 9 April. Bicamumpaka's testimony is generally corroborated by Witness OG-3 who was working at his residence. Moreover, Witnesses DCH, TK-1, OK-3 and TF-2, who lived in Kabuga in April 1994, did not see or hear that Bicamumpaka was in Kabuga in April.

762. This evidence is far from dispositive. Bicamumpaka has an interest in denying that he was in Kabuga on 6 April 1994. Likewise, Defence Witness OG-3 was a former employee of the Accused and consequently may have a motive to testify in a manner favourable to him. Witnesses TK-1, TF-2 and OK-3's general evidence that they did not see or alternatively hear that Bicamumpaka was in Kabuga in April is not dispositive. Notably, they also denied knowing him. Moreover, Witness TK-1 is an alleged accomplice of Bicamumpaka and, therefore, has a clear motive to deny Bicamumpaka's presence at Sebisogo's home where he was staying from 6 April for three to four weeks.[1122] Witness DCH's evidence is likewise of limited probative value in light of his testimony that he went home when he heard the shots that brought the President's plane down.[1123]

763. Bicamumpaka also introduced UNAMIR cables, which he claims demonstrate that it was impossible for him to have travelled from Kigali to Kabuga from 6 to 9 April 1994. The UNAMIR communications indicate that the RPF had taken control over some parts of eastern Kigali, the most likely route to Kabuga.[1124] Witness TK-1 testified, however, that several roads besides the paved road between Kigali and Kabuga would allow one to travel between the two locations.

764. Notwithstanding the frailties in the Defence evidence, Witness GHY's uncorroborated hearsay evidence fails to provide a sufficient basis for the Chamber to make findings beyond reasonable doubt. The Prosecution has not proven that Bicamumpaka attended a meeting with *Interahamwe* at Joseph Sebisogo's house on 6 April 1994 at which he ordered that Tutsis be killed.

(iii) Distribution of Weapons, 7 April 1994

765. Witness GHT is the only Prosecution witness to provide evidence of Bicamumpaka's role in weapons distribution in Kabuga on 7 April 1994. Specifically, Witness GHT testified that around 12.00 p.m., she saw, through the window of her father-in-law's house, a white

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[1122] Witness TK-1, T. 16 October 2007 pp. 74-75, 90-92; T. 17 October 2007 p. 3. The Chamber notes that Witness TF-2 was not asked, nor did he testify, specifically about his whereabouts on 6 April 1994.
[1123] Witness DCH, T. 21 September 2004 pp. 31-32.
[1124] Witness TK-1, T. 17 October 2007 p. 2; Exhibit 3D85 (Outgoing Cable from Booh-Booh to Annan, Goulding and Hansen, 9 April 1994) p. 1; Exhibit 3D87 (Outgoing Cable from Annan to Booh-Booh, 11 April 1994); Exhibit 3D97 (Outgoing Facsimile from Booh-Booh to Annan, 15 April 1994); *see also* Report on Site Visit (5 to 10 October 2008), 22 October 2008, p. 2 (distance from Kigali to Kabuga is 13 kilometres).

advising them not to take part in the massacres. Ndindabahizi was not aware of the cessation of killings by the *Interahamwe* after 9 April.[1213]

Mugenzi Defence Witness Agnès Ntamabyaliro

828. Agnès Ntamabyaliro, a Hutu, was appointed Minister of Trade and Industry in April 1992 and Minister of Justice in July 1993, a post which she retained in the Interim Government.[1214] After the swearing-in ceremony on 9 April 1994, Ntamabyaliro did not recall any other meetings that day. The first cabinet meeting took place on 10 April and she could not recall who was present, including whether Mugenzi attended. The cabinet was informed of the killings in Kigali, but not about other killings in the prefectures. The killings were committed by unruly soldiers and *Interahamwe*, which were denounced by the Interim Government. At the time, the ethnicity of the victims was unclear as people from all ethnic groups were being killed.[1215]

Deliberations

829. The parties do not dispute that there was a meeting among Mugenzi, Nzirorera, and *Interahamwe*, including Witness D, at which Witness D and the other *Interahamwe* were tasked with instructing the killers throughout Kigali to stop killing. Although Witness D places the meeting on 10 April 1994, the Chamber is satisfied that the meeting took place on 9 April, as Mugenzi testified.[1216] Further, the Interim Government, at the 9 April cabinet meeting, was advised that civilians were being killed by the *Interahamwe*. The only issues before the Chamber are the reasons for the pacification mission and whether Mugenzi expressed satisfaction that many Tutsis had been killed.

830. Witness D was the sole witness to testify for the Prosecution in relation to this event. Before turning to the merits of the Prosecution evidence, the Chamber looks at the general credibility of Witness D. His relationship with the Prosecution is extensive. He has provided information to the Prosecution and evidence on its behalf concerning the events of 1994 and assisted in the location of fugitives.[1217] Furthermore, he has received direct or indirect payments from the Prosecution between 1996 and May 2007 for his assistance and has been placed in a witness protection program. Many payments appear to be reasonable expenditures to cover travel, communication and other hardships related to assisting investigations or testifying before the Tribunal.[1218] Notwithstanding, the payments are significant.[1219]

[1213] Ndindabahizi, T. 2 May 2007 pp. 8-11, 15-16.

[1214] Ntamabyaliro, T. 21 August 2006 pp. 3-7; Exhibit 2D102A (Ntamabyaliro's Personal Information Sheet). At the time of her testimony, Agnès Ntamabyaliro was charged with genocide and a detainee in Kigali prison. Her trial had commenced but was postponed so that she could testify before the Tribunal. T. 23 August 2006 pp. 18-19.

[1215] Ntamabyaliro, T. 21 August 2006 pp. 42-44; T. 28 August 2006 pp. 55-56.

[1216] During his testimony, Witness D stated that he believed that the Interim Government had been sworn in on the day of the meeting. The Chamber accepts that the Interim Government was sworn in on 9 April 1994 (II.7.2), and, thus, accepts that the meeting where Witness D and others were instructed to undertake the pacification tour took place on 9 April. The Chamber notes that the Indictment places the meeting on 9 April.

[1217] *See* Witness D, T. 15 June 2004 pp. 67-68; T. 17 June 2004 pp. 13-14, 67-70.

[1218] *See, e.g.*, Witness D, T. 15 June 2004 pp. 68-69; T. 16 June 2004 pp. 8-9, 71; Exhibit P56 (Statement of Payments to Witness D, 15 February 2002).

831. Furthermore, in February 2002, the Prosecutor issued a statement that the Prosecution had decided not to open an investigation against Witness D given that the "evidence assessed" did not provide sufficient grounds to prosecute him. It further described his willingness to cooperate with the Office of the Prosecutor.[1220] Notably, this agreement was made in order to secure his testimony in the *Nahimana et al.* trial. While Witness D testified that this was done to allay suspicions about his involvement in the genocide and affirm his general credibility, it can also be seen as a concession made to obtain testimony.[1221] The record does not reflect that the Prosecution has acted improperly or sought to influence Witness D's testimony. Nonetheless, the possibility that Witness D is motivated to provide evidence favourable to the Prosecution in order to ensure continued benefits cannot be ignored.

832. In addition, aspects of Witness D's testimony regarding his position within the *Interahamwe* raise questions about his credibility. He testified that, by 1992, his position within the *Interahamwe* was by title only and that he held little influence within the organisation.[1222] However, he was a signatory to a January 1994 letter from the *Interahamwe* to UNAMIR that complained about the impartiality of its peacekeepers.[1223] After the formation of the Interim Government, Witness D was called upon to pacify *Interahamwe* killing Tutsis throughout Kigali and, during his tour, was able to move freely throughout Kigali. In the last week of April, he was part of a contingent of *Interahamwe* officials who met with General Roméo Dallaire to address the fact that *Interahamwe* were preventing UNAMIR-escorted refugees from the *Hôtel des Mille Collines* from reaching Kanombe airport.[1224] Finally, while in Butare, he was approached by Colonel Muvunyi to discourage *Interahamwe* arriving from Kigali to participate in looting.[1225]

833. Given his own admissions that *Interahamwe* participated in killings in 1994, his attempts to distance himself from the organisation, while understandable, are inconsistent with the contemporaneous recognition of his status by those in power in 1994 and his acts on the organisation's behalf.[1226] Under these circumstances, the Chamber does not consider Witness D to be an accomplice witness. However, the Chamber has some concerns that his evidence might be incomplete, particularly to the extent that it implicates him in criminal

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[1219] *See* Exhibit 4D163 (Payments to Witness D). In so finding, the Chamber has considered the Prosecution submissions about the nature of the compensation received by Witness D. *See* T. 16 June 2004 p. 15. Indeed, Witness D's estimates of the payments he has received are significantly lower than what records reveal. *See* Witness D, T. 16 June 2004 p. 71.

[1220] *See* Witness D, T. 15 June 2004 pp. 69-70; Exhibit P57 (Letter of Non-Prosecution of Witness D, 5 February 2002).

[1221] Witness D, T. 15 June 2004 p. 70; T. 16 June 2004 pp. 16, 71-72.

[1222] Witness D, T. 15 June 2004 pp. 61-65; T. 16 June 2004 pp. 44-45, 58-59; T. 17 June 2004 pp. 48-50, 58-59.

[1223] Witness D, T. 16 June 2004 pp. 51-52; Exhibit 2D14 (Letter from *Interahamwe* to UNAMIR, 19 January 1994).

[1224] Witness D, T. 15 June 2004 pp. 48, 50-54; T. 16 June 2004 pp. 29-32, 57-59.

[1225] Witness D, T. 17 June 2004 p. 65.

[1226] *See* Witness D, T. 17 June 2004 p. 51 ("Q. ... Some people have said that the *Interahamwe* is a criminal, genocidal organisation. Would you say it is fair or unfair to characterise the *Interahamwe* in general that way? A. It would be dishonest, in my view, to call this organisation as genocidaire, because as I explained to you, it is not only the *Interahamwe* who perpetrated the killings in Rwanda.").

supported by documentary evidence.[1470] Notably, Bizimungu has presented evidence that he was in Zaire in the days before and possibly the very day this agreement was signed (II.14.2.2). Thus, evidence that Bagosora was sent to purchase weapons in Zaire and intended to disguise them as medical supplies *could be* consistent with the proposition that Bizimungu, the Minister of Health, was involved in or complicit in this purchase and possibly earlier ones. Further, Bizimungu was accompanied by a military officer, Setako, who conceivably could have assisted with a weapons purchase and it is a reasonable possibility that the funds given to Bizimungu was an initial payment, either related to Bagosora's purchase or a different weapons shipment.

1017. Notwithstanding, Witness WAE testified that Bizimungu was not present at the Rwandan Embassy when Bagosora signed the contract on 24 May 1994. Indeed, a contemporaneous radio broadcast indicates that Bizimungu was in Rwanda that day (II.14.2.2). Furthermore, Witness WAE did not believe that Bizimungu was aware of Bagosora's decision to disguise the weapons in this manner and Bizimungu testified that he did not learn of this until after his incarceration. The Prosecution did not cite to any direct evidence that Bizimungu would have known about this.[1471]

1018. The Chamber recalls that elsewhere in the Judgement it found that evidence implicating Bizimungu in the receipt and distribution of weapons in Gisenyi was insufficient to support findings beyond reasonable doubt (II.11.3). Under the circumstances, the Chamber is not satisfied that Uwizeye's uncorroborated hearsay evidence, which is contradicted by its source, provides a sufficient basis for it to conclude beyond reasonable doubt that Bizimungu was sent to Zaire on 12 April 1994 with $17,500 USD to buy weapons and did purchase them.

8.2 Kamonyi School, After 12 April 1994

Introduction

1019. The Prosecution contends that shortly after the Interim Government moved from Kigali to Gitarama prefecture, Prosper Mugiraneza and other Interim Government ministers, including Callixte Nzabonimana, were at Kamonyi parish school in the midst of an attack by armed *Interahamwe*. Reference is made to Fidèle Uwizeye.[1472]

1020. The Mugiraneza Defence argues that there was no attack as alleged by Uwizeye. Reference is made to the testimony of Witness RRJ and the Rule 92 *bis* statements of Witnesses RWY, BGK, BGL and BGD.[1473]

[1470] Exhibit P160 (Certificate of Funds Transfer, 26 May 1994). *See also* Witness WAE, T. 14 February 2007 pp. 59-60.
[1471] Prosecution Closing Brief, paras. 681-682.
[1472] Prosecution Closing Brief, paras. 261, 1192-1193; Prosecution Closing Arguments, T. 1 December 2008 p. 67. The Indictment contains no reference to the attack at Kamonyi secondary school nor is it mentioned in the Prosecution Pre-Trial Brief. The Chamber considers it for context only.
[1473] Mugiraneza Closing Brief, paras. 87, 621(v), 678; Mugiraneza Closing Arguments, T. 4 December 2008 p. 67. *See also*, Mugenzi Closing Brief, para. 411.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER III

ENGLISH
Original: FRENCH

Before Judges: Andresia Vaz, presiding
Jai Ram Reddy
Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 17 June 2004

THE PROSECUTOR

v.

SYLVESTRE GACUMBTSI

Case No. ICTR-2001-64-T

JUDGMENT

Office of the Prosecutor:
Richard Karegyesa
Andra Mobberley
Khaled Ramadan

Counsel for the Defence:
Kouengoua
Anne Ngatio Mbattang

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30 metres away from the *locus in quo*. In such circumstances, compounded by the enormous stress the witness experienced at the time of the events, his identification of the Accused and his account of the Accused's gestures and actions at the time he observed the Accused, have been examined with caution. Moreover, the Chamber has noted several inconsistencies and contradictions in Witness TAC's evidence. For example, the Witness gave differing accounts of the number and identity of the policemen who remained on the premises after the Accused had left. Besides, Witness TAC contradicted himself on several issues in his prior statements. In particular, Witness TAC testified that the Accused was not armed and had left the Catholic Centre before two policemen killed Mutunzi and Rukomeza, whereas in his prior statement of 8 April 1997, he alleged that the Accused was armed and had personally killed the two victims. The witness had allegedly stated to investigators that the Accused had extorted money from the two victims before killing them, whereas in court he testified that he did not know what the Accused had taken from the victims.[181] The witness further testified that he was hiding alone in the banana fields, whereas he had alleged in his prior statement that he was in the company of his wife and three sisters. The witness's explanations about such major inconsistencies and contradictions, which cannot be attributed to error on the part of the investigators, were not persuasive.

193. In conclusion, the Chamber finds that the Prosecutor has not proven the allegations contained in paragraph 34 of the Indictment beyond a reasonable doubt.

Paragraph 36 of the Indictment

194. The Chamber finds that paragraph 36 of the Indictment is vague as it fails to identify the victims precisely, and does not specify their killers. Paragraph 36 only alleges that the Accused ordered the killing of his former tenants. However, the Chamber further finds that the Pre-Trial Brief and its annexes, which provided further details on the allegation, cured the vagueness.

195. The Chamber finds the evidence of Witnesses TBC and TAS to be credible. Their accounts corroborate each other and are consistent with that of Witness TAW, whom the Chamber has already found to be credible. On the evidence of Witnesses TAW, TBC and TAS, the Chamber finds that on 12 April 1994, at Nyakarambi, the Accused ordered Marie and Béatrice, two Tutsi sisters, to vacate the premises which they were renting, stating that the said premises did not belong to CND, a reference to the RPF cantonment in Kigali. The Accused returned to the premises on 13 April 1994 and, with the assistance of the communal police, expelled the tenants.

196. On the evidence of Witness TBC and Defence Witnesses UPT, YCW and YEW, the Chamber finds that Marie and Béatrice were killed in the night of 13 April 1994. However, the hearsay evidence of Witness TAS is insufficient, failing corroboration, to establish that the Accused ordered the murder of Marie and Béatrice.

197. In the light of the Chamber's findings on the involvement of the Accused in preparing, inciting and perpetrating the massacres of Tutsi at Rusumo, the Chamber

[181] T., 4 August 2003, pp. 12 and 40.

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the Accused is charged in the Prosecutor's Pre-Trial Brief, under the heading "Genocide", with acts of planning.[254] The Chamber also notes that the Indictment contains factual allegations sustaining the charges of preparing, planning and organizing preferred against the Accused.[255] With regard to the form "aiding and abetting in the preparation and execution", it should be noted that aiding and abetting are pleaded at the planning and execution phases of the crime, in conformity with the Statute under which, alternatively, this form of responsibility covers three stages of the crime, namely planning, preparation and execution.

270. Pursuant to Article 6(1), the Prosecutor charges Sylvestre Gacumbitsi with planning, instigating, ordering, committing, and aiding and abetting in genocide. The Chamber will examine each of these forms of participation *seriatim*.

271. "Planning" presupposes that one or more persons contemplate the commission of a crime at both its preparatory and execution phases.[256] On 9 April 1994, Sylvestre Gacumbitsi, as *bourgmestre* of Rusumo *commune*, convened a meeting of *conseillers de secteurs* and instructed them to organize meetings at the *secteur* level between 9 and 12 April, without the knowledge of Tutsi, and to incite Hutu to kill Tutsi. On 10 April 1994, Sylvestre Gacumbitsi, together with communal policemen, received boxes of weapons at the Kibungo *gendarmerie* camp, and had the boxes delivered to various *secteurs*. On 11 April, Sylvestre Gacumbitsi met successively with Majors Ndekezi and Nsabimana, as well as with *Interahamwe* leader, Cyasa. Together, they travelled to several areas in Rusumo *commune* on 11 April 1994. The Accused then visited several *secteurs* in Rusumo on 12 April 1994 to check whether the *conseillers* had held such meetings with the local population. The same day, he met the local CDR leader, André, in Gasenyi and reiterated his request of 10 April, namely, not to let people flee to Tanzania.[257]

272. In the morning of 13 April 1994, at the Nyakarambi market, the Accused, using a megaphone, addressed a crowd of about one hundred people who had assembled at his request. He issued various instructions and asked the crowd not to let anyone escape. The instructions were directed at the Hutu majority and aimed at preventing Tutsi from escaping from the attacks, and preparing Hutu to eliminate Tutsi.

273. On 14 April 1994, at the Rwanteru trading centre, the Accused addressed about a hundred people and urged them to arm themselves with machetes and participate in the fight against the enemy, stressing that all the Tutsi had to be driven away. After his speech, the Accused drove towards Kigarama, followed by some of the people. In Kigarama, the attackers attacked the house and property of a Tutsi called Callixte, and also looted the property of other Tutsi. Led by Juvénal Ntamwemizi, who was identified as the Accused's representative, another group, composed of people who had also listened to the Accused's speech in Rwanteru, attacked the property of a Tutsi called Buhanda.

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[254] Prosecutor's Pre-Trial Brief, para. 3.35.
[255] Indictment of 20 June 2001, paras. 4 to 7, 9 and 11.
[256] ICTY, *Bla{ki}* Judgment (TC), para. 386; *Musema* Judgment (TC), para. 119; *Akayesu* Judgment (TC), para. 480.
[257] See *supra*: Chapter II, Part B. This reference is also relevant to subsequent factual findings.

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274. The Chamber finds that these attacks resulted from the instigation stirred up by the Accused at the Rwanteru trading centre: the Kigarama attack took place under his direct supervision, while Buhanda's house was attacked under the supervision of his representative.

275. In the afternoon of 14 April 1994, the Accused, together with some armed communal policemen, went to the Kanyinya trading centre, where he told a group of about ten people: "Others have already completed their work. Where do you stand?". Soon after he left, a group of attackers set up and led by two demobilized soldiers, Nkaka and Sendama, started attacking Tutsi targets.

276. On 14 April 1994, after addressing the crowd at the Kanyinya commercial centre, the Accused, still accompanied by communal policemen, went to the Gisenyi commercial centre, where he addressed about 40 people, mainly Hutu. The Accused urged them to kill the Tutsi and throw their bodies into the River Akagera. He also asked boatmen to remove their canoes from the river to prevent the Tutsi from using them to cross the river.

277. Furthermore, the Accused met with various political and military officials, notably Colonel Rwagafirita from whom he received boxes of weapons that he had unloaded in various areas of the *commune*.

278. All such facts amount to acts of preparation for the massacres of the Tutsi in Rusumo *commune*. Sylvestre Gacumbitsi's involvement leads the Chamber to find that he planned the murder of Tutsi in Rusumo *commune* in April 1994.

279. "Instigating" involves prompting another person to commit an offence.[258] Instigating need not be direct and public.[259] For it to be a punishable offence, proof[260] is required of a causal connection between the instigation and the *actus reus* of the crime. In this particular case, the Accused, at various locations, publicly instigated the population to kill the Tutsi. For example, the Accused made speeches at the Rwanteru commercial centre where, following his instigation, those who listened to his speeches participated, shortly after, in looting property belonging to the Tutsi and in killing the Tutsi.[261]

280. The Chamber finds that Sylvestre Gacumbitsi incited the killing of Tutsi in Rusumo *commune* in April 1994.

281. "Ordering" refers to a situation where an individual in a position of authority uses such authority to compel another individual to commit an offence.[262] On this issue, the two ad hoc Tribunals have ruled differently. One has held that ordering implies the existence of a superior-subordinate relationship between the individual

[258] *Kajelijeli* Judgment (TC), para. 762; *Bagilishema* Judgment (TC), para. 30; *Akayesu* Judgment (TC), para. 482.
[259] *Semanza* Judgment (TC), para. 381; *Akayesu* Judgment (AC), paras. 478 to 482.
[260] *Bagilishema* Judgment (TC), *ibid.*
[261] See *supra*: Chapter II, Part B.
[262] *Akayesu* Judgment (TC), para. 483; *Kajelijeli* Judgment (TC), para. 763.

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326. The Prosecutor submits that the Accused planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or perpetration of the rape of the above-mentioned victims.

327. The Chamber finds that the evidence adduced establishes that Sylvestre Gacumbitsi, through such utterances as were heard by Prosecution Witness TAQ, also instigated the rape of Tutsi women and girls. On her part, Prosecution Witness TAS also testified that she heard those who raped her say that the Accused had ordered them to rape Tutsi women and girls, but her uncorroborated hearsay evidence is not such as to prove the involvement of the Accused.

328. The Chamber recalls that, immediately after the utterances made by the Accused instigating the rape of Tutsi women and girls, while he was crossing the bridge between Kankobwa and Nyarubuye *secteurs* on his way to Nyarubuye, Prosecution Witness TAQ and seven other Tutsi women and girls were raped by young men who, being in the neigbourhood, heard the *bourgmestre*'s instigation. The Chamber finds that these rapes, as recounted by Prosecution Witness TAQ, resulted directly from the instigation of the Accused.

329. On the contrary, the Chamber finds no evidence establishing a link between the rape of Prosecution Witness TAS and the possible utterances of the Accused and therefore the Accused cannot incur responsibility in that respect. The same applies to the rape of the wife of Prosecution Witness TAO, and the rape of the mother of Prosecution Witness TAP. However, the Chambers finds that these rapes are established as part of the widespread and systematic attack against Tutsi civilians in Rusumo.

330. Pursuant to Article 6(1) of the Statute, the Chamber finds Sylvestre Gacumbitsi criminally liable for instigating the rape of Witness TAQ and seven other Tutsi women and girls, thereby also committing a crime against humanity.

331. As to the other forms of criminal participation, the Prosecution has not adduced evidence to show that they are applicable to the Accused.

332. Having found the Accused criminally liable under Article 6(1) of the Statute for instigating others to commit rape in Rusumo *commune* in April 1994, the Chamber does not deem it necessary to *enquire* whether he is equally responsible pursuant to Article 6(3) of the Statute, given the similarity of the acts charged and the lack evidence of a superior-subordinate relationship between the Accused and the perpetrators of the rapes.

333. Thus, with regard to Count 5, the Chamber finds Sylvestre Gacumbitsi GUILTY OF RAPE AS A CRIME AGAINST HUMANITY.

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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Carmel Agius

Registrar: **Mr. Adama Dieng**

Judgement of: **20 October 2010**

CALLIXTE KALIMANZIRA

v.

THE PROSECUTOR

Case No. ICTR-05-88-A

JUDGEMENT

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Ms. Anta Guissé

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
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Ms. Charity Kagwe-Ndungu
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Ms. Florida Kabasinga
Ms. Jane Mukangira

C. Alleged Errors in Assessing the Alibi (Ground 4)

52. The Trial Chamber convicted Kalimanzira for instigating and aiding and abetting genocide at the Butare-Gisagara roadblock around 22 April 1994, for aiding and abetting genocide at Kabuye hill on 23 April 1994, and for aiding and abetting genocide by his presence at the inauguration of Élie Ndayambaje as bourgmestre of Muganza Commune on 22 June 1994.[132] In addition, it convicted Kalimanzira for direct and public incitement to commit genocide at the Jaguar roadblock in middle to late April 1994, the Kajyanama roadblock in late April 1994, the Gisagara marketplace at the end of May 1994, and the Nyabisagara football field in late May or early June 1994.[133]

53. In respect of each of these allegations, Kalimanzira presented an alibi, placing him, for the most part, at his home in Kigali from 6 to 14 April 1994, working with the interim government in Murambi, Gitarama Prefecture, between 14 April and 30 May 1994, and at his home in Butare Prefecture from 31 May until 30 June 1994.[134] Kalimanzira submits that the Trial Chamber erred in rejecting his alibi.[135] In this section, the Appeals Chamber addresses two principal questions: (1) whether the Trial Chamber erred in taking into account the lack of his notice of alibi; and (2) whether the Trial Chamber erred in assessing the underlying alibi evidence.

1. Notice of Alibi

54. The Trial Chamber found that Kalimanzira did not provide adequate notice of his intent to rely on an alibi defence as prescribed in Rule 67(A)(ii)(a) of the Rules.[136] The Trial Chamber observed that the lack of notice "may suggest that the Defence has tailored the alibi evidence to fit the Prosecution's case."[137] It therefore decided to take this into consideration in assessing the alibi,[138] noting that this "may diminish its probative value as it raises the question of whether the alibi was recently invented to fit the [Prosecution case]."[139] In particular, the Trial Chamber ultimately concluded that the "sudden and belated introduction" of specific alibi evidence in

[132] Trial Judgement, paras. 293, 393, 474, 739.
[133] Trial Judgement, paras. 562, 589, 614, 729, 739.
[134] Trial Judgement, paras. 101-111, 114, 280, 295, 459, 537, 564, 591, 718.
[135] Kalimanzira Notice of Appeal, paras. 18-20, 22; Kalimanzira Appeal Brief, paras. 59-91. Kalimanzira has abandoned his second sub-ground of appeal, which contends that the Trial Chamber failed to consider the entire Defence evidence. *See* Kalimanzira Notice of Appeal, para. 21; Kalimanzira Appeal Brief, para. 62. *See also* Trial Judgement, paras. 136, 287, 357, 464, 548, 577, 606, 723.
[136] Trial Judgement, paras. 65, 113.
[137] Trial Judgement, para. 66.
[138] Trial Judgement, para. 66.
[139] Trial Judgement, para. 113.

D. Alleged Errors Relating to the Inauguration of Élie Ndayambajye (Ground 5)

72. The Trial Chamber convicted Kalimanzira for aiding and abetting genocide, in part, based on his presence at the 22 June 1994 inauguration of Élie Ndayambaje as bourgmestre of Muganza Commune, Butare Prefecture, during which Ndayambaje instigated the killing of Tutsis.[194] The Trial Chamber found that, by his presence, Kalimanzira offered moral support to Ndayambaje's call to kill Tutsis during the ceremony and thereby aided and abetted subsequent killings.[195] In making these findings, the Trial Chamber relied on Witnesses BBB and BCA, who attended the ceremony, observed Kalimanzira's presence, and testified about subsequent killings.[196]

73. Kalimanzira submits that the Trial Chamber erred in convicting him in relation to this incident.[197] In this section, the Appeals Chamber will consider whether the Trial Chamber erred in the assessment of the evidence of the killings. In this respect, Kalimanzira contends that there is insufficient evidence demonstrating that killings in fact followed the ceremony.[198] The Prosecution responds generally that Kalimanzira's arguments lack merit, but does not address the sufficiency of the evidence relating to the killings.[199]

74. The Appeals Chamber recalls that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime."[200] The Appeals Chamber has explained that "[a]n accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime."[201] Where this form of aiding and abetting has been a basis of a conviction, "it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it."[202]

75. In view of Kalimanzira's position as *directeur de cabinet* of the Ministry of Interior, it was reasonable for the Trial Chamber to determine that his silent presence during Ndayamabaje's

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[194] Trial Judgement, paras. 291-293, 739.
[195] Trial Judgement, paras. 292, 293.
[196] Trial Judgement, para. 291.
[197] Kalimanzira Notice of Appeal, paras. 23-29; Kalimanzira Appeal Brief, paras. 92-161.
[198] Kalimanzira Appeal Brief, paras. 117-119, 135, 136.
[199] Prosecution Response Brief, paras. 75-90. *See also* T. 14 June 2010 pp. 32-37.
[200] *Muvunyi* Appeal Judgement, para. 79. *See also Seromba* Appeal Judgement, para. 44; *Blagojević and Jokić* Appeal Judgement, para. 127.
[201] *Brđanin* Appeal Judgement, para. 273. *See also Brđanin* Appeal Judgement, para. 277.

inflammatory speech would have offered tacit approval of its message. The basis of Kalimanzira's conviction, however, rests on the Trial Chamber's conclusion that Kalimanzira's tacit approval not only sanctioned Ndayambaje's message, but in fact substantially contributed to killings which occurred after the ceremony.[203]

76. As the Trial Chamber noted, Witnesses BBB and BCA attest to killings occurring after the meeting.[204] Their accounts regarding these crimes are vague and devoid of any detail. In particular, the extent of Witness BBB's description of the killings is that "after the speech, people went to sweep their houses, that is to say, to kill those persons."[205] Witness BCA's account is similarly brief: "As was noticed later on, it meant that [Tutsis and Hutus who opposed the government] who had been hidden had to be taken out of their hiding so that they should be killed as well."[206]

77. The Appeals Chamber, Judge Pocar dissenting, considers that it is unclear from either account whether the witnesses had first-hand knowledge of the killings or whether their evidence was hearsay. They refer to no particular incident, provide no approximate time-frame for the killings, and do not give any identifying information concerning the assailants or victims. In such circumstances, the Appeals Chamber finds, Judge Pocar dissenting, that it is impossible to determine with any reasonable certainty whether any killings in fact occurred following the meeting and, if so, the degree to which they were related to the ceremony.

78. In the *Muvunyi* case, the Appeals Chamber reversed a conviction for genocide because the evidence of the killings which underpinned the finding of guilt were based on second- or third-hand testimony that "contain[ed] no detail on any specific incident or the frequency of the attacks."[207] The Appeals Chamber, Judge Pocar dissenting, can identify no material distinction between the quality of the evidence in the *Muvunyi* case and that provided by Witnesses BBB and BCA here with respect to the occurrence of killings.

79. Consequently, the Appeals Chamber, Judge Pocar dissenting, is not persuaded that the Trial Chamber acted reasonably in relying on the evidence of Witnesses BBB and BCA about the subsequent killings. No reasonable trier of fact could have concluded that Tutsis were killed as a result of the ceremony in circumstances where it heard no evidence about even a single incident. Therefore, the Trial Chamber erred in fact in finding that the evidence showed that Kalimanzira's

[202] *Br|anin* Appeal Judgement, para. 277.
[203] Trial Judgement, para. 292.
[204] Trial Judgement, para. 291. *See also* T. 16 June 2008 p. 20; T. 18 June 2008 pp. 50, 51.
[205] T. 16 June 2008 p. 20.
[206] T. 18 June 2008 pp. 50, 51.
[207] *Muvunyi* Appeal Judgement, para. 69. *See also Muvunyi* Appeal Judgement, paras. 68, 70-72.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Before:
Judge Laïty Kama, Presiding Judge
Judge Lennart Aspegren
Judge Navanethem Pillay

Decision of: 4 September 1998

Registry: Mr. Agwu Okali

THE PROSECUTOR

VERSUS

JEAN KAMBANDA

Case no.: ICTR 97-23-S

JUDGEMENT and SENTENCE

Office of the Prosecutor:
Mr. Bernard Muna
Mr. Mohamed Othman
Mr. James Stewart
Mr. Udo Gehring

Counsel for the Defence:
Mr. Oliver Michael Inglis

I. The Proceedings

A. Background

1. Jean Kambanda was arrested by the Kenyan authorities, on the basis of a formal request submitted to them by the Prosecutor on 9 July 1997, in accordance with the provisions of Rule 40 of the Rules of Procedure and Evidence (the "Rules"). On 16 July 1997, Judge Laïty Kama, ruling on the Prosecutor=s motion of 9 July 1997, ordered the transfer and provisional detention of the suspect Jean Kambanda at the Detention Facility

42. In the brief dated 10 August 1998 and in her closing argument at the hearing, the Prosecutor stressed the gravity of the crimes of genocide, and crimes against humanity. The heinous nature of the crime of genocide and its absolute prohibition makes its commission inherently aggravating. The magnitude of the crimes involving the killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days constitutes an aggravating fact.

43. Crimes against Humanity are as aforementioned conceived as offences of the gravest kind against the life and liberty of the human being.

44. The crimes were committed during the time when Jean Kambanda was Prime Minister and he and his government were responsible for maintenance of peace and security. Jean Kambanda abused his authority and the trust of the civilian population. He personally participated in the genocide by distributing arms, making incendiary speeches and presiding over cabinet and other meetings where the massacres were planned and discussed. He failed to take necessary and reasonable measures to prevent his subordinates from committing crimes against the population. Abuse of positions of authority or trust is generally considered an aggravating factor.

(ii) Individual circumstances of Jean Kambanda

Personal particulars

45. Jean Kambanda was born on 10 October 1955 at Mubumbano in the Prefecture of Butare. He has a wife and two children. He holds a Diploma d=Ingenieur Commercial and from May 1989 to April 1994, he worked in the Union des Banques Populaires du Rwanda rising to the position of Director of the network of those banks. He was Vice President of the Butare Section of the MDR and member of its Political Bureau. On 9 April 1994, he became Prime Minister of the Interim Government. The Prosecutor has not proved previous criminal convictions, if any, of Jean Kambanda.

(iii) Mitigating Factors

46. Defence Counsel has proffered three factors in mitigation:- Plea of guilty; remorse; which he claims is evident from the act of pleading guilty; and co-operation with the Prosecutor=s office.

47. The Prosecutor confirms that Jean Kambanda has extended substantial co-operation and invaluable information to the Prosecutor. The Prosecutor requests the Trial Chamber to regard as a significant mitigating factor, not only the substantial co-operation so far extended, but also the future co-operation when Jean Kambanda testifies for the prosecution in the trials of other accused.

48. The Plea Agreement signed by the parties expressly records that no agreements, understandings or promises have been made between the parties with respect to sentence which, it is acknowledged, is at the discretion of the Trial Chamber.

UNITED NATIONS

International Criminal Tribunal for Rwanda

Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Taghrid Hikmet, Presiding
Judge Seon Ki Park
Judge Joseph Masanche

Registrar: Adama Dieng

Date: 1 November 2010

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Holo Makwaia
Althea Alexis Windsor
Cheikh Tidiane Mara
Lansana Dumbuya

Defence Counsel:
David Jacobs
Claver Sindayigaya
Marc Nerenberg
Iain Edwards

189. Finally, based on Witness CBS's uncontradicted testimony, the Chamber finds that members of the witness's family, including his father, were killed on or about 11 April 1994 and that the witness sought refuge at the parish on 12 April 1994. The Chamber finds no evidence on the record regarding the perpetrators of these attacks but is again satisfied that the victims were killed by Hutu assailants.

190. According to the Prosecution, "[f]rom the very outset, the killing of Tutsis in Kivumu *commune* was not arbitrary or random, but was sanctioned and ordered by the persons of power, influence or authority in Kivumu *commune*."[447] The Prosecution relies on the evidence of Witnesses CNJ, CBR and CDL to support this allegation.

191. Witness CNJ testified that Hutus were publicly called upon to kill the Tutsi.[448] These calls were broadcast on Radio Rwanda and other radio stations.[449] He testified that, at the local level, Grégoire Ndahimana, IPJ Kayishema and other authorities asked Hutus to go to Nyange to attack the Tutsi who had taken refuge there.[450] Witnesses CBR and CDL both testified that Télesphore Ndungutse, a teacher and local vice-chair of the MRND Party, instigated the Hutu in his locality to launch attacks against Tutsi civilians.[451] Witness CDL testified that Ndungutse received permission for these attacks from IPJ Fulgence Kayishema and Canton Court President Joseph Habiyambere.[452] Finally, Witnesses CDL, CBR and CNJ suggested between them that, after Tutsi were attacked, IPJ Kayishema ordered that the bodies be buried without investigation.[453]

192. Based on this testimony, the Chamber is satisfied that Télesphore Ndungutse instigated attacks against Tutsi in his locality and, particularly, against the home of his neighbour Grégoire Ndakubana. Indeed, the Chamber recalls that Witness CBR was one of those instigated by Ndungutse to launch attacks against Tutsi civilians, including Ndakubana's family. The Chamber is further satisfied that, by declining to investigate the crimes committed at Ndakubana's house and elsewhere, IPJ Kayishema acquiesced to and encouraged the continuation of the attacks.

193. On the other hand, the Chamber attaches little weight to Witness CDL's testimony that Ndungutse received authorisation for these attacks from the IPJ and canton court president because it is both uncorroborated and double hearsay. Similarly, the Chamber notes that, while Witness CNJ testified that Ndahimana, Kayishema and other authorities "asked us to go to Nyange where thousands of Tutsis had sought refuge,"[454] he did not provide any information regarding his basis for knowledge. Moreover, when considered in context, this testimony appears to refer to the attacks on the Nyange Church between 13 and 16 April 1994 and not to the attacks against Tutsi homes in the days immediately following the death of the president.[455] For these reasons, the Chamber is not convinced that Ndahimana or Kayishema ordered attacks against Tutsi civilians prior to their arrival at the Nyange Parish.

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[447] Prosecutor's Final Trial Brief, para. 101.
[448] T. 7 September 2009, pp. 10, 58.
[449] T. 7 September 2009, pp. 10, 58.
[450] T. 7 September 2009, p. 10.
[451] Witness CBR, T. 9 September 2009, pp. 3-4, 23; Witness CDL, T. 10 September 2009, pp. 21-23, 33. Although neither witness explicitly states that those instigated by Ndungutse were Hutu, the Chamber finds that this can be inferred from the context.
[452] T. 10 September 2009, pp. 21-23.
[453] Witness CDL, T. 10 September 2009, p. 25; Witness CBR, T. 9 September 2009, p. 4; Witness CNJ, T. 7 September 2009, p. 9.
[454]: T. 7 September 2009, p. 10.
[455] T. 7 September 2009, p. 10.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER III

Before: Judge Dennis C.M. Byron, presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen

Registrar: Adama Dieng

Date: 2 February 2012

THE PROSECUTOR

v.

Édouard KAREMERA and
Matthieu NGIRUMPATSE

Case No. ICTR-98-44-T

JUDGEMENT AND SENTENCE

Office of the Prosecution:
Don Webster
Maria Wilson
Takeh Sendze
Sunkarie Ballah-Conteh
Jean-Baptiste Nsanzimfura

Defence Counsel for Édouard Karemera:
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

office in Butare, eventually becoming the head prosecutor in Kigali. His work as a prosecutor continued until 1973.[5]

7. Beginning in 1967, Ngirumpatse was a member of the Rwandan delegation to the Organization of African Unity. In 1974, President Habyarimana appointed Ngirumpatse Ambassador to Ethiopia. He served in that capacity until 1979, when he was appointed Ambassador to Germany. While in Europe, Ngirumpatse completed his education with a PhD in law at Strasbourg University.[6]

8. Ngirumpatse returned to Rwanda in 1985 and was appointed diplomatic adviser to President Habyarimana in 1986. Four years later, Habyarimana appointed Ngirumpatse general manager of the *Société Nationale des Assurances au Rwanda* (SONARWA), Rwanda's national insurance corporation.[7]

9. In addition to his involvement in diplomacy and business, Ngirumpatse was an active participant in civil society organizations. In particular, he was interested in music and founded the Kigali Choir. Ngirumpatse was also a composer of Rwandan music and poetry, and his lyrics were included in a poetry anthology used in secondary schools in Rwanda.[8]

10. Ngirumpatse entered domestic politics in 1991, when he was appointed chairman of the MRND in Kigali-*ville préfecture*. He was elected National Secretary of the MRND in May 1992, and National Party Chairman and Chairman of the MRND Executive Bureau in July 1993,[9] positions he held during the events of 1994. Ngirumpatse was Minister of Justice from December 1991 to 7 April 1992.[10]

11. He was arrested in Bamako, Mali, on 5 June 1998 and transferred to the UNDF where he has remained throughout the course of this trial, apart from periods in a hospital or safe house for health reasons.[11]

PRELIMINARY ISSUES

1. INTRODUCTION

12. In their Closing Briefs, the Accused challenge various aspects of the fairness of the proceedings. The Prosecution did not address these issues in its Closing Brief or during its oral arguments. Many of them have been addressed by the Chamber at various stages of the trial. The Chamber will consider the following Defence submissions.

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[5] Ngirumpatse, T. 17 January 2011, pp. 3, 5, 7, 8.
[6] *Id.*, pp. 5, 6, 11, 12.
[7] *Id.*, pp. 22, 23.
[8] *Id.*, pp. 14-16.
[9] Ngirumpatse, T. 19 January 2011, pp. 9, 10.
[10] Ngirumpatse, T. 17 January 2011, p. 10; *Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Case No. ICTR-98-44-T, ("*Karemera et. al.*"), (Ngirumpatse) Defence Closing Brief, filed 2 June 2011, para. 89 ("Ngirumpatse Closing Brief").
[11] Ngirumpatse, T. 18 February 2011, p. 5. According to the Commanding Officer of the UNDF, Ngirumpatse spent the following dates in a hospital: 4/4/03 – 16/4/03 (AICC); 17/8/08 – 18/8/08 (AAR); 18/8/08 – 5/9/08 (KCMC); 8/10/08 – 4/6/09; 12/5/10 – 15/5/10; 14/6/10 – 22/6/10; 6/7/11 – 9/7/11 (Nairobi Hospital). He spent the following period in a safe house: 4/6/09 – 25/6/10. See email sent by Saidou Guindo, Commanding Officer of the UNDF, to Amanda Grafstrom, Associate Legal Officer, on 23/9/11.

criminal acts as the accused. Therefore, as long as no special circumstances have been identified, it is reasonable for a Trial Chamber to employ a lesser degree of caution towards the testimony of witnesses charged with similar crimes as opposed to accomplices.[151]

109. The Appeals Chamber has explained that two testimonies corroborate each other when one *prima facie* credible testimony is compatible with another *prima facie* credible testimony regarding the same fact or a sequence of linked facts.[152] Further, corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[153]

110. It is well-established that a Trial Chamber has the discretion to consider a material fact proven by the uncorroborated testimony of a single witness if that testimony is otherwise credible.[154] However, such evidence must be assessed with appropriate caution.[155] Nevertheless, if the Trial Chamber finds that a witness's testimony is inconsistent or otherwise problematic, it may still accept the evidence if it is corroborated by other evidence.[156] Whether it is necessary to rely on several witnesses' evidence to establish proof of a material fact depends on various factors that must be assessed in light of the circumstances of each case.[157] Where there is conflicting testimony, it is the duty of the Trial Chamber to decide which evidence it deems more probative.[158]

12. PROTECTIVE MEASURES

111. Most Prosecution and Defence witnesses were granted protective measures in order to prevent public disclosure of their identities.[159] Accordingly, when a witness or exhibit refers to a protected witness by his or her real name, the Chamber will not assist the reader by cross-referencing the real name of the protected witness with his or her pseudonym. Notwithstanding, the Chamber seeks to set forth the basis of its reasoning as clearly as possible, while avoiding disclosure of any information that may reveal the identity of protected witnesses. It has been mindful in its deliberations of the information it cannot fully explain.

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[151] *Prosecutor v. Ntagurera, Bagambiki, and Imanishimwe*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 234, ("*Cyangugu* Appeal Judgement").

[152] *Karera* Appeal Judgement, para. 173.

[153] *Id.*

[154] *Id.*, para. 45.

[155] *Id.*

[156] *Prosecutor v. Ntakirutimana and Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, para. 132.

[157] *Rutaganda* Appeal Judgement, para. 29.

[158] *Id.*

[159] *Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, Joseph Nzirorera, and André Rwamakuba*, Case No. ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004; *Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Édouard Karemera's Motion for Orders for the Protection of Defence Witnesses (TC), 19 February 2008; *Karemera et al.*, Décision relative aux requêtes d'Édouard Karemera en modification de la liste de ses témoins ainsi qu'en extension des mesures de protection (TC), 2 June 2008; *Karemera et al.*, Décision relative à la protection des témoins d'Édouard Karemera (TC), 24 October 2008; *Karemera et al.*, Décision consolidée sur les diverses écritures de Matthieu Ngirumpatse en vertu de l'article 73 *ter* du réglement ainsi que sur celles du procureur (TC), 5 July 2010.

192. Ngirumpatse had nothing to do with the formation of the *Interahamwe*. Towards the end of 1991, the Provisional National Committee simply informed him that the *Interahamwe* had been created.[276] He refuted the testimony of multiple Prosecution witnesses who claimed that: he was involved with the creation of the *Interahamwe*; the *Interahamwe* was created to counter insults from other opposition political parties and was initially composed of the children of MRND members; he introduced members of the *Interahamwe* at meetings and chose them for the purpose of killing Tutsis and opposition leaders; he distributed weapons at *Interahamwe* meetings and prepared appointments to the Provisional National Committee; the *Interahamwe* recruited unemployed youth; the Steering Committee of the MRND controlled the *Interahamwe*; the *Interahamwe* protected the interests of the MRND; he urged the extension of the *Interahamwe* to other *préfectures*; and that the MRND provided venues for *Interahamwe* meetings.[277]

193. Ngirumpatse acknowledges that he played a role in recruiting youth into the MRND but claims he did so to strengthen the party and give it a future. He did not recruit youth so they could defend the country.[278] Rutaganda and Witnesses G and T were among those who independently created the *Interahamwe* without the intervention of any member of the MRND.[279]

Deliberations

Cautionary Issues

194. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses HH, ALG, and Defence Witness Rutaganda were convicted and imprisoned for participating in the genocide.[280] Furthermore, at the time of his testimony, Prosecution Witness T was detained and awaiting trial on genocide charges.[281] The Chamber also takes into account that Prosecution Witnesses G and T have received extensive benefits under the Prosecution's witness protection program[282] and that Rutaganda called Ngirumpatse as a Defence witness in his own trial.

195. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Undisputed Issues

196. It is undisputed that the *Interahamwe* was initially founded to counter the existing youth groups of other political parties, which harassed the MRND party, and to recruit new members for the MRND.

Initiation of the Interahamwe *and its Establishment in Kigali-Ville Préfecture*

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[276] T. 21 January 2011, p. 18.
[277] See T. 24 January 2011, pp. 6-22.
[278] T. 2 February 2011, p. 8.
[279] *Id.*, p. 20.
[280] See paras. 170 (HH); 157 (ALG); and 187 (Rutaganda).
[281] See para. 178.
[282] See paras. 175 (G) and 178 (T).

followed the assassination of the president. The *Interahamwe* was not created for the purpose of forming a militia.[341]

245. There was no integration between the *Interahamwe* and the MRND.[342] Regarding Rutaganda's testimony that the *Interahamwe* was an integral part of the MRND, Ngirumpatse asserted that Rutaganda had misinterpreted the constitution of the MRND.

246. Although the MRND encouraged the creators of the *Interahamwe* to continue with their project, this does not mean that Ngirumpatse was the one in charge of the *Interahamwe*. He could assist the founders of the *Interahamwe* as the National Secretary and, later, as the chairman of the MRND but he did not organise their activities. The MRND leadership would advise the *Interahamwe* regarding any demonstrations they wished to organise, which might have been prejudicial to the interests of the party, but the party did not have the power to authorise the *Interahamwe* to organise these demonstrations.[343]

247. Jean-Pierre Turatsinze may have sat in an office at the MRND headquarters, but he did not have his own small office and he was not in charge of the *Interahamwe*.[344] Turatsinze was merely a driver and staff member of the National Secretariat of the MRND. He was a member of the MRND and was recruited in 1992. Turatsinze was used to deliver messages and worked at the reception during a congress on 3 July 1993. He was not in charge of coordinating the activities of the *Interahamwe*, he was not Ngirumpatse's right-hand man, and he was not the liaison between Ngirumpatse and the *Interahamwe*. Turatsinze had a primary school education, did not speak French, was fired for embezzlement and barred from the premises of the MRND National Secretariat in November 1993.[345]

248. It is wrong to assume that Ngirumpatse controlled the *Interahamwe* simply because others contacted him first when they wanted to change the behavior of the *Interahamwe*. He was simply the liaison between the *Interahamwe* and the MRND.[346]

Deliberations

Cautionary Issues

249. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses HH, ALG, AXA, UB, and Defence Witnesses Rutaganda and Nahimana were convicted and imprisoned for participating in the genocide.[347] Furthermore, at the time of their testimony, Prosecution witnesses AWD and T were detained and awaiting trial on genocide charges.[348] The Chamber also takes into account that Prosecution Witnesses G and T have received extensive benefits under the Prosecution's witness protection program[349] and that

[341] *Id.*, pp. 18-22.
[342] T. 2 February 2011, p. 19.
[343] *Id.*, p. 19.
[344] T. 2 February 2011, pp. 20, 21.
[345] *Id.*, pp. 16-18.
[346] T. 1 February 2011, p. 40.
[347] See paras. 170 (HH); 157 (ALG); 216 (AXA); 154 (UB); 187 (Rutaganda); and 237 (Nahimana).
[348] See paras. 219 (AWD) and 178 (T).
[349] See paras. 175 (G) and 178 (T).

Rutaganda called Ngirumpatse as a Defence witness in his own trial. The Chamber also takes into account that Witness Delphine Ngirumpatse is Ngirumpatse's daughter.[350]

250. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Expansion of the Interahamwe *Throughout Rwanda*

251. The *Interahamwe* was initially established in Kigali *préfecture*. Prosecution Witnesses HH, ALG and G, who lived in Kigali at the time, stated that the *Interahamwe* was established at all levels in that *préfecture*.

252. In April 1992, the MRND National Congress resolved that the *Interahamwe* should be set up throughout Rwanda. Witnesses ALG, HH, and G and Defence Witness Rutaganda testified that this actually happened. The evidence of Prosecution Witness AXA, and the transcript of the 7 November 1993 rally corroborate that the *Interahamwe* was established in Kibuye *préfecture* and Ngirumpatse confirmed that the *Interahamwe* was established in Gisenyi *préfecture*. It is also apparent that the *Interahamwe* existed in Kibungo *préfecture*.

253. Defence Witness Mpambara testified that the *Interahamwe* were attacked by youth groups of the PL party after an MRND rally in Kibungo in 1993. Although he stated that the *Interahamwe* was not an organised, structured group in Kibungo, he did not dispute that it existed in that *préfecture*. Furthermore, a report from General Augustin Ndindiliyimana[351] confirms that the *Interahamwe* existed in Kibungo in 1993 and were being trained in Mutara sector where Witness Mpambara commanded his troops.[352] Ngirumpatse, on the other hand, testified that apart from Kigali and Gisenyi *préfectures* there was no "development or organisation" of the *Interahamwe* nationwide. If by this, Ngirumpatse meant that there were *préfectures* where the *Interahamwe* did not exist, the Chamber finds the evidence that the *Interahamwe* existed in all *préfectures* in one form or another more probative.

254. The evidence of Prosecution Witness T that the Provisional National Committee sent members to Gisenyi *préfecture* in January 1994 and Butare *préfecture* from March to April 1994 to set up *Interahamwe* organisations is, with respect to Gisenyi, corroborated by Ngirumpatse's evidence. It is also generally supported by the evidence of Witness ALG that Ngirumpatse announced that *Interahamwe* were to be set up throughout the country at the Kigali-ville prefectural committee in January 1994.

Structure of the Interahamwe

255. It was decided during the April 1992 MRND congress that the *Interahamwe* should be established throughout the country at the prefectural and communal levels. It follows from the evidence of Witnesses HH and G that the *Interahamwe* was, in fact, organised at the prefectural level in all *préfectures*. This is consistent with the Chamber's findings with respect to Kigali *préfecture* (see para. 251), and with respect to Gisenyi *préfecture* it is

[350] See para. 230.
[351] See Exhibit P512, "Les événements du Rwanda d'Octobre 1990 à Juin 1994".
[352] See T. 16 September 2010, p. 6; T. 20 September 2010, p. 32.

341. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses ALG, HH, UB, AWE, AXA, and Defence Witnesses Rutaganda, Renzaho, Nsengiyumva, and Kajelijeli were convicted and imprisoned for participating in the genocide.[489] Furthermore, at the time of their testimony, Prosecution Witnesses AWD and T, and Defence Witness Ntamabyaliro were detained and awaiting trial on genocide charges.[490] The Chamber also takes into account that Prosecution Witnesses G and T have received extensive benefits under the Prosecution's witness protection program[491] and that Rutaganda called Ngirumpatse as a Defence witness in his own trial.

342. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Military Training of the Interahamwe

343. The Prosecution witnesses gave consistent evidence that *Interahamwe* were selected for military training and received military training.

344. Prosecution Witnesses HH and AWE testified that they selected *Interahamwe* for training. Witness HH stated that he and other *Interahamwe secteur* leaders from Kigali received training in weapons handling by an ex-soldier in the Kabuga building. Prosecution Witnesses GBU and AXA stated that they received training in Mukingo *commune* in Ruhengeri *prefecture* and in Bwakira *commune* in Kibuye *prefecture*, respectively. Prosecution Witness GOB claimed that he participated in selecting trainers and Prosecution Witness BDW asserted that he trained *Interahamwe* in Bwakira *commune* and witnessed training in Birambo. The evidence that military training of the *Interahamwe* took place was confirmed by Prosecution Witnesses T and G who held high positions in the *Interahamwe* movement and therefore were in a position to know of this activity.

345. The evidence was further corroborated by Prosecution witnesses who received the information from authorities and MRND leaders: Witness ALG from Renzaho; Witness AWD from Ngirumpatse and Karemera; Witness HH from Ngirumpatse; Witness AWE from Ngirumpatse and Nzirorera; and Witness BDW from Karemera.

346. The evidence was also corroborated by Prosecution Witnesses AWD, HH, and GAY who received the information from *Interahamwe* who had undergone training, and Prosecution Witness Claeys who had heard the information from Turatsinze.

347. Nonetheless, the Prosecution evidence was rebutted by a number of Defence witnesses who had not heard of any training and asserted that it could not have taken place without their knowledge. The Chamber notes that testimony from a witness who positively experienced or learned a matter is generally more probative than testimony from a witness who was unaware of that same matter.

348. With respect to the evidence of Defence Witnesses Rutaganda and Renzaho who held positions that would have enabled them to know about military training of the *Interahamwe*, the Chamber notes they are both convicted for genocide related to the

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[489] See paras. 157 (ALG); 170 (HH); 154 (UB); 299 (AWE); 216 (AXA); 187 (Rutaganda); 312 (Renzaho); 315 (Nsengiyumva); and 324 (Kajelijeli).
[490] See paras. 219 (AWD), 178 (T); and 334 (Ntamabyaliro).
[491] See paras. 175 (G) and 178 (T).

430. Joseph Nzirorera denied being aware of any distribution of weapons to the youth of Mukingo commune.[636] Nzirorera further denied being aware of the distribution of weapons to Robert Kajuga and Turatsinze by the Ministry of Defence.[637]

Matthieu Ngirumpatse

431. Ngirumpatse denied that he ordered, authorised, facilitated, or issued instructions for weapons to be distributed to the *Interahamwe* in 1993 or 1994. The only activity involving arms was related to the Provisional National Committee of the *Interahamwe* and the Minister of Defence. The purpose of the distribution was not to kill, but to provide personal protection to members of the Provisional National Committee.[638]

432. He denied participating in the clandestine importation of arms.[639] He further denied hiding any arms or issuing instructions for arms to be hidden at the MRND headquarters or at any other location under MRND supervision.[640] He was never informed of the distribution of arms by anyone to the youth of the MRND.[641]

433. He denied ever being aware that weapons were clandestinely imported using a Romanian plane in 1993 or 1994.[642]

434. With regard to Frank Claeys' testimony, Ngirumpatse explained that Turatsinze no longer had access to the MRND headquarters at that time and Claeys could not get inside because of the colour of his skin so neither of them could have seen anything.[643]

435. He agreed that he and Nzirorera met with General Dallaire and Claeys at the Amahoro hotel on 13 January 1994 and were questioned about hidden weapons. They spontaneously invited them to carry out a search but they refused.[644]

436. He met Booh-Booh in his capacity as chairman of the MRND to talk about the storage and distribution of weapons. The President of the republic had been told that there was an arms cache in the MRND building and that weapons were being distributed to the MRND youth; and that was the purpose of the discussion.[645]

Deliberations

Cautionary Issues

437. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses UB, HH, AWE, and Defence Witnesses Nzabanterura, Rutaganda and Renzaho were convicted and imprisoned for participating in the genocide.[646] Furthermore, at the time of his

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[636] T. 20 May 2010, p. 13.
[637] T. 24 May 2010, p. 3.
[638] T. 25 January 2011, p. 6.
[639] *Id.*, p. 7.
[640] *Id.*
[641] *Id.*
[642] *Id.*, p. 16.
[643] *Id.*, p. 26.
[644] *Id.*, p. 27.
[645] T. 1 February 2011, p. 19.
[646] See paras. 154 (UB), 170 (HH); 299 (AWE); 429 (Nzabanterura); 187 (Rutaganda); and 312 (Renzaho).

testimony, Prosecution Witness T was detained and awaiting trial on genocide charges.[647] The Chamber also takes into account that Prosecution Witnesses G and T have received extensive benefits under the Prosecution's witness protection program[648] and that Rutaganda called Ngirumpatse as a Defence witness in his own trial.

438. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Stockpiling and Distribution of Weapons

439. Prosecution Witness Claeys recalled abundant information he received from Turatsinze regarding the stockpiling of weapons and their distribution to the *Interahamwe*. The information he related was corroborated in many ways, as follows.

440. Claeys stated that Turatsinze showed Captain Deme an arms cache in the MRND headquarters while he waited outside. He also mentioned that Turatsinze showed him and Deme three other arms caches. Prosecution Witness T mentioned that he saw weapons at Kajuga's house, and Prosecution Witness G claimed that he received a firearm from Turatsinze. Prosecution Witness HH asserted that he participated in the distribution of the firearms. Witnesses T, G, and HH testified that distributions began in 1993.

441. Furthermore, the information Claeys received from Turatsinze is corroborated by the testimony of Witnesses G and UB regarding what Kajuga and Turatsinze, respectively, told them about the distributions. It is also corroborated by Defence Witness Nzabanterura's evidence that *Interahamwe* members received weapons after undergoing training at a military camp.

442. Thus, the Chamber attaches no weight to Defence Witness Booh-Booh's doubt that weapons had been distributed, which appears to have been based on the meager results of UNAMIR weapons searches. Because of his position, he would have known about the arms caches Turatsinze showed Claeys and Deme because they were mentioned in the UNAMIR reports he was served with on a regular basis. Furthermore, his testimony as a whole seemed to reflect bitterness towards the publicity the UNAMIR Force Commander had received.

443. The Chamber is convinced that firearms were provided by military authorities and widely distributed to members of the *Interahamwe*. Unlike the testimony of Ngirumpatse and Rutaganda, they were not distributed solely for the protection of members of the Provisional National Committee. The Prosecution has also presented strong evidence that additional weapons were stockpiled for later distribution.

Conclusion

444. The Prosecution has proved beyond a reasonable doubt that, starting in 1993, weapons were provided to the *Interahamwe* and also stockpiled for later distribution to the *Interahamwe*.

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[647] See para. 178.
[648] See paras. 175 (G) and 178 (T).

Matthieu Ngirumpatse

468. Ngirumpatse testified that he never attended a meeting to raise funds for the *Interahamwe*. He was not aware of money being handed to the Executive Bureau and then used in a clandestine manner. The buses hired to transport *Interahamwe* to rallies in other *préfectures* were not exclusively for *Interahamwe* but were for all party members who wanted to attend.[677]

469. Ngirumpatse also disputed Witness AWE's testimony that he chaired a meeting at the *Hôtel L'Horizon Rebero* on 28 March 1994. At that time, he was busy attending meetings for the establishment of institutions. He was not aware of any meeting that may have taken place at the *Hôtel L'Horizon Rebero*.[678]

Deliberations

Cautionary Issues

470. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses AWE and ALG, and Defence Witnesses Bizimungu and Rutaganda were convicted and imprisoned for participating in the genocide.[679] Furthermore, at the time of their testimony, Prosecution witnesses AWD and T were detained and awaiting trial on genocide charges.[680] The Chamber also takes into account that Prosecution Witnesses G and T have received extensive benefits under the Prosecution's witness protection program[681] and that Rutaganda called Ngirumpatse as a Defence witness in his own trial.

471. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Fundraising Activities

472. Based on the evidence of Prosecution Witnesses G, T, and AWD, and Defence Witnesses PR and Rutaganda, the Chamber is satisfied that fundraising activities for the *Interahamwe* took place in 1993 and 1994 at the *Hôtel L'Horizon Rebero* in Kigali. The evidence of these witnesses was broadly consistent on this point and the Chamber considers it to be credible.

473. The Chamber is also satisfied that Nzirorera and other senior officials, including Juvénal Habyarimana and Robert Kajuga, participated in these fundraising activities. Witnesses G, T, and Rutaganda provided consistent testimony on this point and the Chamber considers it to be credible.

474. The Chamber is not satisfied, however, that Ngirumpatse participated in these fundraising events at the *Hôtel L'Horizon Rebero*. Prosecution Witness AWE's evidence is

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[677] T. 25 January 2011, pp. 28, 29.
[678] T. 20 January 2011, p. 45.
[679] See paras. 299 (AWE); 157 (ALG); 465 (Bizimungu); and 187 (Rutaganda).
[680] See paras. 219 (AWD) and 178 (T).
[681] See paras. 175 (G) and 178 (T).

example those whose children joined the RPF, people who were suspected to be propagandists of the RPF, people who collected financial support for the RPF, and Hutus who supported the RPF war. Those listed were to be killed at some point in the future, and most were killed within the first three days after 6 April 1994.[699]

492. Based on his observations in Kigali and Byumba between April and July 1994, he stated that the *Interahamwe* almost always assisted or aided the Rwandan Armed Forces in the killings. He testified that everybody knows one another in Rwanda so Hutus do not need to draw up lists if the purpose was to kill all Tutsis.[700]

Ngirumpatse Defence Witness André Nzabanterura

493. The witness[701] stated that there was no list of Tutsis to eliminate. The issue of lists was created to discredit the MRND and the *Interahamwe*. In Rugando *cellule*, the MRND vice-chair was a Tutsi named Kalisa Rutabingwa and he would not have remained a member of the MRND if they had drawn up such a list.[702]

Matthieu Ngirumpatse

494. Ngirumpatse testified that any allegations that he chaired meetings where lists of Tutsis and moderate Hutus to be killed were created are fabricated. The RPF collected all the records and archives after they took control of Rwanda so if the lists existed they would have been turned over to the Prosecutor and would be in evidence in this trial. Lists were not necessary in Rwanda because everyone's ethnicity was known.[703]

Deliberations

Cautionary Issues

495. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses HH and UB, and Defence Witness Nzabanterura were convicted and imprisoned for participating in the genocide.[704] Furthermore, at the time of his testimony, Prosecution Witness T was detained and awaiting trial on genocide charges.[705] The Chamber also takes into account that Witness T has received extensive benefits under the Prosecution's witness protection program.[706]

496. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

The Lists

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[699] Exhibit DNZ554, *Bagosora et. al.*, T. 10 March 2006, pp. 18-20.
[700] *Id.*
[701] See para. 429, *supra*.
[702] T. 29 September 2010, p.16.
[703] T. 24 January 2011, pp. 23-24.
[704] See paras. 170 (HH); 154 (UB); and 429 (Nzabanterura).
[705] See para. 178 (T).
[706] *Id.*

Matthieu Ngirumpatse

528. Ngirumpatse is unsure if Hutu Power was an ideology or slogan but learned that it was introduced on 23 October 1993 by Froudouald Karamira at the Nyamirambo stadium rally. He was not present at this rally, because it was an MDR party rally and he was never in any way associated with that slogan or idea.[739] He never made private or public statements to indoctrinate youth to hate Tutsis and never promoted hatred or division. Such statements would have subjected him to reprimands or sanctions.

529. He did not order Witness UB to attend the rally. If such an order would have been given, it would not have come from the national chairman of the MRND but from the prefectural chair. Ngirumptase listened to some excerpts of the rally on the radio, which did not conform to the allegations of Witness UB. The MRND was not present at the rally because it was organized by the MDR.[740]

Deliberations

Cautionary Issues

530. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses ALG and UB were convicted and imprisoned for participating in the genocide.[741] Furthermore, at the time of their testimony, Prosecution Witnesses AWD and T were detained and awaiting trial on genocide charges.[742] The Chamber also takes into account that Prosecution Witness T has received extensive benefits under the Prosecution's witness protection program.[743]

531. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

The Speeches

532. In his speech, Karamira equated Tutsis with: "those who supported" Paul Kagame; "the enemy in their midst"; and "a traitor infiltrating their ranks and stealing their power". This corroborates the testimony of Prosecution Witnesses ALG and UB that speakers at the rally referred to Tutsis as accomplices of the enemy. The testimony of Witness UB that Tutsis were attacked immediately after the rally further corroborates the evidence that Tutsis were referred to in this way during the rally.

533. Therefore, the Chamber finds it proven beyond a reasonable doubt that speeches were made during the 23 October 1993 rally at Nyamirambo stadium, which characterized Tutsis as accomplices of the enemy.

Involvement of Ngirumpatse and Karemera

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[739] T. 20 January 2011, pp. 37, 38; T. 21 January 2011, p. 2.
[740] T. 20 January 2011, pp. 37, 38; T. 21 January 2011, p. 4.
[741] See paras. 157 (ALG) and 154 (UB).
[742] See paras. 219 (AWD) and 178 (T).
[743] See para. 178.

Ngirumpatse Defence Witness PR

586. The witness[799] spoke at an MRND rally at Nyamirambo Stadium on 16 January 1994, but denied making a speech about the *Interahamwe*. The witness was shown Exhibit P229A, and commented that only an ill-intentioned observer could conclude that he was endorsing the *Interahamwe*.[800]

Édouard Karemera

587. Karemera's speech during the rally updated MRND militants on the reasons for the stalemate with the Arusha Accords. He touched on the responsibility of Agathe Uwilingiyimana and Faustin Twagiramungu in particular. He spoke of the dissent among opposition parties but never attacked Tutsis in his speech. Instead, he was denouncing the irresponsible conduct of the Prime Minister designate who insisted on making arrangements with the RPF without consulting with the President and MRND.[801]

Matthieu Ngirumpatse

588. Ngirumpatse testified that the purpose of the rally was to remind party members of the MRND's commitment to the Arusha Accords and the importance of participating in transitional institutions. It was also meant to update members on the security situation.[802] He did not threaten a repeat of the massacres that had happened before but was speaking against a perceived determination by some of the partners to the Arusha Accords to destabilise the transition process.

589. He did not mention plans to compile lists of persons to exterminate; instead, the lists he referred to in his speech were of RPF infiltrators.[803] His call for the UN to leave was simply a reference to the time when a referendum would put an end to the UN mission.[804]

590. He never made public or private statements in order to indoctrinate youth to hate Tutsis and never promoted hatred or division. He never called for the extermination of an entire part of a population or for violence. From 1990 to 1994 there is not a speech, call, radio programme, public statement, article, or mail in which he called for hatred. He did not engage in doublespeak because doublespeak would not be understood by a crowd with different levels of training and education.[805]

Deliberations

Cautionary Issues

591. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses ALG and UB were convicted and imprisoned for participating in the genocide.[806]

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[799] See para. 232, *supra*.
[800] T. 23 November 2010, p.21 (closed session).
[801] T. 18 May 2009, pp. 41-45.
[802] T. 21 January 2011, p. 6.
[803] *Id.*, pp. 9, 10.
[804] *Id.*, pp. 10, 11.
[805] T. 21 January 2011, p. 17.
[806] See paras. 157 (ALG) and 154 (UB).

Furthermore, at the time of their testimony, Prosecution witnesses AWD and T were detained and awaiting trial on genocide charges.[807] The Chamber also takes into account that Prosecution Witness T has received extensive benefits under the Prosecution's witness protection program.[808]

592. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

The Rally

593. The broadcasts give a varied picture of the message conveyed by MRND leaders during the rally. On one hand, they attacked: the party's main opponents (RPF and Prime Minister Agathe Uwilingiyimana); the UN generally for suspecting the MRND of distributing weapons and preparing an armed conflict; and the Arusha Accords for giving the RPF a disproportionate role in power-sharing. The MRND leaders also warned that this could lead to a repeat of the events of 1959. On the other hand, the leaders blamed the other political parties for delaying the implementation of the Broad-Based Transitional Government.

594. Ngirumpatse's claim that the rally supported the Arusha Accords is not credible. It does not conform to the general themes addressed by the speakers or the aggressive criticism of delays in the implementation of the Broad-Based Transitional Government. The latter appears to have been more of a means for attacking the political opponents of the MRND than an expression of support for the Arusha Accords and its principles of power-sharing.

595. Thus, the Chamber finds Prosecution Witnesses T and ALG reliable to the extent that they asserted that, during the rally, the MRND criticized the Arusha Accords and opposed the envisaged power-sharing with the RPF. Consequently, the Chamber is convinced that Hutu Power was espoused at the rally. Moreover, considering the centralised structure of the MRND and the fact that the speakers did not object to each other's speeches, the Chamber finds that the MRND maintained a unified front during the rally.

596. Karemera's contention that his speech was restricted to updating the audience on the state of the Arusha Accords and criticizing Agathe Uwilingiyimana and Faustin Twagiramungu's behavior does not rebut the Prosecution evidence concerning the general tenor and purpose of the rally.

597. Nonetheless, the Chamber is not convinced by the testimony of Prosecution Witnesses AWD and ALG that the rally called for the killing of Tutsi civilians. The language Witness AWD claimed that Ngirumpatse used when referring to the events in 1959 does not appear in the broadcast. Nor does the broadcast show any chanting of "*Tubatsembatsembe.*" The possibility that some militants may have chanted it as testified by Witness ALG does not show that it was part of the program for the rally.

Conclusion

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[807] See paras. 219 (AWD) and 178 (T).
[808] See para. 178 (T).

Cautionary Issues

623. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses HH and ALG, and Defence Witnesses Nsengiyumva and Nahimana were convicted and imprisoned for participating in the genocide.[851] Furthermore, at the time of his testimony, Prosecution Witnesses FH was detained and awaiting trial on genocide charges.[852] The Chamber also takes into account that Prosecution Witness G has received extensive benefits under the Prosecution's witness protection program.[853]

624. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

RTLM's Editorial Policy

625. The evidence shows beyond a reasonable doubt that the RTLM radio station served as a vehicle for the dissemination of extremist ideology, both before and after the commencement of the genocide. The evidence does not, however, show whether this was the case from the outset of RTLM's broadcasting activities or, if not, from which point in time its broadcasting policy may have changed.

Ngirumpatse's Involvement

626. There is no evidence before the Chamber to suggest that Ngirumpatse played any role in the creation or financing of RTLM beyond purchasing two shares in the station. Nor is there evidence that RTLM served as a vehicle for disseminating extremist ideology at the time he purchased the shares. Finally, no evidence was led that Ngirumpatse knew that RTLM had been created for this purpose.

Conclusion

627. The Prosecution has proved beyond a reasonable doubt that the RTLM served as a vehicle for disseminating extremist ideology. It has not proved beyond a reasonable doubt that Ngirumpatse participated in the creation and financing of RTLM as part of a campaign of propaganda to instigate and incite violence against Tutsis.

3. CIVIL DEFENCE

3.1 Meeting Called by Nsabimana on or about 29 March 1994

Allegation in the Indictment

628. On or about 29 March 1994, a meeting was held by Army Chief of Staff Déogratias Nsabimana with the *préfet* of Kigali and the *commandant de secteur* for the city of Kigali, to fine-tune the structure and organisation of a civil defence plan.[854]

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[851] See paras. 170 (HH); 157 (ALG); 315 (Nsengiyumva); and 237 (Nahimana).
[852] See para. 609.
[853] See para. 175.
[854] Indictment, para. 26.

700. Ephrem Nkezabera provided the report and stated that the message had been well received. Persons manning the roadblocks had asked for weapons because the RPF was firing on them.[927]

Deliberations

Cautionary Issues

701. The Chamber recalls that, at the time of his testimony, Prosecution Witnesses T was detained and awaiting trial on genocide charges.[928] The Chamber also takes into account that Prosecution Witnesses G and T have received extensive benefits under the Prosecution's witness protection program.[929]

702. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Course of the Meeting

703. As a preliminary matter, the Chamber notes that Prosecution Witness G testified that he saw Interim President Sindikubwabo at the hotel, not that Sindikubwabo attended the first meeting with the *Interahamwe* leaders on 10 April 1994.

704. There are some discrepancies between the testimonies concerning the meeting, mainly with respect to the timing of the events and persons who attended.

705. Witness G testified that Nzirorera chaired the first meeting. The Chamber, however, is convinced by the testimony of Nzirorera and Ngirumpatse that the latter, as the senior leader, chaired the meeting.

706. Witness G also claimed that the first tour to the roadblocks took place on 10 April with the first feedback meeting with the political leaders taking place later that same day with Karemera, Nzirorera and Mugenzi in attendance. Prosecution Witness T, on the other hand, testified that the first tour to the roadblocks took place on 11 April with the feedback meeting occurring later that day attended by Ngirumpatse, Karemera, and Nzirorera.

707. The evidence of Witness G is corroborated by Nzirorera's testimony that the *Interahamwe* leaders reported to him, Ngirumpatse, and Mugenzi on 10 April that they had aborted the first tour and requested a military escort. It is also corroborated by Ngirumpatse's testimony that the *Interahamwe* leaders may have reported to Nzirorera on 10 April with the same information. Thus, Witness G could have been referring to the aborted tour and the subsequent feedback meeting on 10 April whereas Witness T could have referred to the tour that was executed the next day with a military escort and the subsequent feedback meeting with Ngirumpatse, Karemera and Nzirorera. With respect to the feedback meeting, the testimony of Witness T is corroborated by Ngirumpatse and Nzirorera, although Ngirumpatse testified that Mugenzi, not Karemera, was the third person who attended the feedback meeting.

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[927] T. 27 January 2011, p. 4.
[928] See para. 178.
[929] See paras. 175 (G) and 178 (T).

requesting weapons. Nzirorera believed that people were worried for their security and wanted to be able to defend themselves. Nzirorera and Ngirumpatse could not promise anything to the population because the government had problems with weapons and ammunitions.[955]

732. The meeting ended at about 8.00 p.m. Nzirorera went back to where he was residing whereas Ngirumpatse stayed at the *Hôtel des Diplomates*. Nzirorera and Ngirumpatse had instructed the group of *Interahamwe* leaders to go around the remaining neighbourhoods the following day, 12 April 1994, very early in the morning, and provide another report by 11.00 a.m. at the *Hôtel des Diplomates*.[956]

Matthieu Ngirumpatse

733. Ngirumpatse testified that he did not cooperate with Théoneste Bagosora or others to obtain firearms from the Ministry of Defence to be distributed to youth of political parties in Kigali.[957] He did not give any instructions for the distribution of weapons to the *Interahamwe* following 6 April 1994.[958] He was not aware of any meeting held by Bagosora and MRND officials around 10 or 11 April 1994 at the *Hôtel des Diplomates* during which it was allegedly decided that *conseillers* should distribute weapons to trusted youths to be used to kill Tutsis.[959]

Deliberations

Cautionary Issues

734. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses HH, UB, and ALG were convicted and imprisoned for participating in the genocide.[960] Furthermore, at the time of their testimony, Prosecution Witnesses AWD and T were detained and awaiting trial on genocide charges.[961]

735. The Chamber also notes that Witnesses G and T received extensive benefits, financial and otherwise, from the Prosecution in exchange for their testimony and takes this into account when assessing their credibility.[962]

736. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Weapons Distribution on 10 April 1994

737. Prosecution Witness UB gave hearsay evidence about a meeting on 10 April 1994 attended by Ngirumpatse, Karemera and Nzirorera. Prosecution Witness AWD provided

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[955] T. 18 May 2010, pp. 13, 14.
[956] *Id.*, p. 15.
[957] T. 27 January 2011, p. 10.
[958] *Id.*, p. 21.
[959] *Id.*, pp. 23, 24.
[960] See paras. 170 (HH); 154 (UB); and 157 (ALG).
[961] See paras. 219 (AWD) and 178 (T).
[962] See para. 175 (G) and 178 (T).

secteur, and the chief of communal police. Ruzindana was removed from his position around 17 or 18 April 1994.[1097]

Nzirorera Defence Witness Eliézer Niyitegeka

876. The witness[1098] stated that Godefroid Ruzindana was not removed on 17 April because he was opposed to the killings in Kibungo. He was already dead on 17 April 1994.[1099]

Édouard Karemera

877. Karemera stated that he proposed and appointed Alphonse Nteziryayo as the replacement *préfet* for Sylvain Nsabimana in Butare *préfecture*.[1100]

Deliberations

Cautionary Issues

878. The Chamber recalls that, at the time of their testimony, Prosecution Witness ALG and Defence Witness Niyitegeka were convicted and imprisoned for participating in the genocide.[1101] Furthermore, at the time of his testimony, Prosecution Witness FH was detained and awaiting trial on genocide charges.[1102] The Chamber also takes into account that Prosecution Witness G has received extensive benefits under the Prosecution's witness protection program.[1103]

879. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Fate of Préfets *Habyalimana and Ruzindana*

880. The Chamber is convinced by the testimony of Defence Witness ZNJ that Ruzindana was known to have opposed the attacks against the Tutsi population and by Prosecution Witness Uwizeye's testimony, which is corroborated by Prosecution Witness G, that the killings of Tutsis in Butare started only after Habyalimana was removed as *préfet*. This indicates that Habyalimana had resisted attacks against the Tutsi population. The Chamber, furthermore, relies on the undisputed testimony of Witness G that Habyalimana was a Tutsi. The Prosecution, however, did not present evidence that he was the only Tutsi *préfet* in Rwanda.

881. Concerning the reasons why the two *préfets* were replaced, Defence Witness Niyitegeka claimed that Ruzindana was replaced because he had died. This is inconsistent, however, with Niyitegeka's radio announcement and the evidence of Witness ZNJ that

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[1097] *Id.*, pp. 3, 4, 31.
[1098] See para. 794, *supra*.
[1099] T. 3 March 2010, pp. 14, 15.
[1100] T. 19 May 2009, pp. 45-47.
[1101] See paras. 157 (ALG) and 794 (Niyitegeka).
[1102] See para. 609.
[1103] See para. 175.

Deliberations

Cautionary Issues

1281. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses HH, UB, AWE, ALG, and Defence Witnesses Rutaganda, Niyitegeka, Renzaho, Ndindabahizi, and Nzabanterura were convicted and imprisoned for participating in the genocide.[1601] Furthermore, at the time of their testimony, Prosecution Witness T, and Defence Witnesses Nyiramasuhuko and Ntamabyaliro were detained and awaiting trial on genocide charges.[1602] The Chamber also takes into account that Prosecution Witnesses G and T have received extensive benefits under the Prosecution's witness protection program,[1603] and that Rutaganda called Ngirumpatse as a Defence witness in his own trial. Moreover, it recalls that Witness Delphine Ngirumpatse is Ngirumpatse's daughter.[1604]

1282. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Erection and Manning of Roadblocks

1283. It is undisputed that roadblocks were set up in Kigali following the downing of the President's plane. This is evident from the testimony of nearly all witnesses, which is corroborated by the adjudicated facts and the UNAMIR situation report of 7 April 1994.

1284. According to adjudicated facts and the evidence of Prosecution Witnesses HH, AWE, BDX, and ALG, and Defence Witness Ntamabyaliro, which is corroborated by Niyitegeka's radio interview, the roadblocks were established and manned by *Interahamwe*.

1285. Although a few Defence witnesses contend that Prosecution Witness BDX was not in Nzirorera's convoy when it left Kigali, the Chamber does not find that their evidence disproves that Witness BDX passed roadblocks when leaving Kigali, and the Chamber believes his evidence that he did.

1286. Many witnesses mentioned different groups as being responsible for at least partly establishing and manning roadblocks. Witnesses UB, BDX, Rutaganda and Ndindabahizi mentioned the population. Witness AWE named local authorities pursuant to an instruction of 9 April 1994 by *Préfet* Renzaho. Witnesses BDX and Rutaganda mentioned soldiers. Witness Ndindabahizi named farmers and inhabitants of Kigali. Witness Nzabanterura referred to the youth of all political parties who collectively referred to themselves as *Interahamwe*. Witness PTR mentioned young civilians, and Karemera named bandits.

1287. The Chamber does not discount the possibility that not all roadblocks in Kigali were set up and manned by MRND *Interahamwe* or that the MRND *Interahamwe* at some roadblocks were joined by non-MRND youths or that the term "*Interahamwe*" over time became diluted to mean all youths engaged in anti-Tutsi activities. Furthermore, the Chamber notes that the Indictment refers to militia and soldiers as the principal perpetrators

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[1601] See paras. 170 (HH); 154 (UB); 299 (AWE); 157 (ALG); 187 (Rutaganda); 794 (Niyitegeka); 312 (Renzaho); 924 (Ndindabahizi); and 429 (Nzabanterura).
[1602] See paras. 178 (T); 915 (Nyiramasuhuko); and 334 (Ntamabyaliro).
[1603] See paras. 175 (G) and 178 (T).
[1604] See para. 230.

Ngirumpatse afforded her no benefits at the roadblocks because she was similarly treated at the next two roadblocks.[1666]

1327. Though her identity card had Ngirumpatse's name on it, those manning the roadblocks were not interested in who she or her father were.[1667] Because of her physical features, people often assume she is a Tutsi and this was why she was threatened at roadblocks.[1668]

Édouard Karemera

1328. Karemera testified that the radio address by President Sindikubwabo on 10 April 1994 ordering all unauthorised roadblocks to be dismantled was sincere.[1669]

Matthieu Ngirumpatse

1329. Ngirumpatse testified that his address on Radio Rwanda on 10 April, where he called for people to stop killing, stealing, and to leave the roads was meant and understood to mean that they should dismantle the roadblocks.[1670] The French and English translations of the transcript of the radio address are inaccurate because they do not include the part where he calle for the people to stop the killings and leave the roads.

1330. He never called for the *Interahamwe* Provisional National Committee to control its men, and never implied that the committee was in control of the men at the roadblocks. The youth who were causing trouble on the streets were not only from the MRND, they were people from the general population. There was no control over them by the Provisional National Committee or MRND, or really even the government. Those in control were those with weapons, but really there was no control.[1671]

Deliberations

Cautionary Issues

1331. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses HH, UB, AWE, ALG, and Defence Witnesses Rutaganda, Niyitegeka, Renzaho, and Ndindabahizi were convicted and imprisoned for participating in the genocide.[1672] Furthermore, at the time of their testimony, Prosecution Witness T, and Defence Witnesses Nyiramasuhuko and Ntamabyaliro were detained and awaiting trial on genocide charges.[1673] The Chamber also takes into account that Prosecution Witnesses G and T have received extensive benefits under the Prosecution's witness protection program[1674] and that

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[1666] *Id.*, p. 14.
[1667] *Id.*, p. 16.
[1668] *Id.*, p. 32.
[1669] T. 19 May 2009, pp. 26, 27.
[1670] T. 27 January 2011, p. 6.
[1671] *Id.*, pp. 7, 8.
[1672] See paras. 170 (HH); 154 (UB); 299 (AWE); 157 (ALG); 187 (Rutaganda); 794 (Niyitegeka); 312 (Renzaho); and 924 (Ndindabahizi).
[1673] See paras. 178 (T); 915 (Nyiramasuhuko); and 334 (Ntamabyaliro).
[1674] See paras. 175 (G) and 178 (T).

Rutaganda called Ngirumpatse as a Defence witness in his own trial. Moreover, it recalls that Witness Delphine Ngirumpatse is Ngirumpatse's daughter.[1675]

1332. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Awareness of the Killings

1333. It is undisputed that Karemera and Ngirumpatse were aware that widespread killing had commenced on 8 April 1994 as evidenced by: the initiatives they took on 10 April 1994 in the form of instructing the Provisional National Committee to tour the roadblocks; the radio broadcast of a *communiqué* drafted by Karemera; and Ngirumpatse's radio address.

Control Over the Interahamwe

1334. The Chamber recalls that the MRND Executive Bureau exercised control over the *Interahamwe* in areas where the *Interahamwe* was organized according to party structures, such as Kigali, and over the Provisional National Committee of the *Interahamwe*, which exercised control of the *Interahamwe* in at least Kigali (see IV.1.3).

1335. The evidence of Prosecution Witnesses BDX and GBY that Nzirorera and Ngirumpatse greeted and expressed support for the *Interahamwe* when their convoys passed roadblocks manned by *Interahamwe* would tend to corroborate the above finding. The Chamber is, however, doubtful as to what the witnesses would have been able to hear from their respective positions (inside a car somewhere behind Nzirorera's car and in a nearby building), and is mindful that expressing support and greeting *Interahamwe* when passing roadblocks could be opportunistic gestures to extract oneself and others from a potentially dangerous situation. Accordingly, the Chamber need not address the Defence's challenges to the testimony of BDX and GBY in this regard.

1336. The finding that Ngirumpatse and Karemera were generally in control of the *Interahamwe* does not discount that the genocide could have started as a response to the assassination of President Habyarimana. The Chamber will discuss whether this was the case or whether the genocide was planned in advance of Habyarimana's assassination in (VI.3.2).

8. RAPE AND SEXUAL ASSAULT OF TUTSI WOMEN AND GIRLS

Allegation in the Indictment

1337. *Interahamwe* and militiamen raped and sexually assaulted Tutsi women in Ruhengeri *préfecture*, during early-mid April 1994, Kigali-*ville préfecture* during April 1994, Butare *préfecture* during mid-late April 1994, Kibuye *préfecture* during May-June 1994, and Gitarama *préfecture* during April and May 1994, and elsewhere throughout Rwanda.[1676] The resulting serious bodily or mental harm occurred as part of widespread and

[1675] See para. 230.
[1676] Indictment paras. 66, 68.

Nyanza.[1704] At Nyanza, an attack took place on 11 April, in the later afternoon and into the evening. Many were killed in this attack.[1705] The *Interahamwe* then began killing people with clubs and other weapons. Some girls were selected, put aside, and raped before they were killed. Clothing had been removed from many of the women who were killed.[1706]

Deliberations

Cautionary Issues

1352. The Chamber recalls that, at the time of their testimony, Prosecution Witnesses HH, and UB were convicted and imprisoned for participating in the genocide.[1707] Furthermore, at the time of his testimony, Prosecution Witness T was detained and awaiting trial on genocide charges.[1708] The Chamber also takes into account that Witness T has received extensive benefits under the Prosecution's witness protection program.[1709]

1353. None of the witnesses mentioned above were direct accomplices of the Accused. The Chamber will apply the requisite degree of caution to each when assessing their credibility and the weight of their evidence.

Rapes

1354. The testimony and statements of Witnesses HH, UB, T, ATE, DBV, and Lavie together with the adjudicated facts from the *Rutaganda* trial provide consistent evidence that rapes of Tutsi women by *Interahamwe* and soldiers occurred on a large scale in Kigali-ville *préfecture* during the period when Tutsis were assaulted as a group. The Chamber notes that the Defence has not sought to rebut the Prosecution evidence.

8.2 Ruhengeri *Préfecture*

Oral Testimony

Prosecution Witness GAY

1355. The witness[1710] was 17 years old in April 1994.[1711] She was abducted and raped by Michel Niyigaba on 8 April 1994. She was raped by Nzamba shortly thereafter in the same house. The following night she was raped by Dusabe, a member of Nzirorera's family. On the third occasion, she was raped by Musafiri. She was never raped by Noel. She was raped by more than eight men, each taking their own turn, virtually every day.[1712]

1356. She saw the bodies of her younger sisters, Joyce and Denise on 7 April 1994. The breast of one of Denise's daughters was cut off, while the other one had a piece of wood

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[1704] Adjudicated fact no. 27 – *Rutaganda* Trial Judgement.
[1705] Adjudicated fact no. 28 – *Rutaganda* Trial Judgement.
[1706] Adjudicated fact nos. 29, 30 – *Rutaganda* Trial Judgement.
[1707] See paras. 170 (HH) and 154 (UB).
[1708] See para. 178.
[1709] *Id.*
[1710] See para. 305, *supra*.
[1711] T. 18 January 2010, p. 29 (closed session).
[1712] *Id.*, pp. 23-29 (closed session).

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 27 October 2008

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON JOSEPH NZIRORERA'S MOTION TO DISMISS FOR ABUSE OF PROCESS: PAYMENTS TO PROSECUTION WITNESSES AND "REQUETE DE MATHIEU NGIRUMPATSE EN RETRAIT DE L'ACTE D'ACCUSATION"

Office of the Prosecutor:
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Defence Counsel for Joseph Nzirorera
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skew the truth-finding process, and are prejudicial to him, because potential or actual Prosecution witnesses such as T and Michel Bagaragaza initially met freely with his Lead Counsel, and provided exculpatory information, but ceased to do so after they began to receive payments from the Prosecution.

5. The Chamber does not find that the payments were made for the purpose of "inducing" testimony against Joseph Nzirorera, as Nzirorera claims. Instead, these payments and benefits were made as part of a witness protection program, which aims to neutralize the risks that arise from cooperating with the Prosecution, and testifying against the accused. Moreover, Nzirorera has not demonstrated how these benefits have influenced Prosecution witnesses to align their testimony and behavior with the interests of the Prosecution.

6. The loose associations that Joseph Nzirorera draws between cooperation by Prosecution witnesses with him prior to benefits being paid, and their lack of cooperation during the time period after benefits were paid, fall short of proving pre-trial impropriety or misconduct that contravenes the court's sense of justice. The Prosecution witnesses' lack of cooperation with Nzirorera during the time period where they were paid benefits could have arisen for a host of reasons, which Nzirorera has not discounted. Therefore, Nzirorera has not demonstrated that he has suffered prejudice as a result of the payments, and the Chamber does not find that an abuse of process has occurred.

7. Nonetheless, the Chamber recognizes that an unfortunate side-effect of the necessary practice of providing benefits to witnesses who agree to testify for the Prosecution may be that their testimony is sometimes influenced to some degree by such payments. Because the Chamber understands the importance of the integrity of this Tribunal, and endeavours to maintain the fairness of the proceedings against the Accused, it has already recognized that the benefits paid to Witness T go beyond that which is reasonably required for the management of a witness, and that they may affect the credibility of his testimony.[9] The credibility issues that may be raised by the nature of these payments and benefits will be an integral part of the Chamber's assessment of the weight to be accorded to Witness T's testimony in light of all other relevant factors and other evidence, at the end of the trial.

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[9] *Karemera et al.*, Decision on the Full Disclosure of ICTR Payments Made for the Benefit of Witness T (TC), 6 August 2008, para. 5.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before :
Judge Mohamed Shahabuddeen, Presiding Judge
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar : Mr. Adama Dieng

Date of filing : 16 June 2006

Prosecutor
v.
Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-AR73(C)

DECISION ON PROSECUTOR'S INTERLOCUTORY APPEAL OF DECISION ON JUDICIAL NOTICE

Office of the Prosecutor	**Counsel for the Accused**
Mr. Hassan Bubacar Jallow	Ms. Dior Diagne and Mr. Moussa Félix Sow for **Édouard Karemera**
Mr. James Stewart	
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Mr. Gregory Lombardi	
	Mr. Peter Robinson for **Joseph Nzirorera**

other proceedings of the Tribunal relating to the matter at issue in the current proceedings."

Taking judicial notice of adjudicated facts under Rule 94(B) is a method of achieving judicial economy and harmonizing judgements of the Tribunal while ensuring the right of the Accused to a fair, public and expeditious trial.[69]

40. Although governed by some of the same principles, judicial notice under Rule 94(B) is different in nature from judicial notice under Rule 94(A). Adjudicated facts are different from facts of common knowledge (although there is some overlap in the categories). There is no requirement that adjudicated facts be beyond reasonable dispute. They are facts that have been established in a proceeding between other parties on the basis of the evidence the parties to that proceeding chose to introduce, in the particular context of that proceeding. For this reason, they cannot simply be accepted, by mere virtue of their acceptance in the first proceeding, as conclusive in proceedings involving different parties who have not had the chance to contest them.

41. Thus, there are two crucial differences between the two provisions. One is built into the Rule: whereas judicial notice under Rule 94(A) is mandatory, judicial notice under Rule 94(B) is discretionary, allowing the Trial Chamber to determine which adjudicated facts to recognize on the basis of a careful consideration of the accused's right to a fair and expeditious trial. The principles guiding and limiting the exercise of that discretion have been developed through jurisprudence and are discussed below.

42. The second difference is established by the Tribunal's jurisprudence, and concerns the consequences of judicial notice: whereas facts noticed under Rule 94(A) are established conclusively, those established under Rule 94(B) are merely presumptions that may be rebutted by the defence with evidence at trial.[70] The Appeals Chamber reiterates that judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution. In the case of judicial notice under Rule 94(B), the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into question by introducing reliable and credible evidence to the contrary. This approach is consistent with practice in national jurisdictions: whereas judicial notice of facts of common knowledge may be treated as conclusive,[71] the final adjudication of facts in judicial proceedings is treated as conclusively binding only, at most, on the parties to those proceedings (*res judicata*).[72]

43. The Prosecution sought judicial notice under Rule 94(B) of 153 adjudicated facts. The Trial Chamber rejected this request in full, and the Prosecution appeals with respect to 147 of the facts. The Prosecution, the Accused, and the Trial Chamber have not proceeded in their analysis one by one through these facts, and the Appeals Chamber will not do so either. It will instead address the two major reasons given by the Trial Chamber for refusing to take judicial notice and consider whether each constitutes a legitimate reason to so refuse under Rule 94(B). In doing so, the Appeals Chamber bears in mind that "a Trial Chamber's exercise of discretion will only be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 23 August 2005

THE PROSECUTOR
v.
Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-PT

DECISION ON DEFENCE MOTION FOR FULL DISCLOSURE OF PAYMENTS TO WITNESSES AND TO EXCLUDE TESTIMONY FROM PAID WITNESSES

Rule 73 of the Rules of Procedure and Evidence

Office of the Prosecutor:
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Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short, and Gberdao Gustave Kam (the "Chamber");

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Kambanda and Witness GFA,[3] one can expect that the Prosecution has given financial compensation to a number of its other witnesses as well.

3. The Defence recalls this Chamber's Decision of 7 October 2003[4] and argues that the Prosecution has violated Rule 68 of the Rules as well as the Chamber's Order for disclosure by failing to disclose the records of payments to witnesses. The Defence states that making payments or gifts to a witness is unlawful and affects the integrity of the proceedings. It supports this statement by citing national jurisprudence of the United States and other civil law jurisdictions.[5]

4. The Prosecution opposes the Motion and acknowledges its obligations under Rule 68, giving its assurance that the disclosure of information which falls within Rule 68 will be made on a continuing basis. Regarding the request for an oral evidentiary hearing, the Prosecution submits that it is unnecessary, since the Defence may cross-examine witnesses concerning any allegation of benefits conferred upon them by the Prosecution. The Prosecution further submits that if such an allegation is proved by the Defence during the conduct of its cross-examination of a witness, it will be open to the Chamber to exclude the witness' testimony pursuant to Rule 95.

DISCUSSION

5. In its Decision of 7 October 2003, the Chamber said:

"Information and records relating to benefits and promises made to Prosecution Witnesses or their families would fall under Rule 68 of the Rules in that they may affect the credibility of prosecution evidence."[6]

6. Rule 68 of the Rules, which governs the disclosure of exculpatory evidence, compels the Prosecutor to disclose to the Defence evidence within its knowledge which may be of an exculpatory nature and provides a framework within which the Prosecutor should deal with any such material.

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: **Mr. Adama Dieng**

Judgement of: **2 February 2009**

FRANÇOIS KARERA

v.

THE PROSECUTOR

Case No. ICTR-01-74-A

JUDGEMENT

Counsel for the Appellant

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Mr. Alexandre Bergevin
Mr. Christian Deslauriers, Assistant

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Dior Sow Fall
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Mr. François-Xavier Nsanzuwera
Mr. Alfred Orono Orono
Ms. Florida Kabasinga
Ms. Béatrice Chapaux

does not imply that the rules applied to assess the testimony of an accused are different from those applied with respect to the testimony of an "ordinary witness". A trier of fact shall decide which witness's testimony to prefer, without necessarily articulating every step of its reasoning in reaching this decision.[38] In so doing, as for any witness, a trier of fact is required to determine the overall credibility of an accused testifying at his own trial[39] and then assess the probative value of the accused's evidence in the context of the totality of the evidence.[40] There is no requirement in the Tribunal's jurisprudence that the accused's credibility be assessed first and in isolation from the rest of the evidence in the case.

20. Furthermore, it is settled jurisprudence that every accused has the right to a reasoned opinion under Article 22 of the Statute and Rule 88(C) of the Rules.[41] A reasoned opinion ensures that the accused can exercise his right of appeal and that the Appeals Chamber can carry out its statutory duty under Article 24 of the Statute.[42] However, the reasoned opinion requirement relates to the Trial Judgement as a whole rather than to each submission made at trial.[43] Indeed,

> the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial. The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective. F...ğ If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[44]

Additionally, a Trial Chamber does not need to set out in detail why it accepted or rejected a particular testimony.[45] This is equally applicable to all evidence, including that tendered by the accused person.

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[38] *Kupreškić et al.* Appeal Judgement, para. 32.
[39] *Ntakirutimana* Appeal Judgement, para. 391, citing *Musema* Appeal Judgement, para. 50.
[40] *See Musema* Appeal Judgement, para. 50 (regarding the assessment of documentary evidence tendered by an accused in support of his alibi); *Muhimana* Appeal Judgement, para. 19.
[41] *Muvunyi* Appeal Judgement, para. 144, citing *Simba* Appeal Judgement, para. 152; *Kamuhanda* Appeal Judgement, para. 32; *Kajelijeli* Appeal Judgement, para. 59; *Semanza* Appeal Judgement, paras. 130, 149.
[42] *See, e.g., Limaj et al.* Appeal Judgement, para. 81.
[43] *Limaj et al.* Appeal Judgement, para. 81; *Kvo~ka et al.* Appeal Judgement, para. 23.
[44] *Kvo~ka et al.* Appeal Judgement, para. 23 (citations omitted); *Simba* Appeal Judgement, para. 152; *Ntagerura et al.* Appeal Judgement, para. 206; *Niyitegeka* Appeal Judgement, para. 124; *Kajelijeli* Appeal Judgement, para. 60; *Musema* Appeal Judgement, paras. 18-20; *Limaj et al.* Appeal Judgement, para. 81; *Naletili} and Martinovi}* Appeal Judgement, para. 603.
[45] *Muhimana* Appeal Judgement, para. 99; *Simba* Appeal Judgement, para. 152; *Musema* Appeal Judgement, paras. 18-20.

Witness BMG's evidence corroborated that of Witness BMF about sparing the life of a Tutsi man named Callixte Kalisa.[341]

171. The Appellant submits that the Trial Chamber's assessment of the evidence of these witnesses and its finding that certain houses of Tutsis were spared on the Appellant's orders are erroneous.[342] The Prosecution responds that the Trial Chamber properly assessed the evidence concerning the order that certain houses of Tutsis be spared.[343]

172. The Appellant first contends that Prosecution Witnesses BMG, BMF, and BMH do not corroborate each other since none of them "gave the same reasons advanced by Fthe Appellantğ or by those persons who were quoting him, as to why the lives and houses of some Tutsi had to be spared."[344]

173. The Appeals Chamber recalls its holding in the *Nahimana et al.* Appeal Judgement that:

> two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others. It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[345]

174. The Appeals Chamber further recalls that minor inconsistencies commonly occur in witness testimony without rendering it unreliable and that it is within the discretion of the Trial Chamber to evaluate such inconsistencies and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.[346]

175. While the Trial Chamber did not explicitly address this matter, the Appeals Chamber finds that the alleged inconsistency is minor and that it is not relevant to the material facts underlying the conviction. Accordingly, the Trial Chamber's failure to address this issue does not render its reliance on the witnesses erroneous.

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[341] Trial Judgement, para. 174.
[342] Notice of Appeal, para. 102; Appellant's Brief, para. 149.
[343] Respondent's Brief, paras. 110, 111.
[344] Appellant's Brief, para. 148.
[345] *Nahimana et al.* Appeal Judgement, para. 428.
[346] *Kvočka et al.* Appeal Judgement, para. 23.

event and the Trial Chamber decided to consider his testimony with caution,[408] since he might "have been influenced by a wish to positively affect the criminal proceedings against Fhimğ in Rwanda".[409]

204. Witness BMU testified that he saw the policemen guarding the Appellant's house arrest Ndingutse and that later they "took two vehicles Fbelonging to Ndingutseğ, a minibus and a Peugeot 504" to the Appellant's compound.[410] He also testified that he was told by a subordinate that Ndingutse was killed by "Karera's policemen" and *Interahamwe*.[411] The Appeals Chamber finds that no reasonable trier of fact could have accepted this witness's uncorroborated hearsay testimony that the policemen who killed Ndingutse were the policemen who guarded the Appellant's house. Furthermore, no reasonable trier of fact could have concluded on the basis of that circumstantial evidence that the only reasonable inference was that Ndingutse had been killed pursuant to the Appellant's orders to kill Tutsis.

205. In sum, the Appeals Chamber finds that the Trial Chamber erred in fact in finding that Ndingutse had been killed pursuant to the Appellant's order. Accordingly, the Appeals Chamber grants this sub-ground of appeal and reverses the Appellant's convictions for genocide and extermination and murder as crimes against humanity based on this event.

H. Alleged Errors relating to the Killing of Nyagatare on the Appellant's Orders

206. The Trial Chamber found that a Tutsi man named Palatin Nyagatare was killed at a roadblock by policeman Kalimba on 24 April 1994 and that this followed the Appellant's orders to kill Tutsis in Nyamirambo.[412] Partly on this basis, the Trial Chamber found the Appellant guilty for ordering genocide and extermination and murder as crimes against humanity.[413]

207. The Appellant submits that the Trial Chamber erred in fact in finding that he was responsible for the killing of Palatin Nyagatare.[414] He contends that even assuming that he gave the order to kill Tutsis in Nyamirambo, the Trial Chamber committed a factual error in finding that this order resulted in Nyagatare's killing.[415] The Appellant recalls that the witnesses who claimed that he gave such an order pointed to the time period between 7 and 15 April 1994, whereas Nyagatare

[408] Trial Judgement, para. 113.
[409] Trial Judgement, para. 113.
[410] T. 23 January 2006 pp. 17, 24.
[411] Trial Judgement, para. 193.
[412] Trial Judgement, para. 203.
[413] Trial Judgement, paras. 540, 557, 560.
[414] Notice of Appeal, para. 140; Appellant's Brief, para. 181; Brief in Reply, para. 33.
[415] Notice of Appeal, para. 135; Appellant's Brief, para. 181.

the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[727]

318. Contrary to the Appellant's contention, the specific identification of the perpetrators, who were identified in the Trial Judgement as *Interahamwe*, was not required for a finding that the Appellant instigated the killing of Gakuru. In any event, the Trial Chamber did identify the perpetrators. It is implicit, but certain, in the Trial Judgement that the Trial Chamber found that Gakuru was killed by the *Interahamwe* who were informed by the Appellant that Gakuru was an "*Inyenzi*" and who received his order to arrest him. The Trial Chamber found that "[b]y doing so, Karera left him [Gakuru] in the hands of *Interahamwe*" and that "[u]nder the prevailing circumstances, he must have understood that Gakuru would be killed".[728] That the Trial Chamber made such a finding is implicit in its recollection of the evidence of Witnesses BMO and BMN.[729] While it would have been preferable for the Trial Chamber to explicitly state that it identified the perpetrators of Gakuru's murder as being the *Interahamwe* to whom the Appellant indicated that Gakuru was an "*Inyenzi*" and who received the order to arrest him, this omission does not amount to an error.

319. However, based on the Trial Chamber's factual findings, the Trial Chamber could not have reasonably concluded that the Appellant prompted the perpetrators to kill Gakuru. The Trial Chamber made no factual findings supporting such a conclusion. It merely concluded that the Appellant had informed the *Interahamwe* who later killed Gakuru that he was an "*Inyenzi*" and ordered them to arrest him. The Trial Chamber should have further explained how, on the basis of these factual findings, it inferred that the Appellant had prompted the *Interahamwe* to kill Gakuru. In the absence of such an explanation, the Appeals Chamber finds that the Trial Chamber erred in convicting the Appellant for instigating Gakuru's murder.

320. The Appeals Chamber now turns to the Appellant's submission that the Trial Chamber erred in entering a conviction for aiding and abetting murder as a crime against humanity.

321. The *actus reus* of aiding and abetting is constituted by acts or omissions that assist, further, or lend moral support to the perpetration of a specific crime, and which substantially contribute to the perpetration of the crime.[730] The *mens rea* for aiding and abetting is knowledge that acts

[727] *Nahimana et al.* Appeal Judgement, para. 480; *Gacumbitsi* Appeal Judgement, para. 129; *Kordić and Čerkez* Appeal Judgement, para. 27.
[728] Trial Judgement, para. 456.
[729] *See* Trial Judgement, paras. 445, 447.
[730] *Nahimana et al.* Appeal Judgement, para. 482.

performed by the aider and abettor assist in the commission of the crime by the principal.[731] It is well established that it is not necessary for an accused to know the precise crime which was intended and which in the event was committed, but he must be aware of its essential elements.[732] If an accused is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime.[733]

322. The Trial Chamber found that the Appellant told the *Interahamwe* that Gakuru was an "*Inyenzi*" and that he ordered his arrest by the *Interahamwe*, which he must have understood would result in his murder.[734] On the basis of these findings, it was reasonable for the Trial Chamber to conclude that the Appellant aided and abetted the murder of Gakuru.[735] By instructing the *Interahamwe* to arrest Gakuru and telling them that Gakuru was an "*Inyenzi*", it was reasonable to conclude that the Appellant substantially contributed to the commission of his murder through specifically assisting and providing moral support to the principal perpetrators. Furthermore, in light of the evidence adduced, the Appeals Chamber finds no error in the Trial Chamber's finding that the Appellant had the requisite *mens rea*.

323. For the foregoing reasons, the Appeals Chamber grants this sub-ground of appeal in part and reverses the Appellant's conviction for instigating murder as a crime against humanity based on this event. The Appellant's conviction for aiding and abetting murder as a crime against humanity based on the killing of Gakuru is upheld.

F. Conclusion

324. The Appeals Chamber grants the Appellant's First Ground of Appeal and reverses the Appellant's conviction for aiding and abetting genocide and extermination as a crime against humanity, based on the alleged weapons distribution in Rushashi commune.

325. The Appeals Chamber further grants the Seventh Ground of Appeal, in part, and reverses the Appellant's conviction for instigating murder as a crime against humanity based on the killing of Gakuru.

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[731] *Nahimana et al.* Appeal Judgement, para. 482.
[732] *Nahimana et al.* Appeal Judgement, para. 482.
[733] *See Stakić* Appeal Judgement, para. 50; *Nahimana et al.* Appeal Judgement, para. 482.
[734] Trial Judgement, para. 456.
[735] Trial Judgement, para. 560.

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

APPEALS CHAMBER

Before Judges: Claude Jorda, presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Adama Dieng

Judgement of: 1 June 2001

THE PROSECUTOR

v.

CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-A

JUDGEMENT
(REASONS)

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Philippe Moriceau

Counsel for Obed Ruzindana:

Pascal Besnier
William van der Griend

Office of the Prosecutor:

Carla del Ponte
Salomon Loh
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Sonja Boelaert-Souminen
Morris Anyah

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HAGUE(A)01-21 (E)

argues in an unclear manner, that the Chamber erred in equating failure to act with aiding and abetting.[302]

(ii) Discussion

198. In line with the relevant international case law, referred to in the foregoing analysis, a person may be held criminally liable for any conduct, where it is determined that he participated knowingly in the commission of a crime, if his participation directly and substantially contributed to the perpetration of the crime.[303] The intent to participate in the commission of a crime may thus be inferred from the accused's participation, particularly from his aiding and abetting. Ultimately, and as acknowledged by the Trial Chamber, there must on the part of the Accused be a clear awareness that this participation will lead to the commission of a crime."[304] That intention may be inferred from a number of facts,[305] the assessment of which falls to the Trial Chamber. The Trial Chamber properly exercised its discretion, and found beyond a reasonable doubt that the Accused had the requisite intent. The Trial Chamber also found, upon review of the evidence adduced, that it was clearly established that Kayishema was present at each of the massacre sites, and that he had the intent to participate in the crimes perpetrated at these sites.[306]

199. The Appeals Chamber notes that Kayishema's arguments on the Trial Chamber's erroneous interpretation of the concept of civil defence as well as the terms *"ratisser"* and "*travailler*" have been dealt with under the ground on genocide. Insofar as these arguments constitute, in the opinion of the Appeals Chamber, a question that goes beyond the issue of individual responsibility and falls under either the separate ground on civil defence (Ground 4), or the separate ground of genocide (Ground 6),[307] the Appeals Chamber refers to its analysis in the previous section on genocide.

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[302] Kayishema's Brief, para. 95. Kayishema challenges the finding that by his presence at the site of the crime, he *aided* and *abetted* in the commission of the crimes perpetrated at the various massacre sites. In his submission, failure to act cannot be construed as a positive act and that "even passive presence at the scene does not constitute aiding and abetting".

[303] *Tadić* Trial Judgement, 1997, para. 674. The requirement of intent under Article 6 (1) thus includes *knowledge of the act of participation and a conscious decision to participate* by planning, instigating, ordering, committing or otherwise aiding and abetting in the preparation of a crime.

[304] Trial Judgement, para. 203.

[305] *Akayesu* Trial Judgement, para. 478.

[306] See for example, Trial Judgement, para. 352 (for the facts relating to the Catholic Church and Home St.-Jean), para. 76 (the Stadium), para. 404 (Mubuga Church) as well as paras. 461 and 468 (Bisesero).

[307] The Appeals Chamber specifies that the Defence had moreover raised this issue in its Notice of Appeal under the ground on genocide and civil defence. See Kayishema's Notice of Appeal, pp. 7 and 8. See also T(A),

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International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

Case No. ICTR-96-13-A

Date: 16 November 2001

ENGLISH

Original: FRENCH

APPEALS CHAMBER

Before Judges: Claude Jorda, presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Adama Dieng

Judgement of: 16 November 2001

ALFRED MUSEMA
(Appellant)
v.

THE PROSECUTOR
(Respondent)

JUDGEMENT

Counsel for the Appellant:
Steven Kay, QC
Michail Wladimiroff
Sylvia de Bertodano

Office of the Prosecutor:
Carla Del Ponte
Norman Farrell
Mathias Marcussen
Sonja Boelaert-Suominen

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MUSEMA(A)01-006/Rev.1 (E)

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> ...the Chamber must reject the alibi of Musema as regards 13 May, 14 May and mid-May 1994, as *it is not supported by evidence sufficient to cast any doubt on the overwhelming reliable evidence* for this period presented by the Prosecutor.[387]

- In accepting the alibi in respect of Nyarutovu *cellule* on 22 June, the Trial Chamber stated that,

> the Chamber finds that Musema's alibi for this date, heavily scrutinized by the Chamber, supported by documentary evidence and oral testimony, is such as to cast doubt on the allegation of the Prosecutor as to the involvement of Musema in the events alleged of 22 June 1994.[388]

- And finally, in rejecting the alibi with regard to Nyakavumu cave, the Trial Chamber noted that:

> [...] the alibi *does not specifically refute* the presence of Musema at the cave[...].[389]

209. In considering the manner in which the Trial Chamber applied the burden and standard of proof, the Appeals Chamber must start off by assuming that the words used in the Trial Judgement accurately describe the approach adopted by the Trial Chamber.

210. It is apparent from the above examples that, *prima facie*, the Trial Chamber appears to have used, on several occasions, different terms in relation to the question of alibi. The issue is whether, in doing so, the Trial Chamber applied a burden and/or standard of proof that was inconsistent with its own statement of the relevant law. The Appeals Chamber will therefore seek to discover the Trial Chamber's intention when it used such wording.

211. Hence, the Appeals Chamber will carry out below an in-depth analysis of the findings of the Trial Chamber with respect to each location. The consequences of any erroneous application of the law or unreasonable interpretation of a fact must be considered on a case-by-case basis.

(c) Errors in the assessment of the alibi with regard to specific locations

212. Having found that the Trial Chamber did not err in its findings as to the credibility of each of the witnesses on whose testimonies it relied to convict, the Appeals Chamber will now consider whether the Trial Chamber erred in rejecting Musema's alibi and, as a result, failed to acquit him.

213. However, before considering each of the locations in question, the Appeals Chamber notes that although, for reasons stated in the Trial Judgement, the Trial Chamber rejected the alibi raised by

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387 *Ibid.*, para. 745 (emphasis added).

388 *Ibid.*, para. 795.

389 *Ibid.*, para. 778 (emphasis added).

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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Judgement of: **29 August 2008**

THARCISSE MUVUNYI

v.

THE PROSECUTOR

Case No. ICTR-2000-55A-A

JUDGEMENT

Counsel for Tharcisse Muvunyi:

Mr. William E. Taylor III
Ms. Abbe Jolles
Mr. Dorian Cotlar

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote Odora
Mr. Neville Weston
Ms. Linda Bianchi
Ms. Renifa Madenga
Mr. François Nsanzuwera
Ms. Evelyn Kamau

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analysis the evidence of Witness MO38 in favour of Witness TQ who had been accused of genocide.[162]

78. The Prosecution responds that the Trial Chamber correctly inferred that Muvunyi tacitly approved of the participation of ESO Camp soldiers in the attack at the *Groupe scolaire* from the order given to save the Bicunda family, his attempts to save a child of this family who was mistakenly taken, his refusal to come to the assistance of the other refugees, and his overall conduct in allowing a contingent of armed soldiers to leave the camp to participate in the attack.[163] The Prosecution contends that Muvunyi has not demonstrated that it was unreasonable to rely on the evidence of Witness TQ.[164] The Prosecution also notes that the Trial Chamber's conclusion that Muvunyi knew about the attack is reasonable in light of the proximity of the camp to the *Groupe scolaire* and the repeated nature of the attacks.[165]

79. The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.[166] The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[167]

80. An accused may be convicted of aiding and abetting when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.[168] In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence at or very near the crime scene, especially if considered together with his prior conduct, which allows the conclusion that the accused's conduct amounted to official sanction of the crime and thus substantially contributed to it.[169] The question of whether a given act constitutes substantial assistance to a crime requires a fact-based inquiry.[170]

81. The Trial Chamber refers only to limited circumstantial evidence suggesting that Muvunyi tacitly approved the criminal conduct of the principal perpetrators. It is well established that, as a

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[162] Muvunyi Appeal Brief, para. 63.
[163] Prosecution Response Brief, para. 142.
[164] Prosecution Response Brief, paras. 143, 144.
[165] Prosecution Response Brief, para. 149.
[166] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ntagerura et al.* Appeal Judgement, para. 370.
[167] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ntagerura et al.* Appeal Judgement, para. 370.
[168] *Brđanin* Appeal Judgement, paras. 273, 277.
[169] *Brđanin* Appeal Judgement, para. 277
[170] *Blagojević and Jokić* Appeal Judgement, para. 134.

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Adama Dieng

Judgement of: 28 November 2007

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(*Appellants*)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

JUDGEMENT

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Hassan Bubacar Jallow
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Linda Bianchi
Alfred Orono Orono

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facts which must be pleaded in the indictment are: (i) that the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (ii) the criminal acts committed by those others for whom the accused is alleged to be responsible; (iii) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (iv) the conduct of the accused by which he may be found to have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[776] As regards this last element, it will be sufficient in many cases to plead that the accused did not take any necessary and reasonable measure to prevent or punish the commission of criminal acts.

324. An indictment may also be defective when the material facts that the Prosecutor invokes are pleaded without sufficient specificity.[777] In this regard, the Prosecutor's characterization of the alleged criminal conduct and the proximity between the accused and the crime charged are decisive factors in determining the degree of specificity with which the Prosecutor must plead the material facts of his case in the indictment.[778]

325. Where the Appeals Chamber finds that the Trial Chamber tried the accused on the basis of a defective indictment, it must consider whether the accused has nevertheless been accorded a fair trial, in other words, whether the defect noted caused prejudice to the Defence.[779] In some cases, a defective indictment can indeed be "cured" and a conviction handed down if the Prosecutor provided the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him.[780] This information could, *inter alia* and depending on the circumstances, be supplied in the Prosecutor's pre-trial brief or opening statement.[781] The Appeals Chamber would nonetheless emphasize that the possibility of curing defects in the indictment is not unlimited. A clear distinction has to be drawn between vagueness or ambiguity in the indictment and an indictment which omits certain charges altogether. While it is possible to remedy ambiguity or vagueness in an indictment by providing the defendant with timely, clear and consistent information detailing the factual basis underpinning the charges, omitted charges can be incorporated into the indictment only by formal amendment under Rule 50 of the Rules.[782]

326. The Appeals Chamber reaffirms that a vague or imprecise indictment which is not cured of its defects by providing the accused with timely, clear and consistent information constitutes a prejudice to the accused. The defect can be deemed harmless only if it is

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[776] *Ntagerura et al.* Appeal Judgement, para. 26, citing *Naletilić and Martinović* Appeal Judgement, para. 67, and *Blaškić* Appeal Judgement, para. 218.
[777] *Muhimana* Appeal Judgement, paras. 76, 167, 195 and 217; *Ntagerura et al.* Appeal Judgement, para. 27.
[778] *Ntagerura et al.* Appeal Judgement, para. 23, referring to *Kvočka et al.* Appeal Judgement, para. 28. See also *Ntakirutimana* Appeal Judgement, paras. 73-74; *Kupreškić et al.* Appeal Judgement, para. 89.
[779] Article 24(1)(a) of the Statute.
[780] *Muhimana* Appeal Judgement, paras. 76, 195 and 217; *Simić* Appeal Judgement, para. 23; *Ntagerura et al.* Appeal Judgement, para. 28.
[781] *Ntagerura et al.* Appeal Judgement, para. 130. See also *Naletilić and Martinović* Appeal Judgement, para. 27; *Ntakirutimana* Appeal Judgement, para. 34; *Niyitegeka* Appeal Judgement, para. 219.
[782] *Ntagerura et al.*, para. 32.

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established that the accused's ability to prepare his defence was not materially impaired.[783] Where the failure to give sufficient notice of the legal and factual reasons for the charges against him violated the right to a fair trial, no conviction can result.[784]

327. When the Appellant raises a defect in the indictment for the first time on appeal, then he bears the burden of showing that his ability to prepare his defence was materially impaired. When, however, an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecutor to prove on appeal that the ability of the accused to prepare a defence was not materially impaired.[785] All of this is subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[786]

C. Issues raised by Appellant Nahimana

1. RTLM editorials

328. Appellant Nahimana complains that the Trial Chamber relied on the fact that he "wrote editorials read by RTLM journalists" in order to establish that he exercised control over the journalists of Radio RTLM and was personally involved in the broadcasts.[787] He argues that, in relying on this evidence – which he characterises as a material fact – even though it did not appear in the Indictment or in the Prosecutor's Pre-trial Brief,[788] the Trial Chamber compromised the fairness of the trial.[789]

329. Having examined the evidence on RTLM brought before it, the Trial Chamber found, in paragraph 567 of the Judgement, that "Nahimana also played an active role in determining the content of RTLM broadcasts, writing editorials and giving journalists texts to read".[790] The Appeals Chamber observes that the Trial Chamber did not mention this specific fact in its legal findings, which relied on the Appellant's control over RTLM and his responsibility for the editorial line in order to convict him.[791] However, paragraph 970 of the Judgement refers explicitly to paragraph 567, and it appears logical to assume that the Trial Chamber intended to refer to all of its factual findings on control of RTLM, including the fact that the Appellant had written editorials and given journalists texts to read. Moreover, this fact falls squarely within the more general assertion that Appellants Nahimana and Barayagwiza were responsible for the editorial policy of RTLM. Accordingly, the Appeals Chamber is of the view that it must assumed that the Trial Chamber relied on the disputed fact in order to convict the Appellant.

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[783] *Simić* Appeal Judgement, para. 24; *Ntagerura et al.* Appeal Judgement, para. 30; *Ntakirutimana* Appeal Judgement, para. 58.
[784] *Ntagerura et al.* Appeal Judgement, para. 28; *Naletilić and Martinović* Appeal Judgement, para. 26; *Ntakirutimana* Appeal Judgement, para. 58.
[785] *Muhimana* Appeal Judgement, paras. 80 and 199; *Simić* Appeal Judgement, para. 25; *Ntagerura et al.* Appeal Judgement, para. 31; *Kvočka et al.* Appeal Judgement., para. 35; *Niyitegeka* Appeal Judgement, para. 200.
[786] *Ntagerura et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 200.
[787] Nahimana Appellant's Brief, para. 94.
[788] Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* (B)(i), 9 September 2000 ("Prosecutor's Pre-Trial Brief").
[789] Nahimana Appellant's Brief, paras. 96-97.
[790] Judgement paras. 517 and 557.
[791] See *ibid.*, paras. 970-974.

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> evidence other than hearsay that Ngeze was arrested at all. Their sources of information were vague, with the exception of three witnesses who learned of the arrest from Ngeze himself.

427. The Trial Chamber summarized the Defence witnesses' testimonies in support of the alibi as follows:

> A number of Defence witnesses testified to the date of Ngeze's arrest in April 1994. Witness BAZ2, Witness RM1, Witness RM5, Witness BAZ6, Witness RM19, Witness BAZ9 and Witness BAZ15 testified that Ngeze was arrested on 6 April 1994. Witnesses RM13 and Witness BAZ3 testified that Ngeze was arrested just after Habyarimana's death. Witness RM2 testified that Ngeze was arrested on 6-7 April 1994. Witness BAZ1 testified that Ngeze was arrested the day before 6 April 1994 and was detained for three days. Witness RM117 testified that Ngeze was arrested on 7 April 1994. Witness RM112 testified that he found out on 7 April 1994 that Ngeze had been arrested. As to the date of Ngeze's release from prison, Witness RM5 and Witness RM2 testified that Ngeze was released on 9 April 1994. Witness BAZ2, Witness RM112 and Witness RM1 testified that Ngeze was released on 10 April 1994. Witness BAZ15 testified that Ngeze was released after about six days in custody. Witness BAZ9 testified that she saw Ngeze on 10 April 1994. Witness BAZ31 testified that Ngeze went into hiding from 6 April 1994. All of these witnesses learned of Ngeze's arrest from other people. Witness RM112, Witness RM19 and Witness BAZ15 testified that they heard about the arrest from Ngeze himself. The other witnesses heard about the arrest from people on the street or other Muslims, or knew of it as a matter of common knowledge.[1000]

428. The Appeals Chamber considers that the Trial Chamber could validly conclude that "none of the Defence witnesses had evidence other than hearsay that Ngeze was arrested at all" and that in most cases their sources of information were vague.[1001] However, the Appeals Chamber is of the view that an analysis of Defence witnesses testimonies relating to the alibi from 6 to 9 April 1994 does not demonstrate that those testimonies are "thoroughly inconsistent" (in the words of the authentic, English, text of the Judgement).[1002] From the outset, the Appeals Chamber is of the view that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others. It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.

429. Here, the testimonies of Witnesses BAZ-2,[1003] RM-1,[1004] RM-5,[1005] BAZ-6,[1006] RM-19[1007] and BAZ-15[1008] are consistent regarding the allegation that the Appelant Ngeze was

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[1000] Judgement, para. 808 (footnotes omitted).
[1001] *Ibid.*, para. 828.
[1002] *Idem.*
[1003] T. 29 January 2003, p. 4.
[1004] T. 14 March 2003, p. 62.
[1005] T. 21 March 2003, p. 4.
[1006] T. 15 March 2003, p. 25.
[1007] T. 3 March 2003, p. 6.
[1008] *Ibid.*, p. 23.

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478. The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, but also participation in a joint criminal enterprise.[1153] However, it does not appear that the Prosecutor charged the Appellants at trial with responsibility for their participation in a joint criminal enterprise,[1154] and the Appeals Chamber does not deem it appropriate to discuss this mode of participation here.[1155]

479. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[1156] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[1157] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[1158]

480. The *actus reus* of "instigating" implies prompting another person to commit an offence.[1159] It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[1160] The *mens rea* for this mode of responsibility is the intent to instigate another person to commit a crime or at a miminum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[1161]

481. With respect to ordering, a person in a position of authority[1162] may incur responsibility for ordering another person to commit an offence,[1163] if the person who received the order actually proceeds to commit the offence subsequently. Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that

[1153] *Tadić* Appeal Judgement, para. 188.
[1154] Even if such a charge could possibly be inferred from certain paragraphs of the Indictments, for example: *Nahimana* Indictment, para. 6.27; *Barayagwiza* Indictment, para. 7.13; *Ngeze* Indictment, para. 7.15.
[1155] For a more detailed discussion of this form of participation, see *Brđanin* Appeal Judgement, paras. 389-432; *Stakić* Appeal Judgement, paras. 64-65; *Kvočka et al.* Appeal Judgement, paras. 79-119; *Ntakirutimana* Appeal Judgement, paras. 461-468; *Vasiljević* Appeal Judgement, paras. 94-102; *Krnojelac* Appeal Judgement, paras. 28-33, 65 *et seq.*; *Tadić* Appeal Judgement, paras. 185-229.
[1156] *Kordić and Čerkez* Appeal Judgement, para. 26.
[1157] *Kordić and Čerkez* Appeal Judgement, para. 26. Although the French version of the Judgement uses the terms "*un élément determinant*", the English version – which is authoritative – uses the expression "factor substantially contributing to".
[1158] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 31.
[1159] *Ndindabahizi* Appeal Judgement, para. 117; *Kordić and Čerkez* Appeal Judgement, para. 27.
[1160] *Gacumbitsi* Appeal Judgement, para. 129; *Kordić and Čerkez* Appeal Judgement, para. 27. Once again, although the French version of the *Kordić and Čerkez* Judgement reads "*un élément déterminant*", the English version – which is authoritative – reads "factor substantially contributing to".
[1161] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 32.
[1162] It is not necessary to demonstrate the existence of an official relationship of subordination between the accused and the perpetrator of the crime: *Galić* Appeal Judgement, para. 176; *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[1163] *Galić* Appeal Judgement, para. 176; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras. 28-29.

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order, and if that crime is effectively committed subsequently by the person who received the order.[1164]

482. The *actus reus* of aiding and abetting[1165] is constituted by acts or omissions[1166] aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime, and which substantially contributed to the perpetration of the crime.[1167] Contrary to the three modes of responsibility discussed above (which require that the conduct of the accused precede the perpetration of the crime itself), the *actus reus* of aiding and abetting may occur before, during or after the principal crime.[1168] The *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abettor assist in the commission of the crime by the principal.[1169] It is not necessary for the accused to know the precise crime which was intended and which in the event was committed,[1170] but he must be aware of its essential elements.[1171]

483. The Appeals Chamber concludes by recalling that the modes of responsibility under Article 6(1) of the Statute are not mutually exclusive and that it is possible to charge more than one mode in relation to a crime if this is necessary in order to reflect the totality of the accused's conduct.[1172]

B. Responsibility under Article 6(3) of the Statute

484. The Appeals Chamber recalls that, for the liability of an accused to be established under Article 6(3) of the Statute, the Prosecutor has to show that: (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, he had the material ability to prevent or punish commission of the crime by his subordinate); (3) the accused knew or had reason to know that the crime was going to be committed or had been

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[1164] *Galić* Appeal Judgement, paras. 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Blaškić* Appeal Judgement, para. 42.

[1165] The French version of some Appeal and Trial Judgements of this Tribunal and of the ICTY mention the term "*complicité*" ("complicity") rather than "*aide et encouragement*" ("aiding and abetting"). The Appeals Chamber prefers "*aide et encouragement*" because these terms are the ones used in Article 6(1) of the Statute. Furthermore, the Statute uses the word "*complicité*" in a very specific context (see Article 2(3)(e) of the Statute); it should thus be reserved for that context.

[1166] *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, para. 47.

[1167] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ndindabahizi* Appeal Judgement, para. 117; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 370 and footnote 740; *Blaškić* Appeal Judgement, paras. 45 and 48; *Vasiljević* Appeal Judgement, para. 102.

[1168] *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48. See also *Čelebići* Appeal Judgement, para. 352, citing with approval the conclusion of the Trial Chamber in that case that it is not necessary that the assistance in question be given at the time of the commission of the crime.

[1169] *Blagojević and Jokić* Appeal Judgement, para. 127; *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, paras. 45 and 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162.

[1170] *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50.

[1171] *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50; *Aleksovski* Appeal Judgement, para. 162.

[1172] *Ndindabahizi* Appeal Judgement, para. 122; *Kamuhanda* Appeal Judgement, para. 77.

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opinion that the Trial Chamber could admit this evidence, even if Dr. Blam himself did not testify at the hearing.[1230] However, the Appeals Chamber is of the view that a reasonable trier of fact could not rely solely on the short account by Doctor Blam in order to establish beyond reasonable doubt proof of the murder of the Medical Director of Cyangugu, of the circumstances surrounding it and of its date. In the absence of other evidence corroborating Doctor Blam's account, the Trial Chamber consequently erred in finding that the murder of the Medical Director of Cyangugu was proved. The paragraphs which follow will therefore not refer to this incident.

511. With regard, lastly, to Appellant Nahimana's argument that Witness FY's testimony did not prove the existence of a causal link between RTLM broadcasts and the murder of Daniel Kabaka,[1231] the Appeals Chamber considers that the fact that Daniel Kabaka was allegedly arrested as a suspect in 1990 and that soldiers linked to a "crisis committee" were allegedly responsible for his murder, which was committed after 6 April 1994, does not suffice to demonstrate that it was unreasonable to find that the mention of this person on RTLM had substantially contributed to his murder. Moreover, the Appellant omits to indicate the specific references to the transcripts which mention these acts, and hence has not complied with the requirements for making submissions at the appeal stage. The appeal on this point is dismissed.

512. The Appeals Chamber will now determine whether it was reasonable for the Trial Chamber to find that the RTLM broadcasts prior to 6 April 1994 which mentioned Charles Shamukiga and Daniel Kabaka substantially contributed to the commission of acts of genocide.

513. In the opinion of the Appeals Chamber, evidence of a link between the broadcasts aired on RTLM before 6 April 1994 and the acts of genocide committed against the individuals so named seems, at the very least, tenuous, especially when the date of the broadcast in question is not provided or when the period between the broadcast denouncing a person and the killing of that person is relatively long. This applies notably to the killing of

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Par téléphone on avait déjà été mis au courant des massacres de Kamembe-Cyangugu, au cours desquels par exemple le médecin régional de Cyangugu que nous connaissons avait été brûlé vif devant sa maison. Sur la radio incendiaire RTLM du parti extrémiste CDR, juste trois jours plus tôt, le lundi (4 avril), il avait été insulté comme complice des rebelles, organisateur de réunions de rebelles à Cyangugu. Lors d'un entretien le mardi avant l'attentat, donc le 5 avril, je ne lui avais pas parlé de ces diffamations, parce que je connaissais son honnêteté et que je tenais ces accusations pour totalement absurdes.

[I'd already heard on the phone about the Kamembe-Cyangugu massacres, during which the Medical Director for Cyangugu Region, whom we knew, had been burned alive in front of his house. Just three days earlier, on the Monday (4 April), on RTLM, the inflammatory radio station of the extremist CDR party, he had been vilified as an accomplice of the rebels, accused of organising rebel meetings in Cyangugu. When I met him on the Tuesday before the murder, I didn't mention these libels, because I knew him as an honest man, and regarded the accusations as totally absurd.]

[1230] Dr. Blam's account could be admitted under Rule 89(C) of the Rules. This would also be the case today: since the account was not specifically written for proceedings in the instant case, it could be admitted without necessarily complying with the standards of Rule 92 *bis* of the Rules, which was added to the Rules on 6 July 2002: see *Naletilić and Martinović* Appeal Judgement, paras. 222-223; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C) of the Rules, 7 June 2002, paras. 28-31.

[1231] Nahimana Appellant's Brief, paras. 240-241.

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Charles Shamukiga[1232] and Daniel Kabaka.[1233] Thus the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it. Moreover, even though RTLM was widely listened to in Rwanda, there is no evidence that the unidentified persons responsible for killing Charles Shamukiga and Daniel Kabaka heard the RTLM broadcasts denouncing them. The Appeals Chamber is therefore of the opinion that it has not been sufficiently demonstrated that RTLM broadcasts before 6 April 1994 substantially contributed to the killing of these individuals. Therefore, the Trial Chamber committed an error which partially invalidates the verdict in finding in paragraph 949 of the Judgement that RTLM broadcasts prior to 6 April 1994 substantially contributed to the commission of acts of genocide.

b. Broadcasts after 6 April 1994

514. The Appeals Chamber observes that Appellant Nahimana does not appear to dispute that the broadcasts after 6 April 1994 contributed to the commission of acts of genocide.[1234] For his part, Appellant Barayagwiza contends, without elaborating, that no link was established between the RTLM broadcasts and the killings.[1235] In the absence of any arguments in support of this contention, it cannot suffice to demonstrate that the Trial Chamber erred in finding that the RTLM broadcasts after 6 April 1994 substantially contributed to the commission of acts of genocide.

515. The Appeals Chamber notes that the Trial Chamber found that in several instances after 6 April 1994 the naming of persons of Tutsi origin on the airwaves contributed to the commission of acts of genocide. Such persons included the brother of Witness FS, who was named on RTLM on 7 April 1994 and was later killed with his wife and his seven children,[1236] and Désiré Nsunguyinka, who was killed at a roadblock with his wife, his sister and his brother-in-law after RTLM broadcast the licence number of the car they were travelling in, announcing that a vehicle with these plates was carrying *Inkotanyi*.[1237] The Appeals Chamber also notes the case of Father Muvaro, Father Ngoga and Father Ntagara, whose names were mentioned in a broadcast of 20 May 1994;[1238] the three of them were subsequently killed.[1239]

[1232] Charles Shamukiga "had been mentioned often on RTLM in the first few months of 1994" (Judgement, para. 366); he was killed on 7 April 1994 by Presidential Guard soldiers (Judgement, paras. 366 and 478).
[1233] Daniel Kabaka was named on RTLM "beginning in mid-March", and also after 7 April 1994 (Judgement, paras. 446, 447 and 467); he was killed a few days after the beginning of the genocide.
[1234] See Nahimana Appellant's Brief, paras. 233-241, 572-573. The Appellant only disputes that broadcasts before 6 April 1994 could have contributed to the commission of acts of genocide.
[1235] Barayagwiza Appellant's Brief, para. 169.
[1236] Judgement, para. 482; see also paras. 445 and 895. The witness' Tutsi origin is mentioned in paragraph 890 of the Judgement.
[1237] *Idem*; see also para. 444.
[1238] *Idem*; see also paras. 410-411. The Appeals Chamber notes that only Father Muvaro's Tutsi origin is specifically confirmed by the Trial Chamber on the basis of Appellant Nahimana's testimony: Judgement, paras. 411 and 482. The Appeals Chamber notes however that the remarks made in the broadcast – in particular the sentence "We could not imagine that a priest would ever dare take up a gun, begin to shoot or even distribute guns to people taking refuge in the church, the latter then begin launching sporadic attacks in order to eliminate the Hutus, and then retreat into the church … daring to desecrate God's house" – seems to indicate that the three priests were Tutsi: Judgement, para. 410, referring to Exhibit P103/132E.
[1239] Father Ngoga, who had earlier managed to escape, was killed in Butare 11 days after the broadcast: Judgement, para. 411.

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518. Further, the Trial Chamber considered that, even though "the evidence does not establish a specific link between the publication and subsequent events, [...] a link was clearly perceived by many witnesses such as Witness AHI, Witness ABE and Nsanzuwera, suggesting that *Kangura* greatly contributed to the climate leading to these events, if not causing them directly".[1247] The Trial Chamber then adds that "[a]t times *Kangura* called explicitly on its readers to take action. More generally, its message of prejudice and fear paved the way for massacres of the Tutsi population".[1248] The Appeals Chamber emphasizes, however, that the specific examples given by Witness Nsanzuwera and Witness ABE of attacks on individuals following the publication of *Kangura* articles date back to 1990 and 1991 and do not fall within the temporal jurisdiction of the Tribunal. Moreover, none of the testimonies makes explicit reference to the impact of *Kangura* issues published after 1 January 1994.

519. While there is probably a link between the Appellant's acts, because of his role in *Kangura*, and the genocide, owing to the climate of violence to which the publication contributed and the incendiary discourse it contained,[1249] the Appeals Chamber considers that there was not enough evidence for a reasonable trier of fact to find beyond reasonable doubt that the *Kangura* publications in the first months of 1994 susbstantially contributed to the commission of acts of genocide between April and July 1994. Therefore, the Appeals Chamber is of the opinion that the Trial Chamber erred in finding Appellant Ngeze guilty of the crime of genocide under Article 6(1) of the Statute for having "instigated" the killing of Tutsi civilians as founder, owner and editor of *Kangura*.[1250]

(iii) Link between CDR activities and the acts of genocide

520. Appellant Barayagwiza contends that no causal link was established between the activities of the CDR and the acts of genocide.[1251]

521. The Trial Chamber explained in paragraph 951 of the Judgement that:

> [t]he Hutu Power movement, spearheaded by CDR, created a political framework for the killing of Tutsi and Hutu political opponents. The CDR and its youth wing, the *Impuzamugambi*, convened meetings and demonstrations, established roadblocks, distributed weapons, and systematically organized and carried out the killing of Tutsi civilians. The genocidal cry of "*tubatsembatsembe*" or "let's exterminate them", referring to the Tutsi population, was chanted consistently at CDR meetings and demonstrations. As well as orchestrating particular acts of killing, the CDR promoted a Hutu mindset in which ethnic hatred was normalized as a political ideology. The division of Hutu and Tutsi entrenched fear and suspicion of the Tutsi and fabricated the perception that the Tutsi population had to be destroyed in order to safeguard the political gains that had been made by the Hutu majority.

[1247] Judgement, para. 242.
[1248] *Ibid.*, para. 243.
[1249] See *Kangura* publications mentioned in paragraphs 136-243 of the Judgement. See also the Trial Chamber's findings in paragraphs 245, 246, 950 and 1036 of the Judgement, which make specific reference to "The Appeal to the Conscience of the Hutu" and "The Ten Commandments", and to *Kangura* No. 26.
[1250] Judgement, para. 977A.
[1251] Barayagwiza Appellant's Brief, paras. 194-195.

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785. The Appeals Chamber has already recalled the elements which must be proved in order to establish superior responsibility.[1832] It has also pointed out that civilian leaders need not be vested with prerogatives similar to those of military commanders in order to incur such responsibility under Article 6(3) of the Statute: it suffices that the superior had effective control of his subordinates, that is, that he had the material capacity to prevent or punish the criminal conduct of subordinates.[1833] For the same reasons, it does not have to be established that the civilian superior was vested with "excessive powers" similar to those of public authorities. Moreover, the Appeals Chamber cannot accept the argument that superior responsibility under Article 6(3) of the Statute requires a direct and individualized superior-subordinate relationship.[1834]

786. The Appeals Chamber is not convinced either by the Appellant's argument that the Trial Chamber failed to apply the effective control test. Although the Trial Chamber did not explicitly use the expression "effective control", the Appeals Chamber is of the view that it is clear from paragraphs 970 and 972 of the Judgement that it in fact applied that test.[1835]

787. The Appellant further contends that the Trial Chamber could not conclude that he possessed a *de jure* power, since neither the law of Rwanda, nor the RTLM Statutes or any other official document so provided. The Appeals Chamber recalls that a person possesses a *de jure* power when legally vested with such power.[1836] The Chamber is of the view that this power can derive from law, from a contract or from any other legal document; it may have been conferred orally or in writing and may be proved by documentary or any other type of evidence. The Appeals Chamber will examine below whether the Trial Chamber could conclude that the Appellant was vested with a *de jure* power over the RTLM staff, but considers that, in any event, this is not a decisive factor for the issue of effective control.[1837]

788. The Appeals Chamber further recalls that the authority enjoyed by a defendant must be assessed on a case-by-case basis, so as to determine whether he had the power to take necessary and reasonable measures to prevent the commission of the crimes charged or to punish their perpetrators. Consequently, while the Appeals Chamber concedes that mere membership of a collegiate board of directors does not suffice, *per se*, to establish the existence of effective control, it considers, nonetheless, that such membership may, taken together with other evidence, prove control.

789. With respect to the Appellant's argument that none of the evidence relied upon by the Trial Chamber supports the finding that he had superior status and effective control over RTLM staff, the Appeals Chamber would point out that these are matters which, along with

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[1832] See *supra* XI. B.

[1833] See *supra* XII. D. 2. (a) (i) .

[1834] *Halilović* Appeal Judgement, para. 59; *Kordić and Čerkez* Appeal Judgement, para. 828; *Blaškić* Appeal Judgement, para. 67; *Čelebići* Appeal Judgement, paras. 251-252, 303.

[1835] In this respect, see *supra* XII. D. 2. (a) (i).

[1836] See the definition of "*de jure*" in Bryan A. Garner (ed.), *Black's Law Dictionary*, 8th ed., Saint Paul, Minnesota, Thomson West Publishing Company, 2004, p. 458 ("Existing by right or according to law"). Thus, the jurisprudence describes a superior *de jure* as one whose power derives from an official appointment: *Kajelijeli* Appeal Judgement, para. 85; *Bagilishema* Appeal Judgement, para. 50 ; *Čelebići* Appeal Judgement, para. 193.

[1837] In this respect, see *supra* XII. D. 2. (a) (ii) b. i., where the Appeals Chamber explains that, even if the possession of *de jure* powers can certainly suggest a material capacity to prevent or punish criminal acts by subordinates, it is neither necessary nor sufficient to demonstrate such capacity.

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exclusively on Expert Witness Des Forges' report and testimony, according to which the French Ambassador Yannick Gérard told the Appellant around the end of June or the beginning of July 1994 that the RTLM broadcasts attacking General Dallaire and UNAMIR must cease, that the Appellant promised to intervene with the RTLM journalists, and that the attacks ceased shortly thereafter.[1904]

830. The Appeals Chamber has already recalled that the role of expert witnesses is to assist the Trial Chamber in assessing the evidence before it and not to testify to facts in dispute as would ordinary witnesses.[1905] However, the Appellant does not appear to have objected at trial to this part of Expert Witness Des Forges' testimony.[1906] The Appeals Chamber recalls that, in principle, a party cannot refrain from raising an objection on an issue that was evident at trial, with a view to raising it on appeal if it has lost the case at first instance.[1907] In these circumstances, the Appeals Chamber considers that the Appellant waived his right to raise an objection to this portion of Expert Witness Des Forges' report and testimony.

831. Turning to the argument that the information received from Expert Witness Des Forges was secondary hearsay collected more than five years after the event, the Appeals Chamber recalls that trial chambers may admit and rely on hearsay testimony if they consider it to have probative value.[1908] In the instant case, the Trial Chamber noted that "Des Forges specifies in detail that her source of information about Nahimana's interaction with the French Government is a diplomat who was himself present in meetings between Nahimana and French Ambassador Yannick Gérard, who had a documentary record of the interaction in the form of a diplomatic telegram", and it considered that this piece of information was reliable.[1909] The Appeals Chamber finds that this conclusion was reasonable.

832. The Appellant further submits that, even if the matters reported by Expert Witness Des Forges were true, they could not constitute evidence that the Appellant effectively intervened with RTLM journalists to halt the attacks on UNAMIR and General Dallaire. The Appeals Chamber notes that, according to Expert Witness Des Forges' report and testimony, the said attacks ceased "immediately"[1910] or within two days[1911] after the Appellant met Ambassador Gérard. In these circumstances, the Appeals Chamber is of the view that the Trial Chamber could reasonably conclude that it was the Appellant's intervention that put an end to these attacks. The fact that the Appellant and Witness Bemeriki denied that there was

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[1904] *Ibid.*, para. 543, referring to Exhibit P158A (Des Forges Expert Report), pp. 52-53, and to T. 23 May 2002, pp. 211-213. However, contrary to what the Chamber appears to be saying in paragraph 543 of the Judgement, Expert Witness Des Forges did not rely solely on her conversation of 28 February 2000 with Jean-Christophe Belliard at the French Ministry of Foreign Affairs; in her report, she also cites a press report by Anne Chaon of 7 July 2002.

[1905] See *supra* IV. B. 2. (b) and XII. B. 3. (b) (i) a.

[1906] Nahimana Appellant's Brief does not refer to any specific objection raised at trial. The Appeals Chamber notes that Appellant Nahimana submitted a written motion objecting generally to the scope of Witness Des Forges' testimony (see Motion to Restrict the Testimony of Alison Desforges [*sic*] to Matters Requiring Expert Evidence, 10 May 2002), but this motion did not specifically object to that aspect of Expert Witness Des Forges' report. Moreover the Appellant's motion was submitted prior to Witness Des Forges' testimony on this issue.

[1907] See, for example, *Niyitegeka* Appeal Judgement, para. 199; *Kayishema and Ruzindana* Appeal Judgement, para. 91.

[1908] See *supra*, para. 215 (footnote 519).

[1909] Judgement, para. 563.

[1910] Exhibit P158A, p. 53.

[1911] T. 23 May 2002, p. 212.

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plan".[2022] They contend that the *Rutaganda* Appeal Judgement rejected any form of responsibility "in application of '*guilt by association*', including guilt from '*similarity of conduct*'".[2023] They argue that the jurisprudence of the Nuremberg International Military Tribunal and of this Tribunal requires, in order for a defendant to be convicted of conspiracy, his or her direct and personal participation in meetings to plan crimes.[2024] Appellant Barayagwiza maintains that a tacit agreement cannot establish conspiracy to commit genocide, adding that "[t]he Prosecution could not prove any individual criminal act attributable to the Appellant Barayagwiza".[2025]

896. The Appeals Chamber recalls that the *actus reus* of the crime of conspiracy to commit genocide is a concerted agreement to act for the purpose of committing genocide. While such *actus reus* can be proved by evidence of meetings to plan genocide, it can also be inferred from other evidence.[2026] In particular, a concerted agreement to commit genocide may be inferred from the conduct of the conspirators.[2027] However, as in any case where the Prosecutor seeks, on the basis of circumstantial evidence, to prove a particular fact upon which the guilt of the accused depends,[2028] the existence of a conspiracy to commit genocide must be the only reasonable inference based on the totality of the evidence.

897. The Appeals Chamber takes the view that the concerted or coordinated action of a group of individuals can constitute evidence of an agreement. The qualifiers "concerted or coordinated" are important: as the Trial Chamber recognized, these words are "the central element that distinguishes conspiracy from 'conscious parallelism', the concept put forward

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[2022] Nahimana Appellant's Brief, paras. 586-588 (the extract cited above is at para. 588). See also Ngeze Appellant's Brief, para. 289(ii). Appellant Nahimana adds that "the fact of sharing the same convictions or the same 'objective' does not presuppose any prior interaction, and does not of necessity lead to the conception of a *concerted plan* aimed at achieving these": Nahimana Appellant's Brief, para. 594 (emphasis in the original). In reply, Appellant Nahimana concedes that the conspirators' conduct could constitute circumstantial evidence of a criminal conspiracy, but he adds that such conduct must be reasonably explicable only by the existence of a conspiratorial agreement, which is not the present case: Nahimana Brief in Reply, paras. 28-30.

[2023] Ngeze Appellant's Brief, para. 289(ii) (emphasis in the original). See also Nahimana Appellant's Brief, para. 590.

[2024] Nahimana Appellant's Brief, paras. 591-592; Nahimana Brief in Reply, paras. 31-32; Ngeze Appellant's Brief, para. 289(iii) and (v).

[2025] Barayagwiza Brief in Reply, para. 57. Appellant Barayagwiza adds at para. 59 :

> The Prosecution has failed to prove that the conversations between Nahimana and Barayagwiza were part of an agreement to kill off Tutsi, nor were there any individual criminal acts from which such a conspiracy could be inferred. The theory of the Appellant being a lynchpin (§§ 1050 of the judgement) was not based on any evidence, nor was it ever alleged by the Prosecution, in the indictment or the later amendment.

[2026] See, in this respect, *Kajelijeli* Trial Judgement, para. 787 ("[t]he agreement in a conspiracy is one that may be established by the prosecutor in no particular manner, but the evidence must show that an agreement had indeed been reached"). In the *Ntakirutimana*, *Niyitegeka* and *Kajelijeli* cases, the Trial judges noted that the accused had attended meetings although they did not require meetings as elements of the crime of conspiracy to commit genocide: see *Kajelijeli* Trial Judgement, paras. 434-453, 787-788, 794; *Niyitegeka* Trial Judgement, paras. 423-429; *Ntakirutimana* Trial Judgement, paras. 799-800.

[2027] In this respect, the Appeals Chamber notes that a number of legal systems explicitly recognize that the agreement can be inferred from the conduct of the parties to the conspiracy: United States: *Glasser v. United States*, 315 U.S. 60, 80 (1942); United Kingdom: *R. v. Anderson*, [1986] A.C. 27, 38; Canada: *R. v. Gagnon*, [1956] S.C.R. 635, para. 12.

[2028] *Ntagerura et al.* Appeal Judgement, paras. 306, 399; *Stakić* Appeal Judgement, para. 219; *Krstić* Appeal Judgement, para. 41; *Vasiljević* Appeal Judgement, paras. 120, 128, 131; *Čelebići* Appeal Judgement, para. 458.

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Theodor Meron** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**18 March 2010**

SIMÉON NCHAMIHIGO

v.

THE PROSECUTOR

Case No. ICTR-2001-63-A

JUDGEMENT

Counsel for the Appellant

Mr. Denis Turcotte
Ms. Nathalie Leblanc

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Mr. George Mugwanya

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Trial Chamber's reasoning.[758] It submits that the Trial Chamber took into account Witness BRK's accomplice status, his confession, his possible motives for testifying, the deficiencies in his evidence, and the fact that aspects of his testimony were corroborated by other witnesses.[759] In light of this, the Prosecution asserts that the Trial Chamber exercised the appropriate caution in assessing Witness BRK's credibility.[760] The Prosecution further argues that the Appellant fails to show any error in the fact that the Trial Chamber did not consider evidence from the *Ntagerura et al.* case and Exhibit D71,[761] or the Trial Chamber's finding that Witness BRK's testimony was supported by other witnesses.[762]

305. The Appeals Chamber recalls that "accomplice evidence is not *per se* unreliable, especially where an accomplice may be thoroughly cross-examined".[763] However, when weighing the probative value of such evidence, a Chamber is bound to *carefully* consider the totality of the circumstances in which it was tendered.[764] In particular, consideration should be given to circumstances showing that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal or to lie.[765]

306. The Trial Chamber acknowledged that Witness BRK was an accomplice witness and that therefore his testimony had to be viewed with caution.[766] The Trial Chamber recalled that the testimony of accomplices "may be tainted by motives or incentives to falsely implicate an accused to gain some benefit or advantage in regard to their own case or sentence."[767] However, the Trial Chamber concluded that the witness did not have "any motive or incentive to falsely incriminate [the Appellant]."[768]

307. The Appeals Chamber, Judge Pocar dissenting, considers that this finding is patently unreasonable in light of the Trial Chamber's other findings. In particular, in the paragraph immediately following the finding that Witness BRK did not have any motive or incentive to falsely incriminate the Appellant, the Trial Chamber stated that portions of Witness BRK's testimony "could have been exaggerated or invented to further implicate [the Appellant]" and that, as such,

[758] Respondent's Brief, paras. 148, 158.
[759] Respondent's Brief, paras. 149-153, 155. *See also* AT. 29 September 2009 pp. 39-44.
[760] AT. 29 September 2009 pp. 43-45.
[761] Respondent's Brief, para. 154.
[762] Respondent's Brief, paras. 156, 157.
[763] *Ntagerura et al.* Appeal Judgement, para. 204.
[764] *Ntagerura et al.* Appeal Judgement, para. 204, *citing Niyitegeka* Appeal Judgement, para. 98.
[765] *Ntagerura et al.* Appeal Judgement, paras. 204, 206.
[766] Trial Judgement, para. 214.
[767] Trial Judgement, paras. 17, 214.
[768] Trial Judgement, para. 214.

they could not be relied upon.[769] The Appeals Chamber, Judge Pocar dissenting, considers that in the absence of any explanation by the Trial Chamber, these apparently contradictory findings suggest that it was unsafe to conclude, as the Trial Chamber did, that the witness had no motive or incentive to falsely implicate the Appellant.

308. Furthermore, the Trial Chamber found that Witness BRK was still awaiting trial for charges as a Category I offender for crimes related to the attacks in Nyakanyinya, Mibilizi, and at Kamarampaka as well as for forging documents.[770] It also observed that Witness BRK believed that he might benefit from leniency if he gave evidence for the Prosecution.[771] These findings further undermine the Trial Chamber's conclusion that Witness BRK had no motive to falsely implicate the Appellant.

309. Additionally, the Appeals Chamber, Judge Pocar dissenting, notes that Witness BRK has demonstrated a willingness to tailor his evidence to serve his own interests. He acknowledged that he did not fully confess his crimes when he first confessed in 1999, and that it was only when confronted with further charges in 2005 that he confessed to his involvement in the attacks at Nyakanyinya, Mibilizi and Kamarampaka.[772] The Trial Chamber took this into account and accepted Witness BRK's explanation that he tailored his statements to conceal his role in the events.[773] It concluded that "[a]n initial failure for a witness to incriminate himself is not a reason to disbelieve a subsequent confession."[774] The Appeals Chamber considers that, on its own, it was not unreasonable for the Trial Chamber to accept Witness BRK's explanation. Nevertheless, given the other troubling aspects of Witness BRK's credibility discussed above, his willingness to conceal relevant information when making official statements should have concerned the Trial Chamber.

310. The Appeals Chamber, Judge Pocar dissenting, also considers that the Trial Chamber's treatment of Witness BRK's evidence regarding the dates of the attacks at Kamarampaka, Mibilizi, and Nyakanyinya shows that the Trial Chamber failed to assess Witness BRK's evidence carefully.

311. More specifically, the Trial Chamber expressly noted that at the time of his testimony, Witness BRK could not recall the exact dates of the relevant events, but considered that this did not

[769] Trial Judgement, para. 215.
[770] Trial Judgement, para. 284.
[771] Trial Judgement, para. 285 and fn. 193, *quoting* T. 22 January 2007 p. 34 (Witness BRK testified: "[m]y position is that by telling the truth, I will be fostering reconciliation in Rwanda and that this might help in the reduction of my sentence.").
[772] Trial Judgement, para. 284.
[773] Trial Judgement, paras. 284, 304.
[774] Trial Judgement, para. 304.

undermine his overall credibility.[775] While he had provided specific dates for the events at Kamarampaka stadium, Mibilizi parish and hospital, and Nyakanyinya school in his 8 March 2006 statement,[776] when testifying at trial he did not accept having provided the dates indicated in that statement.[777] Nonetheless, the Trial Chamber accepted the date of the Mibilizi attack provided in Witness BRK's 8 March 2006 witness statement despite the fact that he had specifically repudiated it.[778] While there is no absolute prohibition on accepting prior statements for the truth of their contents, the Appeals Chamber recalls that Tribunal jurisprudence discourages this practice.[779] In the instant case, the Trial Chamber should have considered more carefully the fact that Witness BRK's testimony at trial suggested that the date of the Mibilizi attack provided in his prior statement was incorrect.[780] The Trial Chamber's failure to explain its preference for Witness BRK's prior statement over his in-court testimony demonstrates a lack of care in considering pertinent evidence.

312. In sum, the Appeals Chamber, Judge Pocar dissenting, concludes that the Trial Chamber erred by failing to apply special caution in the assessment of Witness BRK's testimony that his status as an accomplice witness required. In particular, it failed to properly take into account its own finding that he may have exaggerated or invented evidence to further implicate the Appellant, his belief that his sentence would be reduced if he testified for the Prosecution, his late confession and his willingness to tailor his accounts of the events to serve his interests. The conclusion that the Trial Chamber's analysis was so flawed as to constitute an abuse of discretion is underscored by its lack of care in assessing Witness BRK's testimony regarding dates of particular attacks.

313. In light of the foregoing, the Appeals Chamber, Judge Pocar dissenting, finds that no reasonable trier of fact could have found Witness BRK to be credible. The Appeals Chamber observes that while the Trial Chamber considered that other aspects of Witness BRK's account of

[775] Trial Judgement, paras. 179, 291, 302, 305.
[776] Exhibit D30.
[777] *See, e.g.*, T. 22 January 2007 p. 46.
[778] Trial Judgement, paras. 291, 292.
[779] *See Simba* Appeal Judgement, para. 103, *quoting Akayesu* Appeal Judgement, para. 134. *See also Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, which was filed two months after the *Simba* Appeal Judgement and takes a broader view of the Trial Chamber's discretion to rely on witness statements for the truth of their contents (paras. 29-32). This difference in approach between the two cases can be understood in light of Rule 90(A) of the ICTR Rules, no equivalent of which exists in the ICTY Rules of Procedure and Evidence.
[780] Trial Judgement, para. 302. *See also* T. 22 January 2007 p. 23. Although Witness BRK was unable to provide dates for the attacks at Mibilizi, Nyakanyinya and Kamarampaka at trial, he was able to provide a chronology of the events which placed the attack on Mibilizi first, the attack on Nyakanyinya school second, and ended with the attack on the Kamarampaka stadium. The Appeals Chamber notes that the Trial Chamber accepted that the second attack, at Nyakanyina school occurred on 12 April 1994, and that there is no dispute that the third event, at Kamarampaka stadium, occurred on 16 April 1994. Accordingly, the attack on Mibilizi would have had to occur as much as a week

the events at Kamarampaka stadium were corroborated,[781] Witness BRK was the only witness to provide a direct account of the killings at the gendarmerie, and specifically of the Appellant's role in the killings.[782] Accordingly, given the Trial Chamber's erroneous finding on Witness BRK's credibility, its findings on the Appellant's participation in the killings of the refugees taken from Kamarampaka stadium must be overturned.

314. For the foregoing reasons, the Appeals Chamber, Judge Pocar dissenting, grants the Appellant's Grounds of Appeal 24 to 26 relating to the assessment of Witness BRK's evidence and reverses the Appellant's conviction for genocide based on this event. Consequently, there is no need to address the Appellant's remaining arguments regarding the events at Kamarampaka stadium under this or any other ground of appeal.[783]

before the date provided in Witness BRK's 8 March 2006 statement. *See* Trial Judgement, paras. 35, 219, 220, 359, 360.

[781] Trial Judgement, para. 215.

[782] Trial Judgement, para. 218.

[783] In particular, his arguments under Ground of Appeal 22 that the Trial Chamber erred by failing to require a nexus with a national campaign of genocide (Notice of Appeal, paras. 80, 81; Appellant's Brief, paras. 259-264) and Grounds of Appeal 24 to 26 that the Trial Chamber erred by (1) failing to consider inconsistencies between Witness BRK's testimony and previous statements and other witnesses' evidence (Notice of Appeal, para. 84; Appellant's Brief, paras. 288-293. *See also* Notice of Appeal, para. 137; AT. 29 September 2009 p. 19); (2) finding that Witness BRK's testimony was corroborated (Notice of Appeal, paras. 87-90; Appellant's Brief, paras. 297-300; Brief in Reply, paras. 104, 105. *See also* AT. 29 September 2009 pp. 19, 20); and (3) failing to consider other evidence which undermined Witness BRK's evidence (Appellant's Brief, para. 302).

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron
Gberdao Gustave Kam
Robert Fremr

Registrar: Adama Dieng

Date: 12 November 2008

THE PROSECUTOR

v.

Siméon NCHAMIHIGO

Case No. ICTR-01-63-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Alphonse Van
Lloyd Strickland
Madeleine Schwartz
Adama Niane

Defence Counsel:
Denis Turcotte
Benoît Henry

As such, a sole witness' testimony could suffice to justify a conviction if the Chamber is convinced beyond all reasonable doubt.

15. The jurisprudence on the recollection of details is also well formulated.[13] The events about which the witnesses testified occurred more than a decade before the trial. Discrepancies attributable to the lapse of time or the absence of record keeping, or other satisfactory explanation, do not necessarily affect the credibility or reliability of the witnesses. The Chamber will evaluate the testimony of each witness in the context of the testimony as a whole and determine to what extent it can believe and rely on the testimony. In making this assessment, the Chamber will consider whether the testimony was inconsistent with prior statements made by the witness and, if so, the cause of the inconsistency. The Chamber will also consider the internal consistency and integrity of the testimony and the context in which it was given. The Chamber will compare the testimony of each witness with the testimony of other witnesses and with the surrounding circumstances. The Chamber will explain the criteria on which it acts on a case-by-case basis.

16. The Defence has complained that the investigators were unreliable.[14] Two investigators testified in this case. The Chamber considers that the submissions with regard to Mamadou Koné do not warrant development, because he does not play a significant role in the case and the primary reason for his testimony was to admit a statement allegedly taken from Nchamihigo shortly after he was taken into custody. The Chamber has already ruled that as a matter of law the statement was inadmissible.[15] The second investigator, Jeannette Ebouea, put into evidence certain maps and gave evidence about various locations.[16] However, there was abundant evidence on these matters from other witnesses in the case. Her testimony was not critical to any finding of fact that the Chamber has to make. Still, the Defence complains about her responses to a series of questions about her investigative methods. In particular, the Defence submits that her admission that she did not take notes from the majority of persons she interviewed gives rise to the inference that her investigation was biased and that she only took notes of an incriminating nature thereby depriving Nchamihigo of an investigation which may have revealed exculpatory material.[17] The Chamber considers these submissions to be speculative. There was no evidence to support a conclusion that the Prosecution failed to disclose any exculpatory material in its possession, and the Defence did not make any such allegations. The submissions do not reveal any breach of duty, and the rules governing disclosure do not contain any obligation on the Prosecution to actively search for exculpatory material.[18]

17. In the present case, the Prosecution adduced evidence from many witnesses who admitted to participating in the crimes charged against Nchamihigo. These are accomplices. It is accepted both as a matter of law and common sense that the testimony of accomplices may be tainted by motives or incentives to falsely implicate an accused to gain some benefit or advantage in regard to their own case or sentence. A Chamber must therefore look at the testimony of accomplices, and the circumstances under which it has come to be delivered,

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13 See e.g. *Ndindabahizi*, Judgement (AC), para. 20.

14 Defence Closing Brief, paras. 65 *et seq.*

15 *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-T, Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defence's Request to Hold a *Voir Dire*, 5 February 2006.

16 T. 26 September 2006 and T. 27 September 2006.

17 Defence Closing Brief, paras. 83 *et seq.*

18 Rules 66 and 68 of the Rules.

with caution.[19] However, there is no rule requiring corroboration in the assessment of accomplice testimony. The Chamber may rely on the testimony of an accomplice who has not been corroborated if, after careful examination, the Chamber is convinced of the truthfulness and reliability of the witness. Testimony which supports the evidence adduced by an accomplice may bolster and strengthen the reliance that can be placed on it.[20]

18. Most of the witnesses who testified in this trial were granted protective measures for security reasons. An important element of these measures is the concealment of their identity from the public. In writing this Judgement, this circumstance will be observed. Witnesses, in most cases, will be referred to by pseudonym. In discussing their testimony, the Chamber will exercise care not to disclose any information which may identify the protected witness. Information of such a sensitive character, when adduced, is placed under seal and remains available to the Chamber during its deliberations.

19. In conclusion, the Chamber will guarantee that Nchamihigo benefits from the presumption of innocence and will only make findings against him where the evidence establishes his guilt beyond all reasonable doubt.

1.2. Alibi

20. Rule 67 (A)(ii)(a) of the Rules envisages that the Defence shall give notice of its intention to rely on an alibi before the commencement of the trial. In the present case, Nchamihigo filed an alibi notice on 19 April 2007, long after the close of the Prosecution case. Rule 67 (B) of the Rules specifies that failure of the Defence to provide such notice shall not limit the right of the accused to rely on an alibi defence. This provision is consistent with the principle of the presumption of innocence and the duty of the Prosecution to prove guilt beyond reasonable doubt. In the present case, compliance at such a late stage in the proceedings deprived the Prosecution of the opportunity to adduce evidence related to the alibi. It also raised the question whether the alibi was recently concocted to fit the evidence adduced against Nchamihigo.

1.2.1. Nchamihigo's Alleged Location before March 1994

21. Nchamihigo offered evidence to establish that it was impossible for him to have engaged in certain alleged activities because he did not reside in Cyangugu town before the end of February 1994. He explained that he was appointed Deputy Prosecutor in 1980 and served in various communities including Kigali, Gatsibo in the Mutara region, Byumba, Kibuye, and Cyangugu. In 1990, he was moved to the prosecutor's office in Rwesero sub-prefecture, and towards the end of 1990, up to 1992, he was at the prosecutor's office in Kigali. He said that he was then transferred to the prosecutor's office in Kibuye up to the end of February 1994. Defence Witness SNB testified that Nchamihigo joined the prosecutor's office in Cyangugu in March 1994.[21]

22. Several Prosecution witnesses testified that they saw and had dealings with Nchamihigo in Cyangugu in 1992, 1993 and early 1994. Witness LM, who worked in the

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19 See e.g. *Niyitegeka*, Judgement (AC), para. 98.

20 See e.g. *Cyangugu*, Judgement (AC), paras. 204-206.

21 Exhibit D-1; T. 18 September 2007 pp. 13-15 (Siméon Nchamihigo); T. 30 August 2007 p. 42 (Witness SNB, Closed Session).

involvement in the killing of his children and the mere omission of detail in the statement is not evidence of prevarication.

212. The Defence also suggested that LCR and LBB travelled together and may have worked out their respective testimonies together. No evidence was adduced to support this argument. The Chamber rejects the allegation that LCR and LBB concerted their testimony together. While it is true that LCR was rather belligerent during cross-examination and was intent on mentioning Nchamihigo even when it involved answering something that was not asked, the Chamber does not attribute a motive to falsely implicate Nchamihigo. The Defence neither disputed that LCR was at the stadium, nor that his name was on the list to be removed, nor that his sons were killed. The Chamber considers that those factors explained his hostility to Nchamihigo in the courtroom.

213. The Chamber found that LM, LBB and LCR were all credible and reliable witnesses. The Chamber believed their testimony. After considering the evidence as a whole, the Chamber finds beyond reasonable doubt that Nchamihigo participated in the removal of some 15 Tutsi from Kamarampaka Stadium.

214. BRK confessed to being one of the killers of the refugees removed from the stadium. He is an accomplice and his testimony must therefore be viewed with caution. Having cautiously considered the circumstances under which he is testifying in this case and his evidence, the Chamber has concluded that he does not have any motive or incentive to falsely incriminate Nchamihigo.

215. The Defence contends that BRK's description of events when he arrived at the stadium is not consistent with the testimony of other reliable Prosecution witnesses. The Chamber accepts that no one else testified that Nchamihigo had a megaphone and called out names from a list at the stadium. His evidence about this could have been exaggerated or invented to further implicate Nchamihigo. Several witnesses testified that Prefect Bagambiki and Lieutenant Imanishimwe had gone inside the stadium. The Chamber notes that even though this aspect of BRK's testimony could not be accepted, other aspects of his testimony were supported in many respects.

216. In his testimony, Nchamihigo denied knowing BRK, but confirmed that he was on the list of suspects, prepared by Commander Munyarugerero, for killing the people removed from the stadium. This supports BRK's admission that he was present and was one of the killers. In addition, although Nchamihigo denied going to the Mutongo commercial centre on that day, in his evidence he said that Sub-Prefect Munyangabe did go there to pacify the population. BRK testified that Sub-Prefect Munyagabe was there, but with Nchamihigo.[144]

217. BRK's testimony that *Interahamwe* were outside the stadium to attack those removed was supported by LM, who heard the shouting, as well as by Baziruwiha, who saw them. Several witnesses testified to the fact that the killings took place. SBA testified that Commander Munyarugerero reported the killings to the PSC. AOY testified that Prefect Bagambiki telephoned him to confirm that the killings had taken place as planned. Nchamihigo himself testified that Prosecutor Ndorimana informed him that the people

144 T. 19 September 2007 pp. 29, 67-69 (Siméon Nchamihigo).

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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: **Mr. Adama Dieng**

Judgement of: **16 January 2007**

EMMANUEL NDINDABAHIZI
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-01-71-A

JUDGEMENT

Counsel for the Appellant:

Mr. Michel Konitz
Ms. Magali Pirard

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James K. Stewart
Mr. George Mugwanya
Ms. Inge Onsea
Mr. Abdoulaye Seye
Mr. Alfred Orono Orono

> Q. I understand, Witness. I just want to know, based on what you were told, if the killing of the half-caste had anything to do with the visit of Emmanuel Ndindabahizi to the roadblock?
>
> A. I have already said that regarding Ndindabahizi and the killing of that person, the killing of this person occurred subsequent to Ndindabahizi's departure. I don't know if you understand me, Counsel.
>
> Q. Very well. But this killing occurred after, but was it after, in the course of the same day, in the course of the week? Do you have any further information on this?
>
> A. Well, Counsel, I don't know if you understand what I'm saying. There wasn't a long lapse of time. I don't know if you need someone else to explain what I'm telling you, but I believe it's clear.
>
> MR. PRESIDENT: What did you say now, Mr. Witness, can you repeat your answer?
>
> THE WITNESS: I said that it was not after a long time -- it was not a long time thereafter. I cannot even say hours, let alone days. It was soon after the departure of Ndindabahizi.[253]

And in response to questions asked by Judge Bossa:

> JUDGE BOSSA: You mentioned that you were taken to the roadblock at around 11 o'clock in the morning; is that correct?
>
> THE WITNESS: I cannot tell you that that is the absolute truth. It was not during the evening, but neither was it very early in the morning. I gave a period of time which was approximate.
>
> JUDGE BOSSA: In the morning; okay. How long after that did the Accused arrive?
>
> THE WITNESS: Just a little after my arrival at that place.
>
> JUDGE BOSSA: Okay. And how long after that was the half-caste killed? Because you said he was killed in the morning as well.
>
> THE WITNESS: Briefly, that happened about five minutes after I left the roadblock.[254]

115. Thus, Witness CGC never explained (nor was he asked to[255]) how he learned that Mr. Nors was killed at the roadblock about five minutes after he (Witness CGC) had left.[256] Thus, the Trial Chamber did not know how the person – or persons – who told Witness CGC about the killing knew about it; also, the Trial Chamber did not know on which basis the person – or persons –came to the conclusion that the killing happened some minutes after his departure. The finding that Mr. Nors was killed shortly after the Appellant's visit was thus based only on vague and

[253] T. 29 September 2003, p. 48.
[254] T. 29 September 2003, p. 51.
[255] The fact that Defence counsel did not question Witness CGC as to how he could be sure that Nturusu had been killed five minutes after the witness had left the roadblock should not be held against the Appellant as it was the onus of the Prosecution to prove that the hearsay evidence was reliable and credible.
[256] Witness CGC testified that many people were killed at that roadblock both before and after the Appellant's visit. But Witness CGC did not explain why he recalled specifically that the murder of Nturusu (which murder he did not witness) happened shortly after the Appellant's visit. In fact, Witness CGC himself at first was not entirely certain that the murder of Nturusu occurred after the Appellant's departure: *see* T. 29 September 2003, p. 33 ("If my memory serves me right, that person was killed after Ndindabahizi's departure").

unverifiable hearsay. While hearsay evidence is not *per se* inadmissible, it is well established that a Trial Chamber must be cautious in considering such evidence.[257] Hence, the Appeals Chamber finds, by majority, Judge Shahabuddeen dissenting, that the Trial Chamber failed to adhere to this principle and that no reasonable trier of fact could have reached the conclusion beyond reasonable doubt that Mr. Nors was killed shortly after the Appellant's visit on or about 20 May 1994.

116. In relation to the question whether the Appellant's actions on 20 May 1994 substantially contributed to the killing of Mr. Nors on 26 May 1994 – if Witness DB and Exh. D.34 were to be believed – the Appeals Chamber notes that Witness CGC testified that people were killed at the roadblock even before the Appellant's visit, that is, without his contribution.[258] Also, it is not established whether the persons who were instigated by the Appellant on 20 May 1994 were those who killed Mr. Nors on 26 May 1994. Thus, it is unclear whether the Appellant's acts substantially contributed to Mr. Nors's killing had it occurred six days after these acts or even later.

117. Also, the Trial Chamber did not make a finding on any criminal act of the Appellant during mid-April 1994 (*see* paragraph 25 of the Indictment) that could have substantially contributed to the murder of Mr. Nors in late May 1994 (*see* paragraph 11 of the Indictment). Thus, the Prosecution failed to establish a link between the murder of Mr. Nors at the Gaseke roadblock and a substantial contribution of the Appellant. Without that crime being committed, the Appellant cannot be held liable for instigating and aiding and abetting genocide for the murder of Mr. Nors pursuant to Article 6 of the Statute.[259] Instigating means prompting another person to commit an offence, thus requiring a subsequent criminal action.[260] Similarly, a conviction for aiding and abetting presupposes that the support of the aider and abetter has a substantial effect upon the perpetrated crime.[261] No reasonable trier of fact could have concluded beyond reasonable doubt that the killing of Mr. Nors was a result attributable to the Appellant's acts. In this context, the Appeals Chamber recalls that the Prosecution had withdrawn the charge of direct and public incitement to commit

[257] *Rutaganda* Appeal Judgement, para. 34; *Akayesu* Appeal Judgement, paras 286-92; *Niyitegeka* Trial Judgement, para. 43; *Ntakirutimana* Trial Judgement, para. 33; *Bagilishema* Trial Judgement, para. 25; *Musema* Trial Judgement, para. 51. *See also Naletilić and Martinović* Appeal Judgement, para. 516; *Kordić and Čerkez* Appeal Judgement, para. 281. This principle was recognized by the Trial Chamber in this case: *see* Trial Judgement, para. 23. In this context, the Appeals Chamber notes that the Trial Chamber held in para. 216 of the Trial Judgement that "Rwandans do not always express clearly the difference between what they have seen with their own eyes and what they have heard". The Appeals Chamber does not accept this characterization as being specific to Rwandans. Rather, it interprets the Trial Chamber's finding as a general reference to inaccuracies which often occur in the testimony of witnesses, regardless of their nationality.

[258] T. 29 September 2003, p. 33.

[259] The modes of liability as regulated under Article 6(1) of the Statute are also applicable to the crime of genocide pursuant to Article 2 of the Statute, *Ntakirutimana* Appeal Judgement, para. 500. *See also Krstić* Appeal Judgement, para. 138.

[260] *Kordić and Čerkez* Appeal Judgement, para. 27.

[261] *Blaškić* Appeal Judgement, para. 48.

genocide.[262] Hence, the Trial Chamber erroneously convicted the Appellant for instigating and aiding and abetting the murder of Mr. Nors as a crime against humanity.

118. In this context, the Appeals Chamber notes that the pleadings of the parties have to be clear and unambiguous. On the basis of ambiguous submissions made by the Prosecution during closing arguments, the Appeals Chamber might have come to the conclusion that the Prosecution had abandoned its case in relation to the killing of Mr. Nors.

2. Conclusion

In light of the above, the Appellant's eleventh ground of appeal is granted.

IX. ALLEGED VAGUENESS OF THE INDICTMENT (SUB-GROUND OF APPEAL 1 - GASEKE ROADBLOCK)

119. As the eleventh ground of appeal is granted on the basis of the reasoning set out above, it is not necessary for the Appeals Chamber to consider under the first sub-ground of appeal relating to the Gaseke roadblock whether the case concerning Mr. Nors was withdrawn by the Prosecution.[263] By the same token, it is not necessary to consider allegations of the vagueness of the Indictment relating to Mr. Nors[264] as both issues are rendered moot.

X. ALLEGED ERROR IN FINDING A LEGAL BASIS FOR THE GENOCIDE CONVICTION (GROUND OF APPEAL 7)

120. In addition, for the reasons set out above under the eleventh ground of appeal, it is not necessary for the Appeals Chamber to consider whether the Appellant was erroneously convicted of instigating and aiding and abetting genocide at the Gaseke roadblock on the basis of the killing of Mr. Nors. Consequently, the seventh ground of appeal has become moot.

[262] *See supra* note 4. As the offence of direct and public incitement to commit genocide is an inchoate offence, the legal assessment of such a charge may have been different.
[263] Appellant's Brief, paras 22, 172-77, referring to closing arguments, T. 1 March 2004, pp. 14-15, Appellant's Reply, paras 41-42.
[264] Appellant's Brief, paras 21-29. This argument was also raised during the appeal hearing: the Defence argued that ambiguity must be resolved in favour of the Appellant, at T. 6 July 2006, p. 18, *see also* T. 6 July 2006, pp. 26-27, 34, 64. The Prosecution argued that the act of instigation was not limited to Mr. Nors, T. 6 July 2006, p. 52.

a Minister, the Appellant supported and advocated a policy of genocide;[282] and second, the large number of victims at Gitwa Hill.[283] There is thus no double-counting of the same aggravating circumstance.

135. Also, the Trial Chamber did not err in considering the large number of victims at Gitwa Hill as an aggravating circumstance relevant to the sentence. As to the conviction for genocide, there need not be a large number of victims to enter a genocide conviction. As for extermination, the *actus reus* requires "killing on a large scale".[284] While this does not "suggest a numerical minimum",[285] a particularly large number of victims can be an aggravating circumstance in relation to the sentence for this crime if the extent of the killings exceeds that required for extermination. In the present case, there is no indication that, in considering aggravating circumstances, the Trial Chamber looked at only those killings required for extermination when it specifically cited the fact that "thousands" of people were killed.[286]

136. The Appellant also argues that his position in the Interim Government does not *per se* constitute an aggravating circumstance. The Appeals Chamber agrees, recalling that:

> [a] high rank in the military or political field does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence. Consequently, what matters is not the position of authority taken alone, but that position coupled with the manner in which the authority is exercised.[287]

Thus, the Trial Chamber was entitled to refer to the Appellant's position as a Minister in the Interim Government in sentencing, in accordance with the case law of the Tribunal which recognizes that the abuse of a position of influence and authority in society can be taken into account as an aggravating factor.[288] The Trial Chamber did not find that the Appellant's position in the Interim Government in itself called for a harsher sentence. Instead, it found that it was the wrongful exercise of his powers that constituted the aggravating circumstance. The Appeals Chamber finds no error in this.

137. As to the third challenged circumstance, the Appeals Chamber recalls that "where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it

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[282] *See also* the Trial Chamber's earlier findings concerning the meeting of 3 May 1994, *supra* para. 58.
[283] *See infra* para. 142.
[284] *Ntakirutimana* Appeal Judgement, para. 516.
[285] *Ntakirutimana* Appeal Judgement, para. 516.
[286] Trial Judgement, para. 508(ii).
[287] *Babić* Judgement on Sentencing Appeal, para. 80, referring to *Krstić* Trial Judgement, para. 709 and *Kayishema and Ruzindana* Appeal Judgement, paras 358-59.
[288] *See, e.g., Akayesu* Appeal Judgement, paras 414-15; *Ntakirutimana* Appeal Judgement, para. 563; *Kamuhanda* Appeal Judgement, paras 347-348; *Stakić* Appeal Judgement, para. 411.

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NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

APPEALS CHAMBER

Case No. ICTR-99-46-A

ENGLISH
Original: FRENCH

Before: Judge Fausto Pocar, presiding
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Adama Dieng

Date: 7 July 2006

THE PROSECUTOR
(Appellant and Respondent)

v.

ANDRÉ NTAGERURA
(Respondent)
EMMANUEL BAGAMBIKI
(Respondent)
SAMUEL IMANISHIMWE
(Appellant and Respondent)

JUDGEMENT

Office of the Prosecutor
Hassan Bubacar Jallow
James Stewart

Counsel for André Ntagetura
Benoït Henry
Hamuli Rety

Counsel for Emmanuel Bagambiki
Vincent Lurquin

Counsel for Samuel Imanishimwe
Marie Louise Mbida
Jean-Pierre Fofé

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(b) Aiding and abetting by tacit approval

337. The Prosecution submits that Bagambiki's "knowledge of such massive crimes and his inaction or silence amount to culpable omission or gross negligence or conduct that is tantamount to acquiescence in, tacit approval of, or aiding and abetting the crimes".[683] Citing the *Aleksovski* Trial Judgement, the Prosecution argues that when a superior was aware of crimes committed by his subordinates his silence could only be interpreted as a sign of approval, even when he was not present at the crime scene.[684]

338. In the view of the Appeals Chamber, criminal responsibility for an omission, which leads to a conviction as the principal perpetrator of the crime, has to be distinguished from aiding and abetting a crime by encouragement, tacit approval or omission, amounting to a substantial contribution to the crime. In the Notice of Appeal, the Prosecution's arguments are exclusively related to the issue of criminal responsibility for an omission. The issue of Bagambiki's responsibility for aiding and abetting the crimes by his tacit approval is raised only in the Appeal Brief, without the Prosecution having first sought leave to vary its grounds of appeal.[685] Accordingly, the Appeals Chamber declines to address this issue further.

2. Superior responsibility under Article 6(3) of the Statute

(a) Superior-subordinate relationship between Bagambiki and the gendarmes

339. The Prosecution challenges the Trial Chamber's finding that Bagambiki had neither *de jure* nor *de facto* authority over the gendarmes. The Prosecution submits that the Trial Chamber erred in its definition of a superior under Article 6(3) of the Statute.[686]

340. In its Notice of Appeal, the Prosecution submitted that the Trial Chamber erred in finding "that Bagambiki lacked effective control over the gendarmes *and the military*".[687] However, in the Appeal Brief, the Prosecution's arguments are focused on Bagambiki's effective control over the gendarmes, leading to the conclusion that Bagambiki had "the necessary *material ability* required to prevent or punish crimes by the *gendarmes* he requisitioned".[688] The Appeals Chamber will therefore concentrate on the issue of Bagambiki's responsibility for the crimes committed by the gendarmes.

341. The Prosecution asserts that the "Trial Chamber confined the definition of a superior to a military-style structure, where the superior can give orders or punish or prevent transgressions through issuing orders or taking disciplinary actions".[689] The paragraph of the Trial Judgement, to which the Prosecution refers, reads:

> After reviewing the relevant provisions of Rwandan law, the Chamber is not convinced that Bagambiki's ability to requisition gendarmes gave him *de jure* authority to give orders to them during the execution of an operation. [...] The law

[683] Prosecution Appeal Brief, para. 370.
[684] *Idem*, quoting *Aleksovski* Trial Judgement, paras. 87-88.
[685] *Cf.* Practice Directions on Formal Requirements for Appeals from Judgement, 4 July 2005, Article 2.
[686] Prosecution Appeal Brief, paras. 372-373.
[687] Prosecution Notice of Appeal, para. 59(b) (emphasis added).
[688] Prosecution Appeal Brief, para. 379 (emphasis added).
[689] *Ibid.*, para. 376.

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them to do so".[735] The Prosecution submits that the *actus reus* of aiding and abetting in this instance is established by Imanishimwe's omission to prevent his soldiers from going to Gashirabwoba, and that this omission had a decisive effect on their ability to participate in the attack.[736] It further contends that Imanishimwe possessed the requisite knowledge to be an aider and abettor in the Gashirabwoba massacre,[737] given that the Trial Chamber found that he knew or should have known about the participation of his soldiers in the attack.[738]

368. The Appeals Chamber notes that the Trial Chamber did not expressly rule on the issue as to whether Imanishimwe could have incurred criminal responsibility for aiding and abetting the crimes committed at the Gashirabwoba football field on 12 April 1994. This notwithstanding, the Appeals Chamber does not conclude that the Trial Chamber failed to consider this form of responsibility. It indeed transpires from the legal findings made by the Trial Chamber that this form of responsibility was considered and even accepted when the facts lent themselves to it. The Appeals Chamber understands the Trial Chamber's silence with respect to aiding and abetting as an indication that it was not established that the Accued's conduct could in this particular instance be characterized as aiding and abetting.[739]

369. Accordingly, the issue is for the Appeals Chamber to inquire into whether this finding is one which a reasonable trier of fact could have made.

370. To establish the material element (or *actus reus*) of aiding and abetting under Article 6(1) of the Statute, it must be proven that the aider and abettor committed acts specifically aimed at assisting, encouraging, lending moral support[740] for the perpetration of a specific crime, and that the said support had a substantial effect on the perpetration of the crime. The Appeals Chamber adds that the *actus reus* of aiding and abetting may, in certain circumstances, be perpetrated through an omission.[741] The requisite *mens rea* is the fact that the aider and abettor knows that his acts assist in the commission of the specific crime of the principal.[742]

371. In the instant case, the Trial Chamber considered that it was not established that the Accused had ordered or was present during the attack launched at Gashirabwoba on 12 April 1994.[743] On the other hand, it found that the soldiers responsible for the attack could not have

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[735] *Ibid.*, para. 407.
[736] *Ibid.*, para. 408. In support of its line of reasoning, the Prosecution cites the *Blaškić* Trial Judgement, para. 284: "the *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*." (footnote omitted).
[737] Prosecution Appeal Brief, paras. 409-410, referring to *Tadić* Appeal Judgement, para. 229 and *Krstić* Appeal Judgement, para. 140.
[738] *Ibid.*, para. 410, citing Trial Judgement, para. 654.
[739] See *supra*, para. 359.
[740] The Appeals Chamber notes that the phrase "assist, encourage or lend no support" originally used by the Appeals Chamber in the *Tadić* (para. 229), *Aleksovski* (para. 163), *Vasiljević* (para. 102) and *Blaškić* (para. 45) Appeal Judgements has been translated as "*aider, encourager ou fournir un soutien moral*" in the French versions of the said Judgements. The Appeals Chamber considers that this translation may mislead the reader, given that "aided and abetted" is rendered in the French text of the Statute by "*aidé et encourage*".
[741] See *Blaskić* Appeal Judgement, para. 47.
[742] *Vasiljević* Appeal Judgement, para. 102; *Blaskić* Appeal Judgement, para. 45; *Kvočka et al.* Appeal Judgement, paras. 89-90, 188.
[743] Trial Judgement, paras. 439 and 653.

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor MERON, Presiding**
Judge Florence MUMBA
Judge Mehmet GÜNEY
Judge Wolfgang SCHOMBURG
Judge Inés Mónica WEINBERG DE ROCA

Registrar: **Mr. Adama Dieng**

Date: **13 December 2004**

ICTR Appeals Chamber
Date: 13 December 04
Action:
Copied To: All Judges, Parties, Judicial Archives, LOs, LSS

THE PROSECUTOR

v.

ELIZAPHAN NTAKIRUTIMANA AND GÉRARD NTAKIRUTIMANA

Cases Nos. ICTR-96-10-A and ICTR-96-17-A

JUDGEMENT

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Ms. Michelle Jarvis
Mr. Mathias Marcussen

Counsel for the Defence

Mr. David Jacobs
Mr. David Paciocco
Mr. Ramsey Clark

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: ROSETTE MUZIGO-MORRISON
SIGNATURE: DATE: 13/December/04

10. The Prosecution presents six grounds for appeal.[8] The Prosecution asserts that the Trial Chamber erred (i) by failing to apply the "joint criminal enterprise" doctrine to determine Elizaphan Ntakirutimana's and Gérard Ntakirutimana's respective responsibility for the crime of genocide, (ii) in restricting Gérard Ntakirutimana's conviction for genocide to the acts of killing or serious bodily harm that he personally inflicted on Tutsis at the Mugonero Complex and in Bisesero, and (iii) in its definition of the *mens rea* requirement for aiding and abetting genocide. The Prosecution's fourth and fifth grounds of appeal address issues relating to crimes against humanity (extermination) and crimes against humanity (murder). As a sixth ground of appeal, the Prosecution challenges the sentences imposed by the Trial Chamber. Elizaphan Ntakirutimana and Gérard Ntakirutimana filed responses to the Prosecution appeal.[9]

D. Standards for Appellate Review

11. The Appeals Chamber recalls the requisite standards for appellate review pursuant to Article 24 of the Statute. Article 24 addresses errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice. Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[10]

12. As regards errors of fact, as has been previously underscored by the Appeals Chamber of both this Tribunal and of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber. Where an erroneous finding of fact is alleged, the Appeals Chamber must give deference to the trial chamber that received the evidence at trial as it is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly

[8] "Prosecution Appeal Brief", filed on 23 June 2003, and "Prosecution Reply Brief" filed on 19 August 2003 ("Prosecution Reply").
[9] "Defence Response to the Prosecution Appeal Brief", filed by Gérard Ntakirutimana on 4 August 2003 ("Response (G. Ntakirutimana)"); "Reply (sic) to Prosecutor's Appeal Brief", filed by E. Ntakirutimana on 5 August 2003 ("Response (E. Ntakirutimana)").
[10] *Niyitegeka* Appeal Judgement, para. 7; *Vasiljević* Appeal Judgement, para. 6 (citations omitted). *See also, e.g., Rutaganda* Appeal Judgement, para. 20; *Musema* Appeal Judgement, para. 16.

erroneous. If the finding of fact is erroneous, it will be quashed or revised only if the error occasioned a miscarriage of justice.[11]

13. The Appeals Chamber emphasises that on appeal, a party cannot merely repeat arguments that did not succeed at trial, in the hope that the Appeals Chamber will consider them afresh. The appeals process is not a trial *de novo* and the Appeals Chamber is not a second trier of fact. It is incumbent on the party alleging the error to demonstrate that the Trial Chamber's rejection of arguments constituted such an error as to warrant the intervention of the Appeals Chamber. Thus, arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[12]

14. Moreover, in its submissions, the appealing party must provide precise references to relevant transcript pages or paragraphs in the trial judgement to which the challenge is being made.[13] Failure to do so, or if the submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies, makes it difficult for the Appeals Chamber to assess fully the party's arguments on appeal.[14]

15. Finally, it is within the inherent jurisdiction of the Appeals Chamber to select those submissions which merit a reasoned opinion in writing. Arguments which are evidently unfounded may be dismissed without detailed reasoning.[15]

[11] *Niyitegeka* Appeal Judgement, para. 8; *Krstić* Appeal Judgement, para. 40; *Krnojelac* Appeal Judgement, paras. 11-13, 39; *Tadić* Appeal Judgement, para. 64; *Čelebići* Appeal Judgement, para. 434; *Aleksovski* Appeal Judgement, para. 63; *Vasiljević* Appeal Judgement, para. 8.
[12] *See in particular Rutaganda* Appeal Judgement, para. 18.
[13] Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002, para. 4(b). *See also Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137; *Vasiljević* Appeal Judgement, para. 11.
[14] *Niyitegeka* Appeal Judgement, paras. 9-10; *Vasiljević* Appeal Judgement, para. 12. *See also Kunarac et al.* Appeal Judgement, paras. 43, 48.
[15] *Niyitegeka* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, paras. 47-48; *Vasiljević* Appeal Judgement, para. 12.

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Carmel Agius, Presiding** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Arlette Ramaroson** **Judge Andrésia Vaz**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**14 December 2011**

Dominique NTAWUKULILYAYO

v.

THE PROSECUTOR

Case No. ICTR-05-82-A

JUDGEMENT

Counsel for Dominique Ntawukulilyayo:

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Dorothée Le Fraper du Hellen

Office of the Prosecutor:

Hassan Bubacar Jallow
James J. Arguin
Alphonse Van
Ousman Jammeh
Priyadarshini Narayanan
Deo Mbuto

his prior good conduct is inconsistent with any possible moral support or encouragement, and that his presence at Kabuye hill would therefore have been of no consequence to the assailants.[529]

212. The Prosecution responds that the elements of aiding and abetting were clearly established beyond reasonable doubt, and that prior good conduct is not a relevant factor.[530]

213. In reply, Ntawukulilyayo contends that, contrary to the Trial Chamber's finding, Kabuye hill was not an isolated area, and that its conclusion that the transfer of refugees provided a "tactical advantage" was therefore purely speculative.[531]

214. The Appeals Chamber recalls that the *actus reus* of aiding and abetting is constituted by acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime.[532] Whether a particular contribution qualifies as "substantial" is a "fact-based inquiry", and need not "serve as condition precedent for the commission of the crime."[533]

215. The Trial Chamber found beyond reasonable doubt that, in the early afternoon of Saturday, 23 April 1994, Ntawukulilyayo directed mostly Tutsi refugees at Gisagara market to go to Kabuye hill, promising them food and protection there, and that the refugees complied with his instructions.[534] The Trial Chamber further found that Ntawukulilyayo arrived at Kabuye hill later that day, and left shortly after dropping off soldiers who, along with others, subsequently attacked the civilian refugees at the hill.[535] As discussed above, the Appeals Chamber has found no error in the Trial Chamber's factual findings regarding Ntawukulilyayo's instructions to refugees at Gisagara market, and his arrival at Kabuye hill with soldiers.[536] Ntawukulilyayo has also failed to demonstrate error in the Trial Chamber's conclusion that the soldiers who accompanied him, along with others, attacked the refugees.[537] As regards the number of soldiers, the Appeals Chamber observes that the Trial Chamber did not rely on the specific number of soldiers who accompanied Ntawukulilyayo but on Ntawukulilyayo's contribution to the killings by bringing armed reinforcements.[538] Ntawukulilyayo's arguments that no reasonable trier of fact could determine with

[529] Appeal Brief, para. 252, *referring to ibid.*, paras. 190-202; Reply Brief, para. 103.
[530] Response Brief, paras. 192-206.
[531] Reply Brief, para. 100.
[532] *See, e.g., Karera* Appeal Judgement, para. 321; *Nahimana et al.* Appeal Judgement, para. 482.
[533] *Kalimanzira* Appeal Judgement, para. 86; *Rukundo* Appeal Judgement, para. 52; *Blagojević and Jokić* Appeal Judgement, para. 134.
[534] Trial Judgement, paras. 12, 263, 424, 453.
[535] Trial Judgement, paras. 18, 303, 453.
[536] *See supra*, Sections III, IV.
[537] *See supra*, para. 159.
[538] *See* Trial Judgement, para. 454.

certainty the number and category of security personnel brought to the hill, and their effective participation in the crimes, are therefore rejected.

216. The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that Ntawukulilyayo substantially contributed to the Kabuye hill killings by encouraging Tutsis to seek refuge there and then providing reinforcements to those attempting to kill them. These acts alone suffice to constitute the *actus reus* of aiding and abetting. The Appeals Chamber is of the opinion that it is therefore unnecessary to assess whether the Trial Chamber erred in concluding that Kabuye hill was an isolated area and that the transfer of refugees thereby provided a "tactical advantage", or in concluding that his status and position lent moral support to the perpetrators. Ntawukulilyayo's prior good conduct is equally inconsequential to the Trial Chamber's finding that the *actus reus* of aiding and abetting had been fulfilled.

217. The Appeals Chamber concludes that Ntawukulilyayo has failed to demonstrate that the Trial Chamber erred in finding that the *actus reus* of aiding and abetting genocide was established.

B. Alleged Errors Relating to the *Mens Rea*

218. The Trial Chamber found that Ntawukulilyayo had knowledge both of the assailants' genocidal intent and that his acts would assist the killings, reasoning as follows:

> Given the systemic and extensive nature of the attack, the Majority has no doubt that its purpose was to eliminate the primarily Tutsi refugees gathered on Kabuye hill and that the assailants possessed genocidal intent. Furthermore, the range of assailants, including soldiers and communal police, who participated in the assault just hours after Ntawukulilyayo sent refugees to Kabuye hill evinces considerable coordination. Indeed, Ntawukulilyayo's arrival on Kabuye hill with soldiers would no doubt have required planning, given that they were not normally stationed within the sub-prefecture. Under the circumstances, there is no doubt that Ntawukulilyayo instructed refugees to go to Kabuye hill and transported soldiers there with the knowledge of the genocidal intent of the assailants and that his acts would assist the killings. The evidence firmly establishes that Ntawukulilyayo shared that genocidal intent.[539]

219. Ntawukulilyayo submits that the Trial Chamber erred in inferring that the only reasonable conclusion was that he intended to aid and abet genocide on Kabuye hill, as there were other reasonable inferences available from the evidence.[540] Specifically, he argues that it would have been reasonable to conclude that he acted in good faith in sending the refugees to Kabuye hill with the

[539] Trial Judgement, para. 456 (internal citation omitted).
[540] Appeal Brief, paras. 203, 210. Under his Third Ground of Appeal, Ntawukulilyayo also submits that the Trial Chamber erred in finding that he shared the perpetrators' genocidal intent. *See* Notice of Appeal, paras. 24-29; Appeal Brief, paras. 160-167. The Appeals Chamber will not entertain this allegation of error as it has found that the Trial Chamber erred in finding Ntawukulilyayo guilty pursuant to Article 6(1) of the Statute for ordering the Kabuye hill killings, and as genocidal intent is not a requisite element of aiding and abetting genocide. *See supra*, para. 206 *and infra*, para. 222. Any error on the part of the Trial Chamber in regard of Ntawukulilyayo's genocidal intent would therefore have no impact on his conviction for aiding and abetting genocide.

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UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER III

Before: Judge Solomy Balungi Bossa, Presiding
Judge Bakhtiyar Tuzmukhamedov
Judge Mparany Rajohnson

Registrar: Adama Dieng

Date: 31 May 2012

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDGEMENT AND SENTENCE

Office of the Prosecutor
Hassan Bubacar Jallow
Paul Ng'arua
Memory Maposa
Simba Mawere
Mary Diana Karanja
Alison McFarlane

Defence Counsel
Vincent Courcelle-Labrousse
Philippe Larochelle

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1452. Witness T133 asserted that he had no knowledge of the meeting held in Masango *commune* and that Witness CNAC did not inform him of the meeting.[1859] The Chamber observes, however, that the meeting at Masango *commune* could have been convened without Witness T133's knowledge. The Chamber further does not find as plausible Witness T133's evidence that because of his close friendship and daily contact with Witness CNAC, he would have necessarily been informed of the meeting. Moreover, the Chamber notes that Witness T133 had a family relationship with Nzabonimana, which in the Chamber's view may have motivated the witness to deny Nzabonimana's involvement in the events.

1453. Witness T134 did not know of any orders given by Nzabonimana to destroy Tutsi houses in Masango *commune* in May 1994, or that Mpamo held a meeting with MRND supporters urging them to implement Nzabonimana's orders.[1860] Again, however, the Chamber notes that the orders and the meeting could have occurred without the witness's knowledge. Furthermore, the Chamber finds that Witness T134 was not credible when he testified that he would go outside at night while he was hiding at Mpamo's, particularly as Witness T134's wife had informed him that he was being sought after. As Witness T134 was in hiding, he was therefore not necessarily aware of what was going on in the *commune* during the period in question.

1454. Nevertheless, the Chamber observes that the Prosecution relied on the uncorroborated hearsay evidence of a single witness to support this allegation. The Chamber recalls that it may find an allegation proven beyond a reasonable doubt on the basis of a single witness's testimony (2.7.4). However, in this instance, given the hearsay nature of the witness's evidence and the lack of corroborating evidence, the Chamber does not find this evidence sufficient to support this allegation. Having considered the totality of the evidence, the Chamber concludes that the Prosecution has failed to prove beyond a reasonable doubt the allegation contained in Paragraph 47 of the Indictment. In light of the foregoing, the Chamber need not address whether sufficient notice was provided for this event.

3.6.2 Destruction of Houses in Nyamabuye *Commune*

3.6.2.1 Introduction

1455. Paragraph 46 of the Indictment alleges that in April 1994, Callixte Nzabonimana visited the Nyamabuye *commune* office and told the Hutu civilians present to destroy the house of a dead Tutsi and to cover it up, so that in the event of an enquiry, the death of the Tutsi would not be known.[1861]

1456. The Prosecution submits that in May 1994, at the Nyamabuye *commune* office, Nzabonimana gave orders that Tutsi houses, including that of a man named Mpambara, should be destroyed and crops planted to cover any traces of the massacre of Tutsis. These orders were given to ensure that evidence of the massacre was destroyed in case a commission of enquiry carried out investigations. The Prosecution relies on Witness CNAA.[1862]

[1859] T. 12 May 2010 pp. 56-62 (ICS) (Witness T133).
[1860] T. 6 July 2010 pp. 35-36, 53 (ICS) (Witness T134).
[1861] Para. 46 of the Indictment.
[1862] Prosecution Closing Brief, paras. 271-272; T. 20 October 2011 p. 38 (Prosecution Closing Argument).

role in the abduction and killing of Witness CNAQ's children.[2140] The Chamber further notes that at the time of his testimony Witness T31 had been convicted by a *Gacaca* court to a term of life imprisonment for his role in the Nyabikenke *commune* office attacks, and his appeal was pending.[2141] The Chamber will therefore treat the testimony of these witnesses with appropriate caution.

1686. The Defence asserts that Nzabonimana's name was not mentioned in connection with the killings during any *Gacaca* proceedings. Witness CNAQ testified at Witness T24's *Gacaca* trial and did not mention Nzabonimana. Her brother also did not mention Nzabonimana.[2142] However, the Chamber notes that *Gacaca* proceedings are separate and distinct legal proceedings which are not binding on this Chamber. The Chamber also notes that Witness T24 acknowledged that *Gacaca* records do not contain the full truth of what happened in Rwanda in 1994.[2143] Nevertheless, the Chamber considers the fact that Witness CNAQ omitted reference to Nzabonimana during *Gacaca* proceedings to negatively impact the credibility of her testimony.

1687. Having considered the totality of the evidence, the Chamber concludes that the testimony of Witnesses CNAQ and CNBU was insufficient to prove beyond a reasonable doubt that Nzabonimana told the assailants to kill Witness CNAQ's children. The Chamber reiterates that it has doubts as to whether Witness CNAQ heard the conversation between Nzabonimana and Emmanuel and recalls the numerous inconsistencies and omissions in the accounts provided by Witnesses CNAQ and CNBU.

1688. Furthermore, the Chamber notes that even if the Prosecution had proven that Nzabonimana told Emmanuel that the children were to be killed, this evidence would not suffice to establish a link between Nzabonimana and the subsequent killings. The Chamber recalls that although the evidence suggested that Emmanuel was an *Interahamwe*, the evidence also established that Emmanuel was protecting Witness CNAQ's children by giving money to the assailants.[2144] There was no evidence that Emmanuel was involved in any of the attacks. Furthermore, although Witness CNAQ testified that the *Interahamwe* present during the ensuing attack on her children told her that they were acting on Nzabonimana's instructions,[2145] the Chamber concludes that this hearsay evidence is insufficient to prove beyond a reasonable doubt that Nzabonimana indeed issued instructions to *Interahamwe* to kill Witness CNAQ's children.

1689. Given the foregoing, the Chamber finds that the Prosecution has not proven beyond a reasonable doubt its allegation that Nzabonimana told *Interahamwe*, *commune* policemen and Hutu civilians to kill Witness CNAQ's children. Additionally, the Prosecution failed to establish that the killings occurred as a result of any orders, as alleged in Paragraph 30 of the Indictment.

[2140] T. 27 April 2010 pp. 12-13 (ICS); T. 28 April 2010 p. 21 (ICS) (Witness T24); Prosecution Exhibit 35 (Excerpts of Witness T24's *Gacaca* Trial, 3 April 2009).
[2141] T. 4 May 2010 pp. 4-8 (ICS) (Witness T31).
[2142] T. 23 November 2009 pp. 39-40 (ICS) (Witness CNAQ).
[2143] T. 27 April 2010 p. 43 (Witness T24).
[2144] T. 16 November 2009 pp. 66-67 (ICS); T. 23 November 2009 p. 10 (ICS) (Witness CNAQ); T. 11 November 2009 pp. 38-39 (ICS) (Witness CNBU).
[2145] T. 16 November 2009 pp. 64-65 (ICS) (Witness CNAQ).

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
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IN THE APPEALS CHAMBER

Before:	**Judge Carmel Agius, Presiding** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Theodor Meron**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**1 April 2011**

Tharcisse RENZAHO

v.

THE PROSECUTOR

Case No. ICTR-97-31-A

JUDGEMENT

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Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. James Arguin
Mr. Alphonse Van
Mr. Abdoulaye Seye

IV. ALLEGED LACK OF NOTICE (GROUND OF APPEAL 1; GROUNDS OF APPEAL 5, 6, 10, 11, AND 12 IN PART)

51. At trial, Renzaho raised several objections regarding the form of and defects in the Indictment.[110] The Trial Chamber considered them and concluded that the Indictment was not defective, that Renzaho had reasonable notice of all material facts underpinning his convictions, and that the Defence's "conduct during the course of the trial and in their final submissions reflect that they have a complete understanding of the case."[111]

52. Renzaho submits that the Trial Chamber erred in law in convicting him despite a number of defects, including vagueness, in the Indictment.[112] He argues that the Indictment was insufficiently precise in relation to his superior responsibility, and that he thus lacked notice of the events at *Centre d'Étude de Langues Africaines* ("CELA"), the events at Sainte Famille, the civil defence system, roadblocks, the distribution of weapons, rapes, and the killings which formed the basis for his conviction for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.

A. Applicable Law

53. The Appeals Chamber recalls that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment in order to provide notice to an accused.[113] Whether a fact is "material" depends on the nature of the

[110] *See* Trial Judgement, paras. 29-31. *See also The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-I, *Requ[é]te en exception pr[é]judicielle pour vices de forme de l'acte d'accusation*, 31 March 2006 (confidential) ("Preliminary Motion"); *Mémoire final de la d[é]fense*, 15 November 2007 ("Defence Closing Brief"), paras. 70-204. The Initial Indictment in this case was issued on 23 October 2002, amended on 11 November 2002, amended again on 1 April 2005, and then amended once more on 16 February 2006, to give the operative Indictment. *See* Trial Judgement, Annex A: Procedural History, paras. 831, 832, 834, 835. *See also supra*, Chapter I (Introduction), fn. 6.

[111] *See* Trial Judgement, para. 32. *See also The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-I, *Décision sur la requête en exception préjudicielle pour vices de forme de l'acte d'accusation*, 5 September 2006 ("Decision on Preliminary Motion"); *The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-I, *Décision relative à la demande aux fins de certification d'appel de la décision du 5 septembre 2006 en vertu de l'article 72(B)*, 25 October 2006 ("Decision on Certification of Decision on Preliminary Motion"). The Trial Chamber also noted that the Defence did not point to any contemporaneous objections made at trial that it lacked notice of any of the evidence which was presented or that the evidence fell outside the scope of the Indictment, and the Trial Chamber was unable to identify any such objections with respect to the events which formed a basis of Renzaho's convictions. *See* Trial Judgement, para. 31.

[112] Notice of Appeal, paras. 8-11; Appellant's Brief, para. 2; Brief in Reply, para. 2. *See also* AT. 16 June 2010 pp. 12-16.

[113] *Karera* Appeal Judgement, para. 292; *Muvunyi* Appeal Judgement, para. 18; *Seromba* Appeal Judgement, paras. 27, 100. *See also Simba* Appeal Judgement, para. 63, *referring to Muhimana* Appeal Judgement, paras. 76, 167, 195 *and Gacumbitsi* Appeal Judgement, para. 49.

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: **Mr. Adama Dieng**

Judgement of: **20 October 2010**

EMMANUEL RUKUNDO

v.

THE PROSECUTOR

Case No. ICTR-2001-70-A

JUDGEMENT

Counsel for Emmanuel Rukundo:

Ms. Aïcha Condé
Mr. Benoît Henry

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Christine Graham
Mr. Abubacarr Tambadou
Mr. Ousman Jammeh
Mr. Shamus Mangan

other forms of responsibility pleaded in the Indictment. In the course of doing so, the Appeals Chamber will consider whether there was a sufficient nexus between Rukundo's acts, which he disputes under this ground of appeal, and the perpetration of the crimes as required by the relevant form of responsibility.

51. In determining Rukundo's role in the murder of Madame Rudahunga and the beating of the four others, the Trial Chamber noted that all four of the Prosecution witnesses who testified about this event connected him to the attacks.[107] It found that Rukundo was at the scene of the abduction and that he followed the vehicle carrying Madame Rudahunga and the soldiers who abducted her.[108] It further found that these same soldiers returned to Saint Joseph's College about 20 minutes later and abducted her children and two other Tutsi civilians.[109] Rukundo's car was also observed in the area of Madame Rudahunga's house after the killing and the beatings.[110] Furthermore, the Trial Chamber noted that Witness BLC attested to hearing him boast that "[w]e entered in Rudahunga's Inyenzi's house, we killed the wife and the children, but the idiot managed to get away",[111] while Witness CCH stated that Rukundo told her that Louis Rudahunga had to be killed.[112] The Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that this evidence was sufficient to support a finding that Rukundo was involved in the killing of Madame Rudahunga and the beatings of the four others.

52. The Appeals Chamber has explained that an "aider and abettor commitFsğ acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime."[113] It recalls that there is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime nor that such conduct served as a condition precedent to the commission of the crime.[114] It is sufficient for the aider and abettor's assistance or encouragement to have had a substantial effect on the realisation of that crime,[115] the establishment of which is a "fact-based

[106] *See supra* Section III.A (Ground 1: Alleged Error Relating to the Pleading of Commission).
[107] Trial Judgement, para. 165.
[108] Trial Judgement, paras. 165, 171.
[109] Trial Judgement, para. 171.
[110] Trial Judgement, para. 166.
[111] Trial Judgement, para. 167.
[112] Trial Judgement, para. 168.
[113] *Seromba* Appeal Judgement, para. 44. *See also Karera* Appeal Judgement, para. 321; *Mrkši} and Radivojevi~anin* Appeal Judgement, para. 81; *Blagojevi} and Joki}* Appeal Judgement, para. 127.
[114] *Mrkši} and Radivojevi~anin* Appeal Judgement, para. 81; *Blagojevi} and Joki} Appeal* Judgement, para. 134; *Blaškić* Appeal Judgment, para. 48.
[115] *Mrkši} and Radivojevi~anin* Appeal Judgement, para. 81; *Ori}* Appeal Judgement, para. 43; *Nahimana et al.* Appeal Judgement, para. 482; *Blagojevi} and Joki}* Appeal Judgement, para. 134.

inquiry".[116] The Appeals Chamber is satisfied that the Trial Chamber's findings on Rukundo's role in the attacks, as set out above, demonstrate that his acts substantially contributed to the commission of the crimes.

53. With regard to the *mens rea* required for aiding and abetting, the Appeals Chamber has held that "Ftğhe requisite mental element F...ğ is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator."[117] Specific intent crimes such as genocide also require that "the aider and abettor must know of the principal perpetrator's specific intent."[118]

54. Bearing in mind the Trial Chamber's findings that these attacks formed part of a larger campaign of ethnic violence in the area and country,[119] the Appeals Chamber is convinced that the perpetrators acted with both genocidal intent and knowledge of the widespread and systematic attack against Tutsi civilians. In his consultation with the assailants prior to the crimes, his presence during the abduction of Madame Rudahunga, and his subsequent boasting of the killing, Rukundo would have been aware of his role in the crimes and the perpetrators' *mens rea*. Consequently, the Appeals Chamber finds that Rukundo's actions aided and abetted genocide and murder as a crime against humanity.

(c) *Chapeau* Elements of Crimes Against Humanity

55. Rukundo challenges his conviction for murder as a crime against humanity on the basis that Madame Rudahunga did not belong to a political group and it was not proven that he was aware of the existence of a widespread or systematic attack on a civilian population.[120]

56. Article 3 of the Statute requires that the crimes be committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." In the present case, the Trial Chamber found that the killing of Madame Rudahunga, a Tutsi, was part of a widespread and systematic attack against Tutsi civilians on ethnic grounds.[121]

[116] *Blagojevi} and Joki}* Appeal Judgement, para. 134.
[117] *Muvunyi* Appeal Judgement, para. 79. *See also Karera* Appeal Judgement, para. 321; *Mrk{i} and [ljivan~anin* Appeal Judgement, para. 49.
[118] *Blagojevi} and Joki}* Appeal Judgement, para. 127; *Blagoje Simi}* Appeal Judgement, para. 86.
[119] Trial Judgement, paras. 565-568, 581-582.
[120] Rukundo Appeal Brief, paras. 75, 76.
[121] Trial Judgement, paras. 581, 582. The Appeals Chamber also recalls that the individual victim's membership in a national, political, ethnic, racial or religious group is not required for a conviction for crimes against humanity, provided that all other necessary conditions are met, in particular that the act in question is part of a widespread or systematic attack against any civilian population. *See, e.g., Muhimana* Appeal Judgement, paras. 172-174 (upholding a conviction for the rape as a crime against humanity of two women whose ethnicity was unknown but which was found to be part of a widespread and systematic attack on ethnic grounds against Tutsis). *See also Mrk{i} and [ljivan~anin*

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UNTED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Original: FRENCH

Before: Judge Theodor Meron, presiding
Judge Fausto Pocar
Judge Claude Jorda
Judge Mohamed Shahabuddeen
Judge Mehmet Güney

Registrar: Adama Dieng

Judgement of: 26 May 2003

GEORGES ANDERSON NDERUBUMWE RUTAGANDA

v.

THE PROSECUTOR

Case No. ICTR-96-3-A

JUDGEMENT

Office of the Prosecutor:

Norman Farrell
Mathias Marcussen
Norul Rashid
Helen Brady

Counsel for the Appellant:

David Jacobs
David Paciocco

HAG(A)03-0004 (E)

Translation certified by LSS, ICTR

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Separate Opinion of Judges Meron and Jorda

We write this separate opinion to urge the Appeals Chamber to thoroughly examine the issue of entering new convictions at appellate level which, at this stage, can no longer be appealed. Pursuant to Article 24 of the Statute, the Appeals Chamber shall hear appeals from the Prosecution, including appeals based on errors of fact, and may "affirm, reverse or revise" the decisions of the Trial Chamber. Article 25 of the Statute of ICTY gives the same power to the Appeals Chamber of that Tribunal. On at least one occasion, the ICTY Appeals Chamber has interpreted that provision as permitting it to reverse an acquittal and enter a conviction in lieu thereof, although, in that case, the issue as to whether the Appeals Chamber was competent to do so was not expressly addressed by the majority of the judges.[1] Although the Statutes of both this Tribunal and ICTY prescribe certain limited forms of review of Appeals Chamber decisions, such as the review proceedings provided for under Article 25 of the Statute of this Tribunal, they do not provide a right of appeal from a conviction entered, for the first time, by the Appeals Chamber. In our opinion, the absence of any right whatsoever to appeal such a conviction, save in the case where the matter is remitted to the Trial Chamber, is likely to infringe upon the fundamental principle of fairness recognized both in international law and many national legal systems.

In the present case, it is not necessary to deal with this issue. Indeed, although the Appeals Chamber entered convictions on two counts, the underlying criminal conduct was already covered by convictions handed down by the Trial Chamber. Consequently, the new convictions do not attract a heavier penalty. Moreover, no party has raised the question of any further appeal. However, given the importance of the issue raised, it is absolutely necessary for the Appeals Chamber to deal with it in the future, in order to find solutions consistent with fundamental principles of fairness and due process.

Done on the 26th of May 2003,
At Arusha, Tanzania

Theodor Meron
Presiding Judge

Claude Jorda
Judge

[1] See *Tadic* Appeal Judgement, paras. 170 and 171 and paras. 235, 236 and 237; 327. Judge Nieto-Navia raised this issue in his Separate Opinion. In that same case, the Defence did not challenge the Appeals Chamber's competence to enter new convictions in its response to the grounds of appeal raised by the Prosecution.

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UNITED NATIONS

Tribunal Pénal International pour le Rwanda

International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr Adama Dieng**

Judgement of: **20 May 2005**

LAURENT SEMANZA

v.

THE PROSECUTOR

Case No. ICTR-97-20-A

JUDGEMENT

The Office of the Prosecutor:

Mr James Stewart
Ms Amanda Reichman
Mr Neville Weston

Counsel for the Appellant

Mr Charles Achaleke Taku

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transfer which occurred sometime between the completion of the case in June 2002 and the delivery of the Trial Judgement on 15 May 2003).[88]

56. The Appeals Chamber is not convinced that this leads to an apprehension of bias since Mr. Eboe-Osuji became Senior Legal Officer of Trial Chamber II and, as such, he could not have played any role in the deliberations of Trial Chamber III in this case. As explained by the Prosecution:

> Deliberations for judgments of the Tribunal are strictly privileged and confined to the staff of each Trial Chamber; staff of different Trial Chambers are thus prohibited from discussing the substance of any Judgments with any other person, including the staff of the other Trial Chambers.[89]

9. Language in Which Trial Judgement was Delivered

57. Under the title "Inadequate guarantees to be tried in language Accused understood," the Appellant argues that the Trial Judgement was delivered only in English on 15 May 2003, despite paragraph 594 stating that the Trial Judgement was done in English and French.[90] The Appeals Chamber notes that the fact that the French translation of the Trial Judgement might not have been ready at the time the Trial Judgement was rendered does not establish unfairness, apprehension of bias or any impropriety on the part of the Tribunal. What is important is that, throughout the proceedings, the Appellant had access to simultaneous translation in French or Kinyarwanda, and that, on 15 May 2003, a summary of the Trial Judgement was read in English, French and Kinyarwanda. This was done and, therefore, there was no apprehension of bias in this regard.

10. Conclusion

58. The Appeals Chamber finds that, on the basis of the foregoing, the Appellant has not rebutted the presumption of impartiality of the Trial Chamber.

B. The Indictment (Ground 2)

1. Initial Appearance, Disclosure, and Confirmation

59. The Appellant contends that the Indictment and initial appearance were flawed in a variety of respects. He begins with the argument that his initial arrest in Cameroon was not consistent with Rule 53 because he was served with the Decision confirming the *Barayagwiza* indictment rather

[88] *Ibid.*, para. 18b).
[89] Prosecution Response, para. 44.
[90] Semanza Appeal Brief, para. 18c).

by national law, it contends that the Trial Chamber did not sufficiently consider the sentencing practice of Rwanda in relation to the crimes for which the Appellant was convicted. The Prosecution adds that had the Trial Chamber properly considered the nature of the Appellant's conduct and crimes within the Rwandan framework, it would have imposed a much higher sentence.[787]

376. Article 23(1) of the Statute provides that, in determining the terms of imprisonment, "Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda." Similarly, Rule 101(B)(iii) of the Rules indicates that the Trial Chamber "shall take into account ... such factors as ... the general practice regarding prison sentences in the courts of Rwanda." The question therefore, as raised in the Prosecution's appeal, is the extent to which the Trial Chamber is bound by the general practices in Rwanda.

377. Guidance on this issue is to be found in cases from both this Tribunal and the ICTY, where the trial chambers are likewise required to have recourse to the practices of the courts of the former Yugoslavia when determining a sentence. The Appeals Chamber clarified in *Serushago* that the command for Trial Chambers to "have recourse to the general practice regarding prison sentences in the courts of Rwanda' does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice."[788] The ICTY Appeals Chamber in *Dragan Nikoli}*, citing notably the *Krstic* Appeal Judgement and the *Kunarac et al.* Trial Judgement, held that "although a Trial Chamber should have 'recourse to' and should 'take into account' the general practice regarding prison sentences in the courts of the former Yugoslavia, this 'does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice.'"[789] It further held that "Trial Chambers have to take into account the sentencing practices in the former Yugoslavia and, should they depart from the sentencing limits set in those practices, must give reasons for such departure."[790] Therefore, a Trial Chamber, whilst not bound by the sentencing practices of the former Yugoslavia or of Rwanda is obliged to explain the sentence imposed and any divergence from the sentencing limits of either the former Yugoslavia or of Rwanda.[791] Following the *Krstic* Appeal Judgement, the Trial Chamber in this

[787] Prosecution Appeal Brief, paras 6.6-6.13.
[788] *Serushago* Appeal Judgement, para. 30.
[789] *Dragan Nikoli}* Appeal Judgement, para. 69.
[790] *Ibid.*
[791] *Ibid.*, paras 68, 69.

case was therefore entitled to impose a greater or lesser sentence than that which would have been imposed by the Rwandan courts.[792]

378. The Trial Chamber, in its discussion on applicable sentencing ranges, reviewed the Rwandan Penal Code with respect to the recommended sentences for the crimes of murder and rape, the penalties to be imposed for accomplices, and aggravating factors in rape cases. It also noted that, for genocide and crimes against humanity, the Rwandan Organic Law[793] stipulated that sentences prescribed in the ordinary Penal Code shall apply "with certain modifications, including heightened penalties of death and life imprisonment, respectively, for Categories 1 and 2 perpetrators."[794] The Prosecution submits that despite these references the Trial Chamber did not appear to have properly considered the Appellant's sentence in the context of the Rwandan Organic Law, and that under Rwandan law the Appellant would have received at least life imprisonment.

379. The Trial Chamber also considered sentences imposed in other cases before the International Tribunal[795] and reviewed any mitigating and aggravating factors.[796]

380. The Trial Chamber thus carefully considered the relevant factors, general as well as individualised, in determining the appropriate sentence the Appellant should receive. Although his sentence may have been more severe in Rwandan courts, the Trial Chamber acted within its discretion when it imposed a lesser sentence. The Appeals Chamber is unable to find a discernible error in the reasoning of the Trial Chamber.

2. Disparity with the Tribunal's Sentencing Practice and Applying a Sentence which is Disproportionate to the Gravity of these Crimes

381. The Prosecution next argues that the Appellant's sentences for complicity in genocide and aiding and abetting extermination are in disparity with the Tribunal's sentencing practice. It contends that the Trial Chamber committed a discernible error in its sentencing discretion by imposing concurrent 15-year sentences for the massacres at Mwulire and Musha. The Prosecution submits that the sentences were manifestly insufficient given the gravity of the crimes, the level of participation of the Appellant, and his genocidal intent at the time of both massacres.

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[792] *Krstić* Appeal Judgement, paras 262, 270.
[793] Loi Organique n° 08/96 du 30/08/96 sur l'organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises a partir du 1er Octobre 1990, Journal Officiel n° 17 du 1/9/1996 (Rwanda).
[794] Trial Judgement, paras 560-561.
[795] *Ibid*, paras 560-564.
[796] *Ibid*, paras 565-578.

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ICTR-97-20-T
15-5-2003
(7494 - 7261)

International Criminal Tribunal for Rwanda

Tribunal Pénal International pour le Rwanda

UNITED NATIONS

NATIONS UNIES

TRIAL CHAMBER III

Original: English

Before Judges: Yakov Ostrovsky, Presiding
Lloyd G. Williams, QC
Pavel Dolenc

Registrar: Adama Dieng

Judgement of: 15 May 2003

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ICTR

THE PROSECUTOR

v.

LAURENT SEMANZA

Case No. ICTR-97-20-T

JUDGEMENT AND SENTENCE

Counsel for the Prosecution:

Chile Eboe-Osuji

Counsel for the Defence:

Charles Acheleke Taku
Sadikou Ayo Alao

17,58

are punishable only for the crime of genocide pursuant to Article 2(3)(b), (c), and (d).[627]

379. To satisfy Article 6(1), an individual's participation must have *substantially* contributed to, or have had a *substantial* effect on, the completion of a crime.[628]

a. Forms of Participation

(i) Planning

380. "Planning" envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime.[629] The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.[630]

(ii) Instigating

381. "Instigating" refers to urging, encouraging, or prompting another person to commit a crime.[631] Instigation need not be direct and public.[632] Proof is required of a causal connection between the instigation and the commission of the crime.[633]

(iii) Ordering

382. "Ordering" refers to a situation where an individual has a position of authority and uses that authority to order – and thus compel – another individual, who is subject to that authority, to commit a crime.[634] Criminal responsibility for ordering the commission of a crime under the Statute implies the existence of a superior-

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[627] *Musema*, Judgement, TC, para. 115; *Rutaganda*, Judgement, TC, para. 34; *Akayesu*, Judgement, TC, para. 473.
[628] *Kayishema and Ruzindana*, Judgement, AC, paras. 186, 198; *Ntakirutimana*, Judgement, TC, para. 787; *Bagilishema*, Judgement, TC, paras. 30, 33; *Musema*, Judgement, TC, para. 126; *Rutaganda*, Judgement, TC, para. 43; *Kayishema and Ruzindana*, Judgement, TC, paras. 199, 207; *Akayesu*, Judgement, TC, para. 477.
[629] BLACK'S LAW DICTIONARY p. 1150 (6th ed. 1990) (defining "plan"); *Rutaganda*, Judgement, TC, para. 37.
[630] *Bagilishema*, Judgement, TC, para. 30.
[631] *Bagilishema*, Judgement, TC, para. 30; *Akayesu*, Judgement, TC, para. 482.
[632] *Akayesu*, Judgement, AC, paras. 478-482.
[633] *Bagilishema*, Judgement, TC, para. 30.
[634] *Bagilishema*, Judgement, TC, para. 30; *Rutaganda*, Judgement, TC, para. 39; *Akayesu*, Judgement, TC, para. 483.

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Judgement of: 12 March 2008

THE PROSECUTOR

v.

ATHANASE SEROMBA

Case No. ICTR-2001-66-A

JUDGEMENT

Office of the Prosecutor:

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Ms. Dior Fall
Ms. Amanda Reichman
Mr. Abdoulaye Seye
Mr. Alfred Orono Orono

Counsel for Athanase Seromba:

Mr. Patrice Monthé
Ms. Sarah Ngo Bihegué

2. Alleged Errors regarding the Criminal Responsibility for Genocide

(a) Alleged Errors regarding the Causing of Serious Bodily or Mental Harm

41. Athanase Seromba submits that the Trial Chamber erred when making the "specious assertion" that his alleged prohibition of the Tutsi refugees seeking food in the banana plantation of the parish and his alleged order to gendarmes to shoot at refugees who were found there; his alleged refusal to celebrate mass for Tutsi refugees at Nyange church; and his alleged decision to expel the Tutsi employees from the parish, contributed towards the perpetration of acts causing serious bodily or mental harm to the Tutsi refugees in Nyange church.[102] He broadly claims that this finding by the Trial Chamber "does not stand up to scrutiny and is not justified in the instant case" and refers generally to his previous submissions in this respect.[103]

42. In this regard, under this ground of appeal, Athanase Seromba submits that the Trial Chamber's finding that his "alleged refusal [to celebrate mass for the refugees] was an element of genocide, which is a new criterion for the characterization of genocide, is not based on rigorous, logical and coherent legal reasoning that a reasonable trier of fact would reach".[104] He also submits that the Trial Chamber failed to state the legal consequence of his refusal to celebrate mass for the refugees in relation to his individual criminal responsibility within the meaning of Article 6(1) of the Statute.[105]

43. The Prosecution responds that the Trial Chamber established that Athanase Seromba "carried out acts which specifically assisted, encouraged, and even lent moral support to the attackers and their leaders".[106] The Prosecution stresses that the relevant factual findings support the determination that Athanase Seromba "at the very least" aided and abetted the commission of genocide.[107]

44. The Appeals Chamber first recalls that the Trial Chamber found that Athanase Seromba could incur criminal responsibility only for his participation by *aiding and abetting* the crime of genocide and did not find him guilty of planning, instigating, ordering, or committing the crime of genocide.[108] The Appeals Chamber recalls that, to establish the *actus reus* of aiding and abetting

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[102] Seromba's Appellant's Brief, paras. 255, 258, 259.
[103] Seromba's Appellant's Brief, para. 259.
[104] Seromba's Appellant's Brief, para. 95.
[105] Seromba's Appellant's Brief, para. 99.
[106] Prosecution's Respondent's Brief, para. 194, referring to Trial Judgement, paras. 326, 328, 334, 335, and to *Vasiljević* Appeal Judgement, para. 102.
[107] Prosecution's Respondent's Brief, para. 195.
[108] Trial Judgement, paras. 311, 312, 322.

under Article 6(1) of the Statute, it must be proven that the alleged aider and abettor committed acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime.[109]

45. In light of the foregoing, the Appeals Chamber considers that the issue at stake is not whether the Trial Chamber erred in finding that Athanase Seromba's refusal to celebrate mass for the Tutsi refugees,[110] either alone or in combination with his order prohibiting refugees from getting food at the banana plantation and his decision to expel Tutsi employees and Tutsi refugees "was an element of genocide",[111] nor whether these acts constituted the necessary *actus reus* for the crime of genocide. Rather, the Appeals Chamber must assess whether the Trial Chamber correctly established the *actus reus* of the principal perpetrators for causing serious bodily or mental harm to the Tutsi refugees in Nyange church such as to amount to genocide and whether the Trial Chamber, when assessing Athanase Seromba's criminal responsibility, erred in finding that his acts constituted the *actus reus* for aiding and abetting the perpetration of this crime.[112]

46. The Appeals Chamber recalls that "serious bodily or mental harm" is not defined in the Statute,[113] and that the Appeals Chamber has not squarely addressed the definition of such harm. The quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.[114] Relatedly, serious mental harm includes "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat".[115] Indeed, nearly all convictions for

[109] *Nahimana et al.* Appeal Judgement, para. 482; *Ntagerura et al.* Appeal Judgement, para. 370; *Ntakirutimana* Appeal Judgement, para. 530. *See also Blagojević and Jokić* Appeal Judgement, para. 127; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 45.

[110] As specifically claimed in Seromba's Appellant's Brief, para. 95. However, the Appeals Chamber notes that, contrary to these submissions, the Trial Chamber did not find that his refusal to celebrate mass for the Tutsi refugees *alone* contributed to the commission of acts causing serious mental harm. Rather, it found that his "line of conduct", which comprised of his "order prohibiting refugees from getting food from the banana plantation, his refusal to celebrate mass in Nyange church, and his decision to expel employees and Tutsi refugees from the parish and the presbytery facilitated the perpetration of acts causing serious mental harm to the Tutsi refugees in Nyange church" (Trial Judgement, para. 326).

[111] Seromba's Appellant's Brief, para. 95.

[112] A similar approach was taken by the ICTY Appeals Chamber in the *Krstić* Appeal Judgement, paragraphs 135ff, where the Appeals Chamber assessed the issue of the level of Radislav Krstić's criminal responsibility "in the circumstances as properly established", *i.e.* after having established that genocide had been committed by the Bosnian Serb forces who had sought to eliminate a part of the Bosnian Muslims in Srebrenica, a conclusion based on the killings of Muslim men of military age (*see*, in particular, *Krstić* Appeal Judgement, para. 37).

[113] *Semanza* Trial Judgement, para. 320.

[114] *Semanza* Trial Judgement, para. 320, referring to *Kayishema and Ruzindana* Trial Judgement, para. 109; *Ntagerura et al.* Trial Judgement, para. 664.

[115] *Kajelijeli* Trial Judgement, para. 815, referring to *Kayishema and Ruzindana* Trial Judgement, para. 110; *Semanza* Trial Judgement, para. 321.

Seromba's contention to the contrary. Whether the Trial Chamber correctly characterized Athanase Seromba's acts as aiding and abetting will be addressed in greater detail in the context of the Prosecution's appeal.

(ii) *Mens Rea*

56. The Appeals Chamber recalls that the Trial Chamber found Athanase Seromba guilty for his participation by *aiding and abetting*.[138] The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[139] In particular, as correctly outlined by the Trial Chamber,[140] in cases of crimes requiring specific intent, such as genocide, it is not necessary to prove that the aider and abettor shared the *mens rea* of the principal, but that he must have known of the principal perpetrator's specific intent.[141]

57. The Appeals Chamber considers Athanase Seromba's argument regarding the alleged failure of the Trial Chamber to establish that he had "conceived the above-mentioned plan before the arrival of the Tutsi at the church"[142] to be without merit. First, as detailed above, there is no requirement of a "plan" in order to establish an intent to aid and abet genocide. Second, the Appeals Chamber does not consider that the Prosecution was required to establish that Athanase Seromba had the requisite *mens rea* to aid and abet genocide prior to the arrival of the Tutsi refugees at the church. Rather, only at the time that he provided support to the principal perpetrators through his acts found to have formed the *actus reus* in question, must he have known the specific intent of the perpetrators.[143]

58. The Appeals Chamber therefore finds that Athanase Seromba has failed to show any error in the Trial Chamber's analysis of the required mental element when finding that he had the requisite *mens rea* for aiding and abetting genocide.

59. With regard to Athanase Seromba's submissions relating to the Trial Chamber's findings on his *mens rea* for aiding and abetting the killing of refugees in Nyange church, the Appeals Chamber

[138] Trial Judgement, paras. 311, 322, 342, 366.
[139] *Nahimana et al.* Appeal Judgement, para. 482; *Ntagerura et al.* Appeal Judgement, para. 370; *Blagojević and Jokić* Appeal Judgement, para. 127; *Blagoje Simić* Appeal Judgement, para. 86; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 46.
[140] Trial Judgement, para. 309, referring, *inter alia*, to *Ntakirutimana* Appeal Judgement, paras. 500-502; *Krstić* Appeal Judgement, paras. 134-140; *Krnojelac* Appeal Judgement, para. 52.
[141] *Ntakirutimana* Appeal Judgement, paras. 500, 501; *Blagojević and Jokić* Appeal Judgement, para. 127; *Blagoje Simić* Appeal Judgement, para. 86; *Krstić* Appeal Judgment, para. 140; *Krnojelac* Appeal Judgement, paras. 51, 52.
[142] Seromba's Appellant's Brief, para. 261.

(c) Proof of the *Actus Reus* by Circumstantial Evidence

219. The Prosecution contends that, even in the absence of evidence of an express agreement, a reasonable trier of fact could have inferred the existence of conspiracy only on the basis of the evidence on the record.[514] It argues that Athanase Seromba's actions and the events that transpired at the parish between 11 and 16 April 1994, would have led a reasonable trier of fact to infer the existence of a concerted and coordinated plan of action.[515] To support its assertion that an agreement can be proven not only by establishing the existence of a formal and express agreement but also by circumstantial evidence, the Prosecution refers to the *Nyiramasuhuko et al.*, *Nahimana et al.*, *Bagosora et al.*, and *Niyitegeka* cases.[516]

220. Athanase Seromba responds that none of these cases can be used to support the Prosecution's argument. He points out that the trial judgement in *Nahimana et al.* is pending appeal,[517] that the trial in the *Bagosora et al.* case is still in progress,[518] and that no similarity exists between the *Niyitegeka* case and his case.[519]

221. As stated above, the *actus reus* of conspiracy to commit genocide is the making of an agreement between two or more persons to commit genocide. This *actus reus* can be proven by establishing the existence of planning meetings for the genocide, but it can also be inferred, based on other evidence.[520] However, as in any case where the Prosecution intends to rely on circumstantial evidence to prove a particular fact upon which the guilt of the accused depends, the finding of the existence of a conspiracy to commit genocide must be the only reasonable inference based on the totality of the evidence.[521]

222. The Appeals Chamber will now consider whether the Prosecution has established that the only reasonable inference from the evidence adduced at trial was that Athanase Seromba participated in a conspiracy to commit genocide.

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[514] Prosecution's Appellant's Brief, paras. 87, 88.
[515] Prosecution's Appellant's Brief, para. 87.
[516] Prosecution's Appellant's Brief, paras. 84, 87, 92, 93.
[517] Seromba's Respondent's Brief, paras. 82, 92.
[518] Seromba's Respondent's Brief, para. 92.
[519] Seromba's Respondent's Brief, paras. 84, 85.
[520] *Nahimana et al.* Appeal Judgement, para. 896.
[521] *See Nahimana et al.* Appeal Judgement, para. 896; *Ntagerura et al.* Appeal Judgement, paras. 306, 399; *Stakić* Appeal Judgement, para. 219; *Krstić* Appeal Judgement, para. 41; *Vasiljević* Appeal Judgement, paras. 120, 128, 131; *Čelebići* Appeal Judgement, para. 458.

circumstances.[534] Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize the penalties to fit the circumstances of the convicted person and the gravity of the crime.[535]

229. Athanase Seromba submits that the Trial Chamber's consideration of the "breach of trust" was incorrect.[536] The Appeals Chamber notes that the Trial Chamber concluded that Athanase Seromba's "status" and his betrayal of the trust which was placed in him by the Tutsi refugees constituted aggravating circumstances.[537] In arriving at this conclusion, the Trial Chamber stated that:

> Athanase Seromba, a Catholic priest, was in charge of Nyange parish at the time of the events referred to in the Indictment. The Accused was known and respected in the Catholic community of Nyange. The Chamber recalls that it has been established that many Tutsi[s] from Kivumu *commune* sought refuge in Nyange church in order to escape attack. The Chamber considers as an aggravating circumstance the fact that the Accused took no concrete action whatsoever to earn the trust of those persons who believed they were safe by seeking refuge at Nyange parish.[538]

230. The Appeals Chamber recalls that the abuse of a position of influence and authority in society can be taken into account as an aggravating factor in sentencing.[539] In the present case, the Trial Chamber established that Athanase Seromba was acting as a priest at Nyange parish during April 1994[540] and that during this period Tutsi refugees sought refuge at the parish.[541] In this context, the Trial Chamber considered the Prosecution's averment that Athanase Seromba betrayed the trust of his parishioners[542] and found that his status and his "betrayal of trust" constituted aggravating circumstances.[543] This finding is not based on Athanase Seromba's position as a priest, as such, but rather on his abuse of a position of trust. The Appeals Chamber finds no error in this.

231. The Prosecution submits that the Trial Chamber erred in considering the individual circumstances of the case. It argues that the Trial Chamber relied on extraneous and irrelevant factors in mitigation of the sentence against Athanase Seromba, giving mitigating factors excessive

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[534] *Čelebići* Appeal Judgement, para. 716; *Galić* Appeal Judgement, para. 392; *Bralo* Sentencing Appeal Judgement, para. 7; *Blagojević and Jokić* Appeal Judgement, para. 320. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute and in Rule 101(B)(iv) of the Rules.
[535] *Nahimana et al.* Appeal Judgement, paras. 1037, 1046; *Ndindabahizi* Appeal Judgement, para. 132, referring to *Semanza* Appeal Judgement, para. 312.
[536] Seromba's Notice of Appeal, para. 42.
[537] Trial Judgement, para. 390.
[538] Trial Judgement, para. 390 (footnotes omitted).
[539] *Ndindabahizi* Appeal Judgement, para. 136. *See also Akayesu* Appeal Judgement, paras. 414, 415; *Ntakirutimana* Appeal Judgement, para. 563; *Kamuhanda* Appeal Judgement, paras. 347, 348.
[540] Trial Judgement, para. 38.
[541] Trial Judgement, para. 54.
[542] Trial Judgement, para. 387.
[543] Trial Judgement, para. 390.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:
Judge Claude JORDA, Presiding
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar:
Mr Agwu U OKALI

Decision of: 6 April 2000

Omar SERUSHAGO
(Appellant)
v
THE PROSECUTOR
(Respondent)

ICTR-98-39-A

REASONS FOR JUDGMENT

Counsel for the Appellant:
Mr Mohamed ISMAIL

Counsel for the Prosecutor:
Mr Bernard MUNA
Mr Mohamed OTHMAN
Mr Upawansa YAPA
Mr ZHU Wen-qi

I. INTRODUCTION

Appellant some clemency, and sentenced him to 'a single term of fifteen 15 years imprisonment for all the crimes of which he has been convicted.'

25. It is particularly noteworthy that the Appellant's counsel did not argue that the 15-year imprisonment imposed on the Appellant may be characterised as a miscarriage of justice within the meaning of Article 24 of the Statute. He conceded that his client's case, in terms of the length of the sentence, 'would be on weaker grounds, much weaker grounds' but for his other argument that the Trial Chamber had not paid due regard to the sentencing practice in Rwanda. That issue will be addressed shortly.

26. Before moving on, it is proper to address the Appellant's effort to rely on *Prosecutor* v. *Erdemović*. His counsel argued that there exists a disparity between the sentence imposed on his client and that imposed by the ICTY on Erdemović, even though both cases share the same elements of confession and guilty plea. He complained that Erdemović was sentenced to five years in prison, whereas his client was sentenced to fifteen.

27. In our view, the *Erdemović* case does not assist the Appellant. The facts of the two cases are materially different. In *Erdemović*, the defendant pleaded duress, and the Prosecution conceded the plea. The duress would have entailed his immediate execution had he refused to kill. By contrast, the case at bar is marked not only by the absence of any plea of duress, but also by evident indicia of volition to commit the crimes. Furthermore, this Appellant was a *de facto* leader in the *Interahamwe*, as well as an elite member of society who commanded respect, engendered fear and exerted power in his community. There was no evidence that Erdemović had a similar profile. *Erdemović* is distinguishable.

B. Whether Due Regard was Paid to Rwandan Sentencing Practice

28. The Appellant's case is further founded on the argument that the Trial Chamber had not paid due regard to the general sentencing practice in the courts of Rwanda.

29. Under the Rwanda Penal Code, the sentence in this case would be fully competent. It should, however, be noted that a special scheme has been instituted by a law adopted by Rwanda on 30 August 1996, which provides for sentences between 7-11 years' imprisonment in the case of certain crimes. The Appellant maintains that this provision would have applied to him had he been prosecuted in Rwanda. This law does not entirely displace the general law of Rwanda; it is limited in certain respects. These limitations raise the question whether or not the law is included in the reference in Article 23(1) of the Statute to 'the general practice regarding prison sentences in the courts of Rwanda'. For purposes only of this decision, the Appeals Chamber will assume in the Appellant's favour that it does. On that basis, the Appeals Chamber considers that the submission of the Appellant should be overruled for the following reason.

30. It is the settled jurisprudence of the ICTR that the requirement that 'the Trial Chambers shall have recourse to the general practice regarding prison sentences in the

courts of Rwanda' does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice. The Appeals Chamber construes paragraphs 17 and 18 of the decision of the Trial Chamber in this case to mean that that is the way in which the Trial Chamber regarded the operation of that requirement and that accordingly the Trial Chamber did have recourse to the relevant practice of the courts of Rwanda.

31. The conclusion reached by the Trial Chamber was that a sentence of 15 years' imprisonment should be imposed on the Appellant in respect of his conviction on one count of genocide and three counts of crimes against humanity. When all the circumstances are taken into account, the Appeals Chamber has difficulty in appreciating any basis for contending that the sentence of 15 years' imprisonment was erroneous.

V. CONCLUSIONS

32. Under Article 24 of the Statute, the Appeals Chamber has the power to 'affirm, reverse or revise' a sentence imposed by a Trial Chamber. The Appeals Chamber considers that it should not exercise that power except where it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law.

33. In the instant case, the Trial Chamber gave full consideration to all of the issues pertaining to sentencing, taking into account the nature of the offences in question and all those elements referred to in Article 23 of the Statute and in Rule 101 of the Rules. As long as the sentence imposed by the Trial Chamber thereafter is within the 'discretionary framework' provided to it by the Statute and the Rules, the Appeals Chamber would see no reason to depart from the Trial Chamber's sentence.

VI. DISPOSITION

34. For these reasons, **THE APPEALS CHAMBER**, on 14 February 2000;

1. DISMISSED the appeal;

2. AFFIRMED the Trial Chamber's Sentence of 5 February 1999.

Done in French and English, the French text being authoritative.

Claude JORDA
Presiding

Lal Chand VOHRAH

Mohamed SHAHABUDDEEN

Rafael NIETO-NAVIA

Fausto POCAR

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Carmel Agius

Registrar: **Mr. Adama Dieng**

Judgement of: **16 November 2009**

PROTAIS ZIGIRANYIRAZO

v.

THE PROSECUTOR

Case No. ICTR-01-73-A

JUDGEMENT

Counsel for Protais Zigiranyirazo:

Mr. John Philpot
Mr. Peter Zaduk
Ms. Fiona Gray
Mr. Kyle Gervais

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Christine Graham
Ms. Linda Bianchi
Ms. Béatrice Chapaux
Mr. Alfred Orono Orono

17. An alibi does not constitute a defence in its proper sense.[34] By raising an alibi, an accused is simply denying that he was in a position to commit the crime with which he was charged.[35] An accused does not bear the burden of proving his alibi beyond reasonable doubt.[36] Rather, "[h]e must simply produce the evidence tending to show that he was not present at the time of the alleged crime"[37] or, otherwise stated, present evidence "likely to raise a reasonable doubt in the Prosecution case."[38] If the alibi is reasonably possibly true, it must be accepted.[39]

18. Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[40] The Prosecution may do so, for instance, by demonstrating that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime. Where the alibi evidence does *prima facie* account for the accused's activities at the relevant time of the commission of the crime, the Prosecution must "eliminate the reasonable possibility that the alibi is true,"[41] for example, by demonstrating that the alibi evidence is not credible.

19. The Appeals Chamber has considered on several occasions whether Trial Chambers have erroneously shifted the burden of proof to the accused with respect to their alibis. Appellants have frequently pointed to language in the assessment of alibi evidence intimating that they were required to disprove the Prosecution's evidence through their alibis. The Appeals Chamber has recognized that language which suggests, *inter alia*, that an accused must "negate" the Prosecution's evidence,[42] "exonerate" himself,[43] or "refute the possibility" that he participated in a

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[34] *Ndindabahizi* Appeal Judgement, para. 66; *Kajelijeli* Appeal Judgement, paras. 41, 42; *Kayishema and Ruzindana* Appeal Judgement, para. 106; *Delali} et al.* Appeal Judgement, para. 581.
[35] *Nahimana et al.* Appeal Judgement, para. 414; *Ndindabahizi* Appeal Judgement, para. 66; *Kajelijeli* Appeal Judgement, paras. 41, 42; *Niyitegeka* Appeal Judgement, para. 60; *Musema* Appeal Judgement, paras. 205, 206; *Kayishema and Ruzindana* Appeal Judgement, para. 106; *Delali} et al.* Appeal Judgement, para. 581.
[36] *Nahimana et al.* Appeal Judgement, para. 414; *Simba* Appeal Judgement, para. 184; *Karera* Appeal Judgement, para. 331; *Musema* Appeal Judgement, para. 202; *Kayishema and Ruzindana* Appeal Judgement, para. 107.
[37] *Musema* Appeal Judgement, para. 202.
[38] *Karera* Appeal Judgement, para. 331 (internal citation omitted); *Simba* Appeal Judgement, para. 184 (internal citation omitted); *Kajelijeli* Appeal Judgement, para. 42 (internal citation omitted); *Niyitegeka* Appeal Judgement, para. 60.
[39] *Nahimana et al.* Appeal Judgement, para. 414; *Kamuhanda* Appeal Judgement, para. 38; *Kajelijeli* Appeal Judgement, para. 41; *Musema* Appeal Judgement, paras. 205, 206.
[40] *Karera* Appeal Judgement, para. 330; *Nahimana et al.* Appeal Judgement, para. 414; *Simba* Appeal Judgement, para. 184; *Kajelijeli* Appeal Judgement, para. 42; *Niyitegeka* Appeal Judgement, para. 60; *Musema* Appeal Judgement, paras. 205, 206; *Kayishema and Ruzindana* Appeal Judgement, para. 107. *See also Limaj et al.* Appeal Judgement, para. 64, *quoting Limaj et al.* Trial Judgement, para. 11 ("[A] finding that an alibi is false does not in itself 'establish the opposite to what it asserts'. The Prosecution must not only rebut the validity of the alibi but also establish beyond reasonable doubt the guilt of the Accused as alleged in the Indictment.").
[41] *Kajelijeli* Appeal Judgement, para. 41 (internal citation omitted); *Kayishema and Ruzindana* Appeal Judgement, para. 106 (internal citation omitted). *See also Limaj et al.* Appeal Judgement, paras. 64, 65 (internal citation omitted); *Delali} et al.* Appeal Judgement, para. 581.
[42] *See Limaj et al.* Appeal Judgement, para. 65 ("When evaluating Haradin Bala's alibi evidence, the Trial Chamber observed that 'the testimony of most of the witnesses for the Defence for Haradin Bala does not necessarily negate the evidence that Haradin Bala remained in Llapushnik/Lapu{nik after the end of May.' The use of the phrase 'to negate

crime[44] indicates that the Trial Chamber misapplied the burden of proof. Indeed, as stated in the *Musema* Appeal Judgement, "[i]n considering the manner in which the Trial Chamber applied the burden and standard of proof, the Appeals Chamber must start off by assuming that the words used in the Trial Judgement accurately describe the approach adopted by the Trial Chamber."[45]

20. In assessing whether a Trial Chamber, when using this type of language, has in fact shifted the burden of proof, the Appeals Chamber carries out an in-depth analysis of the specific findings related to a given incident.[46] The Appeals Chamber has generally found that such language, while inappropriate, is not fatal when viewed in the broader context of a Trial Chamber's findings. This is especially the case where the Trial Chamber accurately refers elsewhere in the judgement to the appropriate burden of proof for the evaluation of alibi evidence, its overall approach evinces a careful assessment of the alibi evidence, and its conclusion that the alibi evidence is ultimately not credible is reasonable when weighed against the evidence of participation in a crime.[47]

2. Alleged Errors in Evaluating Exculpatory Evidence Related to Kesho Hill (Ground 6)

(a) Introduction

21. The Trial Chamber convicted Zigiranyirazo of genocide and extermination as a crime against humanity based on his participation in a joint criminal enterprise to kill Tutsi civilians at Kesho Hill in Gisenyi Prefecture.[48] The Trial Chamber found that he was present at Kesho Hill at some point on the morning of 8 April 1994 and that he addressed the assembled assailants before they launched an attack on the Tutsi refugees there.[49] As part of his defence, Zigiranyirazo presented evidence that he was not observed at Kesho Hill during the attack.[50] The Trial Chamber did not find this evidence to be credible or to have probative value.[51]

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the evidence' could be read in the sense that the Trial Chamber required Haradin Bala to negate the Prosecution evidence"), *quoting Limaj et al.* Trial Judgement, para. 647.

[43] *See Kamuhanda* Appeal Judgement, para. 39 ("the Appeals Chamber notes that in some instances the Trial Chamber applied language which *prima facie* supports the Appellant's arguments [that the Trial Chamber shifted the burden of proof], for example in paragraph 174 of the [*Kamuhanda*] Trial Judgement: '[...] the evidence of Witness ALB does not *exonerate* the Accused from being present at Gikomero.'") (emphasis in original).

[44] *See Musema* Appeal Judgement, para. 295 ("The wording '*are by themselves, insufficient to refute the possibility*' used by the Trial Chamber with respect to alibi evidence might be an error on a point of law, had Musema's evidence been sufficient to sustain a potential alibi.")(emphasis in original), *quoting Musema* Trial Judgement, para. 740.

[45] *Musema* Appeal Judgement, para. 209.

[46] *See, e.g., Musema* Appeal Judgement, paras. 210, 211.

[47] *See, e.g., Limaj et al.* Appeal Judgement, para. 65; *Kamuhanda* Appeal Judgement, paras. 38-44; *Musema* Appeal Judgement, paras. 317, 318.

[48] Trial Judgement, paras. 410, 436, 447.

[49] Trial Judgement, paras. 329, 330, 400, 401.

[50] Trial Judgement, paras. 288-300.

[51] Trial Judgement, paras. 319-322.

4. Conclusion

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

Tenth Ground of Appeal, he challenges his conviction based on the Trial Chamber's failure to address prior inconsistent statements of Witness BCW. *See* Zigiranyirazo Notice of Appeal, para. 10; Zigiranyirazo Appeal Brief, paras. 290-310. In the Eleventh Ground of Appeal, he challenges his conviction based on the Trial Chamber's acceptance of Witness ATO's testimony regarding the presence of General Gratien Kabiligi at the roadblock. *See* Zigiranyirazo Notice of Appeal, para. 11; Zigiranyirazo Appeal Brief, para. 311.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before: Judge Inés Mónica Weinberg de Roca, presiding
Judge Khalida Rachid Khan
Judge Lee Gacuiga Muthoga

Registrar: Adama Dieng

Date: 18 December 2008

THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-01-73-T

JUDGEMENT

Office of the Prosecutor:
Wallace Kapaya
Charity Kagwi-Ndungu
Gina Butler
Iskandar Ismail
Jane Mukangira

Counsel for the Accused:
John Philpot
Peter Zaduk

that during Kuradusenge's last visit to his house around 14 April 1994, he told Bagaragaza that the *Interahamwe* had "finished with the Tutsis in the area and that they were going to continue" elsewhere,[178] in Kigongo and "probably" in Bugoye.[179] As noted in the *Kordić and Čerkez* Trial Judgement:

> [...] it is essentially a matter of common sense that a witness with an interest to serve (particularly an interest to get his sentence reduced) may seek to inculpate others and exculpate himself. On the other hand, it does not follow that such a witness is incapable of telling the truth. In each case it is necessary to consider the witness's evidence and all the circumstances, particularly the extent to which evidence is confirmed.[180]

139. Moreover, the Chamber notes the perquisites provided by the Prosecution to Bagaragaza, including direct payments prior to his arrest, the payment of costs incurred in relocating and supporting his family, and promises made to Bagaragaza related to the venue of his own trial as well as his own relocation after trial.[181] While not inherently unreasonable, the Chamber considers such benefits warrant additional caution when considering Bagaragaza's evidence.

140. Under these circumstances, the Chamber considers it unsafe to accept Bagaragaza's uncorroborated hearsay testimony regarding the Accused's alleged support for the *Interahamwe*.

141. For these reasons, the Chamber concludes that the Prosecution has failed to prove beyond reasonable doubt that the Accused participated in and/or facilitated the arming, training and clothing of the *Interahamwe* and the local population in Gisenyi. Given this conclusion, the Chamber does not consider it necessary to assess the Defence Witness's evidence.[182]

4. Meetings where Attacks were Planned, Organised and Facilitated

4.1. Introduction

142. As discussed above in the section on Allegations on which No Evidence was Presented, the Prosecution failed to adduce any evidence of several meetings specifically pleaded in the Indictment.[183]

143. Additionally, the Chamber recalls that, during Closing Arguments, the Prosecution stated that it was not seeking a conviction on the basis of Witness ATO's evidence.[184] The Chamber may, however, also consider his evidence to the extent it is relevant to other allegations properly pleaded in the Indictment.

144. The Chamber notes that it may still consider the evidence of meetings for which the Prosecution failed to provide notice to the extent they are relevant to the

[178] Michel Bagaragaza, T. 28 November 2006 p. 13.
[179] Michel Bagaragaza, T. 28 November 2006 p. 34.
[180] *Kordić and Čerkez*, Judgement (TC), para. 629.
[181] Michel Bagaragaza, T. 29 November 2006, pp. 5-6, 28-30; Exhibit P80, Agreement between the Prosecutor the ICTR and Bagaragaza (sic), signed 18 December 2004.
[182] Witness BNZ45, T. 27 March 2007 pp. 27-30.
[183] *See supra*, para. 14; Indictment, paras. 7, 8, 9, 10.
[184] Closing Arguments, T. 28 May 2008 pp. 12-13.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-14/1-A

Date: 24 March 2000

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Richard May, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt
Judge Wang Tieya
Judge Patrick Robinson

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **24 March 2000**

PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JUDGEMENT

Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. William Fenrick
Mr. Norman Farrell

Counsel for the Appellant:

Mr. Srdjan Joka for Zlatko Aleksovski

109. It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.

110. What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.

111. Where, in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.

2. Whether the Decisions of the Appeals Chamber are Binding on Trial Chambers

112. Generally, in common law jurisdictions, decisions of a higher court are binding on lower courts. In civil law jurisdictions there is no doctrine of binding precedent. However, as a matter of practice, lower courts tend to follow decisions of higher courts. As one commentator has stated:

> ... it is hardly an exaggeration to say that the doctrine of *stare decisis* in the Common Law and the practice of Continental courts generally lead to the same results... In fact, when a judge can find in one or more decisions of a supreme court a rule which seems to him relevant for the decision in the case before him, he will follow those decisions and the rules they contain as much in Germany as in England or France.[250]

113. The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons:

(i) the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from

2. Appellant's Response

160. The Appellant did not contest the argument of the Prosecution that, in the indictment, it had alleged his individual responsibility by aiding and abetting the mistreatment of the prisoners by the HVO soldiers outside the prison. He asserted, however, that it had not been proved that he had any connection with, or the possibility to control, the HVO soldiers (as their military commander or otherwise) or that he knew that they were going to mistreat the prisoners.[290] He also sought to argue that it had not been proved that the prisoners had been used as human shields, only that there had merely been an attempt to do so.[291] However, the finding by the Trial Chamber that the prisoners had been used as human shields was not challenged by him in his appeal.

3. Cross-Appellant's Reply

161. The Prosecution interpreted the Appellant's Response as asserting that, in the case of aiding and abetting, the *mens rea* of the accessory has to be the same as that of the principal.[292] The Appellant, however, has asserted no more than that the accessory must have known all the essential ingredients of the crime to be committed.[293] The Prosecution also denied that it was necessary for it to establish the Appellant had any connection with, or form of control over, the HVO soldiers who mistreated the prisoners when demonstrating his individual responsibility under Article 7(1) for their acts.

B. Discussion

162. The liability of a person charged with aiding and abetting another person in the commission of a crime was extensively considered by Trial Chamber II in the *Furundžija* Judgement.[294] It stated the following conclusions:[295]

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[288] *See* para. 168, *infra*.
[289] Cross-Appellant's Brief, para. 3.16; T. 45-49.
[290] Appellant's Response, pp. 23-24; T. 80-81.
[291] Appellant's Response, pp. 23-24.
[292] Cross-Appellant's Reply, para. 3.5.
[293] Appellant's Response, p. 23. Although incomplete, the statement by the Appellant was not inaccurate: *see* paras. 162-164, *infra*.
[294] *Furund`ija* Judgement, paras. 190-249.
[295] *Ibid.*, para. 249.

(i) It must be shown that the aider and abettor carried out acts which consisted of practical assistance, encouragement or moral support which had a substantial effect upon the commission by the principal of the crime for which the aider and abettor is sought to be made responsible.

(ii) It must be shown that the aider and abettor knew (in the sense of was aware) that his own acts assisted in the commission of that crime by the principal.

The Trial Chamber had earlier stated the conclusion that it is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal.[296] It is clear that what must be shown is that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.

163. Subsequently, in the *Tadic* Judgement, the Appeals Chamber briefly considered the liability of one person for the acts of another person where the first person has been charged with aiding and abetting that other person in the commission of a crime.[297] This was in the context of contrasting that liability with the liability of a person charged with acting pursuant to a common purpose or design with another person to commit a crime, and for that reason that judgement does not purport to be a complete statement of the liability of the person charged with aiding and abetting. It made the following points in relation to the aider and abettor:[298]

(i) The aider and abettor is always an accessory to the crime committed by the other person, the principal.

(ii) It must be shown that the aider and abettor carried out acts specifically directed to assist, encourage or lend moral support to the specific crime committed by the principal, and that this support has a substantial effect upon the commission of the crime.

(iii) It must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal.

(iv) It is not necessary to show the existence of a common concerted plan between the principal and the accessory.

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[296] *Ibid.*, para. 245.
[297] Judges Cassese and Mumba were members of the Trial Chamber in *Furundžija*, and of the Appeals Chamber in *Tadic*.
[298] *Tadi}* Judgement, para. 229.

D. Discussion

182. The nub of the Prosecutor's appeal is to be found in the third ground as summarised above, namely the weight to be given to the gravity of the Appellant's conduct. Consideration of the gravity of the conduct of the accused is normally the starting point for consideration of an appropriate sentence. The practice of the International Tribunal provides no exception. The Statute provides that in imposing sentence the Trial Chambers should take into account such factors as the gravity of the offence.[348] This has been followed by Trial Chambers. Thus, in the *^elebi}i* Judgement, the Trial Chamber said that "[t]he most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence".[349] In the *Kupreški}* Judgement, the Trial Chamber stated that "[t]he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime".[350] The Appeals Chamber endorses these statements.

183. The Appeals Chamber accepts the Prosecution argument in this connection and holds that the Trial Chamber erred in not having sufficient regard to the gravity of the conduct of the Appellant. His offences were not trivial. As warden of a prison he took part in violence against the inmates. The Trial Chamber recognised the seriousness of these offences but stated that his participation was relatively limited. In fact, his superior responsibility as a warden seriously aggravated the Appellant's offences. Instead of preventing it, he involved himself in violence against those whom he should have been protecting, and allowed them to be subjected to psychological terror. He also failed to punish those responsible. Most seriously, the Appellant, by participating in the selection of detainees to be used as human shields and for trench digging, as he must have known, was putting at risk the lives of those entrusted to his custody. Thus, the instant case is one of a prison warden who personally participated in physical violence against detainees when, by virtue of his rank, he should have taken steps to prevent or punish it. The Appellant did more than merely tolerate the crimes as a commander; with his direct participation he provided additional encouragement to his subordinates to commit similar acts. The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation.

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[348] Article 24(2) of the Statute.
[349] *^elebi}i* Judgement, para. 1225.
[350] *Kupreški}* Judgement, para. 852.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.:	IT-02-60-A
		Date:	9 May 2007
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Judgement of: **9 May 2007**

PROSECUTOR

v.

VIDOJE BLAGOJEVIĆ
AND
DRAGAN JOKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Antoinette Issa
Ms. Marie-Ursula Kind
Mr. Matteo Costi

Counsel for Vidoje Blagojević:

Mr. Vladimir Domazet

Counsel for Dragan Jokić:

Mr. Peter Murphy
Ms. Chrissa Loukas

II. STANDARD OF APPELLATE REVIEW

6. On appeal, the parties must limit their arguments to errors of law that invalidate the decision of the Trial Chamber and to errors of fact that result in a miscarriage of justice. These criteria are set forth in Article 25 of the Statute and are well established.[14] The Appeals Chamber also exceptionally hears arguments where a party has raised a legal issue that would not lead to the invalidation of the judgement but that is of general significance to the International Tribunal's jurisprudence.[15]

7. Any party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.[16] An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground.[17] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may find, for other reasons, that there is an error of law.[18]

8. The Appeals Chamber reviews the Trial Chamber's impugned findings of law to determine whether or not they are correct.[19] Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber may articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[20] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual findings challenged by the appellant before affirming them.[21]

9. When considering an alleged error of fact with respect to a particular ground where no additional evidence has been admitted on appeal, the Appeals Chamber will apply a standard of

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[14] *See, e.g., Simić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 14; *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, paras. 34-40; *Čelebići* Appeal Judgement, paras. 434, 435; *Kupreškić et al.* Appeal Judgement, para. 29; *Kunarac et al.* Appeal Judgement, paras. 35-48; *Vasiljević* Appeal Judgement, paras. 4-12. For jurisprudence under Article 24 of the ICTR Statute *see, e.g., Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, para. 7; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras. 177, 320; *Musema* Appeal Judgement, para. 15.

[15] *See, e.g., Simić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 7.

[16] *See, e.g., Simić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6.

[17] *See, e.g., Simić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6.

[18] *See, e.g., Simić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 8; *Ntagerura et al.* Appeal Judgement, para. 11.

[19] *Simić* Appeal Judgement, para. 9; *Krnojelac* Appeal Judgement, para. 10.

[20] *See, e.g., Simić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 9; *Naletilić and Martinović* Appeal Judgement, para. 10.

[21] *See, e.g., Simić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 9; *Naletilić and Martinović* Appeal Judgement, para. 10.

G. Alleged Errors relating to Aiding and Abetting (Ground 7)

125. The Trial Chamber determined that Blagojević permitted the use of the Bratunac Brigade's resources, including personnel, to facilitate the commission of the crimes for which he was convicted.[338] The Trial Chamber considered that aiding and abetting constituted the most appropriate form of participation under Article 7(1) of the Statute to describe his criminal responsibility.[339] Under this ground of appeal, Blagojević raises four errors of law and fact in connection with his conviction for aiding and abetting, including an alleged legal error in the definition of aiding and abetting and alleged factual errors related to his knowledge of the underlying crimes, whether he made Bratunac Brigade resources available, and whether this constituted substantial assistance.[340]

1. Alleged Error in Defining Aiding and Abetting

126. Initially, Blagojević submits that the Trial Chamber erred in law in setting forth the elements of aiding and abetting.[341]

127. The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.[342] The *actus reus* need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.[343] The Appeals Chamber has also determined that the *actus reus* of aiding and abetting may be satisfied by a commander permitting the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime.[344] The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[345] In cases of specific intent crimes such as persecutions or genocide, the aider and abettor must know of the principal perpetrator's specific intent.[346]

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[338] Trial Judgement, paras. 747, 749, 755, 757, 759-760, 784, 794-796.
[339] Trial Judgement, para. 796.
[340] Blagojević Notice of Appeal, paras. 26, 27; Blagojević Appeal Brief, paras. 8.1-8.18. In addition, Blagojević makes additional arguments concerning his conviction for complicity in genocide. These arguments overlap to some extent with those raised under Ground 6 and are dealt with there.
[341] Blagojević Appeal Brief, paras. 8.1, 8.2.
[342] *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, paras. 45, 46; *Vasiljević* Appeal Judgement, para. 102; *Ntagerura et al.* Appeal Judgement, para. 370.
[343] *Blaškić* Appeal Judgement, para. 48. *See also Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 372.
[344] *Krstić* Appeal Judgment, paras. 137, 138, 144.
[345] *Simić* Appeal Judgement, para. 86; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 46; *Ntagerura et al.* Appeal Judgement, para. 370.
[346] *Simić* Appeal Judgement, para. 86; *Krstić* Appeal Judgment, paras. 140, 141.

VRS Main Staff.[354] He notes that his criminal liability is almost exclusively predicated on their conduct over which he claims to have had no control.[355] Blagojević further challenges the Trial Chamber's findings concerning the role played by elements of the Bratunac Brigade other than the military police by describing it as inconsequential, noting that only a few brigade members were spotted in Potočari and Bratunac town and that they were likely there of their own volition or functioning under a separate, civilian chain of command.[356]

131. A review of the Trial Judgement reveals that the Trial Chamber concluded that Blagojević permitted members of the Bratunac Brigade Military Police to participate in the separations of Bosnian Muslim men from the women, children, and elderly in Potočari on 12 and 13 July 1995 and in the subsequent transfer from the Srebrenica enclave of the women, children, and the elderly as well as in guarding the Bosnian Muslim men detained in Bratunac town from 12 to 14 July 1995.[357] The Appeals Chamber has already addressed and rejected Blagojević's arguments on the Trial Chamber's findings that he had authority over the Bratunac Brigade Military Police and has further noted that his liability is not predicated on the actions of Momir Nikolić.[358] Moreover, the Trial Chamber also concluded that members of the Bratunac Brigade's Second Battalion and Third Artillery Group played a role in shelling and shooting around civilians *en route* to Potočari on 11 July 1995, in patrolling the area in and around Potočari on 12 and 13 July 1995, and in assisting in the transfer operation.[359] The Trial Chamber further concluded that Blagojević had command and control over these elements.[360] Blagojević does not dispute in any detail the role played by these additional elements of the Bratunac Brigade other than offering an alternative basis for their participation which is unsupported by any reference to the trial record. This is insufficient to call into question the reasonableness of the Trial Chamber's findings that Blagojević permitted these brigade resources to facilitate the commission of the crimes.

4. Alleged Error in Finding that Blagojević and the Bratunac Brigade Substantially Contributed to the Crimes

132. Blagojević submits that the Trial Chamber erred in fact in finding that any act of the Bratunac Brigade substantially contributed to the crimes.[361] A review of the Trial Judgement reveals that the Trial Chamber based Blagojević's criminal responsibility on permitting Bratunac

[354] Blagojević Appeal Brief, paras. 8.11-8.16.
[355] Blagojević Appeal Brief, para. 8.14.
[356] Blagojević Appeal Brief, paras. 8.15-8.17.
[357] Trial Judgement, paras. 729, 747, 755, 757, 784.
[358] *See supra* section III.B.8 (Alleged Errors relating to Factual Findings: Blagojević's Authority over Momir Nikolić and the Bratunac Brigade Military Police).
[359] Trial Judgement, paras. 755, 757, 784.
[360] Trial Judgement, para. 419.

referenced statement in relation to the aider and abettor carrying out acts which are specifically directed to assist.[492]

187. In the *Blaškić* Appeal Judgement, the Appeals Chamber considered whether the *actus reus* of aiding and abetting requires causation between the act of the accused and the act of the principal, or in other words, whether the contribution "must have a direct and important impact on the commission of the crime."[493] The Appeals Chamber found that "proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required."[494] However, the Appeals Chamber reiterated that one of the requirements for the *actus reus* of aiding and abetting is that the support of the aider and abettor have a substantial effect upon the perpetration of the crime.[495]

188. In reaching this conclusion, in the *Blaškić* Appeal Judgement the Appeals Chamber referenced the definition of aiding and abetting in the *Vasiljević* Appeal Judgement, which is identical to that set out in the *Tadić* Appeal Judgement, and which, in specifying that the assistance given by an aider and abettor must be specifically directed, also contrasted aiding and abetting liability with that of joint criminal enterprise.[496] However, in the *Blaškić* Appeal Judgement the Appeals Chamber also found that the Trial Chamber correctly held that the standard for the *actus reus* was that set out in the *Furundžija* Trial Judgement: "consist[ing] of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[497]

189. The Appeals Chamber observes that while the *Tadić* definition has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting.[498] This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime. The Appeals Chamber also considers that, to the extent specific direction forms an implicit part of the *actus reus* of aiding and abetting, where the accused knowingly participated in the commission of an offence and his or her participation

[492] *Aleksovski* Appeal Judgement, para. 163(ii).
[493] *Blaškić* Appeal Judgement, para. 43.
[494] *Blaškić* Appeal Judgement, para. 48. *See also Simić* Appeal Judgement, para. 85.
[495] *Blaškić* Appeal Judgement, para. 48.
[496] *Vasiljević* Appeal Judgement, para. 102.
[497] *Blaškić* Appeal Judgement, para. 46, quoting *Blaškić* Trial Judgement, para. 283 (quoting *Furundzija* Trial Judgement, para. 249).
[498] *Krnojelac* Appeal Judgement, para. 37, citing *Tadić* Appeal Judgment, para. 229; *Čelebići* Appeal Judgement, para. 345, citing *Tadić* Trial Judgement, para 688 (where the opposition is drawn between culpability where the accused "intentionally commits" a crime or where he "*knowingly* aids, abets or otherwise assists, *directly and substantially*, in the commission of such a crime" (emphasis added)). *But see Čelebići* Appeal Judgement, para. 352.

substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her "routine duties" will not exculpate the accused.

190. Jokić seeks to rely on the statement of the Appeals Chamber in the *Čelebići* Appeal Judgement that it "would not accept that the circumstance alone of holding a position as a guard somewhere within a camp in which civilians are unlawfully detained suffices to render that guard responsible for the crime of unlawful confinement of civilians."[499] On this basis, Jokić argues that "while the work of camp guards directly contributed to the unlawful confinement of prisoners within the camp, the Appeals Chamber accepted, as a matter of law, that such contribution alone was too insignificant or insubstantial to constitute aiding and abetting that crime."[500] From this, Jokić extrapolates that "where a person holds a position within an organized structure to which certain lawful duties attach, the mere performance by that person of their routine duties will not of itself constitute aiding and abetting crimes that may be committed by others within that organized structure."[501]

191. The Appeals Chamber considers it unreasonable to compare Jokić's position within the Zvornik Brigade to that of a camp guard in the *Čelebići* case. At issue in the *Čelebići* case was the ability of the accused, Zejnil Delalić and Hazim Delić, to affect the continued detention of the civilians in the camp.[502] The Appeals Chamber considers that it was reasonable for the Trial Chamber in this case to find, with respect to the three execution sites, that Jokić's role, whether as duty officer or Chief of Engineering, went beyond that of merely relaying orders up and down the chain of command.[503] The Trial Chamber's findings make it clear that Jokić's ability to affect the commission of the crime was substantial. In particular, the Trial Chamber found that, while Jokić did not directly issue orders in his capacity as Chief of Engineering, he assisted in carrying out the orders of the Brigade Commander which were based on his advice and proposals.[504]

192. Finally, Jokić's attempt to ground his argument in its apparent consistency with the principle that a person convicted of aiding and abetting "is convicted *of the crime itself*, in the same way as the principal perpetrator who actually commits the crime"[505] and thus must be specifically directed, is fundamentally misguided. The Appeals Chamber recalls that Article 7(1) of the Statute deals not only with individual responsibility by way of direct or personal participation in the criminal act but

[499] *Čelebići* Appeal Judgement, para. 364.
[500] Jokić Appeal Brief, para. 94.
[501] Jokić Appeal Brief, para. 95.
[502] *Čelebići* Appeal Judgement, paras. 336-369.
[503] Trial Judgement, paras. 761-770.
[504] Trial Judgement, para. 519.
[505] Jokić Appeal Brief, para. 100.

because he lacked the requisite *mens rea*, the Trial Chamber did not convict Blagojević of aiding and abetting the mass executions.

218. The Prosecution submits that the Trial Chamber erred in finding that Blagojević did not know about the mass killings which occurred between 12 and 14 July 1995 and, consequently, erred in finding that he lacked the requisite *mens rea* for aiding and abetting these crimes.[570] The Prosecution requests the Appeals Chamber to enter convictions for aiding and abetting murder and extermination, and for complicity in genocide on the basis of the mass executions.[571] First, the Prosecution submits that the Trial Chamber erred in law by not applying the correct definition of the *mens rea* for aiding and abetting.[572] Second, according to the Prosecution, the Trial Chamber further erred in law in its application of the standard of proof beyond reasonable doubt.[573] Third, the Prosecution contests a number of factual findings and alleges that no reasonable Trial Chamber could have concluded that Blagojević did not have knowledge of the mass killings.[574]

1. Alleged Error of Law in the Definition of the *Mens Rea* for Aiding and Abetting

219. The Prosecution alleges that the Trial Chamber erred in law in its approach to the "knowledge" component of the *mens rea* for aiding and abetting.[575] The Prosecution contends that the Trial Chamber required proof that Blagojević knew, "in the sense of virtual certainty", that the mass killings would be committed.[576] According to the Prosecution, however, "the *mens rea* for aiding and abetting is awareness of a probability that the crime will be committed and that, if the crime will be committed, the acts of the accused assist the crime."[577] In the Prosecution's view, if the Trial Chamber would have applied this standard, it would have convicted Blagojević for aiding and abetting the mass killings.

220. In support of its position concerning the *mens rea* of aiding and abetting, the Prosecution refers to the *Blaškić* Appeal Judgement, three trial judgements, and several national jurisdictions.[578] The Prosecution also argues that the standard for aiding and abetting should be consistent with other

[570] Prosecution Appeal Brief, para. 2.3. The Prosecution submits that, for the purposes of this appeal, the relevant period for ascertaining Blagojević's knowledge is 12-14 July 1995, the period when he rendered practical assistance to the murder operation, but that, if he is found to have the requisite knowledge when he rendered assistance at that time, the Appeals Chamber should hold him responsible for all mass killings from 12 July through 17 July 1995. Prosecution Appeal, para. 2.4 fn. 1.
[571] Prosecution Appeal Brief, para. 2.111.
[572] Prosecution Appeal Brief, para. 2.16.
[573] Prosecution Appeal Brief, para. 2.66.
[574] Prosecution Appeal Brief, para. 2.71.
[575] Prosecution Appeal Brief, paras. 2.6, 2.16, citing Trial Judgement, paras. 727, 782.
[576] Prosecution Appeal Brief, para. 2.17.
[577] Prosecution Appeal Brief, para. 2.18 (internal citations omitted). The Prosecution also submits that it is "awareness of a substantial likelihood that the crime will be committed and knowledge (or awareness) of a substantial likelihood that the acts of the accused will assist." Prosecution Appeal Brief, para. 2.62.

forms of liability under Article 7(1) of the Statute, including ordering, instigating, and planning, which, in its view, require only an awareness of the substantial likelihood that the crime will be committed.[579]

221. In describing the applicable law for aiding and abetting, the Trial Chamber restated the formulation of the *mens rea* for aiding and abetting found in the *Vasiljević* Appeal Judgement:

> [I]t is not required that the aider and abettor shared the *mens rea* required for the crime; it is sufficient that the aider and abettor had knowledge that his or her own acts assisted in the commission of the specific crime by the principal offender. The aider and abettor must also be aware of the "essential elements" of the crime committed by the principal offender, including the state of mind of the principal offender.[580]

The Appeals Chamber has applied this formulation consistently in its judgements.[581] Consequently, the Appeals Chamber finds no legal error on the part of the Trial Chamber in this regard.

222. The Prosecution faults the Trial Chamber for not recalling the following additional language from the *Blaškić* Appeal Judgement and applying it in this case:

> The Trial Chamber agreed with the statement in the *Furundžija* Trial Judgement that "it is not necessary that the aider and abettor [...] know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor." The Appeals Chamber concurs with this conclusion.[582]

The Appeals Chamber, however, recalls its position from the *Blaškić* Appeal Judgement that there are no reasons to depart from the definition of *mens rea* of aiding and abetting found in the *Vasiljević* Appeal Judgement.[583] The *Blaškić* Appeal Judgement did not extend the definition of *mens rea* of aiding and abetting.

223. The Prosecution also points to the Trial Chamber's statement that it had reasonable doubt that Blagojević "knew" that his acts furthered the mass killing operation,[584] suggesting that this indicates that the Trial Chamber examined the evidence to determine whether Blagojević knew that the mass killings were a virtual certainty. The Appeals Chamber, however, can identify no error on the part of the Trial Chamber based on the use of this formulation. The Appeals Chamber has employed the same formulation in its examination of the *mens rea* of aiding and abetting in other

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[578] *See* Prosecution Appeal Brief, paras. 2.28-2.58.
[579] Prosecution Appeal Brief, paras. 2.35-2.38, 2.55-2.58.
[580] Trial Judgement, para. 727.
[581] *See, e.g.*, *Blaškić* Appeal Judgement, para. 45; *Vasiljević* Appeal Judgement, para. 102; *Tadić* Appeal Judgement, para. 229.
[582] *Blaškić* Appeal Judgement, para. 50 (internal citations omitted).
[583] *Blaškić* Appeal Judgement, para. 45.
[584] Prosecution Appeal Brief, para. 2.17, citing Trial Judgement, paras. 742, 743 (emphasis in Prosecution Appeal Brief).

cases.[585] Moreover, the Appeals Chamber observes that the Trial Chamber's reasonable doubt as to Blagojević's knowledge of the impending murder operation arose out of the equally plausible inference that "he saw [the detention and capture of Bosnian Muslim men] as further steps in transporting the Bosnian Muslim population out of Serb-held territory".[586] In this respect, the Trial Chamber also noted throughout the Trial Judgement that Bosnian Muslim men, who were captured, were told that they would be exchanged.[587] It is also telling that the Trial Chamber accepted as credible testimony from a former Bratunac Brigade officer who stated that he did not assist a particular detainee who was taken to the Vuk Karadžić School and later killed because he thought that the detainee was going to be exchanged.[588] Thus, the Trial Chamber did not decline to find that Blagojević knew about the mass killing operation because he lacked certainty, but because it could not rule out the equally reasonable inference that he thought that his acts were directed towards another goal. Accordingly, the Trial Chamber did not err in its formulation of the *mens rea* requirement for aiding and abetting, and the Appeals Chamber dismisses this sub-ground of appeal.

2. Alleged Error of Law in the Application of the Standard of Proof Beyond Reasonable Doubt

224. The Prosecution submits that the Trial Chamber erred in law in its application of the standard of proof. Specifically, the Prosecution contends that the Trial Chamber applied the standard of proof in a two-stage process, first to the individual strands of evidence and then to the issue of *mens rea*, rather than reserving the application of the standard to the ultimate conclusion of guilt.[589] The Prosecution argues that this approach led the Trial Chamber to consider the evidence "piecemeal", failing to consider all of the established facts as a coherent whole in assessing Blagojević's *mens rea* for the mass killings.[590]

225. In particular, the Prosecution argues that the Trial Chamber failed to incorporate the following findings into its analysis of Blagojević's knowledge of the mass killings: (1) Blagojević's knowledge of the killings in Bratunac town on the nights of 12 and 13 July 1995 and the assistance provided by the Bratunac Brigade units in those killings;[591] (2) the vastness of the murder operation, involving many elements of VRS and MUP forces and occurring in many towns in a geographically small area, including Potočari, Jadar River, Kravica Warehouse, and Tišca;[592] (3) Blagojević's knowledge of his units' participation in the separation and transport of Muslims from Potočari, in

[585] *See, e.g., Kvočka et al.* Appeal Judgement, paras. 89, 90.
[586] Trial Judgement, para. 742.
[587] Trial Judgement, paras. 177, 227, 242, 251, 252, 254, 277, 316, 647, 736.
[588] Trial Judgement, paras. 251-252, 736, fn. 2197. At the time, this officer was tasked with matters related to prisoners of war. Trial Judgement, paras. 50, 251.
[589] Prosecution Appeal Brief, paras. 2.8, 2.66.
[590] Prosecution Appeal Brief, para. 2.69.
[591] Prosecution Appeal Brief, paras. 2.92-2.95.

294. With respect to the executions at the Kravica Warehouse, the Trial Chamber found that on the evening of 13 July 1995, approximately 1,000 Bosnian Muslim men were executed in a warehouse in Kravica.[791] The Prosecution emphasizes the Trial Chamber's finding in paragraph 497 that some members of the Bratunac Brigade were "around the Kravica Warehouse around the time that the mass executions took place".[792] The Prosecution argues that these facts lead to only one reasonable conclusion: Blagojević's subordinates knew from this event forward that Bosnian Muslim men would be channelled into a murder operation.[793]

295. The Appeals Chamber recalls that the Trial Chamber found the evidence insufficient to conclude that members of the Bratunac Brigade participated in the killing at Kravica Warehouse.[794] Moreover, the Trial Chamber noted that "evidence as to the presence of members of the Bratunac Brigade members [*sic*] at the Kravica Warehouse is limited"[795] and refused to conclusively determine that Bratunac Brigade members were present "*when* the mass executions were carried out".[796] Reading these findings together, the time-frame described in paragraph 497 of the Trial Judgement – "*around* the time the mass executions took place" – is properly interpreted to extend to periods beyond the precise moment the killings took place.[797] Such an interpretation, coupled with an absence of facts demonstrating that Bratunac Brigade members offered assistance to the executions as they occurred,[798] negates the finding that Bratunac Brigade members rendered practical assistance to these particular killings as they happened. Moreover, the Prosecution submissions fail to demonstrate that any assistance rendered by Bratunac Brigade members prior to or contemporaneously with the killings was done with knowledge that executions would occur at the Kravica Warehouse or elsewhere.[799] In light of the Trial Chamber's findings, the Appeals Chamber finds no error in the Trial Chamber's refusal to ground superior liability pursuant to Article 7(3) of the Statute on the Kravica Warehouse killings.[800]

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[791] Trial Judgement, paras. 296-303.
[792] Prosecution Appeal Brief, para. 4.27, citing Trial Judgement, paras. 497, 742.
[793] Prosecution Appeal Brief, para. 4.27.
[794] Trial Judgement, paras. 366, 497.
[795] Trial Judgement, para. 364.
[796] Trial Judgement, para. 366 ("The Trial Chamber concludes that while members of the Bratunac Brigade *might* have been present around the Kravica Warehouse *when* the mass executions were carried out[...]." (emphasis added)).
[797] *See, e.g.*, Trial Judgement, para. 364 fn. 1368 (finding that a member of the Bratunac Brigade went to the Kravica Warehouse on 13 July 1995 prior to the executions).
[798] *See* Trial Judgement, paras. 298-303.
[799] Momir Nikolić is an exception to this statement and his particular role will be discussed in the fourth sub-ground. *See* Trial Judgement, paras. 246, 247, 262. The Trial Chamber determined that those detained in the Kravica Warehouse were taken from Sandići Meadow and that members of the Bratunac Brigade were in the area at the time. Trial Judgement, paras. 261, 296 fns. 1062-1064.
[800] Trial Judgement, para. 794.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-02-60-T

Date: 17 January 2005

Original: English

IN TRIAL CHAMBER I, SECTION A

Before: **Judge Liu Daqun, Presiding**
Judge Volodymyr Vassylenko
Judge Carmen Maria Argibay

Registrar: **Mr. Hans Holthuis**

Judgement of: **17 January 2005**

PROSECUTOR

v.

VIDOJE BLAGOJEVIĆ
DRAGAN JOKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter McCloskey
Mr. Stefan Waespi
Ms. Antoinette Issa
Mr. Milbert Shin
Mr. Salvador Viada

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Vidoje Blagojević
Mr. Miodrag Stojanović and Mr. Branko Lukić for Dragan Jokić

724. As will be discussed below and recalling that joint criminal enterprise is a form of "commission", the Trial Chamber finds that the appropriate form of liability to describe Dragan Jokić's participation in these crimes is aiding and abetting.

725. Accordingly, the Trial Chamber finds that Dragan Jokić did not commit murder, extermination or persecutions as part of a joint criminal enterprise.

2. Aiding and Abetting

(a) Applicable Law

726. The Trial Chamber finds that the *actus reus* for 'aiding and abetting' is that the accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal.[2175] The criminal act of the principal for which the aider and abettor is responsible must be established.[2176] The assistance need not have caused the act of the principal, but it must have had a "substantial effect" on the commission of the crime.[2177] The assistance may be provided by either an act or by an omission,[2178] and it may occur before, during or after the act of the principal.[2179]

727. For aiding and abetting, it is not required that the aider and abettor shared the *mens rea* required for the crime; it is sufficient that the aider and abettor had knowledge that his or her own acts assisted in the commission of the specific crime by the principal offender.[2180] The aider and abettor must also be aware of the "essential elements" of the crime committed by the principal offender, including the state of mind of the principal offender.[2181]

2175 *Tadić* Appeal Judgement, para. 229 (iii); *Vasiljević* Appeal Judgement, para. 102 (i). *See also* Criminal Code of SFRY, Art. 24(2):
The following, in particular, shall be considered as aiding: the giving of instructions or counselling about how to commit a criminal act, the supply of tools and resources for the crime, the removal of obstacles to the commission of a crime, as well as the promise, prior to the commission of the act, to conceal the existence of the criminal act, to hide the offender, the means to commit the crime, its traces, or goods gained through the commission of a criminal act.

2176 *Aleksovski* Appeal Judgement, para. 165.

2177 *Čelebići* Appeal Judgement, para. 352; *Blaškić* Appeal Judgment, para. 48; *Furundzija* Trial Judgment, para. 235. "Mere presence" at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender. *Furundzija* Trial Judgment, para. 249.

2178 *Blaškić* Appeal Judgement, para. 47.

2179 *Čelebići* Appeal Judgement, para. 352, adopting the *Čelebići* Trial Judgement, para. 327 which held that "[subject to the caveat that it be found to have contributed to, or have had an effect on, the commission of the crime, the relevant act of assistance may be removed in time and place from the actual commission of the offence." *See also Aleksovski* Appeal Judgement, para. 62; *Blaškić* Appeal Judgement, para. 48.

2180 *Tadić* Appeal Judgement, para. 229(iv); *Vasiljević* Appeal Judgement, para. 102 (ii); and *Blaškić* Appeal Judgement, para. 45.

2181 *Aleksovski* Appeal Judgement, para. 162. *See also Krnojelac* Trial Judgement, para. 90.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-14-A

Date: 29 July 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Judgement of: **29 July 2004**

PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Sonja Boelaert-Suominen
Ms. Michelle Jarvis
Ms. Marie-Ursula Kind
Ms. Kelly Howick

Counsel for the Appellant:

Mr. Anto Nobilo
Mr. Russell Hayman

41. Having examined the approaches of national systems as well as International Tribunal precedents, the Appeals Chamber considers that none of the Trial Chamber's above articulations of the *mens rea* for ordering under Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct. The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.

42. The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[76]

2. Aiding and Abetting

43. The Appellant submits that liability for aiding and abetting requires, at a minimum, actual knowledge.[77] He submits that not only must the aider and abettor know that his acts provide support to another person's offence, but he must also know the specifics of that offence. Recklessness or negligence on his part is not sufficient, he asserts, contrary to the Trial Chamber's alleged finding on that point.[78] Furthermore, the Appellant submits that the *actus reus* of aiding and abetting includes a causation requirement which the Trial Chamber failed to acknowledge and to apply.[79] In other words, the contribution must "have a direct and important impact on the commission of the crime."[80] Instead, the Appellant maintains, the Trial Chamber erroneously applied a strict liability standard to find the Appellant guilty as an aider and abettor and reiterates that the Trial Chamber's conclusion that "he could be found guilty if he accepted the possibility that some unspecified crime was a 'possible or foreseeable consequence' of military action effectively eliminates the 'actual knowledge' *mens rea* of aiding and abetting, and is thus erroneous as a matter

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[76] The French translation of this legal standard reads as follows:
> Quiconque ordonne un acte ou une omission en ayant conscience de la réelle probabilité qu'un crime soit commis au cours de l'exécution de cet ordre possède la *mens rea* requise pour établir la responsabilité aux termes de l'article 7 alinéa 1 pour avoir ordonné. Le fait d'ordonner avec une telle conscience doit être considéré comme l'acceptation dudit crime.

[77] Appellant's Brief, p. 131.
[78] Appellant's Brief, pp. 131-133.
[79] Appellant's Brief, pp. 133-135.
[80] Appellant's Brief, p. 134.

of law."[81] He states that this standard was set out at the beginning of the Trial Judgement and pervades the entire analysis that followed.[82]

44. The Prosecution submits that the Appellant's claim that the *mens rea* adopted by the Trial Chamber in relation to aiding and abetting — "possible and foreseeable consequence of the conduct" — was too low is unsupported by any "standard" or authority. Nor did the Appellant, according to the Prosecution, indicate any instance where the application of such a standard would have impacted upon his conviction thereby possibly enabling him to claim prejudice.[83] The Prosecution further submits that the Trial Chamber did not apply a negligence standard in the instant case but that, if it had, it would have been completely appropriate to do so.[84] Finally, the Prosecution rejects the Appellant's unsupported assertion that aiding and abetting liability requires an element of causation between the act of the accused and the act of the principal.[85]

45. In *Vasiljević*, the Appeals Chamber set out the *actus reus* and *mens rea* of aiding and abetting. It stated:

> (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. [...]
>
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal. [...][86]

The Appeals Chamber considers that there are no reasons to depart from this definition.

46. In this case, the Trial Chamber, following the standard set out in *Furundžija*, held that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[87] It further stated that the *mens rea* required is "the knowledge that these acts assist the commission of the offense."[88] The Appeals Chamber considers that the Trial Chamber was correct in so holding.

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[81] Brief in Reply, para. 115.
[82] Brief in Reply, para. 116.
[83] Respondent's Brief, para. 5.67.
[84] Respondent's Brief, paras. 5.68-5.69.
[85] Respondent's Brief, paras. 5.71-5.75.
[86] *Vasiljević* Appeal Judgement, para. 102.
[87] Trial Judgement, para. 283 (quoting *Furundžija* Trial Judgement, para. 249).
[88] Trial Judgement, para. 283 (quoting *Furundžija* Trial Judgement, para. 249).

47. The Trial Chamber further stated that the *actus reus* of aiding and abetting may be perpetrated through an omission, "provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*."[89] It considered:

> In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.[90]

The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting.

48. The Trial Chamber in this case went on to state:

> Proof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required. Furthermore, participation may occur before, during or after the act is committed and be geographically separated therefrom.[91]

The Appeals Chamber reiterates that one of the requirements of the *actus reus* of aiding and abetting is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime. In this regard, it agrees with the Trial Chamber that proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required. It further agrees that the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and that the location at which the *actus reus* takes place may be removed from the location of the principal crime.

49. In relation to the *mens rea* of an aider and abettor, the Trial Chamber held that "in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct."[92] However, as previously stated in the *Vasiljević* Appeal Judgement, knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement of this mode of participation.[93] In this respect, the Trial Chamber erred.

50. The Trial Chamber agreed with the statement in the *Furundžija* Trial Judgement that "it is not necessary that the aider and abettor...know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed,

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[89] Trial Judgement, para. 284 (footnote omitted).
[90] Trial Judgement, para. 284 (footnote omitted).
[91] Trial Judgement, para. 285 (citing *Furundžija* Trial Judgement, para. 233; *Aleksovski* Trial Judgement, para. 61).
[92] Trial Judgement, para. 286.
[93] *Vasiljević* Appeal Judgement, para. 102.

and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[94] The Appeals Chamber concurs with this conclusion.

51. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber was correct in part and erred in part in setting out the legal requirements of aiding and abetting.

52. The Appeals Chamber notes that in this case, the Trial Chamber did not hold the Appellant responsible for aiding and abetting the crimes at issue. In addition, the Appeals Chamber considers that this form of participation was insufficiently litigated on appeal.[95] Furthermore, the Appeals Chamber does not consider that this form of participation was fairly encompassed by the Indictment.[96] In these circumstances, the Appeals Chamber declines to consider this form of participation any further.

B. Command Responsibilty under Article 7(3) of the Statute

53. In this section,[97] the Appeals Chamber will only address alleged legal errors concerning Article 7(3) of the Statute, and will leave contentions raised by the Appellant in his second ground of appeal, concerning whether the facts of the case support a finding that the Appellant had effective control in the Central Bosnia Operative Zone (CBOZ), to the parts of the Judgement where the factual grounds of appeal are considered.

1. Actual knowledge of a superior

54. The Appellant claims that the *mens rea* under Article 7(3) of the Statute is actual knowledge or "information which, if at hand, would oblige the commander to conduct further inquiry."[98] Regarding actual knowledge, the Appellant submits that it requires more than proof of a person's rank as a military commander, and that the Trial Chamber failed to look beyond the Appellant's status to establish his knowledge, thus relying "almost exclusively" on the Appellant's rank and status. This, the Appellant contends, is an unacceptable form of strict liability which in effect shifts the burden of proof.[99]

55. The Prosecution responds that the Appellant has failed to make a single reference to any paragraph of the Trial Judgement that would lend credence to this allegation. On the contrary, it

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[94] Trial Judgement, para. 287 (quoting *Furundžija* Trial Judgement, para. 246). *See*, for example, in German law, "Risikoerhöhungstheorie" ("theory of added peril"), BGH St. 42, 135-139.
[95] It was discussed primarily as an error of law in the parties' briefs, and there was no discussion concerning aiding and abetting during the appeal hearing. Compare *Krstić* Appeal Judgement, p. 47, n. 228; *Vasiljević* Appeal Judgement, para. 133.
[96] *See* below Chapter VI (A); compare *Krstić* Appeal Judgement, para. 137.
[97] In this Judgement, the expressions "command responsibility" and "superior responsibility" are synonymous.
[98] Appellant's Brief, p. 136.

67. The Appeals Chamber takes note that the Trial Chamber concurred with the *Čelebići* Trial Judgement, which endorsed the view that a superior must have effective control over "the persons *committing* the underlying violations of international humanitarian law."[128] The Trial Chamber also stated that "a commander may incur criminal responsibility for crimes *committed* by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them."[129] Both conclusions of the Trial Chamber fall within the terms of Article 7(3) of the Statute, and both are not challenged by the Appellant.

68. With regard to the position of the Trial Chamber that superior responsibility "may entail" the submission of reports to the competent authorities,[130] the Appeals Chamber deems this to be correct. The Trial Chamber only referred to the action of submitting reports as an example of the exercise of the material ability possessed by a superior.

69. The Appeals Chamber also notes that the duty of commanders to report to competent authorities is specifically provided for under Article 87(1) of Additional Protocol I, and that the duty may also be deduced from the provision of Article 86(2) of Additional Protocol I.[131] The Appeals Chamber also notes the Appellant's argument that to establish that effective control existed at the time of the commission of subordinates' crimes, proof is required that the accused was not only able to issue orders but that the orders were actually followed. The Appeals Chamber considers that this provides another example of effective control exercised by the commander. The indicators of effective control are more a matter of evidence than of substantive law,[132] and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[133] The appeal in this regard is therefore rejected.

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[128] Trial Judgement, paras. 300-301 (emphasis added) (quoting *Čelebići* Trial Judgement, para. 378).
[129] Trial Judgement, para. 301 (emphasis added) (footnote omitted).
[130] Trial Judgement, para. 302.
[131] Article 86(2) provides: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."
[132] *Aleksovski* Appeal Judgement, paras. 73-74; *Čelebići* Appeal Judgement, para. 206.
[133] *Aleksovski* Appeal Judgement, para. 76.

May and 1 June 1996.[561] The statement was admitted as Exhibit H1 during the evidentiary portion of the hearing.[562] After consulting with one of the investigators who took the statement, Counsel for the Prosecution clarified that a copy of his statement was never provided to Witness Watkins,[563] because it was the policy of the Office of the Prosecutor in 1996 not to provide any witnesses with any copies of any statements due to a concern at that time about the witnesses handing around their statements, primarily in the former Yugoslavia.[564]

278. The Prosecution stated that it intended to make submissions the week thereafter on whether an inference could be drawn from its refusal to provide a copy of his statement to Witness Watkins, that the Prosecution was deliberately trying to suppress exculpatory evidence.[565] Counsel for the Prosecution argued that evidence regarding the fact that, when allowing the Convoy of Joy to pass through a checkpoint, the Military Police would only respond to Kordić's orders, was also provided by Witness Duncan who testified at the Appellant's trial and was in the Convoy of Joy with Witness Watkins, and thus the same evidence contained in Exhibit H1 was before the Trial Chamber.[566]

279. In reply, Counsel for the Appellant submitted that the policy of the Office of the Prosecutor not to provide witness statements was an issue concerning which an oral stipulation could be entered.[567] However, he stressed that the real issue was not whether Witness Watkins got a copy of his statement, but rather that the Appellant "was never given information about Kordić controlling the Jokers...despite the obvious relevance that this would have had to [the Appellant's] case," and he added that he would litigate this issue in final argument.[568] Counsel for the Appellant further argued that since Witness Watkins is a military expert, his evidence is neutral and more relevant, and noted that Exhibit H1 contains information concerning command and control problems within the HVO, and the existence of isolated pockets.[569] With respect to the testimony of Witness Duncan, Counsel for the Appellant noted that the former did not identify the Military Police "as the problem with the Convoy of Joy," and did not testify that Kordić controlled the Jokers.[570]

280. The Appeals Chamber notes that contrary to the Prosecution's assertion, the evidence provided by Witness Watkins to the effect that the Military Police would only respond to Kordić's orders was not provided by Witness Duncan, and thus, the same evidence contained in Exhibit H1

[561] AT 329-331 (9 Dec. 2003).
[562] AT 346 (9 Dec. 2003).
[563] AT 363-364 (9 Dec. 2003).
[564] AT 361 (9 Dec. 2003).
[565] AT 361 (9 Dec. 2003).
[566] AT 727, 728 (16 Dec. 2003).
[567] AT 364 (9 Dec. 2003).
[568] AT 364 (9 Dec. 2003).
[569] AT 803 (17 Dec. 2003).
[570] AT 803 (17 Dec. 2003).

C. The Appellant's Responsibility under Article 7(3) of the Statute

1. The Appellant's Role in the Prevention of Crimes

(a) The Appellant's orders to ensure compliance with humanitarian law

482. The Appellant submits that he issued dozens of humanitarian orders directing troops both within and outside his chain of command to respect civilians' rights and to protect their property, both prior to, and subsequent to, the hostilities in Vitez in April 1993.[987]

483. The Prosecution submits that the Appellant issued "preventive" orders after the 16 and 18 April attacks on Stari Vitez and that he never enforced the orders or punish anyone who violated them.[988]

484. The Appeals Chamber recalls that under Article 7(3) of the Statute, effective control means the possession by the superior or commander of the material ability to prevent and punish the commission of crimes subject to the jurisdiction of the International Tribunal.[989] The Appeals Chamber also recalls that to establish superior responsibility, three elements of that responsibility must be proved beyond reasonable doubt: the existence of a superior-subordinate relationship; the fact that the superior knew or had reason to know that the criminal act was about to be or had been committed; and the fact that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[990]

485. As the Appellant has conceded, he had *de jure* command over regular HVO units in the CBOZ,[991] sometimes with special units such as the Vitezovi attached to his command.[992] His authority entitled him to issue orders, including the humanitarian ones referred to above. However, the Appeals Chamber considers that the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over the troops that received the orders.

486. While the humanitarian orders referred to by the Appellant may show that he was not a person prone to issuing illegal orders in the conflict in Central Bosnia in 1993, they are not relevant to the issue of his liability, if any, under Article 7(3) of the Statute, unless the reference to them is premised on the fact that he knew or had reason to know that his subordinates were about to commit crimes subject to the jurisdiction of the International Tribunal.

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[987] Appellant's Brief, p. 80.
[988] Respondent's Brief, para. 2.264.
[989] *See* Chapter III of this Judgement, section (B)(3), above.
[990] *Aleksovski* Appeal Judgement, para. 72; *Čelebići* Trial Judgement, para. 346.
[991] Appellant's Brief, p. 57.

(b) The gravity of the offence

683. Article 24(2) of the Statute provides that the Trial Chambers shall consider the gravity of the offence when imposing sentences. The gravity of the offence is the primary consideration in imposing a sentence[1439] and is the "litmus test" in the determination of an appropriate sentence.[1440] The Appeals Chamber has ruled that sentences to be imposed must reflect the inherent gravity or totality of the criminal conduct of the accused, the determination of which requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[1441] Factors to be considered include the discriminatory nature of the crimes where this is not considered as an element of a conviction,[1442] and the vulnerability of the victims.[1443] The consequences of the crime upon the victim directly injured is always relevant to sentencing, that is, "the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences."[1444] Furthermore, the effects of the crime on relatives of the immediate victims may be considered as relevant to the culpability of the offender and in determining a sentence.[1445]

684. In this case, the Appellant has been found guilty of particular instances of ordering what amounted to cruel and inhuman treatment of persons who were not participating in the hostilities, and of failing to punish such conduct on the part of others. The crimes of which the Appellant has been convicted are serious violations of international humanitarian law, directed almost exclusively

[1439] *Čelebići* Appeal Judgement, para. 731; *Kupreškič* Appeal Judgement, para. 442.
[1440] *Čelebići* Trial Judgement, para. 1225, cited with approval by *Aleksovski* Appeal Judgement, para. 182; *Čelebići* Appeal Judgement, para. 731; *Krstić* Appeal Judgement, n. 431.
[1441] *Furundžija* Appeal Judgement, para. 249.
[1442] *Kvočka et al.* Trial Judgement, para. 702 (under appeal).
[1443] *Kunarac* Appeal Judgement, para. 352.
[1444] *Krnojelac* Trial Judgement, para. 512 (not addressed on appeal).
[1445] *Krnojelac* Appeal Judgement, para. 260 ("The Appeals Chamber considers that, even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others.")

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-82-T
		Date:	10 July 2008
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: **Mr Hans Holthuis**

Judgement of: **10 July 2008**

PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Dan Saxon
Ms Antoinette Issa
Ms Joanne Motoike
Mr Gerard Dobbyn
Ms Meritxell Regue
Ms Nisha Valabhji
Mr Matthias Neuner

Counsel for the Accused:

Ms Edina Rešidović and Mr Guénaël Mettraux for Ljube Boškoski

Mr Antonio Apostolski and Ms Jasmina Živković for Johan Tarčulovski

orders to support the action, to which Johan Tarčulovski replied that there would be orders from the President or "the persons around him".[525]

E. Were the events in Ljuboten justified by military necessity?

132. It is the position of the Defence that individuals from Ljuboten participated in placing the land mine that killed eight Macedonian soldiers on 10 August, that there was an NLA presence in Ljuboten on the weekend of 10-12 August,[526] and that Ljuboten was used as a logistics base by the NLA as early as February of 2001.[527] It is argued that there was a legitimate reason for the security forces to enter the village,[528] and that the purpose of the operation was to search for NLA members in the village to prevent further attacks.[529] It is further submitted that on 12 August, there were a number of NLA positions within Ljuboten from which the army and in some cases the police, received fire on 12 August 2001.[530] It is the position of the Defence that Ljuboten was a legitimate military target,[531] that the operation was limited to those areas and houses where members of the NLA were believed to be located,[532] and that fire upon these locations was justified by military necessity.[533]

133. The Prosecution argues that Ljuboten was not an NLA stronghold, and it was not used as an NLA logistics base.[534] It is argued that while the NLA may have enjoyed support in the village, it was not "full of NLA fighters" on 12 August.[535] The Chamber also notes in this context the assertion or admission in the Indictment that there were, on 12 August, about 10-15 "armed Albanian combatants" present in Ljuboten, armed with automatic weapons and at least one machine-gun.[536] Finally, the Prosecution submits that the destruction that occurred in Ljuboten was not justified by military necessity.[537]

134. The Chamber observes that the Defence has, in support of a number of its assertions on the issue of NLA membership of specific persons and NLA and logistical support, relied heavily and sometimes exclusively on Security and Counter-Intelligence Division (UBK) operative interviews and reports of which the sources are anonymous, and the content is unverified. A number of such

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525 Exhibits P302, P303, P304.
526 Boškoski Defence Final Brief, para 271.
527 Boškoski Defence Final Brief, paras 271, 283; Tarčulovski Defence Final Brief, para 165.
528 Tarčulovski Defence Final Brief, para 174.
529 Boškoski Defence Final Brief, paras 280, 283.
530 Boškoski Defence Final Brief, para 323; Tarčulovksi Defence Final Brief, paras 200-204.
531 Tarčulovski Defence Final Brief, para 191.
532 Boškoski Defence Final Brief, paras 284-285.
533 Boškoski Defence Final Brief, para 323.
534 Prosecution Final Brief, para 158-159.
535 Prosecution Final Brief, para 159.
536 Indictment, para 68.
537 Prosecution Final Brief, paras 80, 155, 157.

interviews and reports came into existence months after the events in Ljuboten.[538] In the absence of independent confirmation, the Chamber is unable to rely on these documents for the truth of their content. Equally, in light of evidence to the contrary, the Chamber is not persuaded that it can attach significant weight to the suspiciously almost uniform evidence of Ljuboten residents that no individuals from Ljuboten participated in the land mine incident,[539] that none of the villagers were NLA members,[540] that there was no NLA presence in Ljuboten on the weekend of 10-12 August,[541] and denying that there was any form of logistical support to the NLA from within Ljuboten.[542] In these circumstances, while recognizing that a credible source is not *ipso facto* reliable, the Chamber has been assisted in many matters by the evidence provided by more neutral sources. However, in this respect the Chamber must observe that it approaches with care the evidence provided by Peter Bouckaert, a senior researcher for Human Rights Watch ("HRW"). His observations of the village were made 11 days after the events. Further, the HRW report on the relevant events in Ljuboten,[543] to which he was the main contributor, and which is a cornerstone of his evidence, is sourced primarily by unchallenged accounts of ethnic Albanian residents from Ljuboten which have not been tested against the other differing accounts which the Chamber has heard.[544]

135. It is also noted that the evidence regarding NLA presence in Ljuboten and the question of whether Ljuboten was a logistics base often refers to "terrorists", armed groups, or persons wearing black clothes, without using the term "NLA" as such.[545] In many cases this is merely a matter of terminology and no distinction is intended. However, this distinction in terminology touches upon an issue mentioned later in the Judgement, whether, during the situation in FYROM in 2001, there were a number of ethnic Albanian armed groups involved in fighting the police and army.[546]

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538 *Inter alia*, and especially, Exhibits 1D87; 1D165; 1D166; 1D167; 1D168; 1D223.1; 1D273.

539 M012, T 936; Ćemuran Redžepi, T 3519-3520; Ismail Ramadani, T 1011; Vehbi Bajrami, T 1835; 1864.

540 M012, T 942; 961-962; Aziz Rexhepi, T 4660-4665; Elmaz Jusufi, T 548-550; Fatmir Kamberi, T 4570-4574; 4577; 4620; Fatmir Kamberi, Exhibit P426, para 5; Vehbi Bajrami, T 1847-1848; 1864; Sedat Murati, T 4080-4083; 4109; M017, T 706-708; Ismail Ramadani, T 1009-1010; Osman Ramadani, T 1092-1095; Osman Ramadani, Exhibit P197, para 20.

541 Nazim Bushi, T 5669-5670; 5678-5683; M088, Exhibit P206, paras 12, 29; M092, Exhibit P215, paras 28-30, 40; Isni Ali, T 3457-3458; Aziz Rexhepi, T 4665-4667; Ćemuran Redžepi, T 3512; 3544; Elmaz Jusufi, T 550; Farush Memedi, T 2052; Vehbi Bajrami, T 1864-1865; Sedat Murati, T 4076.

542 Aziz Rexhepi, T 4658; Ćemuran Redžepi, T 3518; Ismail Ramadani, T 1009; Elmaz Jusufi, T 493-494; Fatmir Kamberi, T 4576-4577; Ismail Ramadani, T 1008-1009; 1029-1030; 1049; *see* also Nazim Bushi, T 5607; 5647; 5883.

543 Exhibit P352.

544 Exhibit P352. The Chamber also notes that aspects of his observations may have been influenced by media reports. (Peter Bouckaert, T 3074-3075)

545 Igno Stojkov, T 8922-8923; Blagoja Markovski, T 10648. The Chamber notes that the witness' conclusion of a structure of an Albanian armed group in Ljuboten does not refer to NLA as such; Exhibit 2D101, paras 333-334 and 343.

546 *See infra*, para 211.

that the Brigade staff was formed in only two or three days, although the process of formation of the Brigade was much more prolonged and indeed continued throughout the conflict.[1126] He denied that the 114th Brigade carried out joint operations with the 113th NLA Brigade, but accepted that the two Brigades coordinated their activities as far as the front line was concerned,[1127] whereas other evidence indicates the 114th Brigade may have been under the command of the 113th Brigade while it was in the process of formation.[1128]

259. The Chamber has difficulty fully accepting the evidence of Mr Bushi in many respects. His evidence regarding the number of members in his Brigade is in sharp contrast with other evidence received in the trial,[1129] which the Chamber accepts as more reliable. Despite his role as the "commander of the 114th Brigade", Mr Bushi did not know how much ammunition and arms were required for this Brigade.[1130] He did not know the number of members the NLA had at the time and his estimates varied from 5,000 to 6,000 to 4,000.[1131] He repeatedly stated that his Brigade implemented NLA regulations[1132] (to be discussed in more detail below) whereas Gzim Ostreni testified that these were implemented only gradually according to the needs of each Brigade.[1133] Further, at the material time, the zone of responsibility of the 114th Brigade which Nazim Bushi said he commanded included Skopje and its outskirts,[1134] thus also the village of Ljuboten.[1135] Nazim Bushi's consistent denial of NLA presence and activities in and around Ljuboten during the material time, which contradicts other evidence received in the trial, left the Chamber with the view that Mr Bushi had been prepared to diminish any role that NLA members may have played in these events. Considering all these factors the Chamber will treat the evidence of Nazim Bushi with considerable circumspection.

260. Franz-Josef Hutsch also gave evidence regarding the structure and the level of organisation of the NLA. As explained elsewhere in this Judgement the Chamber has not been able to accept the truth of the evidence of Mr Hutsch that he was in Ljuboten on 12 August 2001 and about his

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1126 Nazim Bushi, T 5867-5868.
1127 Nazim Bushi, T 5931-5932.
1128 Exhibit P493, p 11.
1129 According to Exhibit P493, p 11(NATO document), the 114th Brigade was thought to number some 200 fighters. It was also thought that the 114th Brigade may have been under the command of 113th Brigade and that its mission might include attacks on strategic military and political targets within the capital in conjunction with the 113th Brigade.
1130 Nazim Bushi, T 5884.
1131 Nazim Bushi, T 5930.
1132 Nazim Bushi testified that the NLA Code of Conversation (Exhibit P456) was used to communicate between the 114th Brigade and with Gzim Ostreni; T 5584-5585; 5934. He also testified that the NLA adopted all the military standards and procedures when establishing the Brigades, T 6013-6015 and that he implemented disciplinary measures for violations of the standards.
1133 Gzim Ostreni, T 7438.
1134 Nazim Bushi, T 5575-5576; 5605.
1135 Viktor Bezruchenko, T 7241.

purported observations on that and the surrounding days.[1136] In addition to this major issue of credibility, Franz-Josef Hutsch's evidence regarding the structure and organisation of the NLA was based on information provided to him by Gzim Ostreni,[1137] as well as information obtained at press briefings with Ali Ahmeti, information from undisclosed confidential sources, and meeting(s) with Ali Ahmeti and another NLA figure named Dreni Korabu.[1138] In view of these matters the Chamber is unable to rely on this evidence of Mr Hutsch.

261. To establish the level of organisation of the NLA the Prosecution also seeks to rely on the evidence of Viktor Bezruchenko. The Defence challenges the credibility of this witness and submits in particular that he was seriously involved in the investigation and prosecution of this case, that he was chosen as an expert witness for the Prosecution because of his views regarding the situation, and that large parts of his evidence amount to nothing more than advocacy for the Prosecution.[1139] Viktor Bezruchenko, as noted, a military analyst with the Office of the Prosecutor, testified as an expert witness for the Prosecution. He gave evidence that he was tasked by the Prosecution to cover in his report the issues related to the conflict in Macedonia in 2001, among other issues. The Chamber accepts, however, that it is more accurately expressed that he had been asked to prove the existence of an armed conflict in Macedonia in 2001 in relation to a case before this Tribunal.[1140] While simultaneously undertaking that task, he had been present during witness interviews by the Prosecution and in some cases asked questions during these interviews on behalf of the Prosecution.[1141] When, in the process of conducting his analysis, Mr Bezruchenko felt that he needed certain documents, he and colleagues from the Office of the Prosecutor prepared specific requests for assistance directed to the Macedonian authorities.[1142] He was assisted by members of the Prosecution team.[1143] While aspects of Mr Bezruchenko's report and evidence have been of value to the Chamber, because of the matters summarised above, the Chamber is unable to accept with full confidence that Mr Bezruchenko's judgement and conclusions are formed with the independence and impartiality appropriate for an expert witness. The Chamber will, therefore, focus instead on, and examine, the sources Mr Bezruchenko relied on in preparation of his report, as well as the other evidence, to reach its conclusion.

1136 *See supra*, para 18.
1137 Franz-Josef Hutsch, T 2829.
1138 Franz-Josef Hutsch, T 2822-2826.
1139 Boškoski Defence Final Brief, paras 760-764.
1140 *Prosecutor v Boškoski and Tarčulovski*, Case No: IT-04-82-T, "Decision on Prosecution's Urgent Application to Be Relieved from Disclosing Information pursuant to Rule 68(iv)", 30 October 2007, para 2.
1141 Viktor Bezruchenko, T 6879-6998; 6645; 7146-7149; *see* also Exhibit P215.
1142 Viktor Bezruchenko, T 6747-6752.
1143 Viktor Bezruchenko, T 6750-6752.

262. One of the documents relied on in Mr Bezruchenko's report is Exhibit P485.[1144] The document is unsigned and undated; there is no indication as to which authority prepared it. The document includes charts depicting the structure of the NLA Brigades, lists of weapons allegedly in possession of the NLA, estimates as to the number of members of the NLA Brigades, lists of NLA leaders, lists of locations of alleged NLA training camps, and describes the NLA's goals, strategies, capabilities and weaknesses. There is no indication what the sources relied on in this document were or how the information there was collected. Viktor Bezruchenko believed that this document was prepared by the analytical section of the FYROM military intelligence in September 2001 on the basis of information collected by it.[1145] However, there is nothing in the document that could attribute it to this institution. In the absence of any evidence as to the author, date, and the nature of the information relied on in the document, the Chamber is unable to rely on this document.

263. Reliance was also placed on a document entitled the "Macedonia Briefing Pack".[1146] The part of this document which provides information about the NLA structure and its political and military leadership was prepared by Franz-Josef Hutsch on the basis of information he says he obtained from Gzim Ostreni, Ali Ahmeti, and sources whose identity Mr Hutsch refused to provide.[1147] In light of the view the Chamber has already expressed with respect to the evidence of Franz-Josef Hutsch and its reservations concerning Gzim Ostreni and Ali Ahmeti, the Chamber is unable to rely on this document without independent confirmation of its relevant content.

264. The Prosecution expert's report further cites documents produced by the MoI which are dated and titled, but unsigned.[1148] These reports are not in evidence and little is known as to how they were produced. The Chamber will rely on statements in the Prosecution expert's report based on such documents only to the extent that they are confirmed by other evidence. Further, reliance is placed on a book entitled the "War in Macedonia in 2001" published in FYROM by three high-ranking Macedonian military officials in 2006.[1149] The authors of this book did not give evidence in this trial. Their sources and the methodology used are unknown. Moreover, considering the political context in which this book was written and in particular that its authors were senior

[1144] Exhibit P485 is cited 37 times in the section of the report (Exhibit P466) dealing with NLA.
[1145] Viktor Bezruchenko, T 6511-6512.
[1146] Exhibit P321 cited four times.
[1147] Franz-Josef Hutsch, T 2817, 2818-2819; 2822-2826; 2827-2830.
[1148] Rule 65*ter* document 1013 is an unsigned MoI report regarding the "Actions of the So-Called ONA/ONA-NLA in the Skopje Crisis Region" dated August 2001. The document is cited four times. Rule 65*ter* document 1012 is an unsigned report titled "Cross-Section of information on illegal channels for the entry of members of the so-called NLA from Kosovo and the transport of weapons (Illegal entry into Macedonia of members of the NLA from Kosovo)", dated 23 March. Rule 65*ter* document 936 is an unsigned report titled "Albanian Terrorists in the Tetovo Region", dated August 2001. The report is cited three times. Rule 65*ter* document 662 is an MoI document entitled "Information on the weapons held by the self-styled NLA in the RM" dated 23 August 2001. The document is cited seven times.

members of an institution itself heavily involved in the events in FYROM in 2001, the Chamber is unable to accept this document as an accurate and unbiased account in the absence of independent confirmation in other evidence.

265. The Prosecution expert's report also cites a number of unsigned and undated documents, which are not attributed to a specific agency or institution.[1150] These documents have not been admitted into evidence. The Chamber cannot give weight to them or to statements in the report which are supported by such documents.

266. With these considerations in mind the Chamber has reviewed the evidence and has been able to reach the following conclusions.

267. In June 2001 the NLA had approximately 2,000 to 2,500 fighters[1151] with some non-military support (food, lodging, transport, etc.) being provided by another 1,000.[1152] By August 2001 the NLA had four functioning, though not fully manned, Brigades – the 112th, 113th, 114th, and 115th – and two (the 111th and 116th Brigades) still in the process of becoming operational.[1153] The 112th Brigade operated in the area of Tetovo, the 113th in the Kumanovo area, the 114th in the Skopje area, and the 115th in the Raduša area.[1154]

268. Ali Ahmeti was the leader of the NLA. Although the manner in which he assumed this position was not fully verified in evidence,[1155] members of the NLA regarded him as the leader,[1156] as did members of the international community, as indicated by the fact that communications to the

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[1149] Exhibit P464. The authors of the book are the former Chief of General Staff Dr Mitre Arsovski and his colleagues Colonel Kuzev and General Damjanovski. Viktor Bezruchenko, T 6545.

[1150] Rule 65*ter* document 741, providing detail regarding the 114th Brigade is cited 10 times. The document, which appears to be a segment of a larger document, has no title; is undated and unsigned. Rule 65*ter* document 702, titled "The National Liberation Army in FYROM," is cited nine times. The document is unsigned and undated. Rule 65*ter* documents 663 and 927 are undated, unsigned. Each document is cited once. Rule 65*ter* document 664 (undated and unsigned list of 113th Brigade members) is cites five times. Rule 65*ter* document 661 is titled "Intelligence Data on the Ismet Jashari 113th Brigade, Links with the Kosovo Defence Corps, and the Involvement in it of Mujahedins from the Republic of Macedonia, Kosovo, Bosnia and the Islamic States". The document is undated and unsigned. It is cited three times. Rule 65*ter* document 669 is an unsigned, unattributed table entitled "Part of the weapons used by the NLA." The document is cited once. Rule 65*ter* document 935 is an unsigned, unattributed document entitled "The connections between the so-called LNA (*sic*) in Macedonia and the LAPMB in Southern Serbia." The document is cited once. Rule 65*ter* document 934, an unsigned, unattributed article entitled "Information about the NMK fund 'The Fatherland is calling' in financing the KLA, LNA (*sic*) and NLPMB" is cited once.

[1151] Exhibit P493, p 3 (NATO UCK/NLA Handbook); Exhibit 1D260 (Jane's Defence Magazine); Exhibit 1D342, p 5 (MoI document). The Chamber does not accept the evidence of Gzim Ostreni and Nazim Bushi that there were between 5,000 and 6,000 NLA members at the height of the conflict. (Gzim Ostreni, Exhibit P497; para 2; Nazim Bushi, T 5928). The Chamber also does not accept Viktor Bezruchenko's evidence that the NLA numerical strength as of May was around 2000 people (Viktor Bezruchenko, T 7094-7095), nor the post-war estimates by FYROM security experts of 8,000 NLA members cited in his report. (Exhibit P466, p 11)

[1152] Exhibit P493, p 3.

[1153] Exhibits P493; 1D342, p 5; *see* also Exhibit P466, para 93; Viktor Bezruchenko, T 6067; Exhibit P321.

[1154] Exhibit P493, pp 3, 11, 21.

[1155] Gzim Ostreni, T 7525; 7807; Exhibit 2D101, para 279; Blagoja Markovski, T 10639-10640.

[1156] Gzim Ostreni, T 7525-7526; 7807; Nazim Bushi, T 5585.

397. The perpetrators carrying out the *actus reus* of the crimes set out in the indictment do not have to be members of the JCE. What matters in such cases is whether the crime in question forms part of the common purpose[1577] and whether at least one member of the JCE used the perpetrator acting in accordance with the common plan.[1578] In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that this person knows of the existence of the JCE, *i.e.* of the common purpose, may be a factor taken into consideration when determining whether the crime forms part of the common criminal purpose.[1579] When the direct perpetrator commits a crime beyond the common purpose of the JCE, but which is its natural and foreseeable consequence[1580] the accused may be found responsible if he participated in the common criminal purpose with the requisite intent and if, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.[1581]

(b) Planning

398. The *actus reus* of "planning" requires that one or more persons plan or design, at both the preparatory and execution phases, the criminal conduct constituting one or more crimes, provided for in the Statute, which are later perpetrated.[1582] Such planning need only be a feature which contributes substantially to the criminal conduct.[1583] As regards the *mens rea*, the accused must have acted with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan.[1584]

(c) Instigating

399. The term "instigating" has been defined to mean "prompting another to commit an offence."[1585] Both acts and omissions may constitute instigating, which covers express and implied

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1577 *Brđanin* Appeals Judgement, paras 410, 418.
1578 *Brđanin* Appeals Judgement, paras 413, 430.
1579 *Brđanin* Appeals Judgement, para 410.
1580 *Brđanin* Appeals Judgement, paras 413, 431.
1581 *Brđanin* Appeals Judgement, para 411.
1582 *Brđanin* Trial Judgement, para 268; *Krstić* Trial Judgement, para 601; *Stakić* Trial Judgement, para 443; *Kordić* Appeals Judgement, para 26, citing *Kordić* Trial Judgement, para 386.
1583 *Kordić* Appeals Judgement, para 26; *Limaj* Trial Judgement, para 513.
1584 *Kordić* Appeals Judgement, para 31.
1585 *Krstić* Trial Judgement, para 601; *Akayesu* Trial Judgement, para 482; *Blaškić* Trial Judgement, para 280; *Kordić* Appeals Judgement, para 27; *Kordić* Trial Judgement, para 387; *Limaj* Trial Judgement, para 514.

not established that the police responsible for this cruel treatment then intended his death, nor did they act realising that his death was a probable consequence of their actions. It was different police, not under the authority or direction of Johan Tarčulovski, who further mistreated Atulla Qaili later at Mirkovci police station and whose conduct constitutes his murder, as set out earlier in this Judgement. It has not been established that Johan Tarčulovski is criminally responsible for their actions in murdering Atulla Qaili.

576. The circumstances that have been discussed and, in particular, the presence of Johan Tarčulovski as the leader of the police when the acts of murder, cruel treatment and wanton destruction were committed during the operation demonstrates, in the Chamber's finding, that acts of murder, cruel treatment and wanton destruction were intended by Johan Tarčulovski at the times relevant respectively to ordering, planning and instigating, or, alternatively, that the commission of crimes of this nature were foreseen, at these times, to be a substantial likelihood of the execution of the operation.

577. The elements necessary to constitute ordering, planning and instigating, for the purposes of Article 7(1) of the Statute have been set out earlier in this Judgement.[2052] Having regard to the matters discussed above, the Chamber finds that it has been established that the Accused Johan Tarčulovski is criminally responsible for ordering, planning and instigating some of the offences charged against him in the Indictment. These offences are:

- the murder of Rami Jusufi, Sulejman Bajrami and Muharem Ramadani;

- the wanton destruction of the houses or other property of Alim Duraki, Agim Jusufi, Qenan Jusufi, Sabit Jusufi, Xhevxhet Jusufovski, Abdullah Luftiu, Harun Rexhepi (Redžepi), Ismet Rexhepi (Rexhepovski), Nazim Murtezani, Qani Jashari, Afet Jashari and Ramush Jashari;

- the cruel treatment at Adem Ametovski's house of M012, Hamdi Ahmedovski, Adem Ametovski, Aziz Bajrami, M017, Nevaip Bajrami, Vehbi Bajrami, Atulla Qaili, Beqir Ramadani, Ismail Ramadani, Muharem Ramadani, Osman Ramadani, and Sulejman Bajrami and at Braca's house of M012, Hamdi Ahmedovski, Adem Ametovski, M017, Nevaip Bajrami, Vehbi Bajrami, Atulla Qaili, Beqir Ramadani, Ismail Ramadani, and Osman Ramadani.

The Accused will be convicted of these offences pursuant to Article 7(1) of the Statute.

[2052] In addition to those elements which were discussed in this section, the Chamber is also satisfied that the actions taken by Johan Tarčulovski at both the preparatory and execution phases of the operation to enter the village of Ljuboten contributed substantially to the commission of the crimes with which he is charged and which have been proved.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-99-36-A
		Date:	3 April 2007
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Christine Van Den Wyngaert

Registrar: **Mr. Hans Holthuis**

Judgement of: **3 April 2007**

PROSECUTOR

v.

RADOSLAV BRĐANIN

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Helen Brady
Ms. Kristina Carey
Ms. Katharina Margetts

Counsel for the Accused:

Mr. John Ackerman

findings in the Trial Judgement related to certain specific acts on which his conviction for torture is based (Alleged Errors 87-90), and he denies that he is responsible for having aided and abetted that crime (Alleged Errors 91, 93-94; 95-100).[465]

(b) Severity of pain inflicted

244. Br|anin submits that the Trial Chamber erred in law in its determination of what acts constitute torture. Br|anin asserts that current customary international law on the amount of harm that must have been caused by the act "is best exemplified by a pronouncement from the Office of Legal Counsel of the United States Justice Department."[466] He then quotes this "pronouncement", which is in fact a memorandum to the Counsel to the President of the United States ("Bybee Memorandum"), for the proposition that:

> [F]or an act to constitute torture ... it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.[467]

Asserting that the Trial Chamber erred by failing to apply this newly recognized standard, Br|anin asks that "all alleged acts of torture in this case should be reviewed in light of it."[468]

245. The Prosecution responds that Br|anin's argument is misleading and defective,[469] and points out that the above-mentioned memorandum is Br|anin's sole support for his assertion of customary international law.[470] The Prosecution also observes that Br|anin "makes no submissions on the customary international law-requirements of general state practice and *opinio juris*".[471] Additionally, the Prosecution notes that a second memorandum from the U.S. Office of Legal

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torture is an error of law (Brđanin Appeal Brief, para. 307). This assertion is inapposite, since the Trial Chamber found that executing some Bosnian Muslim non-combatants while forcing others to watch "was aimed at intimidating the victims", and not that this conduct "constituted torture", as Brđanin erroneously asserts. Alleged Error 150 is therefore dismissed as unfounded. In Alleged Error 151, Brđanin submits that the Trial Chamber's finding (Trial Judgement, para. 211) that forcing people to collect dead bodies constitutes torture is an error of law (Brđanin Appeal Brief, para. 307). The Appeals Chamber finds that, in this case, Brđanin mischaracterises the finding – which was a factual one, since the Trial Chamber stated that coercing Bosnian Muslim non-combatants in the Brđo area and the Ljubija football stadium in July 1992, as well as at Trnopolje between May and October 1992, "could not but cause severe pain and suffering." This alleged error is therefore also dismissed as unfounded.

[465] Brđanin Appeal Brief, paras 255-262, 265-268, 280.

[466] Br|anin Appeal Brief, paras 255-256.

[467] Br|anin Appeal Brief, para. 256. The only citation provided for the block quote on paragraph 256 of the Appellant's Brief is "Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib,* Harper Collins, New York, 2004, p. 4-5." *See* Br|anin Appeal Brief, fn. 227. The quoted text is originally from: Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dept of Justice, to Alberto R. Gonzales, Counsel to the President, 1 August 2002, p. 1, available at: http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf.

[468] Br|anin Appeal Brief, para. 257.

[469] Prosecution Response Brief, para. 7.38.

[470] Prosecution Response Brief, para. 7.34.

[471] Prosecution Response Brief, para. 7.37.

Counsel ("Levin Memorandum") "takes back the very passage relied upon by Br|anin".[472] Br|anin makes no submissions in reply.

246. The Appeals Chamber has previously explained that the definition of the crime of torture, as set out in the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment ("Convention against Torture") "may be considered to reflect customary international law."[473] Accordingly, the Appeals Chamber has drawn verbatim from the Convention against Torture when explaining the amount of harm an act must cause in order to constitute torture: it must cause "severe pain or suffering, whether physical or mental".[474] By examining if the acts charged in the indictment as torture caused "severe pain or suffering, whether physical or mental" – and not if they caused some greater amount of pain or suffering – the Trial Chamber was not only applying clear Appeals Chamber jurisprudence, it was also properly determining whether a conviction would be consistent with customary international law. In the discussion that follows, the Appeals Chamber will focus on developments relating to the law of torture after the indictment period, considering whether the definition of torture has, as suggested by Brđanin, changed to his benefit. Therefore, this discussion should not be in any way construed as an application of *ex post facto* law that could be prejudicial to Brđanin.

247. To support his argument that the requisite amount of harm has increased, Br|anin cites only the 2002 Bybee Memorandum[475] – a memorandum in which the U.S. Department of Justice interpreted the criminal prohibition on torture found in U.S. federal law.[476] Yet even if the U.S. executive branch determined that, for an act causing physical pain or suffering to amount to torture, it must "inflict pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death",[477] this would not suffice to make pain of such intensity a requirement for conviction under customary international law. No matter how powerful or influential a country is, its practice does not automatically become customary international law.[478]

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[472] Prosecution Response Brief, para. 7.36 (citing Memorandum Opinion for the Deputy Attorney General, 30 December 2004). The text of this memorandum may be found at http://www.usdoj.gov/olc/18usc23402340a2.htm.
[473] *Kunarac et al.* Appeal Judgement, para. 146 (citing *Furund'ija* Appeal Judgement, para. 111).
[474] *See Furund'ija* Appeal Judgement, para. 111; Convention against Torture, Article 1(1).
[475] Br|anin Appeal Brief, paras 255-257.
[476] 18 U.S.C. § 2340.
[477] Bybee Memorandum, p. 1.
[478] *See*, for example, *Tadić* Appeal Decision on Jurisdiction, para. 83. In that decision, the Appeals Chamber considered a proposed interpretation of Article 2 of the Statute and held that: "seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were

248. Not only does Br|anin merely cite one memorandum for the proposition that there is a new customary international law standard for the amount of harm required for a torture conviction: he cites a memorandum that was withdrawn.[479] The Levin memorandum, which superseded the Bybee memorandum,[480] did not endorse the view that physical torture consists only of those acts that "inflict pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[481] To the contrary, the Levin memorandum suggested that the criminal prohibition on torture found in U.S. federal law was not intended "to reach only conduct involving excruciating and agonizing pain or suffering."[482] Moreover, this memorandum concluded that the criminal prohibition on torture found in U.S. law covers some acts that cause severe physical suffering even if the acts do not also cause severe physical pain.[483]

249. The Convention against Torture's requirement of "severe" pain or suffering was not itself meant to require "pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death". Indeed, during negotiations over the text of the Convention against Torture, the United Kingdom (seeking to make the definition of torture more restrictive) proposed that the infliction of "extreme pain or suffering" should be required.[484] This wording was rejected.[485] Hence, the Convention against Torture's drafting history makes clear that "severe pain or suffering" is not synonymous with "extreme pain or suffering", and that the latter is a more intense level of pain and suffering – one that might come closer to "pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" – not required by the Convention against Torture. As the Convention against Torture is recognized to be declarative of customary international law on torture,[486] it is therefore clear that, under customary international law, physical torture can include acts inflicting physical pain or suffering less severe than "extreme pain or

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other States and international bodies to come to share this view, a change in customary law concerning the scope of the 'grave breaches' system might gradually materialize."

[479] Levin Memorandum, p. 1 (formally withdrawing the Bybee Memorandum).

[480] *See* Levin Memorandum.

[481] Bybee Memorandum, p. 1.

[482] Levin Memorandum, p. 5 (internal quotation marks omitted).

[483] Levin Memorandum, p. 6.

[484] J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988) ("CAT Handbook"), p. 45.

[485] CAT Handbook, p. 117.

[486] *Kunarac et al.* Appeal Judgement, para. 146; *Furund`ija* Appeal Judgement, para. 111; CAT Handbook, p. 1 (noting that the Convention against Torture does not outlaw new practices, but instead describes practices "already outlawed under international law" and seeks "to strengthen the existing prohibition of such practices by a number of supportive measures").

suffering" or "pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death".

250. Article 3 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") declares that torture is prohibited, without defining it. Nonetheless, cases decided by the European Court of Human Rights ("ECtHR") applying the ECHR have shed light on the degree of harm that Court considers is required for an act to amount to torture.[487] In a decision the ECtHR observed that "what might have been inhumane treatment in the past is now seen as torture in the light of the increasingly higher standard of human rights protections."[488] ECtHR's more recent judgements, moreover, have endorsed the definition of torture contained in the Convention against Torture.[489] This Court's approach thus confirms that no more than "severe" pain or suffering is required under customary international law.

251. The amount of harm required under customary international law for an act to constitute torture has not increased since 2000, when the Appeals Chamber endorsed the above-mentioned standards in *Furundžija*.[490] Acts inflicting physical pain may amount to torture even when they do not cause pain of the type accompanying serious injury. An act may give rise to a conviction for torture when it inflicts severe pain or suffering. Whether it does so is a fact-specific inquiry. As the Appeals Chamber explained in the *Naletilić and Martinović* Appeal Judgement:

> torture is constituted by an act or an omission giving rise to severe pain or suffering, whether physical or mental, but there are no more specific requirements which allow an exhaustive classification and enumeration of acts which may constitute torture. Existing case-law has not determined the absolute degree of pain required for an act to amount to torture. Thus, while the suffering inflicted by some acts may be so obvious that the acts amount *per se* to torture, in general allegations of torture must be considered on a case-by-case basis so as to determine whether, in light of the acts committed and their context, severe physical or mental pain or suffering was inflicted.[491]

252. Thus, in assessing whether the harm caused by the acts charged suffices to support a torture conviction, the Trial Chamber applied principles that the Appeals Chamber has endorsed and that reflect customary international law. Br|anin has failed to demonstrate that the Trial Chamber made an error of law which invalidated the decision.

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[487] *See*, among others, *Aydın v. Turkey*, Judgement of 25 September 1997, *Reports of Judgments and Decisions* 1997-VI, para. 82. For examples of acts constituting torture, *see also* Report of the Special Rapporteur Kooijmans, UN Doc. Res. 1985/33, E/CN.4/1986/15, 19 February 1986, para. 119.
[488] *Selmouni v. France* [GC], no. 25803/94, para. 101, ECHR 1999-V.
[489] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press 2002), p. 51, fn. 23 pointing to *Ilhan v. Turkey* [GC], no. 22277/93, para. 85, ECHR 2000-VII; *Salman v. Turkey* [GC], no. 21986/93, para. 114, ECHR 2000-VII and *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, para. 115, ECHR 2000-X.
[490] *Furund`ija* Appeal Judgement, para. 111.
[491] *Naletilić and Martinović* Appeal Judgement, para. 299 (footnotes and punctuation omitted).

272. The Trial Judgement findings related to the responsibility of Brđanin for the crimes in the camps can be found in paragraph 537 of the Trial Judgement (footnote omitted):

> There is also ample evidence that throughout the entire period when the Accused was President of the ARK Crisis Staff, not only did the Accused not take a stand either in public or at the meetings of the ARK Crisis Staff but that he adopted a *laissez-faire* attitude. Although the Accused did not actively assist in the commission of any of the crimes committed in these camps and detention facilities, in the light of his position as the President of the ARK Crisis Staff, the Trial Chamber is satisfied beyond reasonable doubt that his inactivity as well as his public attitude with respect to the camps and detention facilities constituted encouragement and moral support to the members of the army and the police to continue running these camps and detention facilities in the way described to the Trial Chamber throughout the trial. This complete inactivity combined with the public attitude on the part of the Accused could only serve the purpose of leaving no doubt in the mind of those running the camps and detention facilities that they enjoyed the full support of the ARK Crisis Staff and its President. The Trial Chamber is satisfied that this fact had a substantial effect on the commission of torture in the camps and detention facilities throughout the ARK.

It is not entirely clear to which mode of responsibility the Trial Chamber refers in this paragraph. Two interpretations of the Trial Chamber's position are possible.

273. The Trial Chamber might have intended to apply in this case the theory of aiding and abetting by tacit approval and encouragement. An accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.[551] This form of aiding and abetting is not, strictly speaking, criminal responsibility for omission.[552] In the cases where this category was applied, the accused held a position of authority, he was physically present on the scene of the crime, and his non-intervention was seen as tacit approval and encouragement.[553] The Trial Chamber in *Kayishema and Ruzindana* held that "individual responsibility pursuant to Article 6(1) [that is, individual criminal responsibility under 7(1) of the Tribunal's Statute] is based, in this instance, not on a duty to act, but from the encouragement and support that might be afforded to the principals of the crime from such an omission."[554] In such cases the combination of a position of authority and physical presence on the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement.[555]

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[551] *Aleksovski* Trial Judgement, para. 87; *Kayishema and Ruzindana* Appeal Judgement, paras 201-202; *Akayesu* Trial Judgement, para. 706.
[552] *Ntagerura et al.* Appeal Judgement, para. 338 (for the parallel provision in Article 6(1) of the ICTR Statute).
[553] *Aleksovski* Trial Judgement, para. 87; *Kayishema and Ruzindana* Appeal Judgement, paras 201-202; *Akayesu* Trial Judgement, para. 706. *See also Furundžija* Trial Judgement, paras 205-207, discussing the *Synagogue* case.
[554] *Kayishema and Ruzindana* Trial Judgement, para. 202, upheld by *Kayishema and Ruzindana* Appeal Judgement, paras 201-202.
[555] *Kayishema and Ruzindana* Trial Judgement, para. 200, referring to the discussion of the *Synagogue* case in the *Furundžija* Trial Judgement, para. 207.

encouragement or moral support for the camp personnel (*actus reus*), which had a substantial effect on the commission of torture.

(ii) Encouragement or moral support

277. It is recognized in the jurisprudence of the Tribunal that "encouragement" and "moral support" are two forms of conduct which may lead to criminal responsibility for aiding and abetting a crime.[561] As recalled above, the encouragement or support need not be explicit; under certain circumstances, even the act of being present on the crime scene (or in its vicinity) as a "silent spectator" can be construed as the tacit approval or encouragement of the crime.[562] In any case, the contribution to the crime of this encouragement or moral support must always be substantial.[563] As the *Furundžija* Trial Chamber put it, "[w]hile any spectator can be said to be encouraging a spectacle – an audience being a necessary element of a spectacle – the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals".[564] In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it.[565] It follows that encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it.[566] Accordingly, the Appeals Chamber finds that, in this case, encouragement and moral support could only have had a substantial effect if the camp personnel

[560] AT. 8 December 2006, pp. 160-161.
[561] *Tadi}* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, para. 162; *Vasiljević* Appeal Judgement, para. 102; *Bla{ki}* Appeal Judgement, para. 48; *Kvočka et al.* Appeal Judgement, para. 89; *Simi}* Appeal Judgement, para. 85.
[562] *Aleksovski* Trial Judgement, para. 87; *Kayishema and Ruzindana* Appeal Judgement, paras 201-202; *Akayesu* Trial Judgement, para. 706; *Bagilishema* Trial Judgement, para. 36; *see also Furundžija* Trial Judgement, para. 207, discussing the *Synagogue* case.
[563] *Tadi}* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, para. 162; *Furundžija* Trial Judgement, para. 234.
[564] *Furundžija* Trial Judgement, para. 232.
[565] *Kayishema and Ruzindana* Appeal Judgement, para. 201; *Akayesu* Trial Judgement, paras 706-707; *Furundžija* Trial Judgement, paras 207-209; *Aleksovski* Trial Judgement, para. 88; *Bagilishema* Trial Judgement, para. 36; *Ndindabahizi* Trial Judgement, para. 457.
[566] In *Simi}*, the Appeals Chamber found with regard to Simi}'s alleged tacit encouragement of beatings in detention centres: "[t]he Appeals Chamber emphasises that the Trial Chamber's findings do not allow for a clear inference as to how the Appellant's conduct was construed by the principal perpetrators committing the beatings, or as to what effect his conduct may have had on their acts." *Simi}* Appeal Judgement, para. 130. *See also Bagilishema* Trial Judgement, para. 36; *Semanza* Trial Judgement, para. 389; *Ntagerura et al.* Appeal Judgement, para. 374.

committing torture were aware that Brđanin made encouraging and supporting statements or encouraged and supported through his inaction.[567]

278. The Trial Chamber's examination of Br|anin's responsibility for torture in camps and detention facilities refers to no evidence indicating that the personnel running the camps and detention facilities were encouraged to commit torture by Br|anin's inactivity or public attitude, and the Prosecution does not contest this point.[568] Rather, the Prosecution contends in essence that it was reasonable for the Trial Chamber to infer, from circumstantial evidence, that Br|anin's failure to intervene, together with his public attitude, had the effect of encouraging camp and detention facilities personnel to commit acts of torture.

279. The Trial Chamber also refers to no evidence showing that camp and detention facilities personnel were even aware of Br|anin's public attitude towards the camps and facilities, or that personnel believed that Br|anin supported (albeit passively) the torture of detainees.[569] Again, the Prosecution considers that this finding can reasonably be inferred.

280. The Appeals Chamber agrees that the awareness of the perpetrators can be inferred from the facts of the case. However, this must be the only reasonable inference from the evidence.

281. The evidence the Trial Chamber did consider included two statements by Brđanin. The first statement – that "[i]f Hitler, Stalin and Churchill could have working camps so can we" could have alerted the personnel running the camps to Br|anin's support for the camps, assuming the statement was actually heard by camp personnel.[570] Yet, even under this assumption,[571] it does not necessarily follow that such a statement would have been interpreted as a signal of acquiescence to the torture of detainees. It might alternatively have been taken as a signal of acquiescence to the maintenance of the camps and detention facilities.

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[567] The Appeals Chamber notes that the Trial Chamber speaks of encouragement and moral support given to the persons running the camps and detention facilities (Trial Judgement, para. 537), and not to those actually committing the crime of torture. The Appeals Chamber understands that the Trial Chamber also meant to say that Brđanin's statements provided encouragement and moral support to the perpetrators committing the crime of torture.

[568] The Prosecution concedes that it did not present direct evidence from the people running the camps in the ARK to show that they were encouraged by Br|anin's lack of intervention or his public attitude. (Prosecution Response Brief, para. 6.264.) In its Response Brief, moreover, the Prosecution identifies no other evidence showing that people running camps and detention facilities were encouraged by this "lack of intervention" or this public attitude.

[569] *See* Trial Judgement, paras 536-538.

[570] *See* Prosecution Response Brief, para. 6.267.

[571] Br|anin suggests that the statement, which the Trial Chamber found he made in August 1992 (*see* Trial Judgement, para. 536, fn. 1368), could not have been heard by camp personnel since, according to him, it was made after "the offending camps had already been closed" (Br|anin Appeal Brief, para. 278). The Trial Chamber, however, found that "FTğrnopolje camp was officially closed down at the end of September 1992, but some of the detainees stayed there longer" (Trial Judgement, para. 450). The Trial Chamber also found Br|anin guilty for acts of torture committed there between May and October of 1992 (*see* Trial Judgement, paras 510, 513-514).

2. Principal perpetrator as a member of the JCE

(a) Post-World War II jurisprudence

393. In their respective submissions the parties discuss the import of two Control Council Law No. 10 cases, the *Justice* and *RuSHA* cases.[841] For the reasons that follow, the Appeals Chamber finds that, although these two cases do not use the expression "joint criminal enterprise", the discussion of several of the accused in these judgements is particularly apposite for the purpose of analysing the issues raised by the Grounds 1 and 2.

394. The Appeals Chamber finds that these cases provide strong support for the Prosecution's contention that post-World War II jurisprudence: (1) recognizes the imposition of liability upon an accused for his participation in a common criminal purpose, where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose; and (2) does not require proof that there was an understanding or an agreement to commit that particular crime between the accused and the principal perpetrator of the crime.

395. Under Control Council Law No. 10, both the principal perpetrator and a person "connected with plans or enterprises involving" the commission of a crime were considered to have "committed" that crime.[842]

396. In the *Justice* case, the indictment alleged that the "German criminal laws, through a series of expansions and perversions by the Ministry of Justice, finally embraced passive defeatism, petty misdemeanors and trivial private utterances as treasonable for the purpose of exterminating Jews or other nationals of the occupied countries. Indictments, trials and convictions were transparent devices for a system of murderous extermination, and death became the routine penalty ... Non-German nationals were convicted of and executed for 'high treason' allegedly committed against

[841] The Appeals Chamber notes that the ICTR Appeals Chamber relied *inter alia* on these same sources to conclude that, as of 1992, customary international law permitted the imposition of criminal liability on a participant in a common plan to commit genocide. *See Rwamakuba* Appeal Decision, paras 14-31, in particular para. 24, according to which "post-World War II materials do not always fit neatly into the so-called 'three categories' of joint criminal enterprise discussed in *Tadić*, in part because the tribunals' judgements did not always dwell on the legal concepts of criminal responsibility, but simply concluded that, based on the evidence, the accused were 'connected with,' 'concerned in,' 'inculpated in,' or 'implicated in' war crimes and crimes against humanity". This ICTR Appeals Chamber decision cites, *inter alia*: *Justice* Judgement, pp. 1093 ("connected with the commission" of an offence), 1094 ("connected to some extent" with persecution), 1099 ("knowingly was connected" with an offence), 1120 (concluding that the evidence established the "connection of the defendant" to an illegal procedure), 1128 (stating that the Accused Lautz was "criminally implicated" in enforcing the law against Poles and Jews); *RuSHA* Judgement, p. 108 (stating that two Accused "are inculpated in crimes connected with the kidnapping of foreign children").

[842] *See* Control Council Law No. 10, art. II(2), in *Official Gazette of the Control Council for Germany* (1946), vol. 3, p. 50, according to which "[a]ny person ... is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission."

the Reich. The above-described proceedings resulted in the murder, torture, unlawful imprisonment, and ill-treatment of thousands of persons."[843] It also alleged that "German criminal laws through a series of additions, expansions, and perversions by the defendants became a powerful weapon for the subjugation of the German people and for the extermination of certain nationals of the occupied countries. This program resulted in the murder, torture, illegal imprisonment, and ill-treatment of thousands of Germans and nationals of occupied countries."[844] Lautz, Chief Public Prosecutor of the People's Court, Rothaug, former Chief Justice of the Special Court in Nuremberg, and others were charged with responsibility for, and participation in, these crimes.[845]

397. The United States Military Tribunal stated that, pursuant to Article II(2) of Control Council Law No. 10, the prosecution had to show the following for an accused connected with a criminal plan or enterprise to be found liable:

> The material facts which must be proved in any case are (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law.[846]

It further required that the accused have "knowledge of an offense charged in the indictment and established by the evidence" and "consciously participated in the plan or took a consenting part therein."[847]

398. The Appeals Chamber has considered in particular Judge Bonomy's Separate Opinion in the case *Prosecutor v. Milutinović et al.*[848] and has found his discussion of the *Justice* case to be instructive:

> 18. The Military Tribunal found that the Prosecution had proved the existence of a "pattern and plan of racial [persecution]" to enforce the criminal laws against Poles and Jews.[849] After determining that the accused Lautz, the Chief Public Prosecutor of the People's Court, knew of this plan,[850] the Tribunal found that he had authorised indictments charging a number of Poles with high treason for "leaving their places of work and attempting to escape Germany by crossing the border into Switzerland".[851] The Poles were ultimately sentenced to death and executed. On the basis of this evidence, the Military Tribunal concluded that Lautz had consciously participated in the national plan of racial discrimination "by means of the perversion of the law of high treason",[852]

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[843] *Justice* Judgement, Indictment, para. 11.
[844] *Justice* Judgement, Indictment, para. 23.
[845] *Justice* Judgement, Indictment, paras 11 and 23.
[846] *Justice* Judgement, p. 1063.
[847] *Justice* Judgement, pp. 1081, 1093.
[848] Separate Opinion of Judge Iain Bonomy, *Milutinović et al.* Decision on Ojdanić's Motion Challenging Jurisdiction, in particular paras 18-22.
[849] (Fn. 36 in the original) *Justice* Judgement, [p. 1081].
[850] (Fn. 37 in the original) *Ibid.*, [pp. 1118-1128].
[851] (Fn. 38 in the original) *Ibid.*, [pp. 1120-1121].
[852] (Fn. 39 in the original) *Ibid.*, [p. 1123].

and accordingly convicted him of war crimes and crimes against humanity.[853] The Tribunal concluded in relation to his responsibility:

> We have cited a few cases which are typical of the activities of the Prosecution before the People's Court in innumerable cases. The captured documents which are in evidence establish that the defendant Lautz was criminally implicated in enforcing the law against Poles and Jews which were deemed to be a part of the established governmental plan for the extermination of those races. He was an accessory to, and took a consenting part in, the crime of genocide.[854]

19. In similar fashion the Military Tribunal found that Rothaug, the former Chief Justice of the Special Court in Nuremberg, knew of the plan of racial discrimination.[855] The Tribunal convicted Rothaug of crimes against humanity for his role in convicting and sentencing to death three Poles and a Jew "in conformity with the policy of the Nazi State of persecution, torture, and extermination of [the Jewish and Polish] races."[856] The Tribunal opined that Rothaug had consciously participated in the plan in the following terms:

> The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national program of racial persecution. It is of the essence of the proof that he identified himself with this national program and gave himself utterly to its accomplishment. He participated in the crime of genocide.[857]

20. The Military Tribunal appears to have imposed criminal responsibility on both accused for their participation in the common criminal plan although they did not perpetrate the *actus reus* of the crimes of which they were convicted; the *actus reus* was instead perpetrated by executioners simply carrying out the orders of the court. Nowhere did the Tribunal discuss the mental state of the executioners who carried out the death sentences imposed as a result of the actions of Lautz, Rothaug, and their fellow participants in the common plan, or whether such persons even had knowledge that the death sentences formed part of a plan to pervert the law for the purpose of exterminating Jews and other "undesirables".

399. The second case of relevance is the *RuSHA* case. Once again, the Appeals Chamber refers to Judge Bonomy's apt description and analysis of this case:

> 21. In the *RuSHA* case, the United States Military Tribunal approached the question of the criminal responsibility of the accused Hofmann and Hildebrandt in a similar way [to the *Justice* case]. Several officials of the SS Race and Resettlement Main Office (known by the German acronym "RuSHA") were charged, along with other Nazi leaders, with war crimes and crimes against humanity brought about by means of murder, extermination, enslavement, deportation, imprisonment, torture, and persecutions. Hofmann was the Chief of RuSHA from July 1940 until April 1943. Hildebrandt was Higher SS and Police Leader at Danzig-West Prussia from October 1939 to February 1943, and at the same time Leader of the Administration District Danzig-West Prussia of the Allgemeine SS; thereafter, from 20 April 1943 to the end of the war, he was Chief of RuSHA. The indictment alleged the following common plan—known as the "Germanisation" plan—and steps taken to carry it through:

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[853] (Fn. 40 in the original) *Ibid.*, p. [1128].
[854] (Fn. 41 in the original) *Ibid.*, p. [1128].
[855] (Fn. 42 in the original) *Ibid.*, [pp. 1155-1156].
[856] (Fn. 43 in the original) *Ibid.*, p. 1155.
[857] (Fn. 44 in the original) *Ibid.*, p. 1156.

> The acts, conduct, plans and enterprises charged ... were carried out as part of a systematic Program of genocide, aimed at the destruction of foreign nationals and ethnic groups, ... in part by elimination and suppression of national characteristics. The object of this program was to strengthen the German nation and the so-called "Aryan" race at the expense of such other nations and groups by imposing Nazi and German characteristics upon individuals selected therefrom ... and by the elimination of "undesirable" racial elements. This program was carried out in part by (a) Kidnaping [*sic*] the children of foreign nationals in order to select for Germanization those who were considered of "racial value"; (b) Encouraging and compelling abortions on Eastern workers for the purposes of preserving their working capacity as slave labor and of weakening Eastern nations; (c) Taking away, for the purpose of extermination or Germanization, infants born to Eastern workers in Germany; (d) Executing, imprisoning in concentration camps, or Germanizing Eastern workers and prisoners of war who had had sexual intercourse with Germans, and imprisoning the Germans involved; (e) Preventing marriages and hampering reproduction of enemy nationals; ... and (i) Participating in the persecution and extermination of Jews.[858]

22. The Military Tribunal found that the Prosecution had established that there existed among Hitler, Himmler—the leader of the SS—and other Nazi officials a "two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations."[859] It found additionally that the leadership of RuSHA—and particularly the accused Hofmann and Hildebrandt—adhered to and enthusiastically participated in the execution of this "Germanisation" plan by effecting, through RuSHA agents, abortions on foreigners impregnated by Germans, punishment for sexual intercourse between Germans and non-Germans, the slave labour of Poles and other Easterners, the persecution of Jews and Poles, and the kidnapping of foreign children.[860] In response to contentions by the accused that they did not themselves physically perpetrate any crimes, the Tribunal held that

> [i]t is no defense for a defendant to insist, for instance, that he never evacuated populations when orders exist, signed by him, in which he directed that the evacuation should take place. While in such a case the defendant might not have actually carried out the physical evacuation in the sense that he did not personally evacuate the population, he nevertheless is responsible for the action, and his participation by instigating the action is more pronounced than that of those who actually performed the deed.[861]

400. The Appeals Chamber also notes that the Military Tribunal found that Hofmann and Hildebrandt formulated plans of action with respect to the kidnapping programme in response to decrees and memoranda issued by Himmler. In accordance with these plans of action, RuSHA

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[858] (Fn. 45 in the original) *United States v. Greifelt, Creutz, Meyer-Hetling, Schwarzenberger, Huebner, Lorenz, Brueckner, Hofmann, Hildebrandt, Schwalm, Sollmann, Ebner, Tesch, and Viermetz*, U.S. Military Tribunal, Judgement, 10 March 1948 ("*RuSHA* Judgement"), in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (1951), [Volumes IV and V], Indictment, para. 2 (alleging crimes against humanity). *See also ibid.*, Indictment, para. 24 (re-incorporating crimes against humanity provisions for purposes of allegations of war crimes).

[859] (Fn. 46 in the original) *See ibid.*, p. 90. *See also ibid.*, p. 96 (finding that "in the very beginning the Germanization program envisioned certain drastic and oppressive measures, among them: ... the separation of family groups and the kidnapping of children for the purpose of training them in Nazi ideology; ... the destruction of the economic and cultural life of the Polish population; and the hampering of the reproduction of the Polish population.").

[860] (Fn. 47 in the original) *Ibid.*, pp. 101, 160–161.

[861] (Fn. 48 in the original) *Ibid.*, p. 153.

racial examiners determined which Polish children had sufficiently "good" racial characteristics to be "Germanized"; these children were then wrested from their families and sent to Germany to be placed in special institutions.[862] In the words of the Military Tribunal, "[t]hese examiners were working directly at different intervals under the control and supervision of Hofmann and Hildebrandt respectively, who had knowledge of their activities".[863] Based on their participation in the kidnapping programme and their knowledge of the deeds of the RuSHA examiners acting at their direction, the Military Tribunal concluded that Hofmann and Hildebrand bore "full responsibility" for the kidnappings.[864] No mention is made of the examiners' state of mind, or whether they adhered to or were even aware of the broader Germanization plan pursuant to which their conduct occurred, or whether an agreement existed between Hofmann, Hildebrandt, and any of the examiners.

401. Similarly, with respect to the abortions programme, the Military Tribunal found that RuSHA officials, including the accused Hofmann and Hildebrandt, had participated in that programme, and that Hofmann and Hildebrandt had issued directives detailing how it was to be put into effect.[865] The Military Tribunal summarized RuSHA's role in the following terms:

> The role played by RuSHA was principally in conducting racial examinations of the pregnant worker as well as the suspected father to determine whether a racially inferior or satisfactory child might be expected; and upon the basis of this examination it was determined whether an abortion should or could be performed—orders being to the effect that no abortion could be performed where a child of good racial characteristics might be expected, and that an abortion should be performed where such a child was improbable.[866]

On the basis of their participation in the programme and their knowledge of the conduct of the RuSHA racial examiners, the Military Tribunal concluded that Hofmann and Hildebrand were responsible for the forcible abortions.[867] Here again, however, the Tribunal did not discuss the examiners' state of mind, or whether they adhered to, or knew of, the broader Germanization plan, or whether an agreement existed between Hofmann, Hildebrandt and any of the racial examiners.[868]

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[862] *RuSHA* Judgement, pp. 102, 106.
[863] *RuSHA* Judgement, p. 106.
[864] *RuSHA* Judgement, pp. 106, 160-161. *See also* Separate Opinion of Judge Iain Bonomy, *Milutinović et al.* Decision on Ojdanić's Motion Challenging Jurisdiction, para. 24.
[865] *RuSHA* Judgement, pp. 110-111.
[866] *RuSHA* Judgement, p. 110.
[867] *RuSHA* Judgement, pp. 111-112, 160-161. In a secret memorandum, Hildebrandt described the ultimate objective of the abortions programme: "to ... further all valuable racial strains for the strengthening of our people, and to accomplish a complete elimination of everything racially inferior" (quoted text at pp. 111-112).
[868] The evidence with respect to the abortion programme included the decree issued by Himmler in March 1943 based on which the policy of abortions on Eastern workers began. This decree even provided that "[t]he Russian physicians or the Russian Medical Association, which must not be informed of this order, are to be told in individual cases that the pregnancy is being interrupted for reasons of social distress. It must be explained in such a way that no conclusions to the existence of a definite order may be drawn." (*RuSHA* Judgement, p. 109).

402. The Military Tribunal thus concluded that, "[j]udged by any standard of proof, the record in this case clearly establishes crimes against humanity and war crimes, substantially as alleged in the indictment".[869] It found that "[t]he evidence establishes beyond any reasonable doubt [the accused's] guilt and criminal responsibility for the ... criminal activities", including the kidnapping of children, forcible abortions, child-stealing, punishment for sexual intercourse with Germans, and the hampering of enemy nationals' reproduction.[870]

403. The Appeals Chamber notes that it is clear from the Military Tribunal's discussion of the various aspects of the Germanization plan that Hofmann and Hildebrandt, as the leaders of RuSHA, worked closely and interactively with Himmler, Kaltenbrunner, and other high SS officials in planning the details of how the plan was to be executed, especially with respect to the abortions and abduction programmes. On the basis of their active participation in this plan and their knowledge of the activities carried out pursuant to it, both accused were held responsible for the conduct of the RuSHA agents who carried out the crimes, without any discussion of whether the principal perpetrators had knowledge that their actions formed part of the Germanization plan, or of whether an agreement existed between the accused and these agents.

404. Both the *Justice* case and the *RuSHA* case thus support the Prosecution's contention that post-World War II jurisprudence: (1) recognizes the imposition of liability upon an accused for his participation in a common criminal purpose, where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose; and (2) does not require proof that there was an understanding or an agreement between the accused and the principal perpetrator of the crime to commit that particular crime. The Appeals Chamber will now turn to the Prosecution's submission as to the Tribunal's jurisprudence.

(b) The Tribunal's jurisprudence

405. The Appeals Chamber in *Tadić* held that participation in a JCE existed as a form of responsibility in customary international law at the time of the events in the former Yugoslavia.[871] According to the same judgement, the rationale behind JCE liability is to reflect the exact degree of

[869] *RuSHA* Judgement, pp. 152-153.
[870] *RuSHA* Judgement, p. 160 (findings with respect to Hofmann); *see also* pp. 160-161 (making identical findings with respect to Hildebrand). The Tribunal sentenced both men to 25 years' imprisonment for their conduct. *RuSHA* Judgement, p. 166.
[871] *Tadić* Appeal Judgement, para. 226; *Vasiljević* Appeal Judgement, para. 95.

responsibility of those who in some way made it possible for the perpetrators physically to carry out the criminal acts.[872]

406. Nonetheless, as noted by Judge Bonomy in his Separate Opinion cited above,[873] *Tadić* does not clearly resolve whether the principal perpetrators must have participated in the common purpose. In some places, the Appeals Chamber does not mention a requirement that principal perpetrators belong to the JCE. [874] Elsewhere, however, it uses language – at least as regards the first and third categories – which may imply such a requirement.[875] In this respect, the Appeals Chamber recalls that the factual scenario in *Tadić*, contrary to the one in case at hand, involved a small group of participants operating in one municipality, and that the principal perpetrators were clearly participants in the JCE.[876] It is therefore not surprising that the Appeals Chamber in that case essentially focused on post-World War II cases where this was also the case, even though not

[872] *Tadić* Appeal Judgement, para. 192.
[873] Separate Opinion of Judge Iain Bonomy, *Milutinović et al.* Decision on Ojdanić's Motion Challenging Jurisdiction, para. 6.
[874] *Tadić* Appeal Judgement, para. 196, which provides, in its relevant part, as follows: "The objective and subjective prerequisites for [the first category or basic form of JCE] are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result." *See also*: para. 203, which provides that the second category of "cases ... is really a variant of the first category, considered above ... It would seem that in these cases the required *actus reus* was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates ..."; and para. 227, which provides as follows (emphases in original): "... the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows: (i) *A plurality of persons.* They need not be organised in a military, political or administrative structure ... (ii) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. (iii) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."
[875] *Tadić* Appeal Judgement, para. 204 ("The third category [or extended form of JCE] concerns cases involving a common design to pursue one course of conduct *where one of the perpetrators commits an act* which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.") (emphasis added). *See also*: para. 220, providing, in relevant part, as follows (emphases added): "As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in [the first category or basic form of JCE], where all participants in the common design possess the same criminal intent to commit a crime (*and one or more of them actually perpetrate the crime, with intent*). Secondly, in the [second category or systemic form of JCE], where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases [extended form of JCE], it is appropriate to apply the notion of 'common purpose' only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further—individually and jointly—the criminal purposes of that enterprise; and (ii) the foreseeability of the possible *commission by other members of the group* of offences that do not constitute the object of the common criminal purpose"; and para. 228 ("In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, ... it was foreseeable that such a crime might be perpetrated by one or other members of the group[.]").

every case cited by *Tadić* required participation of the principal perpetrator in the JCE as the *sine qua non* for ascribing of liability to the accused.[877] In light of the above, the Appeals Chamber judgement in *Tadić* cannot be considered conclusive as to whether principal perpetrators must be members of the JCE.

407. While "many subsequent Judgements have employed the *Tadić* language in setting out the elements of JCE, and therefore appear to restrict JCE liability—at least in the third category—to crimes physically perpetrated by JCE participants, in almost all of these Judgements the JCE was, like the enterprise in *Tadić*, relatively small. The fact that some of the physical perpetrators may not have been JCE participants does not appear to have been much of an issue."[878] The Appeals Chamber finds that cases such as the *Vasiljević* Appeal Judgement and the *Krnojelac* Appeal Judgement do not conclusively resolve whether principal perpetrators must be members of the JCE.

408. However, two cases already decided on appeal – *Krstić* and *Stakić* – provide exceptions to this general trend of inconclusiveness. In *Krstić*, the Trial Chamber did not explicitly require principal perpetrators to be members of the JCE.[879] The Chamber found that there existed two JCEs, one with the objective of "forcibly transfer[ring] the Bosnian Muslim women, children and elderly from Potočari on 12 and 13 July" and "creat[ing] a humanitarian crisis in support of this endeavor",[880] the other with the objective of "killing the military-aged Bosnian Muslim men of Srebrenica".[881] It accordingly found the accused guilty of inhumane acts and persecution as crimes against humanity for his participation in the first JCE[882] and genocide for his participation in the second JCE.[883] The members of these JCEs included only high-ranking Bosnian Serb political and military leaders, not the principal perpetrators. The principal perpetrators, though not mentioned explicitly, were probably privates and other low-ranking members of the Drina Corps of the VRS.[884] In the *Krstić* Appeal Judgement, which predates the *Brđanin* Trial Judgement, the Appeals

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[876] *Tadić* Appeal Judgement, paras 230-232.
[877] *See,* for example, *Tadić* Appeal Judgement, para. 210.
[878] Separate Opinion of Judge Iain Bonomy, *Milutinović et al.* Decision on Ojdanić's Motion Challenging Jurisdiction, para. 8 (footnote omitted, but citing to various cases including: *Vasiljević* Appeal Judgement, para. 101 (quoting *Tadić* Appeal Judgement, para. 228 for the proposition that "responsibility for a crime 'committed pursuant to the third category of JCE' arises 'only if ... it was foreseeable that such a crime might be perpetrated by one or other members of the group'") (emphasis omitted); *Krnojelac* Appeal Judgement, para. 32 (quoting *Tadić* Appeal Judgement, para. 228); *Kordić and Čerkez* Trial Judgement, para. 398 (also quoting *Tadić* Appeal Judgement, para. 228)).
[879] *Krstić* Trial Judgement, paras 601, 611, 613. *See also Simić et al.* Trial Judgement, paras 156-160 (setting forth the elements of the first and second categories of JCE but making no mention of a requirement that the physical perpetrator must be a JCE participant).
[880] *Krstić* Trial Judgement, para. 617.
[881] *Krstić* Trial Judgement, para. 644.
[882] *Krstić* Trial Judgement, para. 618.
[883] *Krstić* Trial Judgement, para. 645.
[884] *See also* Separate Opinion of Judge Iain Bonomy, *Milutinović et al.* Decision on Ojdanić's Motion Challenging Jurisdiction, para. 11.

Chamber decided not to disturb the Trial Chamber's findings regarding the existence of a JCE. It even used the expression "genocidal enterprise".[885]

409. In *Stakić*, the Appeals Chamber, relying on the Trial Chamber's findings, treated a JCE operating in the municipality of Prijedor in 1992 as composed only of the leaders of political bodies, the military and the police.[886] Its common purpose was however clearly carried out by a larger number of individuals, including Bosnian Serb police, military, and paramilitary forces.[887] It is particularly noteworthy that Stakić was convicted of certain crimes (murder and extermination) committed by non-members under the third (also "extended") form of joint criminal enterprise.[888] This is precedent not to be lightly dismissed by the Appeals Chamber.

(c) Conclusion

410. In light of the above discussion of relevant jurisprudence, persuasive as to the ascertainment of the contours of joint criminal enterprise liability in customary international law, the Appeals Chamber is of the view that what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose.[889] In cases where the principal perpetrator of a particular crime is not a member of the JCE, this essential requirement may be inferred from various circumstances, including the fact that the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose. In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that the person in question knows of the existence of the JCE – without it being established that he or she shares the *mens rea* necessary to become a member of the JCE – may be a factor to be taken into account when determining whether the crime forms part of the common criminal purpose. However, this is not a *sine qua non* for imputing liability for the crime to that member of the JCE.

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[885] *Krstić* Appeal Judgement, paras 134, 143-144. Moreover, the Appeals Chamber recalls that, in the *Kvočka et al.* Appeal Judgement, while Zoran Žigić was found not to be "responsible as a participant in this joint criminal enterprise" (para. 599), the Appeals Chamber confirmed the conviction of Miroslav Kvočka under JCE for crimes physically perpetrated by, among others, Žigić (*e.g.* the murder of Be}ir Medunjanin, paras 277, 487). This lends further support to the contention of the Prosecution that, under the Tribunal's law, a member of a joint criminal enterprise can be found responsible for crimes perpetrated by a non-member.

[886] *Staki}* Appeal Judgement, paras 68-70.

[887] *Staki}* Appeal Judgement, paras 75, 81, 84, 95-96.

[888] *Stakić* Appeal Judgement, para. 98.

[889] *See infra*, paras 418-419.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-99-36-T

Date: 1 September 2004

Original: English

IN THE TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Ivana Janu
Judge Chikako Taya

Registrar: **Mr. Hans Holthuis**

Judgement of: **1 September 2004**

PROSECUTOR

v.

RADOSLAV BRĐANIN

JUDGEMENT

The Office of the Prosecutor:

Ms. Joanna Korner
Ms. Anna Richterova
Ms. Ann Sutherland
Mr. Julian Nicholls

Counsel for the Accused:

Mr. John Ackerman
Mr. David Cunningham

23. In determining whether the guilt of the Accused has been established to this standard with respect to each particular count in the Indictment, the Trial Chamber has been careful to consider whether there is any reasonable explanation of the evidence accepted by it other than the guilt of the Accused.[17] This is so because any ambiguity must accrue to the Accused's advantage. As stated by the Appeals Chamber, if there is another conclusion which is also reasonably open from that evidence, and which is as consistent with the innocence of an accused as with his or her guilt, he or she must be acquitted.[18]

24. The fact that the Defence has not challenged certain factual allegations contained in the Indictment does not imply that the Trial Chamber has accepted these alleged facts to be proved. For each individual fact alleged by the Prosecution the burden of proof remains with it.[19] Article 21(4)(g) of the Statute provides that no accused shall be compelled to testify against himself. In this case, the Accused made use of his right to remain silent and did not give evidence or any statement. No unfavourable inference was drawn therefrom. The Trial Chamber acknowledges that silence by the Accused may not be used as evidence to prove guilt and may not be interpreted as an admission.

25. In evaluating the evidence of the witnesses that gave evidence *viva voce*, the Trial Chamber has considered their demeanour, conduct and character as far as this was possible. With regard to all witnesses, it has also considered the probability, consistency and other features of their evidence, including the corroboration which may be forthcoming from other evidence and the circumstances of the case. The Trial Chamber has been conscious throughout that the credibility of witnesses depends upon their knowledge of the facts upon which they give evidence, their disinterestedness, their integrity, their veracity and the fact that they are bound to speak the truth in terms of the solemn declaration taken by them. The Trial Chamber has also kept in mind that the fact that a witness gives evidence honestly is not in itself sufficient to establish the reliability of that evidence. The issue is not merely whether the evidence of a witness is honest; it is also whether the evidence is objectively reliable.[20] The Trial Chamber has been conscious, throughout, that evidence about facts that occurred ten or more years prior to giving evidence, involves inherent uncertainties due to

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[17] *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Landžo (aka "Zenga")*, Case No. IT 96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 458.
[18] *Čelebići* Appeal Judgement, para. 458.
[19] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-A &IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac* Appeal Judgement"), paras 63 and 65.
[20] *See, e.g., Čelebići* Appeal Judgement, paras 491, 506; *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić (aka "Vlado")*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement), paras 34-40; *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T &IT-96-23/1-T, Decision on Motion for Acquittal, 3 July 2000 ("*Kunarac* Rule 98*bis* Decision"), para. 8; *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T &IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac* Trial Judgement"), paras 561-562.

the vagaries of human perception and recollection. The lack of detail in relation to peripheral matters was in general not regarded as necessarily discrediting their evidence.[21]

26. The Trial Chamber has also taken into account the extent of any inconsistency between the oral evidence of the witnesses at trial and their respective statements given prior to trial, if such statements, or parts thereof were admitted into evidence. The Trial Chamber accepts that in some instances a witness' oral evidence will not be identical to the information given in such statement. The reason for this is that a witness may be asked questions at trial not previously asked or may, through questioning, remember details previously forgotten. In general, the Trial Chamber has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness had nevertheless recounted the essence of the incident charged in acceptable detail.[22]

27. In some cases, only one witness has given evidence of an incident with which the Accused is charged or otherwise involving the Accused. The Appeals Chamber has held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration.[23] Still, in such a situation, the Trial Chamber has scrutinised the evidence of such witnesses with circumspection and in some instances decided not to rely on such evidence.[24]

28. As regards hearsay evidence, the Trial Chamber reiterates that it is well settled in the practice and jurisprudence of this Tribunal that hearsay evidence is admissible. The approach taken by the Trial Chamber has been that, since such evidence is admitted to prove the truth of its contents,[25] it ought to be satisfied that such evidence is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate. For this purpose, the Trial Chamber has considered both the content of the hearsay statement and the circumstances under which the evidence arose,[26] or, as Judge Stephen described it, considered that the probative value of a hearsay statement will depend upon the context and character of the evidence in question.[27] The absence of

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[21] *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement"), para. 69; *Kunarac* Trial Judgement, para. 564.
[22] *Krnojelac* Trial Judgement, para. 69.
[23] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 62; *Krnojelac* Trial Judgement, para. 71.
[24] *Krnojelac* Trial Judgement, para. 71.
[25] *Tadić* Decision on Defence Motion on Hearsay, 5 August 1996 ("*Tadić* Decision on Defence Motion on Hearsay") paras 15-19; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 21 January 1998 ("*Blaškić* Decision on the Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability"), para. 10.
[26] *Tadić* Decision on Defence Motion on Hearsay, paras 15-19.
[27] *Prosecutor v. Duško Tadić* (aka "Dule"), Case No. IT-94-1, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995 ("Separate Opionion of Judge Stephen on Tadic Protective Measures Motion"), p. 3.

remain within Yugoslavia. On 9 and 10 December 1991, the Bosnian Serbs voted overwhelmingly to remain a part of the SFRY.[119]

63. In early 1992, the SDA increased the pressure to secure independence of the SRBH from the SFRY.[120] A referendum on the question of independence was held on 29 February and 1 March 1992. It was largely boycotted by the Bosnian Serbs and yielded an overwhelming majority of votes in favour of the independence of BiH.[121] In view of the result of the referendum, on 6 April 1992, the European Community recognised BiH as an independent state. Recognition by the US followed on 7 April 1992.[122]

64. The referendum and subsequent recognition by the international community of BiH as an independent state increased the tension between Bosnian Serbs on the one hand and Bosnian Muslims and Bosnian Croats on the other hand. The armed conflict in BiH broke out shortly after.[123]

B. The political agenda of the Bosnian Serb leadership

65. During the second half of 1991, it already appeared increasingly unlikely that the SRBH would remain within the SFRY. The Trial Chamber is satisfied beyond reasonable doubt that during this period, the Bosnian Serb leadership, including the members of the Main Board of the SDS and other members of the SDS, as well as Bosnian Serb representatives of the armed forces, formed a

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[119] Ex. P1817, "Radio Bosanski Petrovac Broadcast"; Robert Donia, T. 1121-1122; Muharem Krzić, T. 1754-1755. Non-Serbs were allowed to vote, but they did so on separate coloured ballots that were counted separately. Very few Croats and Muslims did vote: Robert Donia, T. 1118-11121.

[120] On 15 January 1992, the European Community's Badinter Commission recommended that a referendum be held on the question of independence of the SRBH: Robert Donia, T. 1143, 1227-1228; Patrick Treanor, T. 20962-20965; ex. DB161, "Opinion on Recognition". On 17 December 1991, the foreign ministers of the European Community approved the procedure for allowing the SFRY's republics to apply for independence, and created a commission to assess any applications received. The Badinter Advisory Commission to the European Community thereafter invited applications from these republics in order to evaluate their applications based on adherence to certain guidelines such as the existing legal provisions in place for the respect of individual and minority rights: ex. P53, "Expert Report of Robert Donia", p. 62. The idea of a referendum was energetically opposed by the SDS, which called all Serbs to boycott the referendum, while the SDA and the HDZ leaders urged a vote in favour of Bosnian independence: Robert Donia, T. 1237-1239; ex. P53, "Expert Report of Robert Donia", p. 62; Muharem Krzić, T. 1754; BT-9, T. 3664-3665 (closed session); Patrick Treanor, T. 20920-20924; BT-19, T. 20607 (closed session); Mirko Dejanović, T. 23220. The SDS favoured the 'Cutileiro Plan', which provided for the cantonisation of the SRBH: Robert Donia, T. 1241-1242; ex. DB1, "The War in Bosnia and Herzegovina", book co-written by Paul Shoup, pp. 111, 113; ex. P53, "Expert Report of Robert Donia", p. 70. With respect to the involvement of the international community in the BiH affairs, *see* ex. DB376, "Expert Report of Paul Shoup", p. 19.

[121] Robert Donia, T. 1154; Patrick Treanor, T. 20920-20924; Muharem Krzić, T. 1447.

[122] Robert Donia, T. 1155; ex. P53, "Expert Report by Robert Donia", p. 70; ex. DB1, "The War in Bosnia-Herzegovina", book co-written by Paul Shoup, pp. 94-98. BiH was admitted into the United Nations on 22 May 1992: *see* UN General Assembly Resolution A/RES/46/237 of 22 May 1992; Mirsad Mujadžić, ex. P1601, T. 3626.

[123] Adil Draganović, T. 4897; BT-19, T. 20600-20601 (closed session); Zijahudin Smailagić, T. 1947-1948; Robert Donia, T. 1135-1137. "On 6 April the Serbs began shelling Sarajevo. On April 7 and 8, following the international recognition of Bosnia-Herzegovina, Serb forces crossed the Drina from Serbia proper and lay siege to the Muslim cities of Zvornik, Višegrad, and Foča. By mid-April all of Bosnia was engulfed in war": ex. DB1, "The War in Bosnia and Herzegovina", book co-written by Paul Shoup, p. 129.

plan to link Serb-populated areas in BiH together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed ("Strategic Plan"). The Bosnian Serb leadership knew that the Strategic Plan could only be implemented by the use of force and fear.

66. On 15 October 1991, the SDS Party Council discussed strategies on how to set up a Serbian government, which included establishing parallel government bodies, the regionalisation of BiH and organising militarily.[124]

67. During the first session of the SerBiH Assembly, held on 24 October 1991, Radovan Karadžić made it clear that the Bosnian Serbs were prepared to use force and fear to achieve their ends if they were otherwise unsuccessful.[125]

68. In a speech given on the occasion of the "Plebiscite of the Serb People" in Sarajevo in November 1991, Radovan Karadžić instructed SDS members representing the municipalities to impose complete Bosnian Serb authority in their respective municipalities, regions and local communities.[126] On 11 December 1991, the SerBiH Assembly voted to recommend the establishment of separate Serbian municipalities. The declared aim of this decision was "to break up the existing municipalities where Serbs are not in a majority".[127]

69. On 19 December 1991, the Main Board of the SDS issued a document entitled "Instructions for the Organisation and Activity of Organs of the Serbian People in Bosnia and Herzegovina in Extraordinary Circumstances" ("Variant A and B Instructions"). These instructions provided for the conduct of specified activities in all municipalities in which Serbs lived, and essentially mapped out the take-over of power by Bosnian Serbs in municipalities where they constituted a majority of the population ("Variant A") and where they were in a minority ("Variant B").[128] The stated purpose of

[124] Ex. P2464, "Speech" by Radovan Karadžić before the SRBH Assembly on 14 October 1991; ex. P20, "Minutes" of a meeting held on 15 October 1991.
[125] Ex. P21, "Stenograph", taken at the constituting session of the Assembly of the Serbian People of BiH on 24 October 1991, according to which Radovan Karadžić stated: "War will start here only if someone attempts to force the Serbs to do something they do not want to do".
[126] Ex. P2466, "Speech" by Radovan Karadžić on 1 November 1991, in which he stated: "I am kindly asking you..., you should seise power completely and energetically... to get ready and establish your authority in your territories; in municipalities, regions, local communities".
[127] *See* ex. P24, "Transcript" of the 3rd session of the SerBiH Assembly, pp. 13, 25; Robert Donia, T. 1293-1295.
[128] Ex. P25, "Instructions for the Organisation and Activity of Organs of the Serbian People in BiH in extraordinary circumstances" ("Variant A and B Instructions"). The Document was published in full in *Slobodna Bosna* newspaper on 12 March 1992, ex. P122. It was distributed to the SDS municipal boards, Predrag Radić, T. 22167-22168, 22335; Rajko Kalabić, T. 22576-22577, and it was discussed in the municipalities, including those not in the ARK, by the SDS Municipal Boards and/or the Crisis Staffs. The SerBiH Assembly discussed the second phase of implementation of the Variant A and B Instructions: ex. P102, "Conclusions of the SerBiH Assembly regarding the validity of the referendum on the status of BiH", p. 30; ex. P2470, "Transcript of 6th meeting of the SerBiH Assembly", 26 January 1992. So did the SDS Main Board, where amongst others, Radovan Karadžić took the floor: ex. P2383.14, "Speech" by Radovan Karadžić, 14 February 1992. *See* also ex. P2351, "Expert Report of Patrick Treanor", p. 22.

Articles 2 to 5 of the Statute, proof is required that the crime in question has actually been committed by the principal offender(s).[705]

(a) Planning

268. Planning implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[706] Moreover, it needs to be established that the accused, directly or indirectly, intended the crime in question to be committed.[707] Where an accused is found guilty of having committed a crime, he or she cannot at the same time be convicted of having planned the same crime.[708] Involvement in the planning may however be considered an aggravating factor.[709]

(b) Instigating

269. Instigating means prompting another to commit an offence.[710] Both acts and omissions may constitute instigating, which covers express as well as implied conduct.[711] The *nexus* between instigation and perpetration requires proof.[712] It is not necessary to demonstrate that the crime would not have been perpetrated without the accused's involvement;[713] it is sufficient to prove that

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[705] For 'planning', *see Akayesu* Trial Judgement, para. 473; *Blaškić* Trial Judgement, para. 278; *Kordić* Trial Judgement, para. 386. For 'instigating', *see Akayesu* Trial Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Krstić* Trial Judgement, para. 601; *Kordić* Trial Judgement, para. 387. For 'ordering', implicitly, *see Stakić* Trial Judgement, para. 445. For 'aiding and abetting', implicitly, *see Tadić* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, para. 164; *Čelebići* Appeal Judgement, para. 352; *Furundžija* Trial Judgement, paras 235, 249; *Vasiljević* Trial Judgement, para. 70; *Naletilić* Trial Judgement, para. 63; *Simić* Trial Judgement, para. 161.

[706] *Akayesu* Trial Judgement, para. 480, reiterated in *Krstić* Trial Judgement, para. 601; in *Blaškić* Trial Judgement, para. 279; in *Kordić* Trial Judgement, para. 386; and in *Naletilić* Trial Judgement, para. 59.

[707] *Blaškić* Trial Judgement, para. 278; *Kordić* Trial Judgement, para. 386.

[708] *Kordić* Trial Judgement, para. 386.

[709] *Stakić* Trial Judgement, para. 443.

[710] *Akayesu* Trial Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Krstić* Trial Judgement, para. 601, *Kordić* Trial Judgement, para. 387.

[711] *Blaškić* Trial Judgement, para. 280.

[712] *Blaškić* Trial Judgement, para. 280.

[713] *Kordić* Trial Judgement, para. 387; *Galić* Trial Judgement, para. 168.

[714] *Kordić* Trial Judgement, para. 387; *Kvočka* Trial Judegment, para. 252.

[715] *Kvočka* Trial Judgement, para. 252.

[716] *Krstić* Trial Judgement, para. 601; *Galić* Trial Judgement, para. 168.

[717] *Akayesu* Trial Judgement, para. 483; *Blaškić* Trial Judgement, paras 281-282; *Kordić* Trial Judgement, para. 388.

[718] *Blaškić* Trial Judgement, para. 281.

[719] *Blaškić* Trial Judgement, para. 282.

356. For the foregoing reasons, the Trial Chamber, considering all the circumstances, dismisses JCE as a possible mode of liability to describe the Accused's individual criminal responsibility.

2. Planning

357. As contended by the Prosecution, the Accused in the present case did not physically perpetrate any of the crimes established.[891] Responsibility for 'planning' a crime could thus, according to the above definition, only incur if it was demonstrated that the Accused was substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance. This knowledge requirement should not, however, be understood to mean that the Accused would have to be intimate with every detail of the acts committed by the physical perpetrators.

358. Although the Accused espoused the Strategic Plan, it has not been established that he personally devised it.[892] The Accused participated in its implementation mainly by virtue of his authority as President of the ARK Crisis Staff and through his public utterances. Although these acts may have set the wider framework in which crimes were committed, the Trial Chamber finds the evidence before it insufficient to conclude that the Accused was involved in the immediate preparation of the *concrete crimes*. This requirement of specificity distinguishes 'planning' from other modes of liability. In view of the remaining heads of criminal responsibility, some of which more appropriately characterise the acts and the conduct of the Accused, the Trial Chamber dismisses 'planning' as a mode of liability to describe the individual criminal responsibility of the Accused.

3. Instigating

359. Many of the decisions of the ARK Crisis Staff for which the Accused bears responsibility requested that certain acts amounting to crimes be carried out. Most of the decisions did not take immediate effect and required implementation by, *e.g.*, municipal organs. In this context, it is immaterial whether the physical perpetrators were subordinate to the instigator, or whether a number of other persons would necessarily have to be involved before the crime was actually committed, as long as it can be shown that there was a causal link between an act of instigation and

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these deaths were predictable." *See* also, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, paras 44-45.

[890] ICTY cases have applied JCE to enterprises of a smaller scale, limited to a specific military operation and only to members of the armed forces (*Krstić* Trial Judgement, para. 610); a restricted geographical area (*Simić* Trial Judgement, paras 984-985); a small group of armed men acting jointly to commit a certain crime (*Tadić* Appeal Judgement, paras 232 *et seq.*; *Vasiljević* Trial Judgement, para. 208); or, for the second category of JCE, to one detention camp (*Krnojelac* Trial Judgement, para. 84).

[891] Indictment, para. 33.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-96-21-A

Date: 20 February 2001

Original: ENGLISH

IN THE APPEALS CHAMBER

Before: **Judge David Hunt, Presiding**
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar: **Mr Hans Holthuis**

Judgement of: **20 February 2001**

PROSECUTOR

V

Zejnil DELALIC, Zdravko MUCIC (aka "PAVO"), Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("^*ELEBICI* Case")

JUDGEMENT

Counsel for the Accused:
Mr John Ackerman and Ms Edina Rešidovi} for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:
Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

placed on formal legal bonds, which could also be altered by governments to shield their nationals from prosecution based on the grave breaches provisions of the Geneva Conventions. A more purposive and realistic approach is particularly apposite in circumstances of the dissolution of Yugoslavia, and in the emerging State of Bosnia and Herzegovina where various parties were engaged in fighting, and the government was opposed to a partition based on ethnicity, which would have resulted in movements of population, and where, ultimately, the issue at stake was the final shape of the State and of the new emerging entities.

82. In *Tadi}*, the Appeals Chamber, relying on a teleological approach, concluded that formal nationality may not be regarded as determinative in this context, whereas ethnicity may reflect more appropriately the reality of the bonds:

> This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance.[104]

83. As found in previous Appeals Chamber jurisprudence, Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of "the substance of relations"[105] and not based on the legal characterisation under domestic legislation. In today's ethnic conflicts, the victims may be "assimilated" to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the *Tadi}* Appeal Judgement that "even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable".[106]

84. Applying the principle enunciated in *Aleksovski*, the Appeals Chamber sees no cogent reasons in the interests of justice to depart from the *Tadi}* Appeal Judgement. The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterisations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State.

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[104] *Tadi}* Appeal Judgement, para 166.

fundamental standards appearing in both bodies of law is the protection of the human person from certain heinous acts considered as unacceptable by all civilised nations in all circumstances.[196]

150. It is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber's view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader. The Appeals Chamber is thus not convinced by the arguments raised by the appellants and finds no cogent reasons to depart from its previous conclusions.

2. Did the Trial Chamber Follow the *Tadi}* Jurisdiction Decision?

151. The Trial Chamber found:

> While common Article 3 of the Geneva Conventions was formulated to apply to internal armed conflicts, it is also clear from the above discussion that its substantive prohibitions apply equally in situations of international armed conflicts. Similarly, and as stated by the Appeals Chamber, the crimes falling under Article 3 of the Statute of the International Tribunal may be committed in either kind of conflicts. The Trial Chamber's finding that the conflict in Bosnia and Herzegovina in 1992 was of an international nature does not, therefore, impact upon the application of Article 3.[197]

152. The Trial Chamber therefore clearly followed the Appeals Chamber jurisprudence.

C. Whether Common Article 3 Imposes Individual Criminal Responsibility

1. What is the Applicable Law?

153. The Appeals Chamber in the *Tadi}* Jurisdiction Decision, in analysing whether common Article 3 attracts individual criminal responsibility first noted that "common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions".[198] Referring however to the findings of the International Military Tribunal at

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[196] The UN Human Rights Commission is currently conducting a study to identify certain minimum humanitarian standards applicable at all times, which draw from both bodies of law. *See* UN documents E/C.N. 4/1998/87, E/C.N. 4/1999/92, E/C.N. 4/2000/94, and E/C.N. 4/2000/145.

[197] Trial Judgement, para 314.

[198] *Tadi}* Jurisdiction Decision, para 128.

Nuremberg[199] that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches, provided certain conditions are fulfilled, it found:

> Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognised as the mandatory minimum for conduct in armed conflict of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.[200]

154. In the Appeals Chamber's opinion, this conclusion was also supported by "many elements of international practice (which) show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts".[201] Specific reference was made to prosecutions before Nigerian courts,[202] national military manuals,[203] national legislation (including the law of the former Yugoslavia adopted by Bosnia and Herzegovina after its independence),[204] and resolutions adopted unanimously by the Security Council.[205]

155. The Appeals Chamber found further support for its conclusion in the law of the former Yugoslavia as it stood at the time of the offences alleged in the Indictment:

> Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.[206]

156. Reliance was also placed by the Appeals Chamber on the agreement reached under the auspices of the ICRC on 22 May 1992, in order to conclude that the breaches of international law occurring within the context of the conflict, regarded as internal by the agreement, could be criminally sanctioned.[207]

157. The appellants contend that the evidence presented in the *Tadi}* Jurisdiction Decision does not establish that common Article 3 is customary international law that creates individual criminal responsibility because there is no showing of State practice and *opinio juris*.[208] Additionally, the appellants submit that at the time of the adoption of the Geneva Conventions in 1949, common Article 3 was excluded from the grave breaches system and thus did not fall

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[199] The Appeals Chamber further referred to the IMT's holding that crimes against international law are committed by individuals. *Tadi}* Jurisdiction Decision, para 128.
[200] *Ibid*, para 129.
[201] *Ibid*, para 130.
[202] *Ibid*, at para 130, referring to paras 106 and 125.
[203] *Ibid*, para 131.
[204] *Ibid*, para 132.
[205] *Ibid*, para 133.
[206] *Ibid*, para 135.
[207] *Ibid*, para 136.
[208] Delali} Brief, pp 20-40.

within the scheme providing for individual criminal responsibility.[209] In their view, the position had not changed at the time of the adoption of Additional Protocol II in 1977. It is further argued that common Article 3 imposes duties on States only and is meant to be enforced by domestic legal systems.[210]

158. In addition, the appellants argue that solid evidence exists which demonstrates that common Article 3 is *not* a rule of customary law which imposes liability on natural persons.[211] Particular emphasis is placed on the ICTR Statute and the Secretary-General's Report which states that common Article 3 was criminalised for the first time in the ICTR Statute.[212]

159. The Prosecution argues that the *Tadi}* Jurisdiction Decision previously disposed of the issue and should be followed. The Prosecution submits that, if violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why once those laws came to be extended to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of clear indications to the contrary.[213] It is further submitted that since 1949, customary law and international humanitarian law have developed to such an extent that today universal jurisdiction does not only exist in relation to the grave breaches of the Geneva Conventions but also in relation to other types of serious violations of international humanitarian law.[214] The Prosecution contends that this conclusion is not contrary to the principle of legality, which does not preclude development of criminal law, so long as those developments do not criminalise conduct which at the time it was committed could reasonably have been regarded as legitimate.[215]

160. Whereas, as a matter of strict treaty law, provision is made only for the prosecution of grave breaches committed within the context of an international conflict, the Appeals Chamber in *Tadi}* found that as a matter of customary law, breaches of international humanitarian law

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[209] The appellants emphasise that violations of common Article 3 were thus not subjected to the universal jurisdiction provisions, Delalic Brief, p 28.

[210] Deli} Brief, p 80.

[211] The appellants rely on the ICRC practice; *Nicaragua*; the conclusions of the UN Expert Commission; the ILC draft codes; comments made in the Security Council; the ICC Statute. In relation to *Nicaragua*, Delali} submits that the finding that common Article 3 constitute customary international law is *dicta* and therefore not an authoritative holding. It is also argued that the ICC Statute constitutes evidence that common Article 3 does not reflect customary law: Delalic Brief, pp 32-40.

[212] The report stated that Article 4 "for the first time criminalizes common article 3 of the four Geneva Conventions". Report of the Secretary-General pursuant to Paragraph 5 of Security Council resolution 955 (1994), S/1995/134, 13 February 1995, para 12.

[213] Appeal Transcript pp 351-352.

[214] Appeal Transcript pp 355-356.

[215] Appeal Transcript p 352.

committed in internal conflicts, including violations of common Article 3, could also attract individual criminal responsibility.

161. Following the appellants' argument, two different regimes of criminal responsibility would exist based on the different legal characterisation of an armed conflict. As a consequence, the same horrendous conduct committed in an internal conflict could not be punished. The Appeals Chamber finds that the arguments put forward by the appellants do not withstand scrutiny.

162. As concluded by the Appeals Chamber in *Tadi}*, the fact that common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule. The IMT indeed followed a similar approach, as recalled in the *Tadi}* Jurisdiction Decision when the Appeals Chamber found that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches.[216] The Nuremberg Tribunal clearly established that individual acts prohibited by international law constitute criminal offences even though there was no provision regarding the jurisdiction to try violations: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[217]

163. The appellants argue that the exclusion of common Article 3 from the Geneva Conventions grave breaches system, which provides for universal jurisdiction, has the necessary consequence that common Article 3 attracts no individual criminal responsibility. This is misconceived. In the Appeals Chamber's view, the appellants' argument fails to make a distinction between two separate issues, the issue of criminalisation on the one hand, and the issue of jurisdiction on the other. Criminalisation may be defined as the act of outlawing or making illegal certain behaviour.[218] Jurisdiction relates more to the judicial authority to prosecute those criminal acts. These two concepts do not necessarily always correspond. The Appeals Chamber is in no doubt that the acts enumerated in common Article 3 were intended to be criminalised in 1949, as they were clearly intended to be illegal within the international legal order. The language of common Article 3 clearly prohibits fundamental offences such as murder and torture. However, no jurisdictional or enforcement mechanism was provided for in the Geneva Conventions at the time.

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[216] *Tadi}* Jurisdiction Decision, para 128. The IMT prosecuted violations of Hague Convention IV and Geneva Convention of 1929 even though they did not provide for the punishment of their breaches.
[217] As referred to in para 128 of *Tadi}* Jurisdiction Decision.
[218] Black's Law Dictionary, 6th ed (1990).

164. This interpretation is supported by the provisions of the Geneva Conventions themselves, which impose on State parties the duty "to respect and ensure respect for the present Conventions in all circumstances".[219] Common Article 1 thus imposes upon State parties, upon ratification, an obligation to implement the provisions of the Geneva Conventions in their domestic legislation. This obligation clearly covers the Conventions in their entirety and this obligation thus includes common Article 3. The ICJ in the *Nicaragua* case found that common Article 1 also applies to internal conflicts.[220]

165. In addition, the third paragraph of Article 146 of Geneva Convention IV, after setting out the universal jurisdiction mechanism applicable to grave breaches, provides:

> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

166. The ICRC Commentary (GC IV) stated in relation to this provision that "there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention".[221] It then concluded:

> This shows that all breaches of the Convention should be repressed by national legislation. The Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches. Furthermore, under the terms of this paragraph, the authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention and should institute judicial or disciplinary punishment for breaches of the Convention.[222]

167. This, in the Appeals Chamber's view, clearly demonstrates that, as these provisions do not provide for exceptions, the Geneva Conventions envisaged that violations of common Article 3 could entail individual criminal responsibility under domestic law, which is accepted by the appellants. The absence of such legislation providing for the repression of such violations would, arguably, be inconsistent with the general obligation contained in common Article 1 of the Conventions.

168. As referred to by the Appeals Chamber in the *Tadi}* Jurisdiction Decision, States have adopted domestic legislation providing for the prosecution of violations of common Article 3. Since 1995, several more States have adopted legislation criminalising violations of common

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[219] Article 1 common to the Geneva Conventions ("Common Article 1").
[220] *Nicaragua*, para 220.
[221] ICRC Commentary (GC IV), p 594.
[222] *Ibid.*

Article 3,[223] thus further confirming the conclusion that States regard violations of common Article 3 as constituting crimes. Prosecutions based on common Article 3 under domestic legislation have also taken place.[224]

169. The Appeals Chamber is also not convinced by the appellants' submission that sanctions for violations of common Article 3 are intended to be enforced at the national level only. In this regard, the Appeals Chambers refers to its previous conclusion on the customary nature of common Article 3 and its incorporation in Article 3 of the Statute.

170. The argument that the ICTR Statute, which is concerned with an internal conflict, made violations of common Article 3 subject to prosecution at the international level, in the Appeals Chamber's opinion, reinforces this interpretation. The Secretary-General's statement that violations of common Article 3 of the Geneva Conventions were criminalised for the first time, meant that provisions for international jurisdiction over such violations were *expressly* made for the first time. This is so because the Security Council when it established the ICTR was not creating new law but was *inter alia* codifying existing customary rules for the purposes of the jurisdiction of the ICTR. In the Appeals Chamber's view, in establishing this Tribunal, the Security Council simply created an international mechanism for the prosecution of crimes which were already the subject of individual criminal responsibility.

171. The Appeals Chamber is unable to find any reason of principle why, once the application of rules of international humanitarian law came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context could not be criminally enforced at the international level. This is especially true in relation to prosecution conducted by an international tribunal created by the UN Security Council, in a situation where it specifically called for the prosecution of persons responsible for violations of humanitarian law in an armed conflict regarded as constituting a threat to international peace and security pursuant to Chapter VII of the UN Charter.

172. In light of the fact that the majority of the conflicts in the contemporary world are internal, to maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the

[223] *See* for instance the United States War Crimes Act 1996 extended by the Expanded War Crimes Act of 1997 to include violations of common Article 3.

[224] *See* for instance in Switzerland, *Jugement en la cause Fulgence Niyonteze*, Tribunal de division 2, 3 septembre 1999, and Tribunal militaire d'appel 1, 26 mai 2000.

conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.[225]

173. The Appeals Chamber is similarly unconvinced by the appellants' argument that such an interpretation of common Article 3 violates the principle of legality. The scope of this principle was discussed in the *Aleksovski* Appeal Judgement, which held that the principle of *nullem crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime.[226] It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognised by civilised nations."

174. The Appeals Chamber is unable to find any cogent reasons in the interests of justice to depart from the conclusions on this issue in the *Tadi}* Jurisdiction Decision.

2. Did the Trial Chamber Apply the Correct Legal Principles?

175. The Appeals Chamber notes that the appellants raised before the Trial Chamber the same arguments now raised in this appeal. The Trial Chamber held:

> Once again, this is a matter which has been addressed by the Appeals Chamber in the *Tadi} Jurisdiction Decision* and the Trial Chamber sees no reason to depart from its findings. In its Decision, the Appeals Chamber examines various national laws as well as practice, to illustrate that there are many instances of penal provisions for violations of the laws applicable in internal armed conflicts. From these sources, the Appeals Chamber extrapolates that there is nothing inherently contrary to the concept of individual criminal responsibility for violations of common Article 3 of the Geneva Conventions and that, indeed, such responsibility does ensue.[227]

176. It then concluded:

> The fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of common Article 3 clearly does not in itself preclude such liability. Furthermore, identification of the violation of certain provisions of the Conventions as constituting "grave breaches" and thus subject to mandatory universal jurisdiction, certainly cannot be interpreted as rendering all of the remaining provisions of the Conventions as without criminal sanction. While "grave breaches" *must* be prosecuted and punished by all States, "other" breaches of the Geneva Conventions *may* be so. Consequently, an international tribunal such as this must also be permitted to prosecute and punish such violations of the Conventions.[228]

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[225] The Appeals Chamber also notes that in human rights law the violation of rights which have reached the level of *jus cogens*, such as torture, may constitute international crimes.
[226] *Aleksovski* Appeal Judgement, para 126.
[227] Trial Judgement, para 307.
[228] Trial Judgement, para 308.

189. It is necessary to consider first the notion of command or superior authority within the meaning of Article 7(3) of the Statute before examining the specific issue of *de facto* authority. Article 87(3) of Additional Protocol I to the 1949 Geneva Conventions provides:

> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons *under his control* are going to commit or have committed a breach of the Conventions or of his Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.[245]

190. The *Blaski}* Judgement, referring to the Trial Judgement and to Additional Protocol I, construed control in terms of the material ability of a commander to punish:

> What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.[246]

191. In respect of the meaning of a commander or superior as laid down in Article 7(3) of the Statute, the Appeals Chamber held in *Aleksovski*:

> Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision.[247]

192. Under Article 7(3), a commander or superior is thus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.

193. The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the

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[245] (Emphasis added).
[246] *Blaški}* Judgement, para 302.
[247] *Aleksovski* Appeal Judgement, para 76.

superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.

194. In relation to Muci}'s responsibility, the Trial Chamber held:

> [...] whereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.[248]

195. The Trial Chamber, prior to making this statement in relation to the case of Muci}, had already considered the origin and meaning of *de facto* authority with reference to existing practice.[249] Based on an analysis of World War II jurisprudence, the Trial Chamber also concluded that the principle of superior responsibility reflected in Article 7(3) of the Statute encompasses political leaders and other civilian superiors in positions of authority.[250] The Appeals Chamber finds no reason to disagree with the Trial Chamber's analysis of this jurisprudence. The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature.[251] In relying upon the wording of Articles 86 and 87 of Additional Protocol I to conclude that "it is clear that the term 'superior' is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control", the Trial Chamber properly considered the issue in finding the applicable law.[252]

196. "Command", a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, whilst the term "control", which has a wider meaning, may encompass powers wielded by civilian leaders. In this respect, the Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control.[253] Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility. The *Bla{ki}* Trial Chamber for instance endorsed the finding of the Trial

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[248] Trial Judgement, para 736.
[249] Trial Judgement, paras 364-378.
[250] Trial Judgement, paras 356-363.
[251] By the end of 1992, 119 States had ratified Additional Protocol I, *International Review of the Red Cross* (1993), No. 293, at p 182.
[252] Trial Judgement, para 371.
[253] Trial Judgement, paras 355-363. *See* also Secretary-General's Report, paras 55-56.

219. Delić agrees with the Prosecution's position that Articles 86 and 87 of Additional Protocol I reflect customary law as established through the post Second World War cases. A commander has a duty to be informed, but not every failure in this duty gives rise to command responsibility.[302]

220. The issues raised by this ground of appeal of the Prosecution include:

(i) whether in international law, the duty of a superior to control his subordinates includes a duty to be apprised of their action, i.e. a duty to know of their action and whether neglect of such duty will always result in criminal liability;

(ii) whether the standard of "had reason to know" means either the commander had information indicating that subordinates were about to commit or had committed offences or he did not have this information due to dereliction of his duty; and

(iii) whether international law acknowledges any distinction between military and civil leaders in relation to the duty to be informed.

221. The Appeals Chamber takes note of the fact that this ground of appeal is raised by the Prosecution for its general importance to the "jurisprudence of the Tribunal".[303] Considering that this ground concerns an important element of command responsibility, that the Prosecution alleges an error on the part of the Trial Chamber in respect of a finding as to the applicable law,[304] that the parties have made extensive submissions on it, and that it is indeed an issue of general importance to the proceedings before the Tribunal,[305] the Appeals Chamber will consider it by reference to Article 7(3) of the Statute and customary law at the time of the offences alleged in the Indictment.[306]

(i) The Mental Element Articulated by the Statute

222. Article 7(3) of the Statute provides that a superior may incur criminal responsibility for criminal acts of subordinates "if he knew or had reason to know that the subordinate was about to commit such acts or had done so" but fails to prevent such acts or punish those subordinates.

223. The Trial Chamber held that a superior:

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[302] Delić Response, para 212.
[303] Prosecution Reply, para 2.3; Appeal Transcript pp 147-148.
[304] Trial Judgement, para 393.
[305] *See Tadić* Appeal Judgement, paras 247 and 281.
[306] Secretary-General's Report, para 34.

> [...] may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Articles 2 through 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[307]

224. The Prosecution position is essentially that the reference to "had reason to know" in Article 7(3) of the Statute, refers to two possible situations. First, a superior had information which put him on notice or which suggested to him that subordinates were about to commit or had committed crimes. Secondly, a superior lacked such information as a result of a serious dereliction of his duty to obtain the information within his reasonable access.[308] As acknowledged by the Prosecution, only the second situation is not encompassed by the Trial Chamber's findings.[309] Delali} argues to the effect that the Trial Chamber was correct in its statement of the law in this regard, and that the second situation envisaged by the Prosecution was in effect an argument based on strict liability.[310] Deli} agrees with the Prosecution's assessment of customary law that "the commander has an international duty to be informed", but argues that the Statute was designed by the UN Security Council in such a way that the jurisdiction of the Tribunal was limited to cases where the commander had actual knowledge or such knowledge that it gave him reason to know of subordinate offences, which was a rule inconsistent with customary law laid down in the military trials conducted after the Second World War.[311]

225. The literal meaning of Article 7(3) is not difficult to ascertain. A commander may be held criminally liable in respect of the acts of his subordinates in violation of Articles 2 to 5 of the Statute. Both the subordinates and the commander are individually responsible in relation to the impugned acts. The commander would be tried for failure to act in respect of the offences of his subordinates in the perpetration of which he did not directly participate.

226. Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. The Appeals Chamber takes it that the Prosecution seeks a finding that "reason to

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[307] Trial Judgement, para 383.
[308] Prosecution Brief, para 2.7; Appeal Transcript p 121.
[309] Appeal Transcript, p 121.
[310] Delali} Response, p 157.
[311] Deli} Response, para 215.

know" exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so. The Prosecution's argument that a breach of the duty of a superior to remain constantly informed of his subordinates actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.

227. As the Tribunal is charged with the application of customary law,[312] the Appeals Chamber will briefly consider the case-law in relation to whether there is a duty in customary law to know of all subordinate activity, breach of which will give rise to criminal responsibility in the context of command or superior responsibility.

(ii) Duty to Know In Customary Law

228. In the *Yamashita* case, the United States Military Commission found that:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility [...]. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[313]

The Military Commission concluded that proof of widespread offences, and secondly of the failure of the commander to act in spite of the offences, may give rise to liability. The second factor suggests that the commander needs to discover and control. But it is the first factor that is of primary importance, in that it gives the commander a reason or a basis to discover the scope of the offences. In the *Yamashita* case, the fact stood out that the atrocities took place between 9 October 1944 to 3 September 1945, during which General Yamashita was the commander-in-chief of the 14th Army Group including the Military Police.[314] This length of time begs the question as to how the commander and his staff could be ignorant of large-scale atrocities spreading over this long period. The statement of the commission implied that it had

[312] Secretary–General's Report, para 34.
[313] Law Reports of Trials of War Criminals, Vol IV, p 35.
[314] *Ibid*, p 19.

found that the circumstances demonstrated that he had enough notice of the atrocities to require him to proceed to investigate further and control the offences. The fact that widespread offences were committed over a long period of time should have put him on notice that crimes were being or had been committed by his subordinates.

229. On the same case, the United Nations War Crimes Commission commented:

> [...] the crimes which were shown to have been committed by Yamashita's troops were so widespread, both in space and in time, that they could be regarded as providing either prima facie evidence that the accused *knew* of their perpetration, or evidence that he must have failed to fulfil a duty to *discover* the standard of conduct of his troops.[315]

This last sentence deserves attention. However, having considered several cases decided by other military tribunals, it went on to qualify the above statement:

> Short of maintaining that a Commander has a duty to *discover* the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded *means of knowledge* as being the same as knowledge itself.[316]

In summary, it pointedly stated that "the law on this point awaits further elucidation and consolidation".[317] Contrary to the Trial Chamber's conclusion, other cases discussed in the Judgement do not show a consistent trend in the decisions that emerged out of the military trials conducted after the Second World War.[318] The citation from the Judgement in the case of *United States v Wilhelm List*[319] ("*Hostage case*") indicates that List failed to acquire "supplementary reports to apprise him of all the pertinent facts".[320] The tribunal in the case found that if a commander of occupied territory "fails to require and obtain *complete* information" he is guilty of a dereliction of his duty.[321] List was found to be charged with notice of the relevant crimes because of reports which had been made to him.[322] Therefore, List had in his possession information that should have prompted him to investigate further the situation under his command. The Trial Chamber also quoted from the *Pohl* case.[323] The phrase quoted is also meant to state a different point than that suggested by the Trial Chamber. In that case, the accused Mummenthey pleaded ignorance of fact in respect of certain aspects of the running

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315 *Ibid*, p 94.
316 *Ibid*, p 94.
317 *Ibid*, p 95.
318 The Trial Chamber held that "the jurisprudence from the period immediately following the Second World War affirmed the existence of a duty of commanders to remain informed about the activities of their subordinates." Trial Judgement, para 388.
319 *United States v Wilhelm List et al*, Vol XI, TWC, 1230.
320 *Ibid*, p 1271, cited in Trial Judgement, para 389.
321 *Ibid* (emphasis added).
322 *United States v Wilhelm List et al*, Vol XI, TWC, at pp 1271-1272.
323 Trial Judgement, para 389.

of his business which employed concentration camp prisoners.[324] Having refuted this plea by invoking evidence showing that the accused knew fully of those aspects, the tribunal stated:

> Mummenthey's assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know.[325]

That statement, when read in the context of that part of the judgement, means that the accused was under a duty arising from his position as an SS officer and business manager in charge of a war-time enterprise to know what was happening in his business, including the conditions of the labour force who worked in that business. Any suggestion that the tribunal used that statement to express that the accused had a duty under international law to know would be *obiter* in light of the finding that he had knowledge. In the *Roechling* case, which was also referred to by the Trial Chamber, the court concluded that Roechling had a "duty to keep himself informed about the treatment of the deportees."[326] However, it also noted that "Roechling [...] had repeated opportunities during the inspection of his concerns to ascertain the fate meted out to his personnel, since he could not fail to notice the prisoner's uniform on those occasions".[327] This was information which would put him on notice. It is to be noted that the courts which referred to the existence of a "duty to know" at the same time found that the accused were put on notice of subordinates' acts.

230. Further, the Field Manual of the US Department of Army 1956 (No. 27-10, Law of Land Warfare) provides:

> The commander is...responsible, if he had actual knowledge, or *should have had knowledge, through reports received by him or through other means*, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to use the means at his disposal to insure compliance with the law of war.[328]

The italicised clause is clear that the commander should be presumed to have had knowledge if he had reports or other means of communication; in other words, he *had already information* as contained in reports or through other means, which put him on notice. On the basis of this analysis, the Appeals Chamber must conclude, in the same way as did the United Nations War Crimes Commission,[329] that the then customary law did not impose in the criminal context a general duty to know upon commanders or superiors, breach of which would be sufficient to render him responsible for subordinates' crimes.

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[324] *United States v Oswald Pohl et al.*, TWC, Vol. V, p 1055.
[325] *Ibid.*
[326] TWC, Vol XIV, Appendix B, p 1136.
[327] TWC, Vol XIV, Appendix B, p 1136-37.
[328] Emphasis added.
[329] Law Reports of Trials of War Criminals, Vol IV, p 94.

231. The anticipated elucidation and consolidation of the law on the question as to whether there was a duty under customary law for the commander to obtain the necessary information came with Additional Protocol I. Article 86(2) of the protocol provides:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or *had information which should have enabled them to conclude in the circumstances at the time*, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[330]

232. The phrase, "had reason to know", is not as clear in meaning as that of "had information enabling them to conclude", although it may be taken as effectively having a similar meaning. The latter standard is more explicit, and its rationale is plain: failure to conclude, or conduct additional inquiry, in spite of alarming information constitutes knowledge of subordinate offences. Failure to act when required to act with such knowledge is the basis for attributing liability in this category of case.

233. The phrase "had information", as used in Article 86(2) of Additional Protocol I, presents little difficulty for interpretation. It means that, at the critical time, the commander had in his possession such information that should have put him on notice of the fact that an unlawful act was being, or about to be, committed by a subordinate. As observed by the Trial Chamber, the apparent discrepancy between the French version, which reads "*des informations leur permettant de conclure*" (literally: information enabling them to conclude), and the English version of Article 86(2) does not undermine this interpretation.[331] This is a reference to information, which, if at hand, would oblige the commander to obtain *more* information (i.e. conduct further inquiry), and he therefore "had reason to know".

234. As noted by the Trial Chamber, the formulation of the principle of superior responsibility in the ILC Draft Code is very similar to that in Article 7(3) of the Statute.[332] Further, as the ILC comments on the draft articles drew from existing practice, they deserve close attention.[333] The ILC comments on the *mens rea* for command responsibility run as follows:

> Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or

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[330] Emphasis added.
[331] Trial Judgement, para 392. The two commentaries on Additional Protocol I appear to agree that the French text, which is broader, should be preferred. *See* Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, Michael Bothe, Karl Joseph Partsch, Waldemar A Solf, (Martinus Nijhoff: The Hague 1982), pp 525-526; ICRC Commentary para 3545.
[332] Trial Judgement, para 342.
[333] ILC Report, pp 34 ff.

> had reason to know *in the circumstances at the time* that a subordinate was committing or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations. In the first situation, a superior has actual knowledge that his subordinate is committing or is about to commit a crime...In the second situation, he has *sufficient relevant information to enable him to conclude under the circumstances at the time* that his subordinates are committing or are about to commit a crime.[334]

The ILC further explains that "[t]he phrase 'had reason to know' is taken from the statutes of the ad hoc tribunals and should be understood as having the same meaning as the phrase 'had information enabling them to conclude' which is used in the Additional Protocol I. The Commission decided to use the former phrase to ensure an objective rather than a subjective interpretation of this element of the first criterion."[335]

235. The consistency in the language used by Article 86(2) of Additional Protocol I, and the ILC Report and the attendant commentary, is evidence of a consensus as to the standard of the *mens rea* of command responsibility. If "had reason to know" is interpreted to mean that a commander has a duty to inquire further, on the basis of information of a general nature he has in hand, there is no material difference between the standard of Article 86(2) of Additional Protocol I and the standard of "should have known" as upheld by certain cases decided after the Second World War.[336]

236. After surveying customary law and especially the drafting history of Article 86 of Additional Protocol I,[337] the Trial Chamber concluded that:

> An interpretation of the terms of this provision [Article 86 of Additional Protocol I] in accordance with their ordinary meaning thus leads to the conclusion, confirmed by the *travaux préparatoires*, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the *mens rea* standard established in Article 7(3). The Trial Chamber thus makes no finding as to the present content of customary law on this point.[338]

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[334] *Ibid*, pp 37-38 (emphasis added).

[335] *Ibid*, p 38. Article 28(a) of the ICC Statute provides for the responsibility of a military commander or a person effectively acting as a military commander. To establish the responsibility, proof is required that the commander or person "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes".

[336] Trial Judgement, para 389, where the trial of Admiral Toyoda was cited. Also, the *Tokyo Trial* Judgement, International Military Tribunal for the Far East (29 April 1946-12 November 1948), Vol.1, p 30, cited in the Prosecution Brief, para 2.9.

[337] The Trial Chamber, in particular, correctly observed to the effect that an overly broad "should have known" standard was rejected at the conference which adopted Additional Protocol I. Trial Judgement, para 391.

[338] *Ibid*, para 393.

237. The Prosecution contends that the Trial Chamber relied improperly upon reference to the object and purpose of Additional Protocol I.[339] The ordinary meaning of the language of Article 86(2) regarding the knowledge element of command responsibility is clear. Though adding little to the interpretation of the language of the provision, the context of the provision as provided by Additional Protocol I simply confirms an interpretation based on the natural meaning of its provisions. Article 87 requires parties to a conflict to impose certain duties on commanders, including the duty in Article 87(3) to "initiate disciplinary or penal action" against subordinates or other persons under their control who have committed a breach of the Geneva Conventions or of the Protocol. That duty is limited by the terms of Article 87(3) to circumstances where the commander "is aware" that his subordinates are going to commit or have committed such breaches. Article 87 therefore interprets Article 86(2) as far as the duties of the commander or superior are concerned, but the criminal offence based on command responsibility is defined in Article 86(2) only.

238. Contrary to the Prosecution's submission, the Trial Chamber did not hold that a superior needs to have information on subordinate offences in his actual possession for the purpose of ascribing criminal liability under the principle of command responsibility. A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he "had reason to know". The ICRC Commentary (Additional Protocol I) refers to "reports addressed to (the superior), [...] the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits" as potentially constituting the information referred to in Article 86(2) of Additional Protocol I.[340] As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.

239. Finally, the relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, "in the possession of". It is not required that he actually acquainted himself with the information. In the Appeals Chamber's view, an

[339] *See* Prosecution argument in Prosecution Brief, paras 2.15-2.19. Reference is made to Article 31 of the Vienna Convention on the Law of Treaties of 1969.
[340] ICRC Commentary (Additional Protocol I), para 3545.

assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question. Thus, as correctly held by the Trial Chamber,[341] as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he "knew or had reason to know" about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of *strict* imputed liability.

(iii) Civilian Superiors

240. The Prosecution submits that civilian superiors are under the same duty to know as military commanders.[342] If, as found by the Appeals Chamber, there is no such "duty" to know in customary law as far as military commanders are concerned, this submission lacks the necessary premise. Civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law. As the Trial Chamber made a factual determination that Delali} was not in a position of superior authority over the ^elebi}i camp in any capacity, there is no need for the Appeals Chamber to resolve this question.

(iv) Conclusion

241. For the foregoing reasons, this ground of appeal is dismissed. The Appeals Chamber upholds the interpretation given by the Trial Chamber to the standard "had reason to know", that is, a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.[343] This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment.

2. Whether Delali} Exercised Superior Responsibility

242. The Prosecution's second ground of appeal alleges an error of law in the Trial Chamber's interpretation of the nature of the superior-subordinate relationship which must be established to prove liability under Article 7(3) of the Statute. The Prosecution contends that the Trial Chamber wrongly "held that the doctrine of superior responsibility requires the

[341] Trial Judgement, para 383.
[342] Prosecution Brief, para 2.11.

255. It is clear that the Trial Chamber drew a considerable measure of assistance from the ICRC Commentary (Additional Protocols) on Article 86 of Additional Protocol I (which refers to the circumstances in which a superior will be responsible for breaches of the Conventions or the Protocol committed by his subordinate) in finding that actual control of the subordinate is a necessary requirement of the superior-subordinate relationship.[372] The Commentary on Article 86 of Additional Protocol I states that:

> [...] we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, *being his subordinate, is under his control*. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1 [of Article 86]. Furthermore only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However it should not be concluded from this that the provision only concerns the commander under whose direct orders the subordinate is placed. The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.[373]

The point which the commentary emphasises is the concept of control, which results in a relationship of superior and subordinate.

256. The Appeals Chamber agrees that this supports the Trial Chamber's interpretation of the law on this point. The concept of effective *control* over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[374]

257. In considering the Prosecution submissions relating to "substantial influence", it can be noted that they are not easily reconcilable with other Prosecution submissions in relation to command responsibility. The Prosecution expressly endorses the requirement that the superior have effective *control* over the perpetrator,[375] but then espouses, apparently as a matter of general application, a theory that in fact "substantial influence" alone may suffice, in that "where a person's powers of influence amount to a *sufficient* degree of authority or control in the circumstances to put that person in a position to take preventative action, a failure to do so

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[372] Trial Judgement, paras 354, 371 and 647, referring to para 3544 of the ICRC Commentary (Additional Protocols). Article 86(2) provides: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

[373] ICRC Commentary (Additional Protocols), para 3544.

[374] It has been elsewhere accepted in the jurisprudence of the Tribunal that, where there is no effective control, there is no superior responsibility: *Aleksovski* Trial Judgement, para 108 (HVO soldiers with arms forced their way into the prison without the guards being able to stop them) and para 111 (no finding was made on any existence of control by Aleksovski over the HVO soldiers).

war crimes."[642] In the *Trial of Josef Altstötter and Others (The Justice Trial)*, the tribunal found numerous defendants guilty of war crimes as well as crimes against humanity based on exactly the same acts,[643] thus appearing to uphold the possibility of cumulative convictions, at least when war crimes and crimes against humanity are involved.

412. Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

413. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.

414. In this case, defendants Mucic and Delic have been convicted of numerous crimes under Articles 2 and 3 of the Statute, which crimes arise out of the same acts. The chart below summarises their convictions.

Article 2 (Grave Breaches of Geneva Convention No. IV	Article 3 (Violations of the Laws or Customs of War—Common Article 3)
1. wilful killings	1. murders
2. wilfully causing great suffering or serious injury to body or health	2. cruel treatment
3. torture	3. torture
4. inhuman treatment	4. cruel treatment

[642] *Id.*

[643] *Ibid* at 75-76. *See also* Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc S/25274 ("The Commission notes that fundamental rules of human rights law often are materially identical to rules of the law of armed conflict. It is therefore possible for the same act to be a war crime and a crime against humanity."). However, the Report does not indicate whether *convictions* based on the same acts are possible under provisions for war crimes and crimes against humanity.

without identifying who was involved in it.[693] He said that he thought that the second beating occurred the next evening, and said:

> He was called out again outside, at night fall. I remember Zenga, Esad Landžo. He came in. He came into the hangar. I think that Delic was near the door, outside. He didn't want to go out. He was – and then two other prisoners were ordered to help him get up and push him out, outside the door. This was right next to me in the hangar. They started beating him and by the number of blows, the movements and everything we could hear, there must have been a large group of people, several people.[694]

The "he" who did not want to go out was clearly Gotovac. Witness B was not asked to identify who "they" were who started beating Gotovac. He later described the threat by Landžo concerning the badge on Gotovac's forehead.[695]

452. The Prosecution argued that the sentence "I think that Delic was near the door, outside" should be interpreted as expressing doubt not as to whether Delic was there at the time of the second beating, but only as to where he was standing.[696] Such an argument would have greater force if Witness B had elsewhere in his evidence identified Delic as having been present, but he did not do so. The presence of Delic during the second beating was a vital piece of evidence linking him to that beating. It is the obligation of the Prosecution to ensure that its vital evidence is clear and unambiguous. An accused person should not be convicted upon the basis of a verbal ambiguity in that vital evidence. This sentence of Witness B's evidence, read literally, expresses some doubt as to whether Delic was present, not merely as to where he was standing. Where a Prosecution witness whose evidence is vital is able to clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution.

453. Rajko Draganic described Delic and Landžo as beating Gotovac on the first occasion.[697] In relation to what may have been either the first or the second beating (the evidence is ambiguous), he said:[698]

> [...] and that Delic said, Zenga [Landžo], I do not know exactly, he said two people should come and carry him inside.

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693 *Ibid*, p 5056.
694 *Ibid*, p 5056.
695 *Ibid*, p 5057.
696 Appeal Transcript, pp 519-520.
697 Trial Transcript, p 6929.
698 *Ibid*, p 6930.

therefore not unreasonable for the Trial Chamber to regard the totality of the evidence, when taken as a whole, as establishing beyond reasonable doubt Delic's guilt.

487. Deli}'s grounds of appeal relating to Counts 3 and 4 must accordingly be dismissed.

D. Issues 13 and 14: Convictions Under Counts 18 and 19

488. In Counts 18 and 19, Delic was found guilty of torture for the rape of Grozdana Cecez (for the purposes of this section, "the victim").[744] It was found that the victim was taken to the Celebici camp on 27 May 1992 and on her arrival was brought to a room in which Delic was waiting. She was interrogated by Delic, during the course of which he slapped her. She was then taken to another room with three men including Delic. Delic subsequently raped her.[745] It was found that these rapes constituted the offence of torture.[746]

489. Delic's principal argument centres on the victim's testimony, submitting that it was so weak and contradicted, that the Trial Chamber's conclusions were clearly wrong.[747] In particular, he refers to elements of her testimony which illustrate her unreliability because: (1) she failed to identify Delic properly;[748] (2) her own evidence was weak and contradictory when given in relation to certain issues;[749] (3) her evidence contradicted evidence given by other witnesses, in particular Milojka Antic;[750] and (4) she was unable to recall certain events,[751] illustrating what he describes as her "selective memory".[752]

490. As to the reliability of the testimony presented in relation to these counts, the Trial Chamber in general found:

> the testimony of Ms. Cecez, and the supporting testimony of Witness D and Dr. Grubac, credible and compelling, and thus concludes that Ms. Cecez was raped by Delic, and others, in the ^elebici prison-camp.[753]

491. The argument made under these grounds attacks the credibility and reliability of the main witness on whom the Trial Chamber relied to convict. The Appeals Chamber recalls that

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744 Specifically, Delic was found guilty of torture as a Grave Breach of Geneva Convention IV (Article 2(b) of the Statute) and as a Violation of the Laws or Customs of War (Article 3 of the Statute): Trial Judgement para 943.
745 Trial Judgement, para 937.
746 Trial Judgement, para 941.
747 Delic Brief, para 304; Appeal Transcript, p 499.
748 Delic submits that although she later identified him by name, she was unable to identify him in a photograph array prepared by the Prosecution and she was not asked to identify him in court. Delic Brief, para 305.
749 Appeal Transcript, p 501.
750 Delic Brief, para 302.
751 Appeal Transcript, p 500.
752 Delic Brief, para 306.
753 Trial Judgement, para 936.

the Trial Chamber was in the best position to hear, assess and weigh this testimony. It was accordingly for the Trial Chamber to consider whether the witness was reliable and her evidence credible. In such circumstances, the Appeals Chamber must always give a margin of deference to a Trial Chamber's evaluation of the evidence and findings of fact.[754] It is for Delic in these circumstances to demonstrate that this evidence could not reasonably have been accepted by any reasonable person, that the Trial Chamber's evaluation was wholly erroneous and that therefore the Appeals Chamber should substitute its own finding for that of the Trial Chamber.[755]

492. Delic does not dispute the fact that the Rules do not require corroboration of a victim's testimony.[756] However, although the Trial Chamber also relied on additional testimony to support the principal account, the only direct evidence (and that disputed) in relation to the rapes carried out by Delic was that of the victim. Delic states that this testimony was not worthy of belief, due primarily to inconsistencies in the evidence which he claims illustrate its unreliability.

493. As to these alleged inconsistencies, Delic firstly alleges that the victim's identification of him as the person who raped him was suspect, as she could not identify him in a photograph array and was not asked to identify him directly in court.[757] The Trial Chamber found that: "Upon her arrival at the prison-camp she was taken [...] to a room where a man with a crutch was waiting, whom she subsequently identified as Delic".[758] The Appeals Chamber notes that the victim, having identified Delic at the start of her testimony as "the man with a crutch", confirmed this identification throughout her testimony,[759] while also referring to him by name.[760] The Appeals Chamber sees no reason to question the evaluation of this identification by the Trial Chamber.

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754 *Tadic* Appeal Judgement, para 65; *Aleksovski* Appeal Judgement, para 63.
755 *Aleksovski* Appeal Judgement, para 63.
756 Rule 96(i) of the Rules provides that in cases of sexual assault, "no corroboration of the victim's testimony shall be required".
757 Delic Brief, paras 297 and 305.
758 Trial Judgement, para 937.
759 In testimony, she stated: "When I entered that room, it was a very small room. I saw a man with a crutch. There was a crutch next to him. His leg was bandaged". Trial Transcript p 491. She continued to refer to him as the "the man with the crutch", (*e.g.*, Trial Transcript p 492, when asked who slapped her) and "[t]he one with the crutch" (*e.g.*, Trial Transcript p 494, when asked who raped her). She then stated: "At that time I still did not know who he was but later I found out. Soon after that I found out who and what he was Hazim Delic" (Trial Transcript p 494).
760 In particular, when asked again to confirm the identification, Grozdana Cecez stated that although she did not know who Delic was when he raped her, she "learned shortly [after]. [ ] The women from Bradina had come, and somebody from the entrance was looking for Hazim Delic and he appeared, so I realised that he was the man. He was carrying a crutch and he was limping, so I knew straight away who he was". She further testified

in some domestic jurisdictions, the testimony of victims of sexual assault is not, as a general rule, less reliable than the testimony of any other witness. The appellant's argument that the Trial Chamber shifted the burden of proof to the Defence is thus misconceived, as the Trial Chamber did not rely on any "presumption of reliability" to assess the evidence before it. In the paragraph following the one just quoted the Trial Chamber assessed the evidence of Ms Anti} as follows:

> Despite the contentions of the Defence, the Trial Chamber accepts Ms. Anti}'s testimony, and finds, on this basis, and the supporting evidence of Ms.]e}ez, Witness P and Dr. Petko Gruba~, that she was subjected to three rapes by Hazim Deli}. *The Trial Chamber finds Ms. Anti}'s testimony as a whole compelling and truthful, particularly in light of her detailed recollection of the circumstances of each rape and her demeanour in the court room in general and, particularly, under cross-examination.* The alleged inconsistencies between her evidence at trial and prior statements are immaterial and were sufficiently explained by Ms. Anti}. She consistently stated under cross-examination that, when she made those prior statements, she was experiencing the shock of reliving the rapes that she had "kept inside for so many years". Further, the probative value of these prior statements is considerably less than that of direct sworn testimony which has been subjected to cross-examination.[785]

506. As already stated, there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence.[786] What matters is the reliability and credibility accorded to the testimony. Contrary to Deli}'s assertion, the Trial Chamber did not presume that the testimony of Ms Anti} was reliable and credible as it discussed it carefully, and identified particular reasons why it considered her credible. Clearly, the testimony of Ms Anti} was ascertained on its individual merit, and treated as the testimony of any other witness, and the Trial Chamber was careful to discuss the inconsistencies between prior and live testimony.[787] Moreover, as held above and also in this Judgment, the hearing, assessing and weighing of the evidence presented at trial is primarily vested with the Trial Chamber, which is best placed to ascertain whether a witness is reliable in the circumstances of the case.[788]

507. The Appeals Chamber is of the view that the appellant has failed to demonstrate that the Trial Chamber erred in its evaluation of the evidence, and reached a conclusion that no reasonable tribunal could have reached. Accordingly, these grounds of appeal must fail.

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[784] Trial Judgement, para 956 (footnote omitted).
[785] Trial Judgement, para 957 (emphasis added).
[786] *See* above para 492.
[787] Trial Judgement, para 957.
[788] *Tadic* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63.

XII. JUDGE ODIO BENITO AND VICE-PRESIDENCY OF COSTA RICA

651. Three of the appellants – Delic, Mucic and Landžo – filed grounds of appeal based upon the facts that, whilst still a judge of the Tribunal and engaged in hearing this case, Judge Odio Benito was elected as a Vice-President of Costa Rica and took an oath of office as such. The grounds were in the following terms:

> Delic Issue 1
>
> Whether the Trial Chamber was properly constituted after 8 May 1998 in that Judge Elizabeth Odio Benito was no longer qualified to serve as a judge of the Tribunal in that she did not meet the qualifications in Article 13(1) of the Statute of the Tribunal.[1100]
>
> Mucic Ground 1
>
> Whether Judge Odio Benito was disqualified as a judge of the Tribunal by reason of her election as Vice-President of the Republic of Costa Rica.[1101]
>
> Landžo Ground 2
>
> The Participation at Trial as a Member of the Trial Chamber of a Judge Ineligible to Sit as a Judge of the Tribunal Violated Articles 13 and 21 of the Statute of the ICTY, the Rules of Natural Justice and International Law and Rendered the Trial a Nullity.[1102]

These grounds raise two distinct issues:

(1) Was Judge Odio Benito no longer qualified as a judge of the Tribunal by reason of those facts?

(2) Should Judge Odio Benito have disqualified herself as a judge by reason of those facts because she was no longer independent?

A. Background

652. Judge Odio Benito was elected as a judge of the Tribunal in September 1993, and she was installed as such on 17 November 1993 for a term of four years.[1103] In the elections held on 20 May 1997, neither she nor the other two judges hearing this case were re-elected. On 27 August 1997, the UN Security Council passed a resolution endorsing a recommendation by

[1100] Appellant-Cross Appellee Hazim Delic's Designation of the Issues on Appeal, 17 May 2000, p 2.
[1101] Appellant Zdravko Mucic's Final Designation of his Grounds of Appeal, p 1.
[1102] Landžo Brief, p 2.
[1103] Statute of the Tribunal, Article 13.4.

the Secretary-General that these three judges, "once replaced as members of the Tribunal, finish the *Celebici* case which they have begun before expiry of their terms of office [...]".[1104]

653. On 1 February 1998, and during the course of the trial in this case, Judge Odio Benito was elected as the Second Vice-President of the Republic of Costa Rica, and she took an oath of office as such on 8 May 1998. On 25 May 1998, the four accused jointly filed a "Motion on Judicial Independence", addressed to Judge Karibi-White, the Presiding Judge of the Trial Chamber. The four accused submitted that Judge Odio Benito should cease to take any further part in the trial, upon the grounds that, by having taken that oath of office and thereby become a member of the executive branch of the Government of Costa Rica:

(1) she had ceased to meet (a) the qualifications for a judge of the Tribunal, and (b) the criteria required for an independent judge in international law, and

(2) she had acquired an association which may affect her impartiality.[1105]

Pursuant to Rule 15(B) of the Tribunal's Rules, Judge Karibi-White conferred with Judge Odio Benito and then referred the Motion to the Bureau for its determination.[1106]

654. On 4 September 1998, the Bureau determined that Judge Odio Benito was not disqualified from sitting in the trial on the grounds referred to in Rule 15(A).[1107] Although the Bureau acknowledged that its competence conferred by the Rules did not extend to those aspects of the Motion on Judicial Independence which went beyond the scope of Rule 15(A),[1108] it did consider, and it rejected, the claim that Judge Odio Benito had ceased to possess the qualifications required for appointment to the highest judicial offices of her country (and therefore to be a judge of the Tribunal).[1109] There was no challenge at the time to either of these determinations.[1110]

[1104] Security Council Resolution S/RES/1126, 27 Aug 1997 ("Resolution 1126").
[1105] Motion on Judicial Independence, 25 May 1998, p 1.
[1106] Decision of the Bureau on Motion for Judicial Independence, 4 Sept 1998 ("Bureau Decision"), p 4. The four accused, apparently in ignorance of that referral, subsequently filed a request for a hearing of their joint motion or, alternatively, a request that the Presiding Judge refer the matter to the Bureau. This application was disposed of informally (Trial Transcript, pp 14930-14933).
[1107] Bureau Decision, p 11. Rule 15(A) provides: "A judge may not sit on a trial or appeal in any case in which the judge has a personal interest or concerning which the judge has or has had any association which might affect his or her impartiality".
[1108] Bureau Decision, p 11.
[1109] *Ibid*, p 6.
[1110] It was suggested during the hearing of the appeal that this was because the Bureau Decision of Sept 1998 "was not rendered until after the trial had been concluded" (Appeal Transcript, p 724). That is not so. The final submissions concluded on 15 October 1998 (Trial Transcript, p 16372), and Judgement in the trial was delivered on 16 November 1998.

B. Was Judge Odio Benito No Longer Qualified as a Judge of the Tribunal?

655. The qualifications for judges of the Tribunal are stated in Article 13 of the Tribunal's Statute:

> **Article 13**
>
> **Qualifications and election of judges**
>
> The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.[1111]

This provision is not stated in terms of qualification for *election* as judges, but rather in terms of continuous application ("The judges shall be [...]"). If, for example, a judge of the Tribunal were to be found guilty of some offence committed during his or her term of office which demonstrated a lack of high moral character or integrity, it could hardly be suggested that such a judge remained qualified within the terms of Article 13 simply because he or she was qualified at the time of election. The Appeals Chamber accepts that a judge must *remain* qualified within the meaning of Article 13 throughout his or her term of office.

656. The appellants have directed their arguments to the requirement of Article 13 that the judges of the Tribunal "possess the qualifications required in their respective countries for appointment to the highest judicial offices". Judge Odio Benito was elected as a judge of the Tribunal on the nomination of her country, the Republic of Costa Rica. The highest judicial office in that country is that of a magistrate of the Supreme Court of Justice of Costa Rica.[1112] The appellants argue that, by reason of her assumption of office as Vice-President of Costa Rica, Judge Odio Benito was constitutionally rendered disqualified for election as such a magistrate and therefore lost her qualifications as a judge of the Tribunal.

[1111] This was the form of Article 13(1) of the Statute at the relevant time. It has since been amended by Security Council Resolution 1329, 30 Nov 2000, so that the opening sentence commences: "The permanent and ad litem judges shall be persons of high moral character [...]".

[1112] Constitution of the Republic of Costa Rica ("Constitution"), Article 156. The Constitution was adopted in 1949. The parties (the Prosecution and Landžo, representing all three convicted appellants) have agreed upon an accurate English language translation of the Constitution (which is written in the Spanish language) as it was in force between 17 Nov 1997 (the date upon which Judge Odio Benito's original term expired) and 16 Nov 1998 (the date upon which the Judgement was delivered): Agreement Between the Prosecution and Appellant, Esad Landžo, Regarding the Constitution of Costa Rica, 28 Jul 2000, para 7. Article 156 provides: "The Supreme Court of Justice is the highest court of the judicial branch [...]".

657. On the other hand, the Prosecution, in addition to disputing the appellants' interpretation of Article 13,[1113] argues that, by reason of the Security Council's resolution permitting Judge Odio Benito (and the other two members of the Trial Chamber) to finish this case notwithstanding that they had been replaced as members of the Tribunal, the provisions of Article 13 no longer applied to them.[1114]

658. For reasons which will be given later in this Judgement, the Appeals Chamber does not accept either of these arguments, but it believes that it is important to state first its interpretation of Article 13 of the Tribunal's Statute.

659. In the opinion of the Appeals Chamber, any interpretation of Article 13 must take into account the restriction imposed by Article 12 of the Statute, that no two judges may be nationals of the same State. The Statute envisages that judges from a wide variety of legal systems would be elected to the Tribunal, and that the qualifications for appointment to the highest judicial offices in those systems would similarly be widely varied. The intention of Article 13 must therefore be to ensure, so far as possible, that the *essential* qualifications do not differ from judge to judge. Those *essential* qualifications are character (encompassing impartiality and integrity), *legal* qualifications (as required for appointment to the highest judicial office) and experience (in criminal law, international law, including international humanitarian law and human rights law). Article 13 was *not* intended to include every local qualification for the highest judicial office such as nationality by birth or religion, or disqualification for such high judicial office such as age. Nor was Article 13 intended to include constitutional disqualifications peculiar to any particular country for reasons unrelated to those essential qualifications.

660. This is certainly the way the Security Council has interpreted Article 13 to date. Article 13(2) provides that, before the judges of the Tribunal are elected by the UN General Assembly, the Security Council must submit for consideration by the General Assembly a list of candidates reducing those nominated by the States to a lesser number which takes into due account the need for adequate representation of the principal legal systems of the world. It may safely be assumed that the Security Council would not include within that reduced list any candidate who did not satisfy the requirements of Article 13. Indeed there are concrete examples where the Security Council has interpreted Article 13 in the way set forth by this Chamber.

[1113] Prosecution Response, para 13.42.
[1114] Prosecution Supplementary Brief, para 4.

661. When Judge Odio Benito was included in the list of candidates for election in 1993, she was still (according to her *curriculum vitae* which accompanied her nomination)[1115] the Minister of Justice of the Republic of Costa Rica – which, if the appellants's argument were to be accepted, would have constitutionally rendered her disqualified for election as a magistrate of the Supreme Court of Justice and as a judge of this Tribunal.[1116] Judge Sir Ninian Stephen was already seventy years of age when elected as a judge of the Tribunal in 1993,[1117] and thus was to be seventy four years of age at the conclusion of his term. The highest compulsory retirement age for any high judicial office in his country (Australia) is seventy-two – being for the Supreme Court of New South Wales. In neither of these cases was the judge thought by the Security Council not to be qualified as a judge of the Tribunal for a four year term.

662. It was accepted by the appellants that Judge Odio Benito at all times remained qualified as a judge of the Tribunal in relation to her character, legal qualifications and experience. The Appeals Chamber is accordingly satisfied that Judge Odio Benito did not lose her qualifications as a judge of the Tribunal by reason of her assumption of office as Vice-President of Costa Rica.

663. In any event, the Appeals Chamber does not accept the argument of the appellants that her assumption of office as a Vice-President of Costa Rica rendered Judge Odio Benito constitutionally disqualified for election as a magistrate of the Supreme Court of Justice under the Constitution of that country. It expresses this opinion as a matter of interpretation of the Constitution of Costa Rica, consistently with the jurisprudence of that country as identified by expert evidence during the appeal.

664. The Constitution states:

> The government of the Republic [...] is exercised by three distinct and independent branches: legislative, executive and judicial.[1118]

665. The Constitution has separate sections dealing with the legislative power,[1119] the executive power[1120] and the judicial power.[1121] It makes separate provisions as to the

[1115] General Assembly Document A/47/1006, 1 Sept 1993, p 57.
[1116] According to Judge Odio Benito's *curriculum vitae* which accompanied her nomination for election in 1997, she did not resign as Minister of Justice until 1994: General Assembly Document A/51/878, 22 Apr 1997, p 58.
[1117] ICTY 1994 Year Book, p 201.
[1118] Constitution, Article 9.
[1119] *Ibid*, Title IX.
[1120] *Ibid*, Title X.
[1121] *Ibid*, Title XI.

qualifications and disqualifications for election to a position within each of these three branches (or powers):

(1) Those *qualified* for election as deputies to the Legislative Assembly must be citizens of Costa Rica, Costa Rican by birth (or naturalised with ten years' residence after naturalisation), and twenty one years of age.[1122] Those *disqualified* as candidates for election as deputies include anyone occupying within six months prior to the date of the election the positions of President of the Republic, or a cabinet minister or a magistrate of the Supreme Court of Justice, or relatives of the existing President to the second degree of consanguinity or affinity inclusive.[1123]

(2) Those *qualified* for election as the President or a Vice-President must be citizens of Costa Rica, Costa Rican by birth, laymen and over thirty years of age.[1124] Those *disqualified* for election as President or Vice-President include anyone occupying within twelve months prior to the date for election the positions of President, or a Vice-President, or magistrate of the Supreme Court of Justice or a cabinet minister, or certain relatives of the existing President by consanguinity or affinity.[1125]

(3) Those *qualified* for election as a magistrate of the Supreme Court of Justice must be citizens of Costa Rica, Costa Rican by birth (or naturalised with ten years' residence after naturalisation), laymen, over thirty five years of age and legally qualified as defined.[1126] The only persons *disqualified* for election as a magistrate are persons who are related by consanguinity or affinity to the third degree inclusive to a member of the Supreme Court of Justice.[1127]

666. It is significant that, whilst persons holding positions in both the administrative and the judicial supreme powers at the time of the election (or within six months prior thereto) are expressly disqualified as a candidate for election as a deputy to the Legislative Assembly, and persons holding positions in the judicial supreme power at the time of the election (or within twelve months prior thereto) are expressly disqualified as a candidate for election as the President or a Vice-President, *no* person holding positions with either the executive or the

[1122] *Ibid*, Article 108.
[1123] *Ibid*, Article 109.
[1124] *Ibid*, Article 131.
[1125] *Ibid*, Article 132.
[1126] *Ibid*, Article 159. The Article defines the legal qualification as: "Holder of a lawyer's degree issued or legally recognised in Costa Rica, and must have engaged in the profession for at least ten years, except in the case of judicial [officials] with not less than five years of judicial experience". (The Spanish translator retained by the Tribunal's Conference and Languages Section prefers the word "officers" to "officials").

administrative supreme powers at the time of the election is expressly disqualified as a candidate for election as a magistrate. In particular, a Vice-President at the time of the election is not expressly disqualified for election as a magistrate of the Supreme Court.

667. In support of their argument, however, the appellants rely upon Article 161 which provides:

> The position of magistrate is incompatible with that of an official of the other supreme powers.

The expression "supreme powers" is not defined in the Constitution, but it may be accepted that the reference is to the three "distinct and independent branches" which exercise the government of the Republic through the "powers" already identified.

668. Article 161 is one of similar but not identical provisions which relate to each of the three supreme powers:

> [Legislative power]
>
> Article 111 After taking the oath of office no deputy may accept a position or employment with the other powers of the State or the autonomous institutions, under penalty of losing his credentials, except as a cabinet minister. In the latter event, he will be reinstated in the Assembly when the position terminates. [...]
>
> Article 112 The legislative function is also incompatible with the holding of any other elective public office. [...]
>
> [Executive power]
>
> Article 143 The position of minister is incompatible with the exercise of any other public [charge, elective] or otherwise, except where special laws confer functions upon them. [...].[1128]
>
> The vice-presidents of the Republic may hold the position of minister.
>
> [Judicial power]
>
> Article 161 The position of magistrate is incompatible with that of an official of the other supreme powers.

The object of these provisions appears clearly to be to prevent the one person holding more than one of these positions at the one time. If a Vice-President at the time of the election of magistrates, who is otherwise qualified in accordance with Article 159 but not disqualified by

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[1127] *Ibid*, Article 160.

Article 160, wishes to stand for that election, he or she is permitted to do so, but must, if elected as a magistrate, resign as Vice-President. Such an interpretation of the Constitution itself is consistent with the jurisprudence revealed in the expert opinion of Mr Alejandro Batalla,[1129] although it would appear to be inconsistent with his final conclusion.

669. Citing as authority a decision of the Costa Rican Constitutional Court,[1130] Mr Batalla says:

> [...] the intention of the Constitutional Assembly was to provide the Magistrates with a special level of independence from the other branches to prevent any mixing of their political activity with the justice in order to guarantee impartiality.[1131]
>
> The Constitutional Court argues that holding both positions simultaneously might subordinate the Magistrate psychologically to a certain ideology that can affect and reduce his criteria in such a way.
>
> The body of laws of Costa Rica stipulates, in general terms, the incompatibility of the positions of magistrate and judge[1132] with those positions elected by popular vote such as the position of Vice-President, and the justification lies on the demand of the independence of the judge. In other of its precedents, the Constitutional Court has stated that:
>
> "The position of Judge or Magistrate is incompatible with any other position elected by popular vote or political designation. What is intended is to keep the officials administering justice away from the passions inherent to the political activity which, due to its nature, is very polemical. In this way, this prevents the possibility of establishing a link of psychological subordination of the judge, offering said circumstance, the temptation of adjusting his behaviour to a certain ideology or way of thinking detached from his self, since the freedom of opinion of the judge may be reduced by the influence of an ideological tendency. The system of incompatibilities and the system of prohibitions are guarantees that tend to prevent the creation of links – either of public or private nature – that may lead to the union of two simultaneous qualities in one person; that is, that the status of the Judge may be joined by another quality that may place him, in a submission relationship of any kind. It is possible to prevent the judge from performing any paid job in order to prevent him from establishing links that may restrict his independence".[1133]

670. Mr Batalla then concludes:

> In conclusion, the position of Magistrate of the Supreme Court of Justice has an express restriction on a Constitutional level to be *elected* if he holds another position in any other Supreme Power of Costa Rica.[1134]

[1128] The Spanish translator retained by the Tribunal's Conference and Languages Section prefers the phrase "post, publicly elected" to "charge, elective".
[1129] A Professor of Administrative Law in the Master and Doctoral Program of the Institute of Education and Research of Universidad Autónoma de Centro América.
[1130] Constitutional Court, Decision N 2621-95, quoted in Mr Batalla's opinion at pp 2-3.
[1131] Opinion, pp 3-4.
[1132] [Mr Batalla's footnote] The Judge and the Magistrate are the only officials that may administer justice.
[1133] [Mr Batalla's footnote] Constitutional Court, Decision N 2883-96.
[1134] The emphasis has been added.

If Mr Batalla's ultimate conclusion be correct, the Constitution would have expressed the disqualifications upon candidates for election as a magistrate in substantially different terms. Article 160 would have disqualified as candidates for such election those persons holding positions in both the executive and the administrative supreme powers, in the same way as Articles 109 and 132 have disqualified magistrates as candidates for election, respectively, as deputy of the Legislative Assembly and as President or Vice-President. Significantly, the Constitution has not done so.[1135]

671. Article 161 does not therefore *disqualify* a Vice-President as a candidate for election as a magistrate of the Supreme Court of Costa Rica. It merely requires that such a Vice-President resign that position if *elected* as a magistrate and before assuming office as such.

672. The Prosecution's argument which the Appeals Chamber has not accepted was that the requirements of Article 13(1) of the Statute apply by their terms only to "the judges" of the Tribunal, which means the judges referred to in Article 12 who are elected pursuant to Article 13(2) or appointed pursuant to Article 13(3).[1136] The Prosecution contended that, when the term of office of Judge Odio Benito expired on 17 November 1997, she ceased to be one of "the judges" of the Tribunal, and that the Security Council Resolution 1126 which enabled the judges of the *Celebici* Trial Chamber to finish hearing the case did not affect this.[1137] The terms of Resolution 1126, which authorised the three judges "once replaced as members of the Tribunal, to finish the *Celebici* case which had begun before the expiry of their terms of office", was interpreted by the Prosecution as emphasising that the judges' terms of office had *expired* and that they had been replaced. Although the judges continued to exercise the functions of a judge, it was said, they no longer held the office of judges of the Tribunal.[1138] The source of Judge Odio Benito's authority after 17 November 1997 was not the Statute, but Resolution 1126. The resolution was said to prevail over the Statute in the event of inconsistency, as the Statute itself derives from a Security Council resolution and can be expressly or impliedly amended by a subsequent resolution.[1139]

[1135] An expert opinion by Francisco Villalobos Brenes (a member of the Bar of Costa Rica and Adjunct Professor in the Faculty of Law of the University of Costa Rica) was also tendered. None of the interpretative resources relied upon by Mr Brenes suggest a contrary interpretation of Article 161. Indeed, he expressly concludes (at para 5C) that Article 161 is one of various rules which specifically prohibit the possibility of a person *exercising* the judicial function at the same time as holding a post in the Executive or Legislative Branches (the emphasis has been added).
[1136] Prosecution Supplementary Brief, para 4.
[1137] *Ibid*, paras 6-9.
[1138] *Ibid*, paras 10-12.
[1139] *Ibid*, paras 13-16.

673. However, if the submission that Judge Odio Benito was no longer a "judge" within the meaning of Article 13(1) after the expiry of her initial term of office be correct, it would follow that she was also not a "judge" for the purposes of other articles of the Statute. In that case, since Article 12 provides that the Trial Chambers consist of three "judges", the Trial Chamber would not have been validly composed. Moreover, since it is the "Trial Chambers" which are to pronounce judgements and impose sentences and penalties,[1140] it would follow that the Trial Judgement in this case was not delivered by the body authorised by the Statute to do so. The Appeals Chamber does not accept that this was the intention of the Security Council in adopting Resolution 1126. The Prosecution indeed denied that its interpretation of the resolution has the result that the Trial Chamber was not properly constituted,[1141] and it submitted at the oral hearing that the three judges continued to be judges of the Tribunal with limited functions but that Resolution 1126 nevertheless had the effect that the requirements of Article 13(1) did not apply to them.[1142] This submission is entirely without merit.

674. The words from Resolution 1126 relied upon by the Prosecution must be read in the context of the circumstances in which the resolution was passed. The then President of the Tribunal had written to the Secretary-General seeking from him "an extension of the three judges sitting in the *Celebici* case", and had requested him to submit his letter to the members of the Security Council "for their consideration and approval of the extension of tenure of the three aforementioned judges for 12 months as from 17 November 1997".[1143] The Secretary-General had submitted the letter as requested, describing it in his letters to the Presidents of the Security Council and the General Assembly as requesting "an extension of the terms of office of the non-elected judges of the International Tribunal in order to allow them to dispose of ongoing cases".[1144] His letters continued:

> [...] in the absence of an explicit statutory provision providing for the extension of the term of office of Tribunal judges to complete ongoing cases, an approval of the Security Council, as the parent organ, and of the General Assembly, as the electing organ, would be desirable to preclude any question about the legality of such an extension.

[1140] Statute, Article 23.
[1141] Prosecution Supplementary Brief, para 19.
[1142] Counsel for the Prosecution told the Appeals Chamber that the judges had a "qualified qualification" (Appeal Transcript, p 714). The meaning of that phrase was not explained.
[1143] Letter of 18 June 1997, annexed to Document A/51/958 S/1997/605.
[1144] Letter of 1 Aug 1997, annexed to Document A/51/958 S/1997/605.

Resolution 1126, having noted this correspondence, endorsed the recommendation of the Secretary-General in the terms already partly quoted.[1145]

675. A reading of Resolution 1126 in this context necessarily indicates that its effect was to extend the terms of the judges for the particular purpose of concluding the *Celebici* trial. The terms of office of the judges as extended, although limited in their defined purpose, were otherwise left subject to the relevant provisions of the Statute. Any implied effect on the Statute was not to render Article 13(1) and those other provisions which refer to "judges" of the Tribunal inapplicable to the three judges, as argued by the Prosecution. It was limited to making a narrowly qualified exception to the four year term of office referred to in Article 13(4). The resolution indicates no intention to amend, modify or suspend any other provisions of the Statute, including Article 13(1), in any way.

676. The challenge to Judge Odio Benito's qualifications under Article 13 accordingly fails.

C. Should Judge Odio Benito Have Disqualified Herself as a Judge of the Tribunal?

677. The second issue raised by the appellants based upon the election of Judge Odio Benito as a Vice-President of Costa Rica and her assumption of that office was whether she was thereby disqualified as a judge of the Tribunal because she no longer possessed the necessary judicial independence required by international law.[1146] The appellants relied upon additional material and arguments in relation to this issue.

678. *Appointment as Minister of Environment and Energy:* After she took the oath of office as Second Vice-President, Judge Odio Benito was also appointed as Minister of Environment and Energy in the Government of Costa Rica.[1147]

679. *Membership of Board of Mediators:* A decree issued by the President of Costa Rica on 15 June 1998, dealing with a "Process of National Consensus", provided for a Board of Mediators to be composed of, *inter alia*, the two Vice-Presidents of the Republic. The functions and powers of that Board were to "judge, mediate and propose alternative solutions in those cases where the members of the Consensus Forum [another of the bodies in the Process of

[1145] "Endorses the recommendation of the Secretary-General that Judges Karibi-Whyte, Odio Benito and Jan, once replaced as members of the Tribunal, finish the *Celebici* case which they have begun before expiry of their terms of office [...]".

[1146] Landžo Reply, para 6.18 (which incorporates the arguments in the Motion on Judicial Independence, 25 May 1998); Mucic Brief, para 3.

[1147] Agreement Between the Prosecution and Appellant, Esad Landžo, Regarding Evidence for the Purposes of the Appeal, 19 May 2000 ("Agreement on Evidence"), p 1.

National Consensus] have such disagreements that they are unable to reach decisions by consensus".[1148]

680. *Exercise of Executive Functions:* Reliance was placed upon two media reports, the accuracy of which was not disputed,[1149] to claim that Judge Odio Benito exercised executive functions in Costa Rica whilst still a judge of the Tribunal:

(i) Meeting in April 1998

The first report, dated 28 April 1998, referred to a meeting of the President-elect of Costa Rica and "a group of former Costa Rican legal representatives and high officials" which had been held in order "to evaluate the process of a united national effort before the change in power the following week". The report focused on the release by the group of a communiqué which expressed "profound consternation" at the recent assassination of the Auxiliary Bishop of Guatemala.[1150] The report observed that "Vice-Presidents-elect, Astrid Fischel and Elizabeth Odio, who will assume office this coming May 8", also participated in the meeting.

(ii) Letter of protest

The second report, dated 1 June 1998, stated that an environmental and humanitarian organisation, Foro Emaus, had written to "the vice president of Costa Rica [...] who is furthermore the head of the Department of Environment and Energy" to protest at the deficient labour conditions in which women worked in banana packing plants.[1151]

681. *Separation of Powers:* The appellants assert that Judge Odio Benito exercised an executive function merely by holding the position of Second Vice-President as required by the Constitution of Costa Rica.[1152] They rely upon the doctrine of separation of powers, which is said to prevent a judge of the Tribunal from holding an executive position in a domestic government.[1153] The appellants rely upon the status of Costa Rica as a non-permanent member of the Security Council for a two year period from 1 January 1997 to submit that Costa Rica had

[1148] Landžo Reply, para 6.13; Agreement on Evidence, p 1, and annexed extract from the official gazette.
[1149] The Prosecution denied, however, that the events reported constituted the exercise by Judge Odio Benito of executive functions: Agreement on Evidence, p 2; Prosecution Response, para 13.45.
[1150] "President Elect of Costa Rica Condemns the Assassination of Bishop Gerardi", 28 Apr 1998, translation filed by counsel for Landžo, 5 June 2000.
[1151] "Denunciation of Deficient Labor Conditions in Banana Packing Plants", 1 June 1998.
[1152] Appeal Transcript, p 721.
[1153] *Ibid*, p 654. The submissions made by the appellants in relation to Judge Odio Benito and her position as Vice-President did not always make a clear distinction between the first and second of these issues. This particular submission was described as being relevant to her qualification under Article 13 (the first issue),

"direct political and administrative control over the affairs of this Tribunal",[1154] and that Judge Odio Benito, as a Vice-President of Costa Rica, had the power to give instructions to Costa Rica's representative on the Security Council, placing her "in an executive capacity *vis-à-vis* this very Tribunal".[1155]

682. *Impartiality:* The requirement of a judge's impartiality is stated in Article 13 of the Tribunal's Statute, which has already been quoted. That requirement is reflected in Rule 15(A), which is in these terms:

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

This Rule has been interpreted by the Tribunal as encompassing circumstances establishing both actual bias and an appearance or a reasonable apprehension of bias.[1156] No suggestion of actual bias has been made in the present case; the suggestion made is that the contemporaneous holding by Judge Odio Benito of the offices of a judge of the Tribunal and of Vice-President and government minister of Costa Rica carried the appearance of a lack of impartiality.[1157]

683. The relevant question to be determined by the Appeals Chamber is whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case.[1158] The apprehension of bias must be a reasonable one.[1159] Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold.[1160] A judge of the Tribunal makes a solemn declaration that he or she will perform the duties and exercise the powers of such an office "honourably, faithfully, impartially and conscientiously".[1161]

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but the Appeals Chamber regards it as logically more relevant to her disqualification under Rule 15(A) (the second issue), and it has considered the submission upon that basis.

[1154] Appeal Transcript, p 672.
[1155] *Ibid*, p 681.
[1156] *Furundžija* Appeal Judgement, para 189.
[1157] Mucic Brief, para 7; Landžo Reply, para 6.18.
[1158] *Furundžija* Appeal Judgement, para 189.
[1159] *Furundžija* Appeal Judgement, para 189.
[1160] *Ibid*, para 190.
[1161] Rule 14 of the Rules.

684. The fair-minded observer would also know of the circumstances surrounding Judge Odio Benito's election as Vice-President of Costa Rica. Prior to accepting a nomination as Vice-President, Judge Odio Benito wrote to the then President of the Tribunal (Judge Cassese) undertaking that, if elected, she would not assume any Vice-Presidential functions until the completion of her duties as a member of the Trial Chamber hearing the *Celebici* case ("the Undertaking"). President Cassese submitted that letter to the judges in a Plenary meeting, who unanimously determined, upon the basis of the Undertaking, that her proposed action would not be incompatible with her judicial duties. When she was elected as Vice-President, Judge Odio Benito informed the then President of the Tribunal (Judge McDonald), who submitted the matter again to the judges in a Plenary meeting, where approval was given for her to take the oath of office. The Undertaking given by Judge Odio Benito to the Tribunal was supported by the President of Costa Rica, who wrote to President McDonald to confirm that Judge Odio Benito would continue to discharge her functions as a judge of the Tribunal until the completion of the *Celebici* case[1162] and that she would not assume any functions in the government of Costa Rica before 17 November 1998.[1163] These facts were set out by the Bureau in its decision of 4 September 1998,[1164] and their substance has not been contested by the appellants.[1165]

D. Conclusion

685. The Appeals Chamber does not accept that Judge Odio Benito exercised any executive functions in Costa Rica during the time she was also a judge of the Tribunal. Taking the matters upon which reliance was placed by the appellants by reference to the categories already referred to:

686. *Appointment as Minister of Environment and Energy:* At the same time as Judge Odio Benito was appointed as Minister of Environment and Energy, a substitute minister was appointed to be in charge of that ministry during her absence.[1166] No evidence was produced by

[1162] Letter from His Excellency Miguel Angel Rodriguez E, President-Elect of the Republic of Costa Rica, to the President of the Tribunal, 9 Mar 1998.
[1163] Letter from His Excellency Miguel Angel Rodriguez E, President of the Republic of Costa Rica, to the President of the Tribunal, 7 July 1998.
[1164] Bureau Decision, p 3.
[1165] Appeal Transcript, p 653. The Prosecution relied on the Bureau Decision and the facts found therein: Prosecution Response, para 13.45. The Appeals Chamber has not dealt with this matter as an appeal from the decision of the Bureau. The question whether a judge should have been disqualified from hearing a case is relevant to the fairness of the trial: *Prosecutor v Furundžija*, IT-95-17/1, Decision on Post-Trial Application by Anto Furundžija to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial, 11 Mar 1999, p 2; and it is therefore a valid ground of appeal from a conviction. The *Furundžija* Appeal Judgement proceeded upon the basis that this was a valid ground.
[1166] Agreement on Evidence, para 1.

concurrently.[1237] As a result, the overall sentence imposed was a period of not more than seven years.

729. The Prosecution contends that the Trial Chamber's approach in sentencing Mucic "involved errors of basic principle, and that the sentence it imposed on Mucic was so low that it fell outside the proper limits of the Trial Chamber's discretion".[1238] The errors alleged by the Prosecution were identified separately in relation to those convictions based solely on Article 7(3), the conviction based on Article 7(1) alone, and the convictions based on both Article 7(1) and Article 7(3) liability. The primary argument relates to the Trial Chamber's alleged failure to take into account the gravity of the crimes for which Mucic was convicted. It is also alleged that the Trial Chamber should have taken into account crimes not specifically alleged in the indictment in sentencing Mucic.[1239] Finally, the Prosecution argues that the Trial Chamber erred in determining that all of the sentences imposed on Mucic should be served concurrently.[1240] Mucic argued in relation to his own ground of appeal against sentence that his sentence was too high and did not take into account certain matters in mitigation, including the absence of his direct participation in acts of violence.[1241]

1. Failure to take into account the gravity of the offences

730. Article 24(2) of the Statute of the Tribunal provides:

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

731. The Trial Chamber found, in its general considerations before addressing the factors relevant to each individual accused, that "[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence".[1242] In the subsequent *Aleksovski* Appeal Judgement, the Appeals Chamber expressly endorsed this statement of the *Celebici* Trial Chamber, and also expressed its agreement with the following statement of the Trial Chamber in the *Kupreškic* proceedings:

[1237] Trial Judgement, para 1286.
[1238] Prosecution Brief, para 5.6.
[1239] Prosecution Brief, paras 5.34-5.43.
[1240] Prosecution Brief, paras 5.54-5.75.
[1241] Mucic Brief, Appeal Against Sentence, pp 1-2. This submission in respect of the absence of findings as to his direct participation is effectively incorporated in the Appeals Chambers' consideration of the Prosecution ground

> The sentence to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[1243]

The Appeals Chamber reiterates this endorsement of those statements and confirms its acceptance of the principle that the gravity of the offence is the primary consideration in imposing sentence. It is therefore necessary to consider whether the Trial Chamber in fact gave due weight to the gravity of the offences for which Mucic was convicted in the sentence it imposed.

(a) Convictions under Article 7(3) alone

732. The Prosecution first submitted that there are two aspects to an assessment of the gravity of offences committed under Article 7(3) of the Statute:

> (1) the gravity of the underlying crime committed by the convicted person's subordinate; and
>
> (2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes.[1244]

The Appeals Chamber agrees that these two matters must be taken into account. As a practical matter, the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates. A failure to prevent or punish murder or torture committed by a subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.[1245]

733. The Prosecution submits that the Trial Chamber failed to make the gravity of Mucic's offences the starting point in its determination of his sentence. It suggests first that this is demonstrated by the point at which the Trial Chamber referred to "gravity" in its

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of appeal but in relation to other matters in mitigation is considered further below in relation to Mucic's ground of appeal.

[1242] Trial Judgement, para 1225.

[1243] *Kupreškic* Judgement, para 852, cited in the *Aleksovski* Appeal Judgement at para 182.

[1244] Prosecution Brief, para 5.13.

[1245] Mucic contends that the Prosecution's approach indicates that it mischaracterises the offences of a superior as being the "same crime" as that of the subordinate upon which the superior's offence is based: Mucic Response, para 10. The Prosecution Brief does contain some references which could be understood in this way: *e.g.*, para 5.24. The Appeals Chamber's conclusion, however, is not based on any such reasoning but simply recognises the inevitable relationship between the gravity of the superior's failure to prevent or punish criminal conduct and the criminal conduct to which that failure relates.

DECISION OF THE BUREAU

Before:
President Gabrielle Kirk McDonald
Vice-President Shahabuddeen
Judge Cassese, Presiding Judge of Trial Chamber II
Judge Jorda, Presiding Judge of Trial Chamber I
Judge May, Presiding Judge of Trial Chamber III

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
25 October 1999

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION OF THE BUREAU ON MOTION TO DISQUALIFY JUDGES PURSUANT TO RULE 15 OR IN THE ALTERNATIVE THAT CERTAIN JUDGES RECUSE THEMSELVES

THE BUREAU of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, comprising President McDonald, Vice-President Shahabuddeen, Judge Cassese, Presiding Judge of Trial Chamber II, Judge Jorda, Presiding Judge of Trial Chamber I and Judge May, Presiding Judge of Trial Chamber III,

DECIDES as follows:

11. In this case, as stated above, the three appellants against conviction claim that Judges Riad, Wang and Nieto-Navia should be disqualified from hearing the appeal against conviction. The basis for their disqualification is said to be as follows: One of the grounds of appeal relates to the proper constitution of the Trial Chamber in Celebici; in the appellants' view the Chamber was not properly constituted because Judge Odio Benito, by her election as Vice-President of Costa Rica, became disqualified from serving as a Judge and sitting in Celebici and her impartiality could be apprehended as having been compromised. As in Plenary meetings of the Tribunal the three aforementioned Judges pronounced on the question of whether Judge Odio Benito could serve as a Judge after her election to the position of Vice-President of Costa Rica, they have allegedly formed a prejudgement upon one of the issues to be determined in the appeal.

12. It must be noted that the question of whether the position of Vice-President of Costa Rica was compatible with the discharge of the judicial functions by Judge Odio Benito was raised, at the administrative level, by the then President Cassese on 23 May 1997, in a meeting with Judge Odio Benito, when it became known that she was running as a candidate for that position. Judge Odio Benito responded to President Cassese in a letter of 16 October 1997 in which she specified that, if elected, she would not take office before the end of her functions as a Judge sitting in Celebici and in addition undertook, if elected, to fulfil her judicial functions on a full time basis. In the light of this commitment, the then President Cassese decided that Judge Odio Benito was entitled to run as a candidate for the position of Vice-President. Nevertheless, he felt that it was advisable to submit the matter to the Plenary. This was done in October 1997. The Fourteenth Plenary assembly of all Judges, in the discharge of administrative functions, endorsed the decision of the President.
The matter arose again in March 1998, after the election, on 1 February 1998, of Judge Odio Benito to the position of Second Vice-President of Costa Rica. President McDonald noted the renewed commitment of Judge Odio Benito not to assume the functions of Second Vice-President nor, in case of permanent or temporary absence of the President or the First Vice-President, the functions of President of Costa Rica, prior to the termination of her tenure as a Judge. Judge Odio Benito further undertook not to be diverted by anything from the fulfilment of her mandate as a Judge until November 1998. In light of these commitments, President McDonald decided that there was no incompatibility between Judge Odio Benito's judicial duties and her new status of Second Vice-President of Costa Rica. President McDonald too felt it was advisable to submit the matter to the Seventeenth Plenary. This was done on 11 March 1998. The Plenary assembly of Judges, again exercising its administrative functions, unanimously endorsed President McDonald's decision.

13. It should be emphasised that (i) the Judges assembled at the Fourteenth and Seventeenth Plenary Meetings only passed on the administrative issue of whether or not the election of Judge Odio Benito to the position of Second Vice-President of Costa Rica amounted to a circumstance incompatible with her judicial functions and (ii) this decision was not made with reference to any specific question as to whether Judge Odio Benito was disqualified from sitting in Celebici. Actually, it was only on 25 May 1998, namely more than two months after the administrative decision by the Seventeenth Plenary, that a motion was filed by defence counsel in Celebici asking that Judge Odio Benito take no further part in the proceedings in that case.

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-96-21-T
		Date:	16 November 1998
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Adolphus G. Karibi-Whyte, Presiding**
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **16 November 1998**

PROSECUTOR

v.

ZEJNIL DELALIĆ
ZDRAVKO MUCIĆ also known as "PAVO"
HAZIM DELIĆ
ESAD LANDŽO also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Rešidović, Mr. Eugene O'Sullivan, for Zejnil Delalić
Ms. Nihada Buturović, Mr. Howard Morrison, for Zdravko Mucić
Mr. Salih Karabdić, Mr. Thomas Moran, for Hazim Delić
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landžo

(e) Unlawful Confinement of Civilians

27. Zejnil Delalić and Zdravko Mucić, along with Hazim Delić are charged under count 48 of the Indictment (paragraph 36) with the unlawful confinement of civilians, a grave breach punishable under Article 2(g) of the Statute, for their alleged acts and omissions as superiors with respect to the unlawful confinement of numerous civilians in the Čelebići prison-camp between May and October 1992. Zdravko Mucić and Zejnil Delalić are also charged with direct responsibility in relation to the foregoing charge.

(f) Plunder of Private Property

28. Zdravko Mucić, along with Hazim Delić, is charged under count 49 of the Indictment with plunder, a violation of the laws or customs of war punishable under Article 3(e) of the Statute, for their alleged acts and omissions as superiors with respect to the following events alleged to have been perpetrated by themselves and their subordinates in the Čelebići prison-camp:

> The plunder of money, watches and other valuable property belonging to persons detained at the Čelebići camp between May and September 1992. (Indictment at paragraph 37 paraphrased.)

Zdravko Mucić is also charged with direct responsibility in relation to the foregoing charge.

29. Having outlined the offences charged in the Indictment and the alleged role of the accused therein, it is appropriate to set out the procedural history of the present case, both prior to trial and during the trial itself.

C. Procedural History

30. Towards the close of investigations into the events which occurred in the Čelebići prison-camp during the recent conflict in Bosnia and Herzegovina, the Prosecutor, acting on information regarding the whereabouts of several individuals deemed to be suspects in relation to these events, made two separate requests to Germany and Austria for the provisional arrest of Zejnil Delalić and Zdravko Mucić, respectively, under Rule 40 of the Rules. Pursuant to these requests, both suspects

powers of influence not amounting to formal powers of command to provide a sufficient basis for the imposition of command responsibility.[401]

376. The cases imposing responsibility for failure to act on civilians occupying positions of authority, also indicate that such persons may be held liable for crimes committed by persons over whom their formal authority under national law is limited or non-existent. Thus, it has been noted that the Tokyo Tribunal convicted Foreign Minister Koki Hirota on the basis of command responsibility for war crimes although he lacked the domestic legal authority to repress the crimes in question.[402] The tribunal found Hirota derelict in his duty in not "insisting" before the cabinet that immediate action be taken to put an end to the crimes, language indicating powers of persuasion rather than formal authority to order action to be taken.[403] Moreover, the *Roechling* case is best construed as an example of the imposition of superior responsibility on the basis of *de facto* powers of control possessed by civilian industrial leaders. While the accused in this case were found guilty, *inter alia,* of failing to take action against the abuse of forced labourers committed by the members of the Gestapo, it is nowhere suggested that the accused had any formal authority to issue orders to personnel under Gestapo command. Instead, the judgement employs the wording "sufficient" authority, a term not normally used in relation to formal powers of command, but rather one used to describe a degree of (informal) influence. This view is further supported by the reasoning employed in the judgement of the court of first instance in this case, which, in response to the claim of one of the accused that he could not give orders to the plant police and the personnel of a punishment camp, as these were under the orders of the Gestapo, makes reference to his status as Herman Roechling's son-in-law - clearly a source of no more than *de facto* influence - as a factor affecting his authority to obtain an alleviation in the treatment of workers by the plant police.[404]

377. While it is, therefore, the Trial Chamber's conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority, the fundamental considerations underlying the imposition of such responsibility must be borne in mind. The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his

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[401] Tokyo Trial Official Transcript, 49,820-1.
[402] *See* Hessler, *Command Responsibility for War Crimes,* 82 Yale Law Journal, 1274 (1973) n.12.
[403] *See* Tokyo Trial Official Transcript, 49,791.
[404] The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others, Indictment and Judgement of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, Vol. XIV, TWC, Appendix B, 1075, 1092.

subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered their "superiors" within the meaning of Article 7(3) of the Statute. While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.

378. Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.[405]

(c) The Mental Element: "Knew or had reason to know"

(i) Arguments of the Parties

379. The Prosecution asserts that the requisite *mens rea* under Article 7(3) may be established as follows:

> (1) actual knowledge established through direct evidence; or
> (2) actual knowledge established through circumstantial evidence, with a presumption of knowledge where the crimes of subordinates are a matter of public notoriety, are numerous, occur over a prolonged period, or in a wide geographical area; or
> (3) wanton disregard of, or failure to obtain, information of a general nature within the reasonable access of a commander indicating the likelihood of actual or prospective criminal conduct on the part of his subordinates.[406]

[405] ILC Draft Code, p. 37.
[406] Prosecution Response to the Motion to Dismiss, RP D5810; Prosecution's Pre-Trial Brief, RP D2836.

597. The Trial Chamber has considered the oral testimony before it in the light of these considerations. Accordingly, inconsistencies or inaccuracies between the prior statements and oral testimony of a witness, or between different witnesses, are relevant factors in judging weight but need not be, of themselves, a basis to find the whole of a witness' testimony unreliable. The Trial Chamber has attached probative value to testimony primarily on the basis of the oral testimony given in the courtroom, as opposed to prior statements, where the demeanour of the relevant witnesses could be observed first hand by the Trial Chamber and placed in the context of all the other evidence before it.

598. However, before proceeding with the facts of the present case, it is necessary to make brief reference to the operation of the appropriate burdens of proof.

B. Burdens of Proof

599. The provisions of Article 21(3), of the Statute presume the innocence of the accused until he or she is proven guilty. The Rules do not, however, anywhere expressly prescribe the burden of proof on any party in the proceedings. In accordance with the procedure for the presentation of evidence contained in Rule 85, when a trial commences on an indictment filed by the Prosecution, alleging offences committed by the accused, it would seem clear that the burden of proving the allegations in the indictment rests on the Prosecution. However, there are situations in a case where the accused himself makes allegations or denies the accepted situation, for example, that he is a person of sound mind. Where the obligation of either party at trial is to satisfy the requirement of a rule of law that a fact in issue be proved or disproved, either by a preponderance of evidence or beyond reasonable doubt, there is a *legal burden* on such party. It is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction. As a matter of common sense, therefore, the legal burden of proving all facts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings.

ordinating activities even though he had just become a rank and file soldier. Mr. Delalić continued to communicate with the town of Konjic in relation to logistics. According to Šefkija Kevrić,[699] Mr. Delalić did not take part in combat activities and was not in a position of superior authority during this period. He was without command functions and could not issue any orders.[700] Midhat Cerovac also testified that Mr. Delalić had no military command, since he was not within the structure of command and control. His military task was simply to provide logistic support from the area of Vranske Stijene. Mr. Delalić did not take part in the military or technical planning of the Borći operation, nor did he issue orders in relation to it. In the preparation for the operation, Mr. Delalić made arrangements for the relevant needs for first aid equipment, transport conveyance and such supplies and facilities as could be provided by the civilian authorities, all consistent with his assignment as a co-ordinator.

d. Superior of the Čelebići Prison-Camp

669. The Prosecution is strongly of the view that the participation of Zejnil Delalić in the administrative processes of the Čelebići prison-camp *per se* makes him a superior of that institution and renders him responsible for the crimes of those working in that institution. The Prosecution evidence before the Trial Chamber attempts to show that Mr. Delalić was, on occasion, influential in the release of persons detained therein, and in suggesting the criteria for the release of persons detained. There is no evidence that the Čelebići prison-camp came under Mr. Delalić's authority by virtue of his appointment as co-ordinator. Analysis of the relevant evidence further demonstrates conclusively the failure of the Prosecution to show that Mr. Delalić was in a position of command authority or superiority in relation to the Čelebići prison-camp and in a superior-subordinate relationship with those who have been alleged to have committed offences therein. The Trial Chamber does not consider the acts of Mr. Delalić, as relied upon by the Prosecution, as an unequivocal exercise of superior authority.

[698] *See* T. 11157, Šefkija Kevrić; T. 11543-T. 11545, Midhat Cerovac; T. 11812, Dr. Hadžihusejnović; T. 12594, Šaban Duračić; T. 12785-T. 12786,. Mustafa Polutak; T. 12956, Šućro Pilica.
[699] *See* T. 11163-T. 11164.
[700] *See* T. 11381, Enver Tahirović; T. 11813, Dr. Hadžihusejnović; T. 12600, Šaban Duračić.

1222. Whilst the proposition in theory appears to be unimpeachable, in practice there are factual situations rendering the charging and convicting of the same person under both Articles 7(1) and 7(3) perfectly appropriate. For instance, consider the situation where the commander or person exercising superior authority personally gives orders to his subordinates to beat the victim to death, and joins them in beating the victim to death. There is here criminal liability under Article 7(1) as a participant in the perpetration of the offence, and under Article 7(3) as a superior. Liability in this case is not mutually exclusive, since the exercise of superior authority in this case is not only the result of an omission to prevent the commission of the crime. It is a positive act of knowledge of the crime and participation in its commission.

1223. The question is whether the crime attracts only one sentence in respect of a superior who participates in the offence charged. Ideally a superior who participates in the actual commission of a crime should be found guilty both as a superior and also as a direct participant as any of the other participants who did so in obedience to his orders. However, to avoid the imposition of double sentencing for the same conduct, it should be sufficient to regard his conduct as an aggravating circumstance attracting enhanced punishment.

1224. A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his or her life. In determining sentence, the Trial Chamber shall take into account the factors mentioned in Article 24(2) of the Statute and sub-Rule 101(B) of the Rules, as well as such factors as the age of the accused, his antecedents including his general reputation, and such other matters as would enable the Trial Chamber to determine the appropriate sentence consistent with the gravity of the offence. The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently. Furthermore, credit shall be given to the convicted person for the period, if any, during which he was detained in custody pending surrender to the International Tribunal or pending trial or appeal.

1225. Article 24(2) and sub-Rule 101(B) by themselves contain all the indicia necessary for the determination of the appropriate sentence after a finding of guilt. By far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence. It is necessary to reiterate the fact that the Tribunal is vested with jurisdiction over *serious* violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. In the present case, the offences committed include several acts of murder, torture, sexual assaults of the most revolting types, multiple rapes, severe beatings, cruel treatment and inhumane conditions. In the *Tadić Sentencing Judgment*, Trial Chamber II appears to have

taken into account the specific harm caused to the victims (and their families) by the accused.[1087] Similarly, Trial Chamber I, in the *Erdemović Sentencing Judgement, 29 November 1996*, recognised that the suffering of the victims may be considered in determining the appropriate penalty to impose.[1088] The Prosecution has urged the Trial Chamber, in evaluating the gravity of the relevant offences, to take into consideration the suffering of the victims who ultimately died in the Čelebići prison-camp.

1226. The gravity of the offences of the kind charged has always been determined by the effect on the victim or, at the most, on persons associated with the crime and nearest relations. Gravity is determined *in personam* and is not one of a universal effect. Whereas the guilt of the accused may be related to the specific and general harm of the victim and his relations, it would be too remote to ascribe every woe of the surrounding neighbourhood to the guilty accused. However, in the situation of the Čelebiči prison-camp it is possible that the conduct of the guilty accused may have resulted in the deaths of, or injury to, other detainees in the prison-camp other than those in relation to whom specific findings have been made above. The Trial Chamber is, however, not to engage in speculation and should be bound by the evidence before it. The Trial Chamber adopts the same view in respect of detained persons who survived but suffer from the effects of prolonged incarceration.

1227. The gravity of the offence and the individual circumstances of the accused are typically to be considered with respect to the particular and, if need be, the peculiar circumstances of each case. Thus, the circumstances of the accused would determine the factors the Trial Chamber will take into account as matters of aggravation or mitigation. In the *Tadić Sentencing Judgment*, the willing involvement of the accused in violent ethnic cleansing was regarded as an aggravating circumstance.[1089] In the *Erdemović Sentencing Judgement, 29 November 1996*, after observing that express consideration of aggravating circumstances in crimes against humanity was not necessary, since these crimes are *per se* of extreme gravity, the Trial Chamber went on to suggest possible circumstances surrounding the commission of the offence which might preclude leniency.

1228. Sub-Rule 101(B)(ii) provides that the Trial Chamber, in determining the sentence, shall take into account mitigating factors "including the substantial cooperation with the Prosecutor by the convicted person before or after conviction". The use of the term "including", which is an

[1087] Tadić Sentencing Judgment, RP D17981.
[1088] Erdemovic Sentencing Judgement, 29 November 1996, RP D40/472bis.
[1089] Tadić Sentencing Judgment, RP D17980-D17981.

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Order of: 10 September 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

SCHEDULING ORDER

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mrs. Nihada Buturovic, Mr. Howard Morrison, for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Ms. Cynthia McMurrey, Ms. Nancy Boler for Esad Landzo

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal");

NOTING that the presentation of evidence in this trial was completed on 1 September 1998;

NOTING the amendments to the Rules of Procedure and Evidence of the International Tribunal ("Rules") adopted at the Eighteenth Plenary Session of the International Tribunal on 9 and 10 July 1998 ("Amendments");

CONSIDERING Defendant Hazim Delic's Motion for continuance or in the Alternative, Motion to Proceed under prior Rules of Procedure, filed on 22 July 1998 (Official Record at Registry Page ("RP") D7270-D7276) ("Motion") and the discussions to the Motion on Friday 24 July and Tuesday 1 September 1998;

NOTING that the Amendments include sub-Rule 85(A)(vi) which provides that the presentation of evidence at a trial shall be concluded with "any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment";

FURTHER NOTING that the Amendments include sub-Rule 87(C) which provides that if "the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilt";

CONSIDERING sub-Rule 6(C) of the Rules which provides that an "amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case";

CONSIDERING the obligation of the Trial Chamber to ensure a fair and expeditious trial, pursuant to Article 20 of the Statute of the International Tribunal ("Statute");

FURTHER CONSIDERING that it would be within the spirit of the Amendments to require the accused to present evidence on sentencing at this stage of the proceedings to enable the judgement on the guilt or otherwise of the accused to the charges in the indictment to be rendered at the same time as the penalty to be imposed in respect of any finding of guilt, and that this procedure would not prejudice the rights of the accused nor in any way indicate the guilt or otherwise of the accused;

PURSUANT TO ARTICLE 20 OF THE STATUTE AND RULES 6, 54, 85 AND 87 OF THE RULES;

HEREBY ORDERS that:

1. The Prosecution shall file by Thursday 1 October 1998, written submissions if any in respect of sentencing, including a list of any witnesses to be called with an estimate of the time required for their testimony and a summary of the evidence they will present, and full written reports of any experts to be called.

2. The defence for each of the accused shall file by Monday 5 October 1998, written submissions if any in respect of sentencing, including a list of any witnesses to be called with an estimate of the time required for their testimony and a summary of the evidence they will present, and full written reports of any experts to be called.

3. The parties contact the Victims and Witnesses Unit without delay to co-ordinate the attendance of proposed witnesses before the Trial Chamber.

4. The parties submit written statements in lieu of oral testimony wherever possible.

5. The Trial Chamber shall only receive reports, written statements and oral statements which provide relevant information that may assist it determine sentence and will reject any material relating to the guilt or otherwise of the accused.

5. A status conference shall be heard on Wednesday 7 October 1998 at 10:00 a.m. to discuss the proposed witness lists presented by the parties.

4. The Prosecution may make oral submissions and call witnesses on sentencing on Monday 12 October 1998 for a maximum of one sitting day.

5. Immediately following the Prosecution's submissions, each defendant may make oral submissions and call witnesses on sentencing for a maximum of two sitting days commencing with the accused Delalic followed by the accused Mucic,

the accused Delic and the accused Landzo.

6. The Prosecution and the Defence may make brief final submissions on sentencing immediately following the presentation of the evidence of the last accused.

Done in both English and French, the English version being authoritative.

Adolphus G. Karibi-Whyte

Presiding Judge

Dated this tenth day of September 1998,

At The Hague,

The Netherlands.

[Seal of the Tribunal]

DECISION OF THE BUREAU

Before: President Gabrielle Kirk McDonald

Vice-President Shahabuddeen,

Judge Cassese, Presiding Judge of Trial Chamber II

Judge Jorda, Presiding Judge of Trial Chamber I

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 04 September 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION OF THE BUREAU ON MOTION ON JUDICIAL INDEPENDENCE (President McDonald, Vice-President Shahabuddeen, Judge Cassese and Judge Jorda)

THE BUREAU of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the territory of the Former Yugoslavia since 1991, comprising President McDonald, Vice-President Shahabuddeen, Judge Cassese, Presiding Judge of Trial Chamber II, and Judge Jorda, Presiding Judge of Trial Chamber I,

DECIDES as follows:

On 25 May 1998, the Trial Chamber in the matter of the *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (IT-96-21-T, hereinafter referred to as 'the Celebici case') received a motion from all four of the accused entitled "Motion on Judicial Independence" ('the motion'). The Prosecutor filed no response.

In the motion, the applicants request that Judge Odio Benito cease to take any further part in the proceedings of the Celebici case on two grounds, set out by the applicants as follows:

1. "That on the 8th. Day of May 1998 the Learned Judge, Her Honour Judge Odio Benito, ceased to meet the qualifications for a Judge of the International Criminal Tribunal for the Former Yugoslavia by virtue of her having taken the oath of office of a Vice-President of the Republic of Costa Rica in accordance with Articles 136 and 137 of the Constitucion Politica de la Republica de Costa Rica 1949 (as amended).
2. Further and/or in the alternative, that the Learned Judge, having now become a member of the executive branch of the Government of the Republic of Costa Rica, has ceased to possess the criteria required for independent judge in international law and has acquired an association which may affect her impartiality."

I. Factual and Legal Background

1. The Facts

On 17 September 1993, Judge Odio Benito was elected as a Judge of this Tribunal. She took up office in November 1993 and her term was due to end in November 1997. Judge Odio Benito, Presiding Judge Karibi-Whyte and Judge Jan (making up the entire Trial Chamber in the Celebici case) were not re-elected.

This raised the problem that, with effect from 17 November 1997, the three Judges sitting on the Celebici case would cease to be Judges of the Tribunal and therefore could not continue to hear the case to its conclusion.

On 27 August 1997, the Security Council dealt with that situation by passing Resolution 1126 (1997), by which it -

> "...endorse[d] the recommendation of the Secretary-General that Judges Karibi-Whyte, Odio-Benito and Jan, once replaced as members of the Tribunal, finish the *Celebici* case which they have begun before expiry of their term of office; and [took] note of the intention of the International Tribunal to finish the case before November 1998." [1]

On 1 February 1998, Judge Odio Benito was elected as one of two Vice-Presidents of the Republic of Costa Rica, and on 8 May 1998 she took the oath of office as Second Vice-President.

Before seeking the nomination for Second Vice-President of Costa Rica, Judge Odio Benito explained, in writing, her intentions to the then President of the Tribunal, Judge Antonio Cassese, and sought his approval. Her letter was submitted to the Judges of the Tribunal, meeting in Plenary. In this letter, Judge Odio Benito stated that, if elected, she would not assume any of the functions of that office until the completion of her duties as a member of the Trial Chamber hearing the Celebici case. It was unanimously decided by the Plenary that, based on this commitment by Judge Odio Benito, such action would not be incompatible with her duties as a Judge of this Tribunal. After she was elected, Judge Odio Benito again informed Judge Cassese, in writing. This letter was likewise submitted to the Plenary, which granted approval for her to take the oath of office.

The President of Costa Rica also wrote to the Tribunal confirming that Judge Odio Benito would continue to discharge her functions as Judge of the Tribunal until the completion of the Celebici case[2] and that she would not be assuming any functions in the Costa Rican Government before 17 November 1998.[3]

2. The Law

Article 13(1) of the Statute of the Tribunal and Rule 15 of the Rules of Evidence and Procedure are the relevant provisions under which the motion is made. Article 13(1)[4] reads as follows -

> "The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."

Sub-rule 15(A) and Sub-rule 15(B) of the Rules of Procedure and Evidence read as follows -

> "(A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.
>
> (B) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal on the above grounds. The Presiding Judge shall confer with the Judge in question, and if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge."

The Presiding Judge in the trial, Judge Karibi-Whyte, has conferred with Judge Odio Benito and has, pursuant to Sub-rule 15(B), referred the matter to the Bureau for determination.

II. Discussion

1. Qualification of Judges of the International Tribunal for the Former Yugoslavia

In the motion the applicants contend that Judge Odio Benito ceased to meet the qualifications necessary to be a Judge of this Tribunal.

Pursuant to Article 13(1) of the Statute, in addition to the possession of high moral character, impartiality and integrity, the only prerequisite for appointment as a Judge of the Tribunal is "qualification for appointment to the highest judicial office" of the country from which the Judge comes. Judge Odio Benito's "high moral character" and "integrity" are not in question. In fact, the applicants state in their motion that they "in no way seek to suggest that the Learned Judge has done any act which might be construed as being impartial." It is assumed from the context of the motion that the applicants intended to say that Judge Odio Benito has not done any act which may be construed as being partial. What is being questioned is whether, having regard to the holding of the office of Second Vice-President of Costa Rica, the requirements of impartiality and possession of the qualifications for appointment to the highest judicial offices in Costa Rica are now being met.

Article 159 of the Constitution of Costa Rica, relating to judicial qualifications, provides as follows-

"To be a magistrate it is necessary to be:

1. A Costa Rican by birth, or by naturalization with residence in the country not less than ten years after naturalization. However, the President of the Supreme Court must be a Costa Rican by birth;
2. A citizen in the exercise of his rights;
3. A layman;
4. Over thirty-five years of age;
5. Holder of a lawyer's degree issued or legally recognised in Costa Rica, and must have engaged in the profession for at least ten years, except in the case of judicial officials with not less than five years of judicial experience."

In the circumstances before the Bureau, it has not been shown that Judge Odio Benito has ceased to possess the qualifications required by Article 159 of the Constitution of Costa Rica.

The applicants rely on Article 161, which provides -

"The position of magistrate is incompatible with that of an official of the other supreme

powers."

This relates to the subject of incompatibility of functions, a question dealt with under the topic of judicial independence, discussed below.

2. Judicial Independence

In the motion, the applicants state -

> "...we in no way seek to suggest that the Learned Judge has done any act which might be construed as being impartial [sic]. Rather, we respectfully suggest that as a matter of general principle, the Learned Judge ought to be disqualified from the office of Judge of the International Tribunal because the elective political office which she now holds in addition to the office of Judge of the International Tribunal is one which 'might affect' the Learned Judge's impartiality." [5]

In effect, the motion is grounded on a general principle relating to incompatibility of functions giving rise, in the particular circumstances, to an "appearance of partiality".

The question of impartiality has been dealt with by the European Court of Human Rights ('the Court').

Article 6(1) of the European Convention on Human Rights ('ECHR') provides that -

> "in the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The ECHR organs have established a two-fold test for assessing the impartiality of a tribunal:

> "The existence of impartiality for the purposes of article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction that a particular judge has in a given case, and also according to an objective test, *that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.*"[6] (emphasis supplied).

Under the objective component of this test, the court must assess relevant circumstances that may give rise to an "appearance" of partiality. If there is "legitimate reason to fear" a lack of impartiality

in a judge, he or she must withdraw from the case.[7]

The challenge to the Judge's impartiality in this case is linked to the question of her independence as a judge. The test for measuring independence has been set forth thus by the Court in *Campbell and Fell v. United Kingdom*:

> "In determining whether a body can be considered to be independent - *notably of the executive* and the parties in the case - the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."[8] (emphasis supplied).

In *Sramek v. Austria*[9] the Court was faced with a complaint regarding the "independence" of a tribunal composed of, among others, a person who was the mayor of a municipality. The mayor in fact acted as chairman of the Tribunal. Holding that there was no breach of Article 6(1) of the ECHR by reason of the fact that "the person who . . . acted as chairman of the [tribunal] happened to be a mayor"[10], the Court held:

> "It is true that the municipalities in Austria exercise their powers. . . subject to the supervision of the *Land* [Government] . . . ; however, it cannot be concluded from this that their mayors do not act independently in matters which - like those involved here - fall outside the ambit of those powers."[11]

These cases, though deriving from different systems, are useful in showing that the mere fact that a person who exercises judicial functions is to some extent subject, in another capacity, to executive supervision, is not by itself enough to impair judicial independence.

The applicants contend that, although there is no explicit provision in the Statute of the Tribunal stating that judicial and political offices are incompatible, Article 13 of the Tribunal's Statute and Rule 15 of its Rules of Procedure and Evidence, taken together, have the same effect as Article 16(1) of the Statute of the International Court of Justice, which provides that -

"No member of the Court may exercise any political or administrative function..."

The applicants also refer also to Article 7 of the Statute of the International Tribunal for the Law of the Sea which contains the same wording as the above, except that the word 'Court' is replaced with the word 'Tribunal'.

The question, however, is not whether there is a prohibition against the exercise of any political or administrative function, but whether such a function is being exercised by Judge Odio Benito. In the

circumstances of this case, she is not exercising any such function.

The applicants contend that the fact that Judge Odio Benito holds political office as a Vice-President of the Republic of Costa Rica is sufficient to create the appearance of lack of impartiality within the meaning of Rule 15(A) of the Tribunal's Rules of Procedure and Evidence. They state that –

1. Costa Rica is a member of the General Assembly

> 2. Costa Rica is a non-permanent member of the Security Council, having been elected for a two year term from 1 January 1997.
>
> 3. As Vice-President, pursuant to Title X of the Constitution of Costa Rica, the Judge may be designated to take the President's place in the latter's absence, and that the duties of the President include the conduct of international relations and the making of treaties.

On the basis of these matters, the applicants contend that Judge Odio Benito's impartiality as a Judge of the Tribunal is affected, their argument being as follows -

> 'the Vice-President may be expected to participate in policy decisions affecting, for example, how votes are cast in the Security Council or the General Assembly by Costa Rica (which may include matters relating to the conflict and continuing peace-making process in the countries of the Former Yugoslavia) as well as international relations with the nations which emerged from the collapse of the Former Yugoslavia.
>
> It will also be noted that the Republic of Costa Rica as a member of the Security Council is a member of the very body that created the International Tribunal by its resolution of 25th. May 1993. That body is the one which has the power to alter the Statute, as it has recently done by increasing the establishment of judges. It also extended the term of office for the *Celebici* judges to enable them to complete this case.'[12]

In fact, Judge Odio Benito has been holding the position of Vice-President in name only from the date she took the oath of office. She has committed herself not to take up the duties of her post until she has completed her judicial duties. The contention that in the event of the President's absence she may have to assume his role is not one of substance. Under the Constitution of the Republic of Costa Rica there are two other officials who can also undertake such a role - the first Vice-President and the President of the Legislative Assembly.[13] She has undertaken not to assume the functions or duties of the President of Costa Rica in his temporary or permanent absence prior to the termination of her tenure as Judge. Furthermore, the President of the Republic of Costa Rica has agreed that she will not assume her duties as Second Vice-President until such time.

For these reasons, the Bureau concludes that Judge Odio Benito is not disqualified under Sub-rule 15(A)

of the Rules of Procedure and Evidence from sitting on the trial of the applicants. The competence conferred on the Bureau under Sub-rule 15(B) of the said Rules does not extend to aspects of the applicants' motion raising matters going beyond the scope of Sub-rule 15(A).

3. Disposition

The Bureau, having considered all the arguments and supporting material, decides, under Sub-rule 15(B) of the Rules of Procedure and Evidence of the Tribunal, that Judge Odio Benito is not disqualified to sit in the trial of the four accused on the grounds referred to in Sub-rule 15(A) of the Rules.

Gabrielle Kirk McDonald

President

Dated this 4th day of September 1998

At The Hague

The Netherlands

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[1] U.N. Doc. S/RES 1126 (1997).

[2] Letter from His Excellency Miguel Angel Rodriguez E., President-Elect of the Republic of Costa Rica to the President of the Tribunal, dated 9 March 1998.

[3] Letter from His Excellency Miguel Angel Rodriguez E., President of the Republic of Costa Rica to the President of the Tribunal, dated 7 July 1998.

[4] Which is exactly the same as Article 12(1) of the Statute of the International Tribunal for Rwanda.

[5] IT-96-21-T 6516-6515.

[6] *Hauschildt v. Denmark* A 154 (1989) para. 46.

[7] Id., At para. 48.

[8] App. No. 4300/70

[10] Id: at para. 40.

[11] Id at para. 40.

[12] IT-96-21-T 6515-6514.

[13] Article 135 of the Constitution of the Republic of Costa Rica, which provides that the replacement for the President in the "complete absence" shall be the first Vice-President, the second Vice-President and the president of the Legislative Assembly. If the second Vice-President was required but unavailable (whatever the reason of her unavailability) the president of the Legislative Assembly could take over the President's duties.

[9] (1985) 7 EHRR 351.

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-96-21-T

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Date: 24 May 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC a\k\a\ "PAVO"
HAZIM DELIC
ESAD LANDZO a\k\a "ZENGA"

MOTION ON JUDICIAL INDEPENDENCE

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry
Mr. Guiliano Turone

Counsel for the Accused:

Ms. Edina Residovic, Mr. Eugene O'Sullivan, for Zejnil Delalic
Mr. Zeljko Olujic, Mr. Tomislav Kuzmanovic, for Zdravko Mucic
Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landzo

The position of magistrate is incompatible with that of an official of the other supreme powers.

The constitution of Costa Rica refers to the "Legislative Power" and the "Executive Power" in Titles IX and X and may be taken, we submit, to be those to which Article 161 refers. Title X Chapter 1 sets out the process for election as President and Vice-president of the Republic.

The effect of this is that with effect from 8th. May 1998 the Learned Judge ceased to be qualified to be elected as a Magistrate of the Supreme Court of Justice in her own country.

We respectfully submit therefore that the requirement of qualification to the highest judicial office in Costa Rica is one which operates upon the Learned Judge's being a Judge. Being a member of one of the other "supreme powers" would not disqualify her from election to the office of Judge, provided she resigned such office prior to taking up the office of Judge of this Tribunal. The failure to possess the requisite qualifications affects the ability to serve, not the ability to be elected.

For all the foregoing reasons we respectfully submit that the Learned Judge, no longer holding the requisite qualifications for the "highest judicial offices" in Costa Rica can no longer sit as a judge of the International Tribunal.

Judicial Independence

In the alternative, we respectfully assert that the Learned Judge, by virtue of her having assumed the elective political office of a Vice-President of the Republic of Costa Rica, may fall to be disqualified under Rule 15 (A) of the Rules of Procedure and Evidence, set out *supra*. In an annexe hereto [7] we set out what we assert is the nature of the concept of "judicial independence" in international law.

In making the this assertion, we in no way seek to suggest that the Learned Judge has done any act which might be construed as being impartial. Rather, we respectfully suggest that as a matter of general principle, the Learned Judge ought to be disqualified from the office of Judge of the International Tribunal because the elective political office which she now holds

[7] Annexe I

IN THE TRIAL CHAMBER

Before:

Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar:

Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:

28 April 1997

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON THE MOTIONS BY THE PROSECUTION FOR PROTECTIVE MEASURES FOR THE PROSECUTION WITNESSES PSEUDONYMED "B" THROUGH TO "M"

The Office of the Prosecutor

Mr. Eric Ostberg Mr. Guiliano Turone
Ms. Teresa McHenry Ms. Elles van Duschotten

Counsel for the Accused

Ms. Edina Residovic, Mr Ekrem Galiatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic
Mr. Branislav Tapuskovic, Mr. Micheal Greaves for Zdravko Mucic
Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic
Mr. Mustafa Brackovic, Ms. Cynthia McMurrey, for Esad Landzo

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On 10 March 1997, the trial commenced before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") of the four accused person, Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, for crimes within the jurisdiction of the International Tribunal, namely, grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs of war, which were allegedly committed in 1992

hearing enshrined in Articles 20(4) and 21(2). Rule 75(A) enacted pursuant to Article 22 provides.

> A Judge or a Chamber may *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses provided that the measures are consistent with the rights of the accused.

Accordingly the measures formulated by virtue of Article 22 must be consistent with the rights of the accused. The Statute of the International Tribunal emphasises the public nature of a trial as an essential feature of the proceedings (Articles 20(4), 21(2)).

34. The principal advantage of permitting the public and the press access to a hearing is that their presence contributes to ensuring a fair trial. In *Pretto & Ors v Italy*, (Series A, No. 71 (1984) 6 EHRR 182) the ECHR stated that "[p]ublicity is seen as one guarantee of fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered". Thus, a public hearing is mainly for the benefit of the accused and not necessarily of the public. The following dictum of Chief Justice Warren in *Estes v Texas,* a case decided by the United States Supreme Court, supports this view.

> There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously. . . .

381 U.S. 532 at 583 (1965)

35. The two interests requiring attention in the trial which ought to be maintained, are the right of the accused to a public hearing, and the right of the witness to protection in the interests of justice. Accordingly, the Trial Chamber in considering the motion must balance these two interests. This is clearly provided by Rule 79 which enables the exclusion of the press and public from the proceedings for various reasons including safety by the non-disclosure of the identity of a victim or witness. Thus, in certain circumstances, the right to a public hearing may be qualified and curtailed to accommodate other interests.

36. Several of the Rules relate to maintaining a balance between the right of the accused to a public hearing and the protection of victims and witnesses. Rule 69 allows for non-disclosure at the pre-trial stage of the identity of a victim or witness who may be in danger until the witness is brought under the protection of the International Tribunal. This non-disclosure applies to the press, public and the accused. Under Rule 75 appropriate measures consistent with the rights of the accused may be taken to protect victims and witnesses. Rule 79 enables the exclusion of the press and public from the proceedings on the grounds of public order or morality, the safety or non-disclosure of the identity of a victim or witness or the protection of the interest of justice.

37. It is clear from the construction of the provisions of the relevant Articles of the Statute of the International Tribunal, namely Article 20(4), 21(2) and 22, and the enabling Rules, namely, Rules 69, 75 and 79, that the Statute which is the legal framework for the application of the Rules, provides that the protection of victims and witnesses, is an acceptable reason to limit the accused's right to a public trial. Article 14(1) of the ICCPR and Article 6(1) of the ECHR state that everyone is entitled to a fair and public hearing. Nevertheless both Articles provide that the press and the public may be excluded in the interest of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or where publicity would prejudice the interest of justice.

38. The satisfaction of the public interest in this case is of crucial importance. This trial, apart from being the first multiple-defendant international criminal trial since the Nürnberg and Tokyo trials involving crucial issues relating to command responsibility, is also the second trial before the International Tribunal.

39. After considering all the rights and interests in issue, the Trial Chamber is not persuaded that the arguments presented by the Prosecution have shown that all the twelve witnesses indicated must be heard in closed sessions in order to guarantee their protection. The Trial Chamber notes the submissions of the Defence that granting the prayers of the Prosecution will result in too much evidence being heard in closed sessions. The Trial Chamber is aware of its statutory duty to protect witnesses and cannot lightly abdicate the same. It is encouraging that none of the parties has suggested the

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-83-T
		Date:	15 September 2008
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: **Mr. Hans Holthuis**

Judgement of: **15 September 2008**

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Daryl Mundis
Ms. Laurie Sartorio
Mr. Matthias Neuner
Mr. Kyle Wood
Mr. Aditya Menon

Counsel for the Accused:

Ms. Vasvija Vidović
Mr. Nicholas Robson

21. In its Judgement of Acquittal of 26 February 2008, the Trial Chamber held that Rasim Delić had no case to answer in respect of rape (Count 3) as a violation of the laws or customs of war.[47] In relation to the events involving the three women, Rasim Delić remains only charged with individual criminal responsibility under Article 7(3) of the Statute for cruel treatment (Count 4) as a violation of the laws or customs of war pursuant to Article 3 of the Statute.[48]

C. General Considerations Regarding the Evaluation of Evidence

22. *General Principles.* The Trial Chamber has assessed the evidence in this case in light of the entire trial record, in accordance with the Tribunal's Statute and its Rules of Procedure and Evidence ("Rules"). The Trial Chamber emphasises that it has duly considered and given appropriate weight to *all* the evidence adduced at trial, even if not expressly referred to in this Judgement.[49]

23. *Burden and Standard of Proof.* Rasim Delić is presumed innocent until proven guilty, as enshrined in Article 21(3) of the Statute. It follows that the Prosecution bears the burden of proof for the guilt of Rasim Delić and must establish each and every element of the offences charged against him beyond reasonable doubt.[50]

24. In determining whether the Prosecution has done so, the Trial Chamber has resolved any reasonable doubt in favour of Rasim Delić, in accordance with the principle of *in dubio pro reo.*

25. *Silence of the Accused.* Article 21(4)(g) of the Statute provides that no accused shall be compelled to testify against himself. In the present case, Rasim Delić exercised his right to remain silent. No adverse inference has been drawn from his choice not to testify.

26. *The "Guidelines" on the Admission of Evidence.* At the outset of the trial, the Trial Chamber adopted a decision regulating the conduct of counsel in court and governing the presentation and standard of admission of evidence at trial.[51] These "Guidelines" were amended on one occasion.[52] The Trial Chamber underlines that the mere admission of evidence in the course of the trial has no bearing on the weight subsequently attached to it.

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47 98 *bis* Motion Hearing, T. 6890-6893.

48 Indictment, paras 47, 50.

49 *See Prosecutor v. Radoslav Brđanin*, IT-99-36-A, Judgement, 3 April 2007, para. 11.

50 Rule 87(A); *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Judgement, 30 November 2005 ("*Limaj et al.* Trial Judgement"), para. 10. The fact that the Defence has not challenged certain factual allegations contained in the Indictment does not mean that the Trial Chamber has accepted these facts to be proven.

51 Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 24 July 2007 ("Guidelines").

52 Addendum to Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 22 October 2007.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-98-29/1-A

Date: 12 November 2009

Original: English

IN THE APPEAL CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr John Hocking**

Judgement of: **12 November 2009**

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Paul Rogers

Counsel for the Accused:

Mr Branislav Tapušković
Ms Branislava Isailović

position of authority".[783] The Appeals Chamber accepts that an order does not necessarily need to be explicit in relation to the consequences it will have.[784] However, the Appeals Chamber is not satisfied that the Trial Chamber established beyond reasonable doubt that Milošević instructed his troops to perform a campaign of sniping and shelling of the civilian population in Sarajevo as such.

268. Although Milošević does not explicitly challenge his responsibility for planning the crimes under this ground of appeal, the Appeals Chamber takes note of his relevant submissions under other grounds[785] and decides to address the issue within the present Section of the Judgement. In this regard, the Appeals Chamber recalls that the *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[786] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[787] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[788]

269. The Appeals Chamber reiterates that the campaign of sniping and shelling civilians in Sarajevo was already in place when Milošević took the SRK command over from Galić.[789] Although this cannot be determinative in the present case, the Appeals Chamber finds it instructive to note that Galić was held responsible for ordering the indicted crimes, but not for planning them. Conversely, Milošević, although found not having "devise[d] a strategy for Sarajevo on his own"[790]

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[783] *Galić* Appeal Judgement, para. 176. See also, *Nahimana et al.* Appeal Judgement, para. 481, referring to *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras 28-30.

[784] *Cf. Nahimana et al.* Appeal Judgement, para. 481: "Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order." See also, *Galić* Appeal Judgement, paras 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Blaškić* Appeal Judgement, para. 42.

[785] See *e.g.*, Defence Appeal Brief, paras 41, 42-99 and p. 94.

[786] *Nahimana et al.* Appeal Judgement, para. 479, referring to *Kordić and Čerkez* Appeal Judgement, para. 26.

[787] *Kordić and Čerkez* Appeal Judgement, para. 26. Although the French version of the Judgement uses the terms "*un élément déterminant*", the English version – which is authoritative – uses the expression "factor substantially contributing to".

[788] *Nahimana et al.* Appeal Judgement, para. 479, referring to *Kordić and Čerkez* Appeal Judgement, paras 29, 31.

[789] *Galić* Trial Judgement, paras 746-747. The findings remained undisturbed on appeal.

[790] Trial Judgement, para. 960.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No. IT-98-29/1-A Date: 12 November 2009 Original: English

IN THE APPEAL CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr John Hocking**

Judgement of: **12 November 2009**

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Paul Rogers

Counsel for the Accused:

Mr Branislav Tapušković
Ms Branislava Isailović

XIV. PARTLY DISSENTING OPINION OF JUDGE LIU DAQUN

A. The "crime of terror"

1. I respectfully disagree with the majority of the bench in affirming Milošević's conviction under Count 1 for the "crime of terror".[1] In my view, there is no basis to find that this prohibition was criminalised beyond any doubt under customary international law at the time relevant to the Indictment.[2] Rather, I would have adopted the approach proposed by Judge Schomburg in his Separate and Partially Dissenting Opinion in the *Galić* Appeal Judgement, overturning Milošević's conviction under Count 1 and convicting him under Counts 4 and 7 for unlawful attacks against civilians, taking into account the terrorisation of the civilian population as an aggravating factor.

1. Jurisdiction

2. It is settled jurisprudence that the Tribunal has jurisdiction to prosecute violations of international humanitarian law under Article 3 of the Statute where four conditions are met:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...];
>
> (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. [...];
>
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[3]

3. The principle of *nullum crimen sine lege* requires the Tribunal to apply rules of international humanitarian law which are beyond any doubt part of conventional or customary international law at the time relevant to the commission of the alleged offence.[4]

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[1] The majority upholds the findings of the majority in the *Galić* Appeal Judgement, namely that the crime of terror existed under customary international law. Judgement, para. 30. See also Trial Judgement, para. 874.

[2] See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 ("Report of the Secretary-General"), para. 34: "In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law [...]." (Emphasis in original.)

[3] *Tadić* Jurisdiction Decision, para. 94.

4. The *prohibition* of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is part of customary international law, in accordance with Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. However, this prohibition has not been criminalised by any treaty or convention.[5]

5. It is insufficient for criminalisation to be inferred from the seriousness of the offence but must be established independently.[6] As noted by Justice Robertson: "it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stridently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime."[7] Consequently, criminalisation must be ascertained from the body of customary international law in order to satisfy the fourth *Tadić* condition.

2. State practice

6. It is generally accepted that customary international law may be inferred from state practice and *opinio juris*.[8] To establish a rule of customary international law, state practice has to be virtually uniform, extensive and representative.[9]

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[4] Report of the Secretary-General, para. 34. According to Cassese, "the principle of non-retroactivity of criminal rules is *now* solidly embedded in international law. It follows that courts may only apply substantive criminal rules that existed at the time of commission of the alleged crime." (Emphasis in original.) A. Cassese, *International Criminal Law*, (Oxford, 2003), at p. 149. See also International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 16 December 1966, Article 15(1).

[5] I note that the "crime of terror" is not included in the list of grave breaches in Article 85 of Additional Protocol I.

[6] See G. Abi-Saab, 'The Concept of War Crimes' in S. Yee and W. Tieya (eds.), *International Law and the Post-Cold War World: Essays in Memory of Li Haopei*, (London, 2001), at p. 112.

[7] *Prosecutor v. Sam Hinga Norman,* Special Court of Sierra Leone, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ("*Child Recruitment Case*"), Dissenting Opinion of Justice Robertson, 31 May 2004 ("Dissenting Opinion of Justice Robertson"), para. 12.

[8] See *Galić* Appeal Judgement, para. 92: "Individual criminal responsibility under the fourth *Tadić* condition can be inferred from, *inter alia*, state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals." See also *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, International Court of Justice, Judgement, I.C.J. Reports 1969, ("*North Sea Continental Shelf Cases*"), paras 74, 77: "State practice [...] should have been both extensive and virtually uniform in the sense of the provision invoked [...] Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law

UNITED
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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-95-17/1-A

Date: 21 July 2000

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Patrick Lipton Robinson
Judge Fausto Pocar

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **21 July 2000**

PROSECUTOR

v.

ANTO FURUND@IJA

JUDGEMENT

Counsel for the Prosecutor:

Mr. UpawansaYapa
Mr. Christopher Staker
Mr. Norman Farrell

Counsel for the Accused:

Mr. Luka S. Miseti}
Mr. Sheldon Davidson

II. STANDARD OF REVIEW ON APPEAL

A. Submissions of the Parties

1. The Appellant

27. The Appellant submits that the standard of review in the Appeals Chamber "necessarily takes into account the standard of proof in the Trial Chamber."[16] The Appellant further submits that "[i]f a reasonable person could have reasonable doubt about his guilt, the conviction must be reversed."[17]

28. The Appellant argues that to satisfy the test of proof beyond reasonable doubt, "[t]he evidence must be so overwhelming that it excludes every fair or rational hypothesis except that of guilt."[18] He contends that he "appeals on the basis that the Trial Chamber was unreasonable in concluding that the only fair or rational hypothesis that could be derived from the evidence is that Mr. Furund`ija is guilty."[19] He concludes that the Appeals Chamber must acquit him because the evidence may be read to support a fair or rational inference of innocence.[20]

2. The Respondent

29. The Respondent submits that the appealing party bears the burden of establishing an error within the terms of Article 25(1) of the Statute.[21] The Respondent further contends that the appropriate standard of review on appeal depends on the classification of the alleged error as one of fact or law.[22]

30. The Respondent submits that two categories of error fall within Article 25(1)(a) of the Statute, which provides for an appeal from "an error on a question of law invalidating the decision". The first relates to an error in the substantive law applied by the Trial Chamber and the second to an error in the exercise of the Trial Chamber's discretion.[23] Where the error alleged is one of substantive law, the Respondent says that the nature of the burden on the appealing party is that of persuasion rather than proof.[24] Where the appeal is based on an error in the exercise of the Trial

[16] Appellant's Reply, p.3.
[17] *Ibid.*, p. 5.
[18] T. 11 (2 March 2000).
[19] T. 12 (2 March 2000).
[20] T. 167 (2 March 2000).
[21] Prosecutor's Response, para. 2.2.
[22] *Ibid.*, para. 2.6.
[23] *Ibid.*, para. 2.7.
[24] *Ibid.*, para. 2.9.

Chamber's discretion, the Respondent contends that the Appeals Chamber should review the impugned decision under an abuse of discretion standard.[25] The Respondent submits that "absent a showing that the Trial Chamber abused its discretion, the Appeals Chamber should not substitute its own view for that of the Trial Chamber."[26]

31. As regards the standard of review under Article 25(1)(b) of the Statute, which provides for an appeal on the basis of "an error of fact which has occasioned a miscarriage of justice," the Respondent identifies two types of error which may be the subject of an appeal under this provision. The first is an error based on the submission of additional evidence that was not available at trial, and the second is an error in the factual conclusions the Trial Chamber reached based upon the evidence submitted at trial.[27]

32. The Respondent contends that the standard of review on appeal proposed by the Appellant is erroneous, and that the Appeals Chamber should not disturb the Trial Chamber's findings of fact, unless no reasonable person could have so concluded on the evidence presented.[28] The Respondent finds equally mistaken the Appellant's proposed standards as regards the burden placed on the Appellant.[29]

33. The Respondent further submits that in order to appeal a decision under Article 25(1), a party has to object at trial in a timely and proper manner to an error of the Trial Chamber or to a Trial Chamber's abuse of discretion, or the issue of waiver must be considered.[30]

B. Discussion

34. Article 25 of the Statute sets forth the circumstances in which a party may appeal from a final decision of the Trial Chamber. A party invoking a specific ground of appeal must establish an error within the scope of this provision, which provides:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> (a) an error on a question of law invalidating the decision; or
>
> (b) an error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

[25] *Ibid.*, para. 2.10.
[26] *Ibid.*
[27] *Ibid.*, para. 2.8.
[28] T. 108 – 109 (2 March 2000).
[29] T. 111 – 112 (2 March 2000).
[30] Prosecutor's Response, para. 2.11.

35. Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.

36. Furthermore, this Chamber is only empowered to reverse or revise a decision of the Trial Chamber on the basis of Article 25(1)(a) when there is an error of law that invalidates that decision. It is not any error of law that leads to a reversal or revision of the Trial Chamber's decision; rather, the appealing party alleging an error of law must also demonstrate that the error renders the decision invalid.

37. As to an allegation that there was an error of fact, this Chamber agrees with the following principle set forth by the Appeals Chamber for the International Criminal Tribunal for Rwanda ("the ICTR")[31] in *Serushago*:

> Under the Statute and the Rules of the Tribunal, a Trial Chamber is required as a matter of law to take account of mitigating circumstances. But the question of whether a Trial Chamber gave due weight to any mitigating circumstance is a question of fact. In putting forward this question as a ground of appeal, the Appellant must discharge two burdens. He must show that the Trial Chamber did indeed commit the error, and, if it did, he must go on to show that the error resulted in a miscarriage of justice.[32]

Similarly, under Article 25(1)(b) of the ICTY Statute, it is not any and every error of fact which will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but one which has led to a miscarriage of justice. A miscarriage of justice is defined in *Black's Law Dictionary* as "a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[33] This Chamber adopts the following approach taken by the Appeals Chamber in the *Tadi}* case[34] in dealing with challenges to factual findings by Trial Chambers:

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[31] International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Neighbouring States between 1 January and 31 December 1994 ("the ICTR").
[32] *Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgment, 6 Apr. 2000, para. 22.
[33] Black's Law Dictionary (7th ed., St. Paul, Minn. 1999).
[34] *Prosecutor v. Du{ko Tadi}*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("the *Tadi}* Appeals Judgement").

> [t]he task of hearing, assessing and weighing the evidence presented at trial is left to the judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[35]

The position taken by this Chamber in the *Tadi}* Appeals Judgement has been reaffirmed in the *Aleksovski* Appeals Judgement.[36] The reason the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known; the Trial Chamber has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence.

38. The Appeals Chamber now turns to consider the Appellant's submissions in relation to the appropriate standard of review where the sufficiency of the evidence in support of a conviction is challenged on appeal. The Appellant submits that the *Tadi}* Appeals Judgement demonstrates that, in evaluating the sufficiency of the evidence in support of a conviction, the Appeals Chamber must determine whether the standard of proof beyond reasonable doubt was correctly applied by the Trial Chamber.[37] The Appellant further invites the Appeals Chamber to: 1) conduct an independent assessment of the evidence, both as to its sufficiency and its quality; and 2) inquire whether a reasonable trier of fact could have found that an inference or hypothesis consistent with innocence of the offence charged was open on the evidence.[38] The Appellant further contends that, as to the application of the standard of proof beyond reasonable doubt, the Appeals Chamber must find that guilt was not merely a reasonable conclusion based on the evidence, but rather the only "fair and rational hypothesis which may be derived from the evidence".[39]

39. The Appellant's reliance on the *Tadi}* Appeals Judgement is misplaced. In *Tadi}*, the Appeals Chamber held that the Trial Chamber had erred in law in its application of the legal standard of proof beyond reasonable doubt to its factual findings in respect of certain charges in the indictment. The application of the correct legal standard did not support the inferences which the Trial Chamber had drawn from the facts. On a true interpretation, the *Tadi}* Appeals Chamber did not disturb the finding of facts by the Trial Chamber.

40. The Appeals Chamber finds no merit in the Appellant's submission which it understands to mean that the scope of the appellate function should be expanded to include *de novo* review. This

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[35] *Tadi}* Appeals Judgement, para. 64.
[36] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("the *Aleksovski* Appeals Judgement"), para. 63.
[37] Appellant's Reply, p. 4.
[38] *Ibid.*, p. 8.
[39] *Ibid.* (citing *Tadi}* Appeals Judgement, para. 174).

which there is no corresponding material fact in the indictment, the defence may challenge the admission of the evidence or request an adjournment.

1. Evidence Concerning Other Acts in the Large Room and the Pantry

148. Trial Chambers have been consistently mindful of the primary function of the International Tribunal, which is to ensure that justice is done and that the accused receives a fair trial. It is, no doubt, in light of this preoccupation that in evaluating the testimony of Witness A, the Trial Chamber limited its consideration to that part of the testimony relating to the Amended Indictment. This exercise by the Trial Chamber is indicative of its sensitivity to any prejudice to the fairness of the trial that could result from Witness A's testimony. Consistent with this concern, the Trial Chamber acknowledged that "[t]he witness has testified that rapes and sexual abuse took place in the large room in the presence of the accused", and that the relevant "evidence falls outside the facts alleged in paragraphs 25 and 26 of the Amended Indictment, and is contrary to earlier submissions by the Prosecutor."[198] The Trial Chamber also remarked that during the proceedings the Prosecutor did not seek to modify the Amended Indictment to charge the Accused with participation in the rapes and sexual abuse.

149. It is on the basis of the aforementioned grounds that the Trial Chamber decided that "the Trial Chamber will not consider evidence relating to rapes and sexual assault of Witness A in the presence of the accused, other than those alleged in paragraph 25 and 26 of the Amended Indictment."[199]

150. The factual allegations contained in paragraphs 25 and 26 of the Amended Indictment and pertaining to Counts 13 and 14 are as follows:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUND@IJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUND@IJA, [REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.
>
> 26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUND@IJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witness A to have oral and vaginal sexual intercourse with him. FURUND@IJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions.

[198] Judgement, para. 81 (citing the Confidential Prosecutor's Reply to Trial Chamber's Order, 1 May 1998, filed in this case).
[199] *Ibid.*

176. The second observation is concerned with the additional material annexed to the Appellant's Amended Brief. It is to be recalled that, in an order dated 2 September 1999, the Appeals Chamber granted leave to the Appellant to amend his Appellate Brief, although not specifically admitting the material referred to in the "Defendant's Motion to Supplement Record on Appeal".[237] The Appeals Chamber confirms that, by granting leave to file an amended Appellate Brief, it granted leave to file the annexed documents, which the Appeals Chamber will take into account in considering the Appellant's submissions.

1. Statutory Requirement of Impartiality

177. The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial. Article 13(1) of the Statute reflects this, by expressly providing that Judges of the International Tribunal "shall be persons of high moral character, *impartiality* and integrity".[238] This fundamental human right is similarly reflected in Article 21 of the Statute, dealing generally with the rights of the accused and the right to a fair trial.[239] As a result, the Appeals Chamber need look no further than Article 13(1) of the Statute for the source of that requirement.

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[237] Filed on 28 June 1999.

[238] (Emphasis added). Article 13(1) provides: "The Judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law." See also Arts. 2 and 11 of Statute of the International Tribunal for the Law of the Sea (Annex VI of United Nations Convention on the Law of the Sea of 10 December 1982); Art. 19 of Statute of the Inter-American Court of Human Rights (adopted by Resolution 448 by the General Assembly of the Organisation of American States at its ninth regular session held in La Paz, Bolivia, October 1979); Arts. 36(3)(a), 40 and 41 of the Rome Statute.

[239] Under Article 21(2) of the Statute, the accused is entitled to "a fair and public hearing" in the determination of the charges against him. Paragraph 106 of the Report of the Secretary General provides that "[i]t is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognised standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights." (Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808(1993)). Article 14(1) of the ICCPR provides in relevant part: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The fundamental human right of an accused to be tried before an independent and impartial tribunal is also recognised in other major human rights treaties. The Universal Declaration of Human Rights provides in Art. 10 that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the full determination of his rights and obligations of any criminal charge against him". Art. 6(1) of the European Convention on Human Rights protects the right to a fair trial and provides *inter alia* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Art. 8(1) of the American Convention provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law". Art. 7(1)(d) of the African Charter on Human and Peoples' Rights provides that every person shall have the right to have his case tried "within a reasonable time by an impartial court or tribunal."

submits that the *Erdemovi}* case[320] cannot serve as an appropriate guideline, as the circumstances surrounding that case were unique. The accused in that case pleaded guilty to the charges against him, and duress was treated as a significant mitigating factor. Therefore, the Respondent argues, *Erdemovi}* is clearly distinguishable from the instant case.[321]

224. Contrary to the Appellant's submission that the Appeals Chamber be guided by the sentences passed by the Trial Chambers to date, the Respondent submits that it would be desirable for the Appeals Chamber to establish appropriate sentencing principles in order to achieve consistency and even-handedness.[322]

225. The Respondent further argues that deterrence and retribution should be the primary goals of sentencing. In the Respondent's view, deterrence has two aspects, one "suppressive" and the other "educative". The Respondent submits that both of these aspects of deterrence and the aim of retribution would be defeated were the sentences imposed by the Tribunal generally lower than those typically imposed in national systems.[323]

226. As to the suppressive aspect, the Respondent contends that a prospective violator of international humanitarian law would not be dissuaded by the sanctions imposed by an international tribunal if they were lower than those imposed under national law. As to the educative aspect, the Respondent argues that lower sentences imposed by the International Tribunal would signal that genocide, crimes against humanity and war crimes are less serious than ordinary crimes under national law. Finally, the imposition by the International Tribunal of sentences lower than those prevailing in national jurisdictions would undermine the Tribunal's aim of contributing to the restoration of peace and security in the former Yugoslavia.[324]

227. The Respondent submits that the gravity of the crime must form the starting point for any determination of sentence. Rather than subscribing to some form of hierarchy between the offences generally, a Trial Chamber should impose a sentence which reflects the inherent gravity of the accused's criminal conduct.[325] The gravity of the crimes must ultimately be determined with regard

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[319] In fact, as of the date of this Judgement, the Appeals Chamber has addressed sentencing in two additional decisions, and in each instance has revised the sentence imposed by the Trial Chamber. See the *Tadi}* Sentencing Appeals Judgement and the *Aleksovski* Appeals Judgement.
[320] *See* the Second *Erdemovi}* Sentencing Judgement.
[321] Prosecutor's Response, paras. 7.11-7.14 and T. 152 (2 March 2000)).
[322] Prosecutor's Response, paras. 7.16-7.17 and T. 155 (2 March 2000).
[323] Prosecutor's Response, paras. 7.25-7.27 and T. 156 (2 March 2000).
[324] Prosecutor's Response, para. 7.28 and T. 159 (2 March 2000).
[325] Prosecutor's Response, para. 7.33 and T. 158 (2 March 2000).

to the particular circumstances of the case; the degree of the accused's participation should be considered and, generally, the closer a person is to actual participation in the crime, the more serious the nature of his crime.[326] However, an individual who orders or plans a course of criminal conduct will be responsible for his role in having ordered all of the crimes committed by the perpetrators and his responsibility may, therefore, be greater.[327]

228. As a general proposition, the Respondent agrees with the Appellant that a crime that results in the death of the victim is more serious than a crime not involving the loss of human life. However, this principle may not apply in the circumstances of every case. The Respondent rejects the Appellant's argument that six years' imprisonment has been established as the "appropriate benchmark" for violations of the laws or customs of war when the accused is convicted of particularly cruel and terrorising treatment that did not result in the death of a victim.[328] The Respondent also highlights other factors which are to be considered, such as the personal circumstances of the accused, aggravating and mitigating factors, and the general practice regarding prison sentences in the courts of the former Yugoslavia.[329]

229. The Respondent submits that the Appellant has not demonstrated that his sentence of ten years for torture was manifestly disproportionate to the gravity of the criminal conduct in question. The Trial Chamber found the Appellant guilty as a co-perpetrator of the act of torture, suggesting that the criminal conduct of the Appellant and that of Accused B were equally serious. Therefore, the sentence imposed cannot be regarded as disproportionate.[330] The Respondent adds that the sentence for outrages upon personal dignity reflects the Appellant's diminished role in this crime, although the conduct underlying this count was the same as that underlying the torture count.[331] The Prosecutor concludes that the Defence has failed to establish that the Trial Chamber abused its discretion in imposing the sentences.[332]

230. The Respondent further submits that, even if any weight is given to sentences imposed by Trial Chambers in other cases, the sentences do not appear to be inconsistent. The Respondent highlights as an example the accused Hazim Deli}, in the *^elebi}i* case, who received a sentence of fifteen years for rape. The Respondent contends that this sentence is probably the one most

[326] Prosecutor's Response, paras. 7.34-7.35.
[327] *Ibid.*, para. 7.35 and T. 160 (2 March 2000).
[328] Prosecutor's Response, para. 7.36.
[329] *Ibid.*, para. 7.37.
[330] *Ibid.*, para. 7.42-7.45.
[331] *Ibid.*, para. 7.46.
[332] *Ibid.*, para. 7.48 and T. 162 (2 March 2000).

From this the Appellant deduces that violations which do not result in death should receive a sentence three years less than for those from which death results. In view of the above, the Appellant submits that an appropriate benchmark sentence for a violation of the laws or customs of war that does not result in the death of the victim is six years.

246. The reasoning behind this proposed benchmark of six years depends in part on the view that crimes resulting in loss of life are to be punished more severely than those not leading to the loss of life. The Appeals Chamber considers this approach to be too rigid and mechanistic.

247. Since the *Tadi}* Sentencing Appeals Judgement, the position of the Appeals Chamber has been that there is no distinction in law between crimes against humanity and war crimes that would require, in respect of the same acts, that the former be sentenced more harshly than the latter. It follows that the length of sentences imposed for crimes against humanity does not necessarily limit the length of sentences imposed for war crimes.

248. The argument implicitly advanced by the Appellant in support of a six-year benchmark sentence is that all war crimes should attract similar sentences. The reasoning may be summarised as follows: because war crimes not resulting in death received sentences of six years in *Tadic*, it stands to reason that war crimes not resulting in death in this case should receive the same or a similar sentence. The Appeals Chamber does not agree with this logic, or with the imposition of a restriction on sentencing which does not have any basis in the Statute or the Rules.

249. In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness. While acts of cruelty that fall within the meaning of Article 3 of the Statute will, by definition, be serious, some will be more serious than others. The Prosecutor submits that sentences must be individualised according to the circumstances and gravity of the particular offence. The Appeals Chamber agrees with the statement of the Prosecutor that "the sentence imposed must reflect the inherent gravity of the accused's criminal conduct",[362] which conforms to the statement of the Trial Chamber in the *Kupreškic* Judgement:

> The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[363]

[362] Prosecutor's Response, para. 7.32.
[363] *Kupreškic* Judgement, para. 852.

This statement has been endorsed by the Appeals Chamber in the *Aleksovski* Appeals Judgement,[364] and there is no reason for this Chamber to depart from it.

250. The sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules. It may impose a sentence of imprisonment for a term up to and including the remainder of the convicted person's life.[365] As a result, an individual convicted of a war crime could be sentenced to imprisonment for a term up to and including the remainder of his life, depending on the circumstances.

251. The Appellant's submission regarding the appropriate length of benchmark sentences is contradicted by recent Appeals Chamber practice. In the *Tadic* Sentencing Appeals Judgement, the Appeals Chamber pronounced sentences of twenty years for wilful killings under Article 2 of the Statute and for murders under Article 3 of the Statute,[366] both of which surpass the nine-year benchmark which the Appellant argues is appropriate for war crimes resulting in death.

252. The Appellant further relies upon the judgement of the Trial Chamber in the *Aleksovski* case in order to establish a benchmark for sentencing. In that case, the convicted person was sentenced to two and a half years in prison for outrages upon personal dignity. However, in the recent *Aleksovski* Appeals Judgement, the Appeals Chamber found that there was a discernible error on the part of the Trial Chamber in the exercise of its discretion, namely:

> giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1) of the Statute.[367]

The Appeals Chamber went on to sentence Zlatko Aleksovski to seven years, stating that, had it not been for an element of double jeopardy involved in the process, "the sentence would have been considerably longer."[368]

3. Additional arguments

253. The Appellant submits that "there are substantive issues that hang over the case" that suggest innocence is a possibility and that this should be considered in sentencing.[369] The Appeals

[364] *Aleksovski* Appeals Judgement, para. 182.
[365] Article 24 of the Statute and Rule 101(A) of the Rules.
[366] Noted by the Prosecutor at T. 154 (2 March 2000).
[367] *Aleksovski* Appeals Judgement, para. 187.
[368] *Ibid.*, para. 190.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-17/1-T

Date: 10 December 1998

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Florence Ndepele Mwachande Mumba, Presiding**
Judge Antonio Cassese
Judge Richard May

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **10 December 1998**

PROSECUTOR

v.

ANTO FURUND@IJA

JUDGEMENT

The Office of the Prosecutor:

Ms. Brenda Hollis
Ms. Patricia Viseur-Sellers
Ms. Michael Blaxill

Counsel for the Accused:

Mr. Luka Miseti}
Mr. Sheldon Davidson

as a spectator in civilian dress, a SA (*Stürmabteilung*) "parade" in which two political opponents of the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*) were exposed to public humiliation. P had followed the "parade" without taking any active part. The court found that P,

> followed the parade only as a spectator in civilian clothes, although he was following a service order by the SA for a purpose yet unknown . . . His conduct cannot even with certainty be evaluated as objective or subjective approval. Furthermore, silent approval that does not contribute to causing the offence in no way meets the requirements for criminal liability.[230]

P was found not guilty. He may have lacked the necessary *mens rea*. But in any event, his insignificant status brought the effect of his "silent approval" below the threshold necessary for the *actus reus*.

209. It appears from the *Synagogue* and *Pig-cart parade* cases that presence, when combined with authority, can constitute assistance in the form of moral support, that is, the *actus reus* of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility. This emphasis on the accused's authority was also affirmed in *Akayesu*. Jean-Paul Akayesu was the *bourgmestre*, or mayor, of the Commune in which atrocities, including rape and sexual violence, occurred. That Trial Chamber considered this position of authority highly significant for his criminal liability for aiding and abetting: "The Tribunal finds, under Article 6(1) of its Statute, that the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, *by virtue of his authority*, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place: [. . .]".[231] Furthermore, it can be inferred from this finding that assistance need not be tangible. In addition, assistance need not

[230] *Strafsenat. Urteil vom 10. August 1948 gegen L. u. a.* StS 37/48 (*Entscheidungen*, Vol. I, pp. 229 and 234).
[231] Case No. ICTR-96-4-T, para. 692, emphasis added.

constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.

210. Mention should also be made of several cases which enable us to distinguish aiding and abetting from the case of co-perpetration involving a group of persons pursuing a common design to commit crimes.

211. The *Dachau Concentration Camp* case was held before a US Tribunal under Control Council Law No. 10.[232] All the accused held some position in the hierarchy running the Dachau concentration camp. While allegations of direct participation in instances of ill-treatment were made against certain accused, and allegations of command responsibility against others, the real basis of the charges was that all the accused had "acted in pursuance of a common design" to kill and mistreat prisoners, and hence to commit war crimes.

212. The organised and official nature of the system by which war crimes were perpetrated in this case adds a specific element to the "complicity" of the accused. The report of the case by the United Nations War Crimes Commission isolates three elements necessary to establish guilt in each case. The first was the existence of a system to ill-treat the prisoners and commit the various crimes alleged; the second was the accused's knowledge of the nature of this system; and the third was that the accused "encouraged, aided and abetted or participated" in enforcing the system. Once the existence of the system had been established, a given accused was potentially liable for his participation in this system. The roles of the accused ranged from camp commanders to guards and prisoner functionaries and all were found guilty, with the difference in the levels of participation reflected in the sentences. It would seem that the holding of any role in the administration of the camps was sufficient to constitute encouraging, aiding and abetting or participating in the enforcement of the system.

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[232] *The Dachau Concentration Camp Trial, Trial of Martin Gottfried Weiss and Thirty-Nine Others*, General Military Government Court of the United States Zone, Germany, 15 Nov.-13 Dec. 1945, Vol. XVI, Law Reports, p. 5. The Prosecution did refer to principles of American criminal law on the subject of complicity (pp. 12-13).

Chamber held that the accused "intentionally assisted directly and substantially in the common purpose of the group" to commit the offence.[253]

(b) International Instruments

227. The two international instruments useful for these purposes are the 1996 Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission, and the Rome Statute. Neither instrument is legally binding internationally. The Draft Code was adopted in 1996 by the United Nations International Law Commission, a body consisting of outstanding experts in international law, including governmental legal advisers, elected by the United Nations General Assembly. The Draft Code was taken into account by the General Assembly: in its resolution 51 (160) of 30 January 1997 it expressed its "appreciation" for the completion of the Draft Code and among other things drew the attention of the States participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the Draft Code to their work.[254] In the light of the above the Trial Chamber considers that the Draft Code is an authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain contents or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world. As for the Rome Statute, at present it is still a non-binding international treaty (it has not yet entered into force). It was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998.[255] In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing

[253] *Ibid.*, paras. 730 and 738.
[254] *See* operative para. 2 of the resolution.
[255] The significance of the Rome Statute has also been acknowledged by the Sixth Committee of the United Nations in a resolution entitled "Establishment of an international criminal court", dated 18 Nov. 1998 (A/C. 6/53/L. 9/Rev. 1), in which it "note[s] that a significant number of States have signed the Rome Statute"; "acknowledges the historic significance of the adoption of the Rome Statute", and; "calls upon

or developing law is not "limited" or "prejudiced" by the Statute's provisions, resort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.

228. The Code of Crimes against the Peace and Security of Mankind deals with aiding and abetting in article 2(3)(d), which would impose criminal responsibility upon an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission".[256]

229. In the absence of specification, it appears that assistance can be either physical or in the form of moral support. Encouragement given to the perpetrators may be punishable, even if the abettor did not take any tangible action, provided it "directly and substantially" assists in the commission of a crime. This proposition is also supported by a passage from the International Law Commission's Commentary concerning *ex post facto* assistance:

> The Commission concluded that complicity could include aiding, abetting or assisting *ex post facto*, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime.[257]

230. This conclusion implies that action which decisively encourages the perpetrator is sufficient to amount to assistance: the knowledge that he will receive assistance during or after the event encourages the perpetrator in the commission of the crime. From this perspective, willingness to provide assistance, when made known to the perpetrator, would also suffice, if the offer of help in fact encouraged or facilitated the commission of the crime by the main perpetrator.[258]

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all States to consider signing and ratifying the Rome Statute, and encourages efforts aimed at promoting awareness of the results of the Conference and of the provisions of the Rome Statute".

[256] *Report of the I.L.C.*, on the work of its forty-eighth session, G.A. Supp. No. 10 (A/51/10) 1996, p. 18.

[257] *Ibid.*, p. 24.

[258] *See* the *Rohde* case.

231. The International Law Commission's Commentary also states that "participation of an accomplice must entail assistance which *facilitates* the commission of a crime *in some significant way*".[259] The word "facilitates" suggests that it is not necessary for the conduct of the aider and abettor to cause the commission of the crime; it need not be a *conditio sine qua non* of the crime. The "directly and substantially" requirement in article 2, and the word "significant" used in the International Law Commission Commentary, however, clearly exclude any marginal participation. Article 25(3), in particular paragraphs (c) and (d), of the Rome Statute deals with aiding and abetting:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> [. . .]
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii)Be made in the knowledge of the intention of the group to commit the crime;
>
> [. . .].

This wording is less restrictive than the Draft Code, which limits aiding and abetting to assistance which "facilitate[s] in some significant way", or "directly and substantially" assists, the perpetrator. Article 25 of the Rome Statute, like the Draft Code, also clearly contemplates assistance in either physical form or in the form of moral support. Indeed, the word "abet" includes mere exhortation or encouragement.

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[259] *Report of the I.L.C.*, p. 24 (emphasis added).

(c) Conclusion

232. On the issue of the nature of assistance rendered, the German cases suggest that the assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances. While any spectator can be said to be encouraging a spectacle - an audience being a necessary element of a spectacle - the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals. This is supported by the provisions of the International Law Commission Draft Code. In view of this, the Trial Chamber believes the use of the term "direct" in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime. This may explain why the word "direct" was not used in the Rome Statute 's provision on aiding and abetting.

233. On the effect of the assistance given to the principal, none of the cases above suggests that the acts of the accomplice need bear a causal relationship to, or be a *conditio sine qua non* for, those of the principal. The suggestion made in the *Einsatzgruppen* and *Zyklon B* cases is that the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Having a role in a system without influence would not be enough to attract criminal responsibility, as demonstrated by the case of the defendant Ruehl in the *Einsatzgruppen* case. This interpretation is supported by the German cases cited.

234. The position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime. This is the position adopted by the Trial Chamber.

235. In sum, the Trial Chamber holds that the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.

have known that the purpose of the trip was an unlawful execution, he would be acquitted.

246. Moreover, it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.

247. Knowledge is also the requirement in the International Law Commission Draft Code, which may well reflect the requirement of *mens rea* in customary international law. This is the standard adopted by this Tribunal in the *Tadi} Judgement*, although sometimes somewhat misleadingly expressed as "intent".[267]

248. One exception to this requirement of knowledge is the *Rohde* case, which appears to require no *mens rea* at all. However, this case is based on English law and procedure under the Royal Warrant. Furthermore, it is out of line with the other British cases, which do require knowledge. At the other end of the scale is the appeal court decision in the *Hechingen Deportation* case, which required that the accomplice share the *mens rea* of the perpetrator. However, the high standard proposed by this case is not reflected in the other cases.

249. In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.

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3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

[267] Case No. IT-94-1-T, paras. 675-677.

273. The position of the accused has already been discussed. He did not personally rape Witness A, nor can he be considered, under the circumstances of this case, to be a co-perpetrator. The accused's presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him.

274. On the evidence on record, the Trial Chamber is satisfied that the Prosecution has proved its case against the accused beyond reasonable doubt. In accordance with Article 7(1) and the findings of the Trial Chamber that the *actus reus* of aiding and abetting consists of assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime and that the *mens rea* required is the knowledge that these acts assist the commission of the offence, the Trial Chamber holds that the presence of the accused and his continued interrogation aided and abetted the crimes committed by Accused B. He is individually responsible for outrages upon personal dignity including rape, a violation of the laws or customs of war under Article 3 of the Statute.

275. The Trial Chamber therefore finds the accused, for aiding and abetting, guilty of a Violation of the Laws or Customs of War (outrages upon personal dignity including rape) on Count 14.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-98-29-A
		Date:	30 November 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

STANISLAV GALIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Mr. Mark Ierace
Ms. Michelle Jarvis
Ms. Shelagh Mc Call
Ms. Anna Kotzeva

Counsel for Stanislav Galić:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

II. STANDARD FOR APPELLATE REVIEW

6. On appeal, the Parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute. These criteria are well established by the Appeals Chambers of both the International Tribunal[11] and the ICTR.[12] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the International Tribunal's jurisprudence.[13]

7. A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground.[14] Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may conclude for other reasons that there is an error of law.[15]

8. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[16] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[17] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.[18] The Appeals Chamber will not review the entire trial record *de novo*; rather, it will in principle only take into account evidence referred to by the Trial Chamber in the body of the Judgement or in a related footnote; evidence

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[11] *See, e.g.*, *Stakić* Appeal Judgement, para. 7; *Kvočka et al.* Appeal Judgement, para. 14; *Vasiljević* Appeal Judgement, paras 4-12; *Kunarac et al.* Appeal Judgement, paras 35-48; *Kupreškić et al.* Appeal Judgement, para. 29; *Čelebići* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, paras 34-40; *Tadić* Appeal Judgement, para. 64.
[12] *See Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, para. 7; *Musema* Appeal Judgement, para. 15; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras 177, 320. Under the Statute of the ICTR, the relevant provision is Article 24.
[13] *Stakić* Appeal Judgement, para. 7; *Kupreškić et al.* Appeal Judgement, para. 22; *Tadić* Appeal Judgement, para. 247.
[14] *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement para. 16, citing *Krnojelac* Appeal Judgement, para. 10.
[15] *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 16; *Kordić and Čerkez* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6; *Kupreškić et al.* Appeal Judgement, para. 26. *See also Gacumbitsi* Appeal Judgement, para. 7; *Ntagerura* Appeal Judgement, para. 11; *Semanza* Appeal Judgement, para. 7; *Kambanda* Appeal Judgement, para. 98.
[16] *Stakić* Appeal Judgement, para. 9; *Krnojelac* Appeal Judgement, para. 10.
[17] *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15.
[18] *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17. *Blaškić* Appeal Judgement, para. 15.

1. Whether the Trial Chamber impermissibly departed from the charge stated in the Indictment

71. Article 19(1) of the Statute and Rules 47(E) and (F) of the Rules provide that, on receipt of an indictment for review from the Prosecutor, the confirming Judge must determine whether there is a *prima facie* case against the subject of the indictment in relation to each count alleged in that indictment. The review of an indictment by a Judge involves two steps: (1) the Judge makes an assessment whether, on the face of the indictment, it is alleged that the suspect committed acts which, if proven beyond reasonable doubt, are crimes within the subject matter jurisdiction of the International Tribunal; and (2) the Judge determines whether the evidence accompanying the indictment, viewed in its totality, establishes a *prima facie* case against the suspect in relation to each count alleged.[206] While the Judge reviewing an indictment must assess whether the crimes charged fall within the jurisdiction of the International Tribunal, the Judge does not have to make a final determination as to the precise elements of those crimes. Similarily, while the Prosecution may identify the elements of offences in the indictment it presents to the Judge for confirmation, the only obligation set forth in Article 18(4) of the Statute and Rule 47(C) of the Rules is that the indictment contain a concise statement of the facts of the case and of the crimes with which the suspect is charged. The determination of the legal elements of the crimes charged in an indictment is, as noted by the Prosecution,[207] not a duty of the confirming Judge but the responsibility of the Trial Chamber, which must ensure that, pursuant to the *nullum crimen sine lege* principle, an accused is only found guilty of a crime with respect to acts which constituted a violation of international humanitarian law at the time of their commission.[208] In so ensuring, the Trial Chamber is not bound to accept the elements of an offence as proposed by the parties but is responsible for determining those elements for itself.[209] Accordingly, the Trial Chamber's holding that infliction of terror is not an element of the crime of terror against the civilian population[210] was perfectly within its authority. Indeed, as the Prosecution correctly noted, there are several cases before the International Tribunal in which a Trial Chamber or the Appeals Chamber decided not to adopt the elements of the crimes charged proposed by the Prosecution.[211] In the *Čelebići* case, for example, the Appeals Chamber upheld the interpretation given by the Trial Chamber of the standard "had reason to know" and found that a superior will be criminally responsible as a superior only if information was available

[205] Defence Reply Brief, para. 35.
[206] *Prosecutor v. Kordić et al.*, Case No. IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995; *Prosecutor v. Zoran Marinić*, Case No. IT-95-15-I, Decision on the Review of the Indictment, 10 November 1995; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-I, Decision on the Review of the Indictment, 10 November 1995.
[207] Prosecution Reply Brief, para. 5.5.
[208] *Stakić* Appeal Judgement, para. 315; *Kordić and Čerkez* Appeal Judgement, para. 44; *Tadić* Jurisdiction Decision, para. 143.
[209] *Aleksovski* Appeal Judgement, para. 127; *see also Čelebići* Appeal Judgement, para. 173.
[210] Trial Judgement, para. 65.
[211] Prosecution Response Brief, para. 5.4.

to him which would have put him on notice of offences committed by subordinates.[212] Similarly, in the *Kunarac* case, the Trial Chamber found, contrary to the Prosecution's submission,[213] that "the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law".[214]

72. In the present case, Galić was charged under Count 1 with "unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949 [as a violation of the laws or customs of war pursuant to] Article 3 of the Statute".[215] The Trial Chamber noted in the Trial Judgement that the introductory paragraph to the Indictment reads "[i]nfliction of terror" upon the civilian population of Sarajevo, but it decided that "[i]nfliction of terror" was "not an appropriate designation of the offence [...] because infliction of terror is not a required element of the offence".[216] The Trial Chamber found that proof of the offence required establishing that Galić committed "acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva Conventions of 1949".[217] Under that definition, infliction of terror on the civilian population was not an element of the crime charged. In this circumstance, it cannot be said that the Trial Chamber re-qualified the offence "in order to make the facts allegedly fit with an alleged crime".[218] Rather, the Trial Chamber merely identified the elements that needed to be established for the crime to be made out.

73. The Appeals Chamber therefore finds that while the Prosecution initially envisaged in its description of the charges in the Indictment that the crime of terror among the civilian population comprised actual infliction of terror, the Trial Chamber was acting within the confines of its jurisdiction in determining that the elements of this crime do not comprise the actual infliction of terror on that population.

74. The core issue remains, however, that the accused has to be properly informed of the nature and cause of the charges against him so that he can adequately prepare his defence.[219] Indeed, Galić

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[212] *Čelebići* Appeal Judgement, para. 241 (upholding *Čelebići* Trial Judgement, para. 363).
[213] *Prosecutor v. Kunarac*, Case No. IT-96-23-PT, Prosecutor's Pre-Trial Brief, 9 December 1999, para. 142.
[214] *Kunarac et al.* Trial Judgement, para. 496. This finding was confirmed by the Appeals Chamber. *See Kunarac et al.* Appeal Judgement, para. 148.
[215] Trial Judgement, para. 64.
[216] Trial Judgement, para. 65.
[217] Trial Judgement, para. 769.
[218] Defence Appeal Brief, para. 33.
[219] The obligation of the Prosecution to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21(2) and 21(4)(a) and (b) of the Statute, which state that, in the determination of the charges against him, an accused is entitled to a fair hearing and, more particularly, has to be informed of the nature and cause of the charges against him and to have adequate facilities for the preparation of his defence. *See Prosecutor v. Ivan Čermak and Mladen Markac.*, Case No. IT-03-73-PT, Decision on Ivan Čermak and Mladen Markač's Motion on Form

favour of the accused".[227] He contends that, the existence of terror against the civilian population not having been proved beyond reasonable doubt at the end of the trial, the Trial Chamber should have acquitted him of Count 1 of the Indictment.[228] The Prosecution reiterates that there was no "re-qualification" of the offence but "simply a permissible clarification of its elements".[229] It says that the fact that the Trial Chamber decided that infliction of terror on the civilian population is not an element of the offence implies that "whether terror was inflicted has no determinative bearing on [Galić]'s criminal responsibility under Count 1 and *in dubio pro reo* has no application".[230]

77. The principle of *in dubio pro reo* dictates that any doubt should be resolved in favour of the accused and encompasses doubts as to whether an offence has been proved at the conclusion of a case.[231] In the present case, the question whether there could have been doubt as to the culpability of Galić is dependent on whether the actual infliction of terror is an element of the offence charged under Count 1 or not. As will be shown below, actual infliction of terror is not an element of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population as charged under Count 1 of the Indictment.[232] Therefore, Galić's argument that the principle of *in dubio pro reo* was violated is moot.

78. In his Appeal Brief, Galić contends that the Trial Chamber "failed to proceed" in accordance with the principle of *in dubio pro reo* "in all the counts pronouncing [him] guilty"[233] and argues that "[r]egarding Counts 2, 3, 5 and 6 the same reasoning [as the one regarding Count 1] applies, *mutatis mutandis*".[234] In his Reply Brief, Galić asserts that the Trial Chamber reached conclusions based on "assumptions" or on facts "not supported by firm proof",[235] and argues that the Trial Chamber, in its assessment of "all the so-called scheduled incidents", violated the principle of *in dubio pro reo*.[236] The Appeals Chamber notes that those arguments go beyond the scope of the Defence Notice of Appeal[237] and therefore the Appeals Chamber is not required to consider them. Further, the Appeals Chamber recalls that, in filing an appeal, appellants have an obligation to set out their grounds of appeal clearly, and to provide the Appeals Chamber with specific references to the

[227] Defence Appeal Brief, para. 249.
[228] Defence Appeal Brief, para. 250.
[229] Prosecution Response Brief, para. 5.19.
[230] Prosecution Response Brief, para. 5.20.
[231] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, dated 15 October 1998, filed 16 October 1998, para. 73: "[A]ny doubt should be resolved in favour of the Appellant in accordance with the principle *in dubio pro reo*"; *Čelebići* Trial Judgement, para. 601: "[A]t the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved".
[232] *See* below, paras 103-104.
[233] Defence Appeal Brief, para. 251.
[234] Defence Appeal Brief, para. 251.
[235] Defence Reply Brief, para. 149.
[236] Defence Reply Brief, para. 150.

elements of the crimes of extermination[258] and deportation.[259] In *Naletilić and Martinović*, the Appeals Chamber relied on customary international law for its finding that the existence of an armed conflict is an element of crimes under Articles 2 and 3 of the Statute.[260]

85. The Appeals Chamber rejects Galić's argument that the International Tribunal's jurisdiction for crimes under Article 3 of the Statute can only be based on customary international law. However, while binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the International Tribunal's jurisdiction, in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom.

2. The crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population

86. On appeal, Galić argued that the 22 May 1992 Agreement was not binding on the parties[261] and even if binding did not give rise to individual criminal responsibility on the part of the parties.[262] The Appeals Chamber does not consider it necessary to address this argument on the ground that, as will be demonstrated below, it is satisfied that the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, was a part of customary international law from the time of its inclusion in those treaties. The Appeals Chamber, by majority, Judge Schomburg dissenting, is further satisfied that a breach of the prohibition of terror against the civilian population gave rise to individual criminal responsibility pursuant to customary international law at the time of the commission of the offences for which Galic was convicted.

(a) The prohibition of terror against the civilian population in customary international law

87. In the present case, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was charged under Article 3 of the Statute, on the

[258] *Stakić* Appeal Judgement, para. 260: "[T]here is no support in customary international law for the requirement of intent to kill a certain threshold number of victims [...]."
[259] *Stakić* Appeal Judgement, para. 300: "In general, the question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law"; *ibid.*, para. 301: "[I]t is necessary to examine whether customary international law would support a finding that 'constantly changing frontlines' may amount to *de facto* borders sufficient for the purposes of the crime of deportation." *See also ibid.*, paras 302-303.
[260] *Naletilić and Martinović* Appeal Judgement, para. 120: "[T]he existence of an armed conflict or its character has to be regarded, in accordance with the principle of *in dubio pro reo*, as ordinary elements of a crime under customary international law when applying Articles 2 and 3 of the Statute to the conduct at issue in this case."
[261] Defence Appeal Brief, para. 60. *See also* AT 65.
[262] Defence Appeal Brief, para. 63.

basis of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, both of which state:

> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Article 51 of Additional Protocol I was adopted with 77 votes in favour, one against and 16 abstentions.[263] Neither France, which voted against, nor the States that abstained from voting, expressed any concern as to the content of the prohibition contained in Article 51(2). The only concerns expressed were confined to paragraphs 4, 5, 7 and 8 of this Article.[264] Article 13 of Additional Protocol II, which incorporates the first three paragraphs of Article 51 of Additional Protocol I, was adopted by consensus.[265] The purposes of Additional Protocols I and II, as expressly stated by the High Contracting Parties in the preambles to those treaties, were to "reaffirm and develop the provisions protecting the victims of armed conflicts"[266] and "to ensure a better protection for the victims" of armed conflicts.[267] Additional Protocol II, further, is considered to embody the "fundamental principles on protection for the civilian population".[268] Articles 51(2) of Additional Protocol I and 13(2) of Additional Protocol II, in essence, contribute to the purpose of those treaties. They do not contain new principles but rather codify in a unified manner[269] the prohibition of attacks on the civilian population. The principles underlying the prohibition of attacks on civilians, namely the principles of distinction and protection, have a long-standing history in international humanitarian law.[270] These principles incontrovertibly form the basic foundation of international humanitarian law[271] and constitute "intransgressible principles of international customary law".[272] As the Appeals Chamber has held in previous decisions, the conventional prohibition on attack on civilians contained in Articles 51 of Additional Protocol I and

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[263] *Travaux préparatoires*, Vol. VI, p. 163, para. 118.
[264] *Travaux préparatoires*, Vol. VI, pp. 164-168, 187-188.
[265] *Travaux préparatoires*, Vol. VII, p. 134, para. 76.
[266] Additional Protocol I, Preamble.
[267] Additional Protocol II, Preamble.
[268] ICRC Commentary (Additional Protocols), paras 4762, 4764.
[269] The prohibition of terror was first discussed during the *travaux préparatoires* with regard to Additional Protocol I but was then discussed together with the same provision in Additional Protocol II. *See Travaux préparatoires*, Vol. XIV, pp. 59-75.
[270] The necessary distinction between civilians and combatants was made as early as three-and-a-half centuries ago by Grotius, in *De Jure Belli Ac Pacis* (1625). It was later maintained in the Lieber Code of 24 April 1863 at Articles 23 and 25.
[271] In its Advisory Opinion on the Legality of Nuclear Weapons, the International Court of Justice ("ICJ") described the principle of distinction and the principle of protection of the civilian population as "the cardinal principles contained in the texts constituting the fabric of humanitarian law" and stated that "States must never make civilians the object of attack." *Nuclear Weapons* Case, para. 78.
[272] *Nuclear Weapons* Case, para. 78. The principle of distinction is further set out, among other places, in Article 48 of Additional Protocol I, which states that the warring parties must "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives". *See also Kordić and Čerkez* Appeal Judgement, para. 54.

13 of Additional Protocol II constitutes customary international law.[273] In so holding, the Appeals Chamber has made no distinction within those articles as to the customary nature of each of their respective paragraphs. In light of the above, and considering that none of the States involved in the Diplomatic Conference leading to the adoption of both Protocols expressed any concern as to the first three paragraphs of Article 51 of Additional Protocol I, and as Article 13 of Additional Protocol II was adopted by consensus, the Appeals Chamber considers that, at a minimum, Article 51(1), (2) and (3) of Additional Protocol I and Article 13 of Additional Protocol II in its entirety constituted an affirmation of existing customary international law at the time of their adoption. The Appeals Chamber therefore affirms the finding of the Trial Chamber that the prohibition of terror, as contained in the second sentences of both Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, amounts to "a specific prohibition within the general (customary) prohibition of attack on civilians".[274]

88. The Appeals Chamber found further evidence that the prohibition of terror among the civilian population was part of customary international law from at least its inclusion in the second sentences of both Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. The 1923 Hague Rules on Warfare prohibited "[a]ny air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants".[275] Similarly, the 1938 Draft Convention for the Protection of Civilian Populations against New Engines of War expressly prohibited "[a]erial bombardment for the purpose of terrorising the civilian population".[276] Even more importantly, Article 33 of Geneva Convention IV, an expression of customary international law,[277] prohibits in clear terms "measures of intimidation or of terrorism"[278] as a form of collective punishment, as they are "opposed to all principles based on humanity and justice".[279] Further, Article 6 of the 1956 New Delhi Draft Rules for protection of civilians states that "[a]ttacks directed against the civilian population, as such,

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[273] *See Strugar et al.* Jurisdiction Decision, para. 9; *see also Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis* Motions for Acquittal, 11 March 2005, para. 28.
[274] Trial Judgement, para. 98.
[275] Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Article 22. The Rules were drafted by a Commission of Jurists at the Hague, from December 1922 to February 1923. This Commission was composed of representatives of the United States, France, Great Britain, Italy, Japan and The Netherlands. It prepared rules for the control of radio in time of war (part I of the report of the Commission) and rules of air warfare (part II). Although these rules were never adopted in legally binding form they are of importance "as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war". Hersch Lauterpacht, ed., *Oppenheim's International Law*, 7th Edition, Vol. 2 (London: Longman, Green, 1952), p. 519.
[276] Draft Convention for the Protection of Civilian Populations Against New Engines of War, Amsterdam, 1938. This draft convention was prepared by a committee of the International Law Association and approved in principle by the Fortieth Conference of the Association in 1938.
[277] *See Blaškić* Appeal Judgement, para. 145; *Krnojelac* Appeal Judgement, para. 220; *Čelebići* Appeal Judgement, para. 113. *See also* Report of the Secretary-General (ICTY), para. 35.
[278] Fourth Geneva Convention, Article 33.

whether with the object of terrorizing it or for any other reason, are prohibited."[280] More recently, Article 6 of the 1990 Turku Declaration of Minimum Humanitarian Standards envisaged that "[a]cts or threats of violence the primary purpose or foreseeable effect of which is to spread terror among the population are prohibited."[281]

89. Another indication of the customary international law nature of the prohibition of terror at the time of the events alleged in this case can be found in the number of States parties to Additional Protocols I and II by 1992.[282] Also, references to official pronouncements of States and their military manuals further confirm the customary international nature of the prohibition.[283] With respect to official pronouncements, the Appeals Chamber notes that the United States, a non-party to Additional Protocol I, expressed in 1987 through the deputy Legal Adviser to the US Department of State its support for the "principle that the civilian population as such, as well as individual citizens, not be the objects of acts or threats of violence the primary purpose of which is to spread terror amongst them".[284] Similarly, in 1991, in response to an inquiry of the ICRC as to the application of international humanitarian law in the Gulf region, the US Department of the Army pointed out that its troops were acting in respect of the prohibition of acts or threats of violence the main purpose of which was to spread terror among the civilian population.[285] With respect to military manuals, the Appeals Chamber notes that a large number of countries have incorporated provisions prohibiting terror as a method of warfare,[286] some of them in language similar to the prohibition set out in the Additional Protocols,[287] or even verbatim.[288]

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[279] ICRC Commentary (GC IV), p. 226.

[280] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, ICRC, 1956. The Draft Rules were drawn up by the ICRC with the help of experts and submitted to the 19th Conference of the Red Cross, which took place in New Delhi in 1957. Although those draft rules did not lead to concrete steps, it is particularly noteworthy that many of the provisions therein resemble provisions finally adopted in Additional Protocols I and II.

[281] Declaration of Minimum Humanitarian Standards, *reprinted in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) (Turku Declaration).

[282] By 1992, as correctly noted by the Trial Chamber, there were around 191 States in the world, 118 of which had ratified Additional Protocol I and 108 of which had ratified Additional Protocol II.

[283] *Tadić* Jurisdiction Decision, para. 99.

[284] Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2 (1987), p. 426.

[285] Letter from the Department of the Army to the Legal Adviser of the US Army Forces Deployed in the Gulf Region, 11 January 1991, § 8(F), Report on US Practice, 1997, ch. 1.4, cited in Henckaerts, J-M. and Doswald-Beck, L. *Customary International Humanitarian Law*, Volume II (Cambridge 2005), p. 73. *See also ibid.*, § 4(B)(6): "Acts or threats of violence the main purpose of which is to spread terror among the civilian population are prohibited."

[286] *See, e.g.*, Belgium, Le Droit de la Guerre, Dossier d'Instruction pour Soldats, à l'attention des officiers instructeurs, JS3, Etat-Major Général, Forces Armées Belges (*Teaching Manual for Soldiers*), p. 14; Belgium, Droit Pénal et Disciplinaire Militaire et Droit de la Guerre, Deuxième Partie, Droit de la Guerre, Ecole Royale Militaire, par J. Maes, Chargé de cours, Avocat-Général près la Cour Militaire, D/1983/1187/029, 1983 (*Law of War Manual*), p. 31; Cameroon, Droit International Humanitaire et Droit de la Guerre, Manuel de l'Instructeur en vigueur dans les Forces Armées, Présidence de la République, Ministère de la Défense, Etat-Major des Armées, Trosième Division, Edition

1992 (*Instructors' Manual*), p. 152; Croatia, Compendium « Law of Armed Conflicts », Republic of Croatia, Ministry of Defence, 1991 (*Law of Armed Conflicts Compendium*), p. 40; France, Fiche de Synthèse sur les Règles Applicables dans les Conflits Armés, Note No. 432/DEF/EMA/OL.2/NP, Général de Corps d'Armée Voinot (pour l'Amiral Lanxade ; Chef d'Etat-Major des Armées), 1992 (*Law of Armed Conflict Summary Note*), para. 4.1; Germany, Humanitarian Law in Armed Conflicts, Manual, DSK VV207320067, edited by The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English Translation of ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten, Handbuch, August 1992 (*Military Manual*), para. 507; Hungary, A Hadijog, Jegyzet a Katonai, Föiskolák Hallgatói Részére, Magyar Honvédség Szolnoki Repülötiszti Föiskola, 1992 (*Military Manual*), page 64; Nigeria, The Laws of War, By Lt. Col. L. Ode PSC, Nigerian Army, Lagos, undated (*Manual on the Laws of War*), para. 20; Russia, Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR, Appendix to Order of the USSR Defence Minister No. 75, 1990 (*Military Manual*), para. 5(n); Soviet Union, *Soviet Minister of Defence Order No. 75 of 16 February 1990 on the Publication of the Geneva Conventions of 12 August 1949 Relative to the Protection of Victims of War and their Additional Protocols* (*Manuel d'application des normes du droit international humanitaire par les Forces armées de l'URSS*), Annex, para. 5(o). The Appeals Chamber also notes that the trend in prohibiting terror against the civilian population as a method of warfare at the national level continued after 1992. *See, e.g.*, Benin, Le Droit de la Guerre, III fascicules, Forces Armées du Bénin, Ministère de la Défense Nationale, 1995 (*Military Manual*), p. 12; Colombia, Derecho Internacional Humanitario, Manual Básico para las Personerías y las Fuerzas Armadas de Colombia, Ministerio de Defensa Nacional, 1995 (*Basic Military Manual*), p. 30; France, Fiche didactique relative au droit des conflits armés, Directive of the Ministry of Defence, 4 January 2000, annexed to the Directive No. 147 of the Ministry of Defence of 4 January 2000 (*Law of Armed Conflict Teaching Note*), para. 403; Germany, ZDv 15/1, Humanitäres Völkerrecht in bewaffneten Konflikten, Grundsätze, DSK VV230120023, Bundesministerium der Verteidigung, June 1996 (*International Humanitarian Law Manual*), para. 403; Kenya, Law of Armed Conflict, Military Basic Course (ORS), The School of Military Police, 1997 (*Law of Armed Conflict Manual*), Précis No. 4, p. 2, para. (g).

[287] *See, e.g.*, Argentina, Leyes de Guerra, PC-08-01, Público, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489-89 del Ministerio de Defensa, 23 April 1990 (*Laws of War Manual*), para. 7.08 (prohibiting "acts which aim to terrorise the [civilian] population"); Ecuador, Aspectos Importantes del Derecho Internacional Marítimo que Deben Tener Presente los Comandantes de los Buques, Academia de Guerra Naval, 1989 (*Naval Manual*), para. 6.2.5 ("The civilian population as such, as well as individual civilians, may not be the objects of attack or of threats or acts of intentional terrorisation"); Sweden, International Humanitarian Law in Armed Conflict, with reference to the Swedish Total Defence System, Swedish Ministry of Defence, Januray 1991 (*International Humanitarian Law Manual*), sec. 3.2.1.5, p. 44 (prohibiting "attacks deliberately aimed at causing heavy losses and creating fear among the civilian population"); Switzerland, Lois et coutumes de la guerre (Extrait et commentaire), Règlement 51.7/II f, Armée Suisse, 1987 (*Basic Military Manual*), art. 27(2) ("It is prohibited to commit acts of violence with the primary aim of spreading terror among the civilian population."); United States, Air Force Pamphlet 110-31, International Law, The Conduct of Armed Conflict and Air Operations, US Department of the Air Force, 1976 (*Air Force Pamphlet*), para. 5.3(a)(1)(a) ("Acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited"); Yugoslavia, *Regulations on the Application of International Laws of War in the Armed Forces of the SFRY* (1988), para. 67 ("Attacking civilians for the purpose of terrorising them is especially prohibited."). The Appeals Chamber also notes that the trend in prohibiting terror against the civilian population as a method of warfare at the national level continued after 1992. *See, e.g.*, Netherlands, Toepassing Humanitair Oorlogsrecht, Voorschrift No. 27-412/1, Koninklijke Landmacht, Ministerie van Defensie, 1993 (*Military Manual*), p. V-4, para. 4 (stating that "acts or threats of violence whose primary aim is to terrorise the civilian population are prohibited" during international armed conflicts), p. XI-6 (stating the same for non-international armed conflicts); Australia, Australian Defence Force, Manual on Law of Armed Conflict, Australian Defence Force Publication, Operation Series, ADFP 37, Interim Edition, 1994 (*Defence Force Manual*), para. 554 ("[A]cts or threats of violence primarily intended to spread terror among the civilian population are prohibited."); Spain, Orientaciones, El Derecho de los Conflictos Armados, Publicación OR7-004, 2 Tomos, aprobado por el Estado Mayor del Ejército, Division de Operaciones, 18 March 1996 (*Law of Armed Conflicts Manual*), Vol. I, paras 2.3.b.(3), 3.3.b.(7); Togo, Le Droit de la Guerre, Etat-Major Général des Forces Armées Togolaises, Ministère de la Défense nationale, 1996 (*Military Manual*), Fascicule III, p. 12 (prohibiting "terrorising the civilian population through acts or threats of violence"); United States, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard, October 1995 (*Naval Handbook*), para. 11.3 ("The civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization").

[288] *See*, for example, New Zealand, Interim Law of Armed Conflict Manual, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992 (*Interim Law of Armed Conflict Manual*), para. 517(1), for international armed conflicts, and para. 1819(1) for non-international armed conflicts; Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, B-GJ-005-104/FP-021, 1999 (*The Law of Armed Conflict at the Operational and Tactical Level*), applicable to both international and non international armed conflicts, which prohibits as a "General Rule" "acts or threats of violence the primary

90. In light of the foregoing, the Appeals Chamber finds that the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II clearly belonged to customary international law from at least the time of its inclusion in those treaties.

(b) The criminalisation of the prohibition of terror against the civilian population

91. The crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was charged under Article 3 of the Statute. The conditions that must be fulfilled for a violation of international humanitarian law to be subject to Article 3 of the Statute are ("*Tadić* conditions"):

> i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...];
>
> iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;
>
> iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[289]

92. Individual criminal responsibility under the fourth *Tadić* condition can be inferred from, *inter alia*, state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals.[290]

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purpose of which is to spread terror among the civilian population" (para. 423) and also specifically states the following under "Terrorizing the civilian population": "Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited. The protection of civilians is a fundamental principle of the [Law of Armed Conflict]. A campaign of threats or violence designed to terrorize the civilian population is simply not acceptable under any circumstances, even when the civilian population exhibits a hostile attitude toward the presence of the [Canadian Forces]."

[289] *Tadić* Jurisdiction Decision, para. 94.

[290] *Tadić* Jurisdiction Decision, para. 128.

93. The first reference to terror against the civilian population as a war crime, as correctly noted by the Trial Chamber,[291] is found in the 1919 Report of the Commission on Responsibilities, created by the Peace Conference of Paris to inquire into breaches of the laws and customs of war committed by Germany and its allies in World War I.[292] The Commission found evidence of the existence of "a system of terrorism carefully planned and carried out to the end", stated that the belligerents employed "systematic terrorism", and listed among the list of war crimes "systematic terrorism".[293] Although the few trials organised on that basis in Leipzig did not elaborate on the concept of "systematic terrorism", this is nonetheless an indication that, in 1919, there was an intention to criminalise the deliberate infliction of terror upon the civilian population. Further, in 1945, Australia's War Crimes Act referred to the work of the 1919 Commission on Responsibilities and included "systematic terrorism" in its list of war crimes.[294]

94. With respect to national legislation, the Appeals Chamber notes that numerous States criminalise violations of international humanitarian law – encompassing the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population– within their jurisdiction. The Norwegian Military Penal Code of 1902, as amended, provides that "[a]nyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in [the four Geneva Conventions and the two Additional Protocols of 1977] is liable to imprisonment."[295] The 1962 Geneva Conventions Act of Ireland, for example, provides that any "minor breach" of the Geneva Conventions, including violations of Article 33 of Geneva Convention IV, is a punishable offence.[296]

95. The Appeals Chamber also notes that numerous States have incorporated provisions as to the criminalisation of terror against the civilian population as a method of warfare in a language similar to the prohibition set out in the Additional Protocols. The Criminal Codes of the Czech Republic and the Slovak Republic, for example, criminalise "terroris[ing] defenceless civilians with

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[291] Trial Judgement, para. 116.
[292] On the Commission on Responsibilities, *see* UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948), Chapter III.
[293] *Ibid.*, pp. 34-35 (reproducing the Commission's list of war crimes).
[294] *See Australian Law Concerning Trials of War Criminals by Military Courts*, in *Law R. Trials War Crim.*, Vol. 5, pp. 94-95, referred to at paragraph 118 of the Trial Judgement.
[295] Norway, Militaer Straffelov (*Military Penal Code*), Act No. 13 of 22 May 1902, as amended in 1981, published in Norwegian Law Journal , Volume I, Law and Central Regulations , sec. 108.
[296] Ireland, *Geneva Conventions Act* (1962), sec. 4. *See also* Bangladesh, *International Crimes (Tribunal) Act* (1973), sec. 3(2)(e) (providing *inter alia* that "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" are "crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility" (Bangladesh ratified Additional Protocols I and II, in their entireties, on September 8, 1980); Switzerland, Code pénal militaire (*Military Penal Code*), 13 June 1927, published in the Recueil officiel des lois fédérales, 1927, art. 109 (criminalising acts "contrary to the provisions of international agreements on the conduct of hostilities and the protection of persons and property"; Switzerland ratified Additional Protocols I and II, in their entireties, on February 17, 1982).

violence or the threat of violence".[297] Further, numerous States have incorporated provisions that criminalise terrorisation of civilians in time of war. The Penal Code of Côte d'Ivoire, for example, provides that measures of terror in time of war or occupation amount to a "crime against the civilian population".[298] The Penal Code of Ethiopia punishes anyone who organises, orders or engages in "measures of intimidation or terror" against the civilian population in time of war, armed conflict or occupation.[299] During the relevant period, the Netherlands included "systematic terrorism" in its list of war crimes that carried criminal penalties.[300]

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[297] Czech Republic, Trestní zákon (Criminal Code), Act No. 140/1961 Coll. 29 November 1961, as amended by Act No. 305/1999 Coll. of 18 November 1999, art. 263(a)(1); Slovakia, Trestní zákon (Criminal Code), Act. No. 140/1961 Coll. 29 November 1961, as amended, art. 263(a)(1). The Appeals Chamber notes the continuing trend of nations criminalising terror as a method of warfare. *See, e.g.*, Argentina, Draft Code of Military Justice (1998), art. 291, introducing a new article 875(1) in the Code of Military Justice as amended (1951): punishes "acts or threats of violence whose primary aim is to terrorise"; Bosnia & Herzegovina, Criminal Code of the Federation of Bosnia and Herzegovina No. 327, adopted on 29 July 1998, published in Službene Novine Federacije Bosne i Hercegovine, No. 43/98, 20 November 1998, art. 154(1): criminalises "the application of measures of intimidation and terror" against civilians (1998); Colombia, Ley 599 de 2000 (julio 24) por la cual se expide el Código Penal (Penal Code), published in Diario Oficial, No. 44.097, 24 July, 2000, art. 144: imposes criminal sanction on "anyone who, during an armed conflict, carries out or orders the carrying out of [...] acts or threats of violence whose primary purpose is to terrorise the civilian population"; Croatia, Criminal Code (1997), art. 158(1): imposes criminal sanctions on "whoever, in violation of the rules of international law, at a time of war, armed conflict or occupation, [...] orders [...] the imposition of measures of intimidation and terror"; El Salvador, Código Penal de la Republica de El Salvador, Decreto No. 1030, Título XIX, (Criminal Code, as amended 1998), art. 362: criminalises violations of "international laws [...] of war" (El Salvador ratified Additional Protocols I and II, in their entireties, on November 23, 1978); Finland, Penal Code, Act. No. 39/1889, as amended by Act No. 578/1995 of the Finnish legislative gazette (Suomen säädöskokoelma), issued 21 April 1995, Chapter 11, art. 1: imposes criminal sanction on "a person who in an act of war [...] otherwise violates the provisions of an international agreement on warfare binding on Finland" (Finland ratified Additional Protocols I and II, in their entireties, on August 7, 1980); Ireland, Geneva Conventions Act (1962), as amended by Act No. 35 of 13 July 1998, published in The Acts of the Oireachtas as promulgated, sec. 4: criminalises any "minor breach" of Additional Protocol I, including violations of Article 51(2), as well as any "contravention" of Additional Protocol II, including violations of Article 13(2) (Ireland ratified Additional Protocols I and II, in their entireties, on May 19, 1999); Lithuania, Lietuvos Respublikos baudziamas kodeskas (Criminal Code of the Republic of Lituania), 26 June 1961, published in Valstybes zinios, No. 18-147, 1961, as amended 9 June 1998, art. 336: criminalises "the use of intimidation and terror" in time of war, armed conflict or occupation; Mauritius, Geneva Conventions (Amendment) Act, Act No. 2 of 2003, Government Gazette, 17 May 2003, General Notice 722, section 4(e), amending section 3 of the Geneva Conventions Act of 1970: criminalises breaches of the Additional Protocols under Mauritian law (Mauritius ratified Additional Protocols I and II, in their entireties, on March 22, 1983); Mexico, Código Penal Federal (Federal Criminal Code as amended 2006), First Book, Preliminary Title, art. 6: criminalises acts which are an offence under an international treaty to which Mexico is a party (Mexico ratified the entirety of Additional Protocol I on March 10, 1983); Russia, Criminal Code of the Russian Federation, No. 63-FZ, 13 June 1996, promulgated in Collection of legislation of the Russian Federation, No. 25, 17 June 1996, art. 356(1): punishes the "cruel treatment of [...] the civilian population" and the use in an armed conflict of "means and methods prohibited by an international treaty of the Russian Federation" (Russia ratified Additional Protocols I and II, in their entireties, on September 29, 1989); Spain, Ley Orgánica 10/1995, de 23 de Noviembre, del Código Penal (Penal Code), published in Boletín Oficial del Estato, No. 281, 24 November 1995, art. 611(1): punishes anyone who, during an armed conflict, makes the civilian population the object of "acts or threats of violence whose primary purpose is to terrorise them"; Yemen, Military Criminal Code, Law No. 21/1998 relative to military offences and penalities, 25 July 1998, published in Official Gazette of the Republic of Yemen, No. 18, 20 September 1999: criminalises all acts which constitute an offence against persons or property protected under international agreements to which Yemen is a party (Yemen ratified Additional Protocols I and II, in their entireties, on April 17, 1990).

[298] Côte d'Ivoire, Loi No. 81-640 du 31 juillet 1981 instituant le Code Pénal (*Penal Code*), published in the Journal Officiel de la République de Côte d'Ivoire, No. 1 (numéro special), as amended, art. 138(5).

[299] Ethiopia, Penal Code of the Empire of Ethiopia, Proclamation No. 158, published in Negarit Gazeta, *16th Year, No. 1* (1957), art. 282(g).

[300] Netherlands, Law Concerning Trials of War Criminals, art. 1, in Law R. Trials War Crim., Vol. 11, pp. 86, 93. *See also* Slovenia, Kazenski zakonik (Penal Code) 29 September 1994, art. 374(1) (criminalising the imposition of

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96. The Appeals Chamber also notes the references by the Trial Chamber to the laws in force in the former Yugoslavia at the time of the commission of the offences charged,[301] particularly Article 125 ("War Crime Against the Civilian Population") in Chapter XI ("Criminal Offences Against Humanity and International Law") of the 1960 Criminal Code of the Republic of Yugoslavia[302] and the superseding Article 142 ("War Crime Against the Civilian Population") in Chapter XVI ("Criminal Offences Against Humanity and International Law") of the 1976 Criminal Code,[303] both of which criminalise terror against the civilian population, and provisions of Yugoslavia's 1988 "[Armed Forces] Regulations on the Application of International Laws of War",[304] which incorporated the provisions of Additional Protocol I, following Yugoslavia's ratification of that treaty on 11 March 1977. Those provisions not only amount to further evidence of the customary nature of terror against the civilian population as a crime, but are also relevant to the assessment of the foreseeability and accessibility of that law to Galić.[305]

97. In addition to national legislation, the Appeals Chamber notes the conviction in 1997 by the Split County Court in Croatia for acts that occurred between March 1991 and January 1993, under, *inter alia*, Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, including "a plan of terrorising and mistreating the civilians", "open[ing] fire from infantry arms [...] with only one goal to terrorise and expel the remaining civilians", "open[ing] fire from howitzers, machine guns, automatic rifles, anti-aircraft missiles only to create the atmosphere of fear among the

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measures of "intimidation [and] terrorism" against the civilian population). Several of the above references to military manuals and national legislation were extracted from Henckaerts, J-M. and Doswald-Beck, L. *Customary International Humanitarian Law*, Volume II (Cambridge 2005).

[301] Trial Judgement, paras 121-124.

[302] Yugoslavia, Criminal Code of 1951, as amended June 30, 1959, entered into force January 1, 1960, in *Collection of Yugoslav Laws*, Volume XI, Institute of Comparative Law, Belgrade (1964). Art. 125 states, in relevant part: "Whoever, in violation of the rules of international law at the time of war, armed conflict or occupation, orders or executes wilful killings, tortures, or inhuman treatment of the civilian population, including [...] use of measures of intimidation and terror [...] shall be punished by imprisonment for not less than five years or by the death penalty".

[303] Krivični zakon SFRJ (Criminal Code of the SFRY), adopted on September 28, 1976, published in the Official Gazette SFRJ No. 44 of October 8 1976. Article 142 reads, in relevant part: "Whosoever, in violation of the rules of the international law effective at the time of war, armed conflict or occupation, orders that the civilian population be subject to [...] the application of measures of intimidation and terror [...] shall be punished by imprisonment for not less than five years or by the death penalty".

[304] Regulations on the Application of International Laws of War in the Armed Forces of the SFRY, ex. P5.1. This manual provides *inter alia* that "Serious" violations of the laws of war are considered criminal offences (p. 14), considers as war crimes "attack on civilians [...] inhuman treatment [of civilians] inflicting great suffering or injury to bodily integrity or health [...] application of measures of intimidation and terror" (p. 18, emphasis added), mentions explicitly under the part dealing with means and methods of combat that "Attacking civilians for the purpose of terrorising them is especially prohibited." (p. 29), and envisages that that the perpetrators of war crimes "may also answer before an international court, if such a court has been established" (p. 15).

[305] *Ojdanić* Appeal Decision on Joint Criminal Enterprise, para. 40. *See also Hadžihasanović et al.* Appeal Decision on Jurisdiction in Relation to Command Responsibility, para. 34.

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remaining farmers", and "carrying out the orders of their commanders with the goal to terrorise and threaten with the demolishing of the Peruča dam".[306]

98. In light of the foregoing, the Appeals Chamber finds, by majority, Judge Schomburg dissenting, that customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, from at least the period relevant to the Indictment.

3. The elements of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population

99. Galić argues under his fifth ground of appeal that although he stood trial under Count 1 for terror against the civilian population including as one of its elements the infliction of terror against the civilian population, he was convicted and sentenced for a different offence which did not require the infliction of terror against the civilian population, but merely the intent to spread terror among the civilian population. He argues that the Trial Chamber thereby impermissibly departed from the Indictment.[307] He also contends in his sixteenth ground of appeal that, the existence of terrorisation of the civilian population not being proved beyond reasonable doubt at the end of the trial, the Trial Chamber should have acquitted him of Count 1 of the Indictment, by virtue of the principle of *in dubio pro reo*.[308] The Appeals Chamber has already found that, in principle, the Trial Chamber was acting within the confines of its jurisdiction when it found that actual infliction of terror on the civilian population was not an element of the crime of terror against the civilian population, and rejected both arguments.[309] Under the present ground of appeal, Galić again argues that it was not proven that "terror as such was inflicted upon the civilian population",[310] an argument that the Appeals Chamber understands to address the substantive content of the crime rather than the Trial Chamber's ability to exercise jurisdiction over the crime. He argues in his Notice of Appeal that the Trial Chamber erred both specifically when it found that infliction of

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[306] *Prosecutor v. R. Radulović et al.*, Split Country Court, Republic of Croatia, Case No. K-15/95, Verdict of 26 May 1997. The Appeals Chamber also notes the reference made by the Trial Chamber to the first conviction for terror against the civilian population, delivered in July 1947 by a court martial sitting in the Netherlands East Indies in the *Motomura et al.* case; the court martial convicted 13 of the 15 accused before it of "systematic terrorism practised against civilians" for acts including unlawful mass arrests. *See* Trial Judgement, paras 114-115, referring to *Trial of Shigeki Motomura and 15 Others*, in *Law R. Trials War Crim.*, Vol. 13, p. 138.

[307] Defence Appeal Brief, para. 35. *See also* Defence Notice of Appeal, para. 13: "No rules whatsoever would allow the Tribunal to find someone guilty of a crime which, in the end, is not the same as the one of which the Accused was informed and for which he was prosecuted."

[308] Defence Appeal Brief, para. 250.

[309] *See supra* para. 72.

[310] Defence Appeal Brief, para. 57.

however, discriminatory intent can be used as an aggravating circumstance for the other offences enumerated in Article 5 of the Statute.[1225]

(a) Gravity of the offence

409. The Appeals Chamber notes Galić's argument, in reference to the factors set out in paragraph 764 of the Trial Judgement, that "[i]t appears that the Majority appraised all of these circumstances as aggravating factors".[1226] However, Galić overlooks the fact that that paragraph does not address aggravating circumstances but rather the gravity of the offence.[1227] When assessing the gravity of the offence, a Trial Chamber must take into account the inherent gravity of the crime and the criminal conduct of the accused, the determination of which requires a consideration of the particular circumstances of the case and the crimes for which the accused was convicted, as well as the form and degree of participation of the accused in those crimes.[1228]

410. The Trial Chamber held that the gravity of the offence for which Galić was found guilty encompasses the suffering of the victims, the frequency of illegal actions by the SRK, and the anguishing environment, in which hundreds of people were killed and thousands wounded and terrorised.[1229] These factors are particular circumstances of the crimes for which Galić were convicted and clearly play a role when assessing his sentence. Galić failed to demonstrate that the Trial Chamber committed an error when it took these factors into account in its assessment of the gravity of the offence.

(b) Galić's superior position as an aggravating circumstance

411. The Trial Chamber considered as an aggravating factor "the fact that General Galić occupied the position of VRS Corps Commander, and repeatedly breached his public duty from this very senior position".[1230] Galić argues that the Trial Chamber erred in law as his position as a

[1225] *Vasiljević* Appeal Judgement, paras 171-173.
[1226] Defence Appeal Brief, para. 559, fn. 448, citing Trial Judgement, para.764.
[1227] It is clear that the Trial Chamber, in the section in which it addresses the applicable law on sentencing, distinguished between the concept of the gravity of the offence and that of aggravating circumstances. *See* Trial Judgement, paras 758, 760. Also, when applying the law on the facts of the case, it first addressed the gravity of the offence (Trial Judgement, para. 764) and then Galić's position as commander as an aggravating circumstance (Trial Judgement, para. 765).
[1228] *See Blaškić* Appeal Judgement, para. 683; *Vasiljević* Appeal Judgement, para. 182; *Furundžija* Appeal Judgement, para. 249; *Aleksovski* Appeal Judgement, para. 182.
[1229] The Appeals Chamber notes that the actual infliction of terror on the civilians of Sarajevo, taken into account by the Trial Chamber as an aspect of the gravity of the offence, could also have been considered as a separate aggravating circumstance, since it is, as shown above, not an element of the crime of terror. The Appeals Chamber also recalls, however, that a factor can only be taken into account once in sentencing, that is, either in the gravity of the offence or as an aggravating circumstance. *See Deronjić* Sentencing Appeal Judgement, para. 106: "The Appeals Chamber considers that factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*."
[1230] Trial Judgement, para. 765.

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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-98-29-T
		Date:	5 December 2003
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie**
Judge Amin El Mahdi
Judge Rafael Nieto-Navia

Registrar: **Mr. Hans Holthuis**

Judgement Of: **5 December 2003**

PROSECUTOR

v.

STANISLAV GALIĆ

JUDGEMENT AND OPINION

The Office of the Prosecutor:

Mr. Mark Ierace
Mr. Chester Stamp
Mr. Daryl Mundis
Ms. Prashanthi Mahindaratne
Mr. Manoj Sachdeva

Counsel for the Accused:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

166. Article 7 of the Statute provides for imposition of individual and superior responsibility on persons on the following basis:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. [...]
>
> 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

1. Individual Responsibility under Article 7 (1) of the Statute

167. The Indictment, in describing the Accused's responsibility, makes reference to each head of responsibility in Article 7(1).[275] In the Prosecution's Final Trial Brief reference is made to "ordering" as the basis of responsibility. It is within the Trial Chamber's discretion to convict, if at all, the Accused under the appropriate head of responsibility within the limits set by the Indictment and insofar as the evidence permits.[276]

168. The Trial Chamber considers, briefly, the case-law of the International Tribunals which elaborates the elements of the various heads of individual criminal responsibility in Article 7(1) of the Statute.[277] Considering them in the order in which they appear in the Statute, "planning" has been defined to mean that one or more persons designed the commission of a crime, at both the preparatory and execution phases,[278] and the crime was actually committed within the framework of that design[279] by others.[280] "Instigating" means prompting another to commit an offence, which is actually committed.[281] It is sufficient to demonstrate that the instigation was "a clear contributing factor to the conduct of other person(s)".[282] It is not necessary to demonstrate that the crime would not have occurred without the accused's involvement.[283] "Ordering" means a person in a position of authority using that authority to instruct another to commit an offence. The order does not need to

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[275] Id., para. 10.
[276] *Furundžija* Trial Judgement, para. 189, *Kupreškić* Trial Judgement, para. 746; *Kunarac* Trial Judgement, para. 388, *Krstić* Trial Judgement, para. 602.
[277] *Cf.* Article 6(1) of the Statute of the ICTR. See also the Prosecution Pre-trial Brief (paras 69 *et seq.*) and the Defence's submissions on Article 7 in its Pre-trial Brief (paras 6.1-6.35).
[278] *Akayesu* Trial Judgement, para. 480. See also *Blaškić* Trial Judgement, para. 279; *Kordić* Trial Judgement, para. 386 quoting the *Akayesu* Trial Judgement.
[279] *Akayesu* Trial Judgement, para. 473.
[280] If the person planning a crime also commits it, he or her is only punished for the commission of the crime and not for its planning, *Kordić* Judgement, para. 386 (quoting the *Blaškić* Trial Judgement, para. 278).
[281] *Akayesu Trial* Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Kordić* Trial Judgement, para. 387.
[282] *Kvočka* Trial Judgement, para. 252, citing *Kordić* Trial Judgement, para. 387.
[283] *Kvočka* Trial Judgement, para. 252, citing *Kordić* Trial Judgement, para. 387.

be given in any particular form.[284] "Committing" means that an "accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute".[285] Thus, it "covers first and foremost the physical perpetration of a crime by the offender himself."[286] "Aiding and abetting" means rendering a substantial contribution to the commission of a crime.[287] These forms of participation in a crime may be performed through positive acts or through culpable omission.[288] It has been held in relation to "instigating" that omissions amount to instigation in circumstances where a commander has created an environment permissive of criminal behaviour by subordinates.[289] The Defence contests the applicability of that case-law and considers that "in all the cases [under Article 7(1)] a person must undertake an action that would contribute to the commission of a crime".[290]

169. In the Majority's opinion, a superior may be found responsible under Article 7(1) where the superior's conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met. Under Article 7(3) (see further below) the subordinate perpetrator is not required to be supported in his conduct, or to be aware that the superior officer knew of the criminal conduct in question or that the superior did not intend to investigate or punish the conduct. More generally, there is no requirement of any form of active contribution or positive encouragement, explicit or implicit, as between superior and subordinate, and no requirement of awareness by the subordinate of the superior's disposition, for superior liability to arise under Article 7(3). Where, however, the conduct of the superior supports the commission of crimes by subordinates through any form of active contribution or passive encouragement (stretching from forms of ordering through instigation to aiding and abetting, by action or inaction amounting to facilitation), the superior's liability may be brought under Article 7(1) if the necessary *mens rea* is a part of the superior's conduct. In such cases the subordinate will most likely be aware of the superior's support or encouragement, although that is not strictly necessary. In the Majority's view, the key point in all of this is that a superior with a guilty mind may not avoid Article 7(1) responsibility by relying on his or her silence or omissions or apparent omissions or understated participation or any mixture of overt and non-overt actions, where the effect of such conduct is to commission crimes by subordinates.

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[284] *Krstić* Trial Judgement, para. 601, citing *Akayesu* Trial Judgement, para. 483; *Blaškić* Trial Judgement, para. 281; *Kordić* Trial Judgement, para. 388.
[285] *Kvočka* Trial Judgement, paras 250-1.
[286] *Tadić* Appeal Judgement, para. 188.
[287] *Aleksovski* Appeal Judgement, paras 162-4.
[288] *Tadić* Appeal Judgement, para. 188.
[289] *Blaškić* Trial Judgement, para. 337.
[290] Defence Pre-trial Brief, paras 6.3-6.4.

UNITED NATIONS	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-06-90-T
		Date:	15 April 2011
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Uldis Ķinis
Judge Elizabeth Gwaunza

Registrar: **Mr John Hocking**

Judgement of: **15 April 2011**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

JUDGEMENT

VOLUME I OF II

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi
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Brioni meeting.[83] The Prosecution opposed the Gotovina Defence's proposed revised transcript, with the exception of four minor corrections.[84] The Trial Chamber then directed the Gotovina Defence to send a number of passages from the original audio recording of exhibit P461 to the CLSS to verify their accuracy.[85] After CLSS's verification and in the absence of any objections from the parties, the old version of exhibit P461 was replaced by a revised version.

43. In addition to direct evidence, the Trial Chamber has admitted hearsay and circumstantial evidence. In evaluating the probative value of hearsay evidence, the Trial Chamber carefully considered all indicia of its reliability, including whether the evidence stemmed from a source that gave it voluntarily, whether it was first-hand or further removed, the absence of an opportunity to cross-examine the person who made the statement, and the circumstances under which the hearsay evidence arose.[86] The Trial Chamber clarified that its primary interest in hearing a witness's testimony was to establish facts which were observed by the witness, and that hearsay evidence which is obscure, in the context of all the evidence, may be given no weight.[87] It further clarified that hearsay evidence may also be used as corroborative evidence.[88] The Trial Chamber used as a standard that it would not enter a conviction where the evidence supporting that conviction was based solely on hearsay evidence. Similarly, with regard to written, non-cross-examined evidence such as Rule 92 *bis* or 92 *quater* statements, the Trial Chamber required corroboration by other evidence before entering a conviction.[89] As for circumstantial evidence, the Trial Chamber considered that such evidence alone may be sufficient for a conviction or a finding of fact beyond a reasonable doubt.[90] However the conclusion drawn from the circumstantial evidence had to be the only reasonable conclusion available.[91]

[83] Defendant Ante Gotovina's Submission Regarding P461 Brioni Transcript, 1 April 2009.
[84] Prosecution's Response to Ante Gotovina's Submission Regarding P461 Brioni Transcript, 15 April 2009.
[85] T. 27051-27054.
[86] See *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.
[87] T. 12137.
[88] T. 12137.
[89] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, fn.34 and references cited therein; *Popović et al.* Trial Judgement, para. 60.
[90] See *Kupreškić* Appeal Judgement, para. 303.
[91] See *Čelebići* Appeal Judgement, para. 458.

49. This is the Trial Chamber's position with regard to a number of exhibits.

50. Exhibit P2402 is a report entitled "Military Operation Storm and its Aftermath," published by the Croatian Helsinki Committee and edited by Žarko Puhovski.[110] The report contains un-sourced statements and double entries.[111] Furthermore, during examination of Puhovski in court it became apparent that there were errors in the book.[112] For these reasons, the Trial Chamber decided not to rely on exhibit P2402 in relation to information described therein if uncorroborated by other evidence.

51. Exhibit P744 is a human rights report listing various events which was compiled by Robert Williams from a variety of sources, including Philip Berikoff.[113] The report contains un-sourced hearsay information, and neither Berikoff nor Williams specified the sources in their testimonies. The report was furthermore inconsistent with other evidence from Berikoff, notably with regard to timing.[114] For these reasons, the Trial Chamber decided not to rely on the report in relation to information described therein if uncorroborated by other evidence.

52. Exhibit P541 is a list of alleged human rights violations from UNMO Team Gračac. Steenbergen had no knowledge of its preparation or the information contained therein.[115] The Gotovina Defence objected to its admission, and urged the Chamber to give it the appropriate weight considering that Steenbergen did not establish its origins.[116] For these reasons, the Trial Chamber decided not to rely on the report in relation to information described therein if uncorroborated by other evidence.

53. Exhibit P2417 is a map allegedly signed by Gotovina, apparently depicting troop movements between 4 and 8 August 1995. The Defence did not object to its admission into evidence.[117] It is unclear whether the map depicts actual or planned troop movements, nor are all parts of the map legible. Considering this, the Trial Chamber decided not to rely on exhibit P2417 on its own to establish presence of troops.

[110] P2316 (Zarko Puhovski, witness statement, 14 June 2007), paras 14-15; Žarko Puhovski, T. 15907.
[111] E.g. P2402 (Croatian Helsinki Committee, "Military Operation Storm and Its Aftermath", 2001), pp. 143, 153; Žarko Puhovski, T. 16087.
[112] E.g. P2402 (Croatian Helsinki Committee, "Military Operation Storm and Its Aftermath", 2001), p. 146; Žarko Puhovski, T. 16062-16064.
[113] Philip Berikoff, T. 7609, 7682; Robert Williams, T. 9646.
[114] See e.g. Philip Berikoff, T. 7610.
[115] Herman Steenbergen, T. 5434.
[116] Herman Steenbergen, T. 5434-5436.
[117] T. 17183.

1995,[900] testified that on 6 September 1995, she patrolled the village of Palanka, Gračac municipality, and was told by Boško Brkić and Kata Čuk that Dušan Brkić (born 1926), who had been dressed in military uniform but was unarmed, had been shot by Croatian soldiers who later burned his body.[901] In addition to this evidence, the Trial Chamber has considered evidence of Bogdan Brkić (reviewed in chapter 4.3.7) in relation to this incident.

240. According to the forensic documentation, decomposing body number 395 was retrieved on 15 September 1995 from the village of Palanka, Gračac municipality, and was identified by Bogdan Brkić from Palanka as Dušan Brkić born in Palanka on 19 August 1926, and buried in the City cemetery in Gračac.[902] Body G07/022B exhumed from a cemetery in Gračac on 29 May 2002 with a metal tag numbered 395, was an approximately 1.79-metre-tall male between 40 and 55 years old, wearing a partially burned and shredded olive-green shirt with epaulettes and blue-orange striped nylon shorts, whom the forensic pathologist found most likely died from explosive injuries.[903] On 29 September 2003, at the Zagreb Institute for Forensic Medicine and Criminology, body G07/022B was identified as Dušan Brkić, born in 1926.[904] According to a report of the Zagreb Forensic Institute, dated 29 September 2003 and based on details provided by his daughter, Dušan Brkić, a Serb of SFRY citizenship born in Palanka on 20 August 1926, died on 13 August 1995 in Palanka, probably due to explosive injuries.[905]

241. The evidence indicates that the body of Dušan Brkić, born in 1926, was found in the morning of 9 August 1995 with a bullet mark on his left side. The Trial Chamber also received evidence that a person referred to as a Croatian soldier had told Bogdan Brkić that he had killed Brkić's neighbour. The Trial Chamber considers that there is insufficient evidence to connect the soldier's comment specifically to the murder of Dušan Brkić. Further, the hearsay evidence from Boško Brkić and Kata Čuk insufficiently establishes their source of knowledge in relation to the incident. The Trial

[900] P774 (Laila Malm, witness statement, 30 July 2008, corrected 4 September 2008), paras 1, 13; Laila Malm, T. 8147; P775 (Map of Gračac area, marked by Laila Malm).
[901] Laila Malm, T. 8199-8201; P789 (UNCIVPOL incident report, S05-95-086, 6 September 1995).
[902] P1327 (Information on Dušan Brkić, including photo), p. 1; P1544 (Autopsy report of G07/022B, 9 October 2002), pp. 15-17.
[903] P1544 (Autopsy report of G07/022B, 9 October 2002), pp. 1-2, 6, 11, 13-14, 19; P1778 (Photo of bones of G07/022B); P1779 (Photo of clothes of G07/022B); P1780 (Photo of bones of G07/022B); D1410 (Autopsy report of G07/022B, 9 October 2002), pp. 1-5, 7.
[904] P669 (List of identified persons exhumed in Knin and Gračac from the Croatian Government Office for Co-operation with ICTY and ICC, 2 October 2003); D1410 (Autopsy report of G07/022B, 9 October 2002), p. 7.

Chamber considers their evidence regarding the perpetrator to be uncorroborated, and as the date of the incident is unclear, this hearsay evidence cannot be corroborated by evidence of troop presence in or near Palanka at any specific time. In addition, the forensic evidence indicates explosive injuries as the probable cause of death. Therefore, although the evidence indicates that Dušan Brkić was killed, there is insufficient evidence showing when, by whom, and the circumstances under which he was killed. Under these circumstances, the Trial Chamber will not further consider this incident in relation to Counts 1, 6, and 7 of the Indictment.

Vlado Milanović and Đurad Čanak (Further Clarification nos 25-26)

242. The Trial Chamber has received relevant evidence with regard to the alleged murder of Vlado Milanović and Đurad Čanak primarily through the testimony of Pero Perković and documentation related to the Croatian criminal investigation into the matter.

243. **Pero Perković**, a Croat from the village of Vodice and a member of the HV 15th Home Guards Regiment prior to, during, and after Operation Storm,[906] testified that one day, when he and others were mopping up the terrain in the Zrmanja area, Gračac municipality, Nikola Rašić tied an old man, named Đurad Čanak, to a railing and set some rags around him on fire.[907] When Čanak confessed that he had a rifle, he was untied and took the group to the forest where he handed over the weapon.[908] When they returned from the forest to go back to their unit, the group encountered Milenko Hrstić as well as Ivica Petrić, who was furious when he heard that the man had given a weapon to them.[909] Perković stated that he subsequently heard that an old man got killed, which he presumed was this old man because he was the only one in their close proximity, and that his battalion commander, Ante Belak, was furious when he heard about the incident.[910] Hrstić and Petrić were both charged with this offence and Petrić was

[905] P2034 (Report on circumstances of death of Dušan Brkić, 29 September 2003), pp. 1-2.
[906] Pero Perković, T. 19448, 19451, 19470, 19511, 19527, 19546-19547.
[907] Pero Perković, T. 19454, 19456, 19466, 19468-19469, 19489-19491.
[908] Pero Perković, T. 19466-19467.
[909] Pero Perković, T. 19467-19469, 19482-19483; D1542 (MUP official note of interview with Milenko Hrstić, 18 October 1995), pp. 1-3.
[910] Pero Perković, T. 19466-19468, 19471.

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UNITED NATIONS	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-06-90-T
		Date:	15 April 2011
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Uldis Ķinis
Judge Elizabeth Gwaunza

Registrar: **Mr John Hocking**

Judgement of: **15 April 2011**

PROSECUTOR

v.

ANTE GOTOVINA
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prevent crime, or any operational role or command in the prevention of crime.[2963] As such, any failure to prevent crime through the more effective deployment of police resources could not reasonably be attributed to him.[2964] Albiston testified that Čermak, as garrison commander, had no legal authority to punish criminal behaviour, including that of the civilian police.[2965] Čermak did not have the means at his disposal to prevent or punish crimes that took place during his term as garrison commander.[2966]

2448. On the basis of the evidence reviewed above, the Trial Chamber finds that Čermak had a varying number of subordinates at the Knin garrison. The evidence is unclear as to the identity of some of those subordinates. With regard to certain identifiable persons, the evidence is unclear as to whether they were Čermak's subordinates. The Trial Chamber further finds that Čermak had disciplinary authority over his subordinates. The evidence, notably D766 and D1029, further indicates that other persons were attached to the garrison at times. The extent of Čermak's disciplinary powers over the latter persons is less clear. The Trial Chamber has received little evidence indicating that subordinates of Čermak, or anyone otherwise temporarily attached to the garrison, committed any crimes charged in the Indictment. A reasonable interpretation of the uncorroborated evidence of Witness 84 according to which a person described as a soldier was breaking into a bank and explaining that he was just taking some furniture for Čermak, is that the person was using the name of Čermak to further his criminal activities for personal gain, and that he may well not have been a subordinate of Čermak. Even if he was, there is no evidence that Čermak intended the act, should have known about it or learned about it at any time before or after the act. Nor can the Trial Chamber rely on the uncorroborated hearsay evidence of Gojanović that a member of the 142nd Home Guard Brigade told him that equipment and machinery from a factory in Kistanje was taken by some men working for Čermak. The Trial Chamber recalls in this regard its statement in chapter 2 regarding the reliability of Gojanović's evidence. As for any powers Čermak may have had to initiate disciplinary proceedings against other persons by providing information to the competent

[2963] D1776 (Expert Report of Christopher Albiston, August 2009), para. 3.82; Christopher Albiston, T. 23829-23830, 24037; D1780 (Revised version of the basic criminal law of the Republic of Croatia, 22 March 1993); D1781 (Decree on Internal Organization and Operation of the Ministry of the Interior of the Republic of Croatia, 23 February 1995).
[2964] D1776 (Expert Report of Christopher Albiston, August 2009), para. 3.82.
[2965] D1776 (Expert Report of Christopher Albiston, August 2009), paras 3.83-3.85; Christopher Albiston, T. 23830-23832.

commander, there is no evidence that Čermak knew of any specific individuals committing acts falling within such disciplinary powers. In light of the preceding considerations, there is no need for the Trial Chamber to further consider who among the persons working for Čermak could be considered his subordinates, nor what precise powers he had to discipline or inititate disciplinary proceedings against those or other persons. In conclusion, the Trial Chamber finds that the allegations in paragraph 17 (e) of the Indictment have not been proven with regard to Čermak. In chapter 6.4.7, the Trial Chamber will further consider the acts and omissions of Čermak regarding crimes committed.

6.4.4 Disseminating information intended to cause the departure of Serbs

2449. According to the Indictment, Ivan Čermak contributed to the JCE by supporting and/or participating in the dissemination of (false) information and propaganda to Krajina Serbs that was intended to cause them to leave the area.[2967]

2450. As far as Čermak is concerned, the Trial Chamber has received no, or insufficient, evidence supporting the allegations in paragraph 17 (c) of the Indictment. The Trial Chamber therefore finds that they have not been proven.

6.4.5 Furthering violence against Serbs and a climate of fear among Serbs

2451. According to the Indictment, Ivan Čermak contributed to the JCE by futhering the perpetration of violent acts against Serbs, and the creation of a climate of fear among Serbs.[2968] There is relevant evidence in chapters 4.5.4, 6.4.2 (Oton Bender incident, passes issued to Serbs), and 6.4.7.

2452. **Karolj Dondo**, HV Liaison Officer with the UN and EC in Sector South in 1995,[2969] testified that he was present as a liaison officer and/or interpreter at a meeting

[2966] D1776 (Expert Report of Christopher Albiston, August 2009), para. 2.3; Christopher Albiston, T. 24017.
[2967] Indictment, para. 17 (c), "instigating, supporting, encouraging, facilitating and/or participating in the dissemination of information, false information and propaganda to the Krajina Serbs that was intended to cause them to leave the area."
[2968] Indictment, para. 17 (d), "promoting, instigating, facilitating, encouraging and/or condoning the perpetration of violent acts against Serbs and the creation of a climate of fear amongst those Serbs who had remained."
[2969] D1695 (Karolj Dondo, witness statement, 9 March 2005), p. 1, paras 1-2; D1696 (Karolj Dondo, witness statement, 18 August 2009), p. 1, para. 2.

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UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-01-47-A
		Date:	22 April 2008
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Judgement of: **22 April 2008**

PROSECUTOR

v.

ENVER HADŽIHASANOVIĆ
AMIR KUBURA

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Shelagh McCall
Mr. Marwan Dalal
Mr. Xavier Tracol
Ms. Barbara Goy
Mr. Steffen Wirth
Ms. Katharina Margetts
Mr. Matteo Costi

Counsel for the Defence:

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

Chamber".[31] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in the *Kupreškić et al.* case, according to which:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[32]

12. The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[33] However, since the Prosecution must establish the guilt of the accused at trial, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution.[34] An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[35]

13. Pursuant to Article 23(2) of the Statute and Rule 98*ter*(C) of the Rules, Trial Chambers have an obligation to set out a reasoned opinion in writing.[36] This right is one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute. In the *Furundzija* Appeal Judgement, the Appeals Chamber held that Article 23 of the Statute treats the right of an accused to a reasoned opinion as one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute.[37] With regard to legal findings, this obligation does not require a Trial

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[31] *Halilović* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 19; *Krnojelac* Appeal Judgement, para. 11; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64. *See* also *Seromba* Appeal Judgement, para. 11; *Nahimana et al.*, Appeal Judgement, para. 14; *Muhimana* Appeal Judgement, para. 8; *Kamuhanda* Appeal Judgement, para. 7; *Kajelijeli* Appeal Judgement, para. 5; *Ntakirutimana* Appeal Judgement, para. 12; *Musema* Appeal Judgement, para. 18.

[32] *Kupreškić et al.* Appeal Judgement, para. 30. *See also Halilović* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 14; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 19; *Kordić and Čerkez* Appeal Judgement, para. 19, fn. 11; *Blaškić* Appeal Judgement, paras 17-18.

[33] *Limaj et al.* Appeal Judgement, para. 13; *Blagovević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 14. *See* also *Seromba* Appeal Judgement, para. 11; *Bagilishema* Appeal Judgement, para 13.

[34] *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Krnojelac* Appeal Judgement, para. 14.

[35] *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras 13-14. *See* also *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 14.

[36] *Naletilić and Martinović* Appeal Judgement, para. 603; *Kvočka et al.* Appeal Judgement, para. 23; *Kunarac et al.* Appeal Judgement, para. 41; *Furundžija* Appeal Judgement, para. 69.

[37] *Furundžija* Appeal Judgement, para. 69. *See* also *Naletilić and Martinović* Appeal Judgement, para. 603; *Kunarac et al.* Appeal Judgement, para. 41.

Chamber to discuss at length all of the case-law of the International Tribunal on a given legal issue but only to identify the precedents upon which its findings are based. With regard to factual findings, a Trial Chamber is required only to make findings on those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record.[38] In short, a Trial Chamber should limit itself to indicating in a clear and articulate, yet concise manner, which, among the wealth of jurisprudence available on a given issue and the myriad of facts that emerged at trial, are the legal and factual findings on the basis of which it reached the decision either to convict or acquit an individual. A reasoned opinion consistent with the guidelines provided here allows for a useful exercise of the right of appeal by the Parties and enables the Appeals Chamber to understand and review the Trial Chamber's findings as well as its evaluation of the evidence.[39] While the Appeals Chamber appreciates the care with which the Trial Chamber has expressed itself in the Trial Judgement, the Appeals Chamber is constrained to observe that the Trial Chamber might have been more sparing in its efforts in this respect.

14. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[40] Arguments of a party which do not have the potential to cause the impugned judgement to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[41]

15. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial Judgement to which the challenges are being made.[42] Further, "the Appeals Chamber cannot be

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[38] *Kvocka et al.* Appeal Judgement, para. 23; *Kordić and Čerkez* Appeal Judgement, para. 382; *Kupreškić et al.* Appeal Judgement, para. 39; *Čelebići* Appeal Judgement, para. 498.
[39] *Kunarac et al.* Appeal Judgement, para. 41.
[40] *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 14; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 11; *Blaškić* Appeal Judgement, para. 13. *See* also *Seromba* Appeal Judgement, para. 12; *Muhimana* Appeal Judgement, para. 9; *Gacumbitsi* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 6, citing *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.
[41] *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 14; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 11. *See* also *Seromba* Appeal Judgement, para. 12; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 9; *Gacumbitsi* Appeal Judgement, para. 9; *Ntagerura et al.* Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 6, citing *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.
[42] *Halilović* Appeal Judgement, para. 13; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 12; *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; Practice Direction on Appeals Requirements, para. 4(b). *See* also *Seromba* Appeal Judgement, para. 13; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.

20. In *Čelebići*, the Appeals Chamber underscored that effective control is the ultimate standard and that a showing of effective control is required in cases involving both *de jure* and *de facto* superiors.[53] The Appeals Chamber further noted:

> In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles. [...] In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.[54]

21. Even when a superior is found to have *de jure* authority over his subordinates, the Prosecution still has to prove beyond reasonable doubt that this superior exercised effective control over his subordinates, unless the accused does not challenge having exercised such control.[55] By holding that "a court may presume that possession of [*de jure*] power *prima facie* results in effective control",[56] the Appeals Chamber in *Čelebići* did not reverse the burden of proof. It simply acknowledged that the possession of *de jure* authority constitutes *prima facie* a reasonable basis for assuming that an accused has effective control over his subordinates. Thus, the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates ultimately rests with the Prosecution.

22. The Appeals Chamber will examine, under Hadžihasanović's fifth ground of appeal regarding the Trial Chamber's analysis of his superior-subordinate relationship with the *El Mujahedin* detachment as of 13 August 1993, whether the Trial Chamber applied the correct legal standard.

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[53] *Čelebići* Appeal Judgement, para. 196. *See* also para. 256 ("[t]he concept of effective *control* over a subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute"); para. 266 ("[C]ustomary law has specified a standard of effective control"); *Halilović* Appeal Judgement, para. 59.

[54] *Čelebići* Appeal Judgement, para. 197.

[55] Depending on the circumstances of the case, a finding that an accused had *de jure* authority will not necessarily lead to the conclusion that he had effective control over his subordinates. In *Blagojević*, for example, the Trial Chamber found that Vidoje Blagojević was in command and control of all units of the Brutanac Brigade. This conclusion reflected its assessment of his *de jure* authority over all the members of the brigade, including Momir Nikolić (*Blagojević and Jokić* Trial Judgement, para. 419). The Trial Chamber however concluded that, in light of the actual facts on the ground, Vidoje Blagojević lacked effective control over Momir Nikolić (*Blagojević and Jokić* Trial Judgement, para. 795). The Appeals Chamber in *Blagojević* found that it did not consider the conclusions regarding the scope of Vidoje Blagojević's authority irreconcilable with the finding that he did not exercise effective control over Momir Nikolić (*Blagojević* Appeal Judgement, para. 302). *See* also *Halilović* Appeal Judgement, para. 85 (the Appeals Chamber held that "*de jure* power is not synonymous with effective control" and that "the former may not in itself amount to the latter").

[56] *Čelebići* Appeal Judgement, para. 197.

to activities of plunder and the need to prevent them [but] does not mention acts of destruction".[863] The Appeals Chamber concurs with the Trial Chamber that, given the evidence taken as a whole, the inference that the 7th Brigade "must have received" orders from the 3rd Corps Command on 4 November 1993 does not establish, by itself, Kubura's knowledge of his subordinates' acts of wanton destruction.

295. Second, the Appeals Chamber considers that Kubura's knowledge of the acts of wanton destruction cannot automatically be inferred from his awareness of the plunder in Vareš on 4 November 1993. Indeed, the Trial Chamber's finding regarding Kubura's knowledge of the plunder in Vareš on 4 November 1993 rests on a much broader evidentiary basis. The Trial Chamber reached this conclusion on the basis of the aforementioned 4 November 1993 Order from the OG *Istok*, which specifically referred to acts of plunder but not of wanton destruction being committed in Vareš.[864] The Trial Chamber also relied on a 7th Brigade 2nd Battalion 11 November 1993 Report, which noted the 7th Brigade's collection of war booty in Vareš but did not mention acts of wanton destruction.[865] Furthermore, the Trial Chamber relied on Kubura's knowledge of and failure to punish his subordinates' past acts of plunder.[866] The Trial Chamber made no such findings with respect to any past acts of wanton destruction by Kubura's subordinates. Thus, while there was a sufficient evidentiary basis for the Trial Chamber to conclude that Kubura had knowledge of the acts of plunder in Vareš, it was reasonable for it to conclude that his knowledge as regards the acts of wanton destruction was not established beyond reasonable doubt.

296. In light of the foregoing, the Appeals Chamber finds that the Prosecution failed to establish that no reasonable trier of fact could have concluded, on the basis of all the admitted evidence, that Kubura's knowledge of wanton destruction in Vareš on 4 November 1993 was not established beyond reasonable doubt. The Prosecution's second ground of appeal is dismissed and Kubura's acquittal under Count 5 of the Indictment is confirmed.

[863] Trial Judgement, para. 1851.
[864] Trial Judgement, para. 1986, citing Exhibit P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993).
[865] Trial Judgement, para. 1986, citing Exhibit P468 (ABiH 3rd Corps, 7th Brigade, 2nd Battalion Combat Report, dated 11 November 1993).
[866] Trial Judgement, para. 1982. *See* also Section VI(B): "Plunder in Vareš in November 1993".

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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-01-47-T
		Date:	15 March 2006
		Original:	ENGLISH French

IN THE TRIAL CHAMBER

Before: **Judge Jean-Claude Antonetti**
Judge Vonimbolana Rasoazanany
Judge Bert Swart

Registrar: **Mr Hans Holthuis**

Judgement of: **15 March 2006**

THE PROSECUTOR

v.

ENVER HADŽIHASANOVIĆ
AMIR KUBURA

JUDGEMENT

The Office of the Prosecutor:

Mr Daryl A. Mundis
Ms Tecla Henry-Benjamin
Mr Stefan Waespi
Mr Matthias Neuner

Counsel for the Defence:

Ms Edina Rešidović and Mr Stéphane Bourgon for Enver Hadžihasanović
Mr Fahrudin Ibrišimović and Mr Rodney Dixon for Amir Kubura

159. First, and in view of the case law established by the Appeals Chamber in *Krnojelac*, the Chamber agrees with the Prosecution's position which limits to similar acts a superior's duty to punish unlawful acts in order to prevent their recurrence. In *Krnojelac*, the Appeals Chamber relied on the repetitive nature of the mistreatment inflicted on a discriminatory basis to define a superior's responsibility to prevent unlawful acts from recurring. That same reasoning is applied later in that Judgement as regards the murders committed by the guards at the KP Dom.[289] Furthermore, post-World War II case law supports that position.[290]

160. Conversely, the Chamber is of the opinion that an extension of a superior's duty to include preventing the recurrence of unlawful acts by all of his subordinates would be inconsistent with the *Krnojelac* Appeal Judgement and previously-established Appeals Chamber case law.

161. To respond to the Prosecution position, the Chamber would first note the lack of consistency in its interpretation of the *Krnojelac* Appeal Judgement. The Prosecution acknowledges the limitations on the duty to prevent the recurrence of unlawful acts as set out in the *Krnojelac* Appeal Judgement, in that it is triggered only when acts of the same nature are committed again. The Prosecution, however, neither analyses nor takes a position on the fact that, in the *Krnojelac* Appeal Judgement, the duty to prevent the recurrence of similar unlawful acts concerned only those committed by the guards at the KP Dom in Foča, who had already committed prior abuse.

162. As such, the Prosecution's approach does not limit the Accused Hadžihasanović's duty to punish the recurrence of subsequent acts committed by a same identifiable group of subordinates as did *Krnojelac*, but extends his duty instead to acts of a similar nature committed by all of his subordinates, who were members of the 3rd Corps.

163. Nevertheless, the reasoning of the Appeals Chamber in *Krnojelac* concerns a situation where a same identifiable group of subordinates, that is the guards at the KP Dom in Foča, repeatedly committed acts of abuse. Krnojelac's "prior" knowledge arose from a context where the *modus operandi* of his subordinates was known.

164. It follows that the duty to prevent the recurrence of similar acts must be limited to the acts of subordinates who form part of an "identifiable group", some members of which have already committed similar acts. That limitation bears a relationship to the very nature of the duty to prevent, which is based on the risk of a recurrence of similar acts. In fact, such responsibility can be

[289] *Krnojelac* Appeal Judgement, paras. 178-180.

[290] *See* for example the *Trial of Major Karl Rauer and Six Others*; Law Reports of Trials of War Criminals [1947] (London: Published for the United Nations War Crimes Commission by His Majesty's stationary office) 1947, vol. 4,

established only when the recurrence is foreseeable, since it is premised on the fact that the failure to punish encourages soldiers – who have already committed unlawful acts – to commit those acts once again. The failure to intervene results in the foreseeable consequence of such conduct being repeated.

165. The *Trial of Major Karl Rauer and Six Others* is a good illustration of that issue. The case concerned Major Rauer, the commander of an aerodrome, and his responsibility for the summary executions of prisoners of war on three occasions, namely on 22, 24, and 25 March 1945, by the same group of subordinates. On 22 March 1945, four prisoners from the group captured the day before were shot in cold blood. Rauer received a report explaining that they had been killed while attempting to escape. During his trial, the accused pleaded that he did not have the time to order an investigation into the incident. On 24 March 1945, a second group of prisoners was sent out to fill holes on the aerodrome runway; seven or eight of them were shot by Rauer's subordinates. Regarding that second element, Rauer could not find the time to question the soldier who had escorted the prisoners. Another report justifying the executions and stating that the prisoners had been shot while trying to escape was sent to the high command. On 25 March 1945, a wounded prisoner of war was taken out of the aerodrome in a motorcycle side-car and shot by the same subordinates. The Accused was acquitted of the first executions of 22 March 1945 but convicted of the two others. Commentary on the case suggests that the accused should have taken measures after the first wave of executions in order to prevent further executions from occurring.[291]

166. This case clearly supports the argument that a superior's failure to intervene makes it possible to foresee a recurrence of unlawful acts. This case also supports the proposition that by failing to punish crimes of which he has knowledge, the superior has reason to know that there is a real and reasonable risk that the unlawful acts will be committed again. The case also backs the argument that punishing for the purpose of preventing other unlawful acts presupposes that the subordinates draw conclusions from the superior's intervention and, in so doing, are aware of the measures taken.

167. By attempting to extend Hadžihasanović's duty to prevent the recurrence of unlawful acts committed by all his subordinates, regardless of their position in the 3rd Corps zone of responsibility, the Prosecution is attempting to reintroduce a criterion already dismissed by the Appeals Chamber in *Čelebići*, namely "a general duty to know upon commanders or superiors," the

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Case number 23, and the *Hostage Case* (*United States v. Wilhem List et al.*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XI.

III. EVIDENCE

270. The Chamber considers it appropriate to explain the approach it adopted to assess evidence and determine its probative value, whether such evidence was supported by documentary or visual aids, or if it came in the form of testimony of witnesses called by the Prosecution, Defence, or even the Chamber.

A. Scope of Direct and Cross-Examination

1. Broad Scope of Cross-Examination

271. From the day the trial began, the Chamber adopted a broad approach with regard to the scope of direct examinations and especially cross-examinations. Accordingly, in its Decision on the Defence Motion for Clarification of the Oral Decision of 17 December [...], the Chamber recalled that, pursuant to Rule 90(H), cross-examinations are not limited to issues raised in direct examination, and that questions going to the credibility of witnesses and to the case of the cross-examining party are permitted.[443] On that basis, the Chamber exercised its control and admitted questions intended to establish the historical, political, and military context at the time of the events, provided that the cross-examining party explain the objective and relevance of such questions to the Chamber before putting them to the witness.[444]

272. Mindful that these contextual questions could result in testimony being described as "hearsay" or "indirect", the Chamber recalled that Rule 89(C) applies equally to direct and indirect evidence. In cases where testimony was based on hearsay, the Chamber noted that to assess its probative value, it wished to know the source of the information, that is, insofar as possible, the identity of the initial source, how he might have learned of the facts, and the number of intermediaries through which the testimony had passed.

2. Restrictions

(a) Decision on Defence Motion regarding Cross-Examination of Witnesses by the Prosecution

273. The Chamber placed some restrictions on its flexible approach to questions that could be raised in cross-examination, in view of the stage of the trial and the content of the Indictment. Accordingly, in its Decision on Defence Motion regarding Cross-Examination of Witnesses by the

[443] Decision on Defence Motion for Clarification of the Oral Decision of 17 December 2003 Regarding the Scope of Cross-Examination Pursuant to Rule 90(H) of the Rules, 28 January 2004, p. 3.
[444] *Ibid.*, p. 4.

456. The exhibits from the HVO impart the same confusion. They frequently use the term "mujahedin", "MOS", "ABiH" and "7th Brigade" interchangeably. While Croatian sources seem to have had information on the structure of the ABiH, at times they seemed unwilling to give a faithful description of the facts. Documents from the HVO must be evaluated in view of the tension that existed between the HVO and ABiH at the time. The documents show a propensity for propaganda and thus depict the ABiH in a poor light.[874]As shown by Exhibit DH 1175, the HVO made a conscious decision to characterise the ABiH as "Muslim forces".

457. The documents from the ABiH provide a varied and contradictory picture of the degree of cooperation that existed between the mujahedin and the ABiH. Without going into the difficulties of interpreting these exhibits at this point, the Chamber considers them to be a reliable source of information, particularly since they were written at the material time. The Defence called many witnesses who were former members of the ABiH in order to explain the contents of these exhibits to the Chamber. Their testimony helped the Chamber to better understand the relations between the ABiH and the mujahedin. Nevertheless, on more than one occasion the Chamber was confronted with the situation of witnesses maintaining the opposite of what was indicated in an exhibit.[875]

458. Finally, the Prosecution and the Defence for the Accused Hadžihasanović both called international observers to testify, particularly members of UNPROFOR and ECMM. Additionally, the Chamber admitted into evidence reports from international organisations. The scope and probative value of this evidence will be discussed later.[876]

B. Mujahedin and the ABiH - Arguments of the Parties

459. The arguments of the Parties have guided the Chamber in analysing the evidence. Given the large number of submissions presented by the Parties, however, the Chamber will not systematically discuss each one in detail, but will limit itself to recalling the main arguments.

1. Arguments of the Prosecution

460. The Prosecution claims that mujahedin provided support to the ABiH from their arrival in Central Bosnia in mid-1992 and throughout the period covered by the Indictment.[877] It asserts that mujahedin were incorporated into and subordinated to 3rd Corps units, particularly the 7th Brigade, after its creation on 19 November 1992, and that mujahedin were finally brought together in a

[874] *See* for example P 649.
[875] *See infra* paras. 736, 740, 1413-1422.
[876] *See infra* paras. 566-579.
[877] Indictment, paras. 18-21; Prosecution Final Brief, para. 86.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-01-47-T
		Date:	27 September 2004
		Original:	English French

IN THE TRIAL CHAMBER

Before: **Judge Jean-Claude Antonetti**
Judge Vonimbolana Rasoazanany
Judge Bert Swart

Registrar: **Mr Hans Holthuis**

Decision: **27 September 2004**

THE PROSECUTOR

v.

ENVER HADŽIHASANOVIĆ
AMIR KUBURA

DECISION ON MOTIONS FOR ACQUITTAL PURSUANT TO RULE 98 *BIS* OF THE RULES OF PROCEDURE AND EVIDENCE

The Office of the Prosecutor:

Mr Daryl Mundis
Ms Tecla Henry-Benjamin

Counsel for the Accused:

Ms Edina Rešidović and Mr Stéphane Bourgon for Enver Hadžihasanović
Mr Fahrudin Ibrišimović and Mr Rodney Dixon for Amir Kubura

(b) Discussion

163. The Chamber considers that the constituent elements of criminal responsibility within the meaning of Article 7(3) of the Statute are well established in the Tribunal's case-law: i) a superior-subordinate relationship between the Accused and the alleged perpetrator or perpetrators of crimes falling within the jurisprudence of the Tribunal; ii) the fact that the Accused knew or had reason to know that the perpetrator was about to commit the criminal act or had already done so (knowledge); and iii) the fact that the Accused did not take the necessary and reasonable measures to prevent the criminal act from being committed or to punish the perpetrators thereof.[290]

164. The decisive criterion for establishing the superior-subordinate link is "effective control" of the superior over his subordinates, in other words, the material capacity to prevent or punish the acts.[291] The criterion of "effective control" applies to both *de jure* and *de facto* superiors.[292] According to the Appeals Chamber in the *Čelebići* case, effective control can be exercised only when the superior has a higher rank than the alleged perpetrator of the crimes. In this respect, it referred to "the necessity to prove that the perpetrator was the 'subordinate' of the accused".[293] The Appeals Chamber in the *Blaškić* case found that effective control is more a matter of evidence than of law and that "those indicators [of effective control] are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate".[294]

165. With regard to the knowledge of the superior, the principle of command responsibility does not establish a strict form of liability for a superior who did not prevent his subordinates from committing crimes or did not punish the perpetrators of those crimes.[295] Consequently, a superior could not be held criminally responsible for not making sure that he was informed of the acts of his subordinates.[296] However, the case-law of the Tribunal states that *mens rea* "had reason to know" is established if the superior had specific information alerting him to offences committed by his subordinates.[297] As an example, it held that *mens rea* was established "[when] a military commander [...] has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission".[298]

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[290] *Čelebići* Appeals Judgement, paras. 186-198, 266.
[291] *Čelebići* Appeals Judgement, paras. 196, 197, 256; *Blaškić* Appeals Judgement, para. 67.
[292] *Čelebići* Appeals Judgement, para. 197.
[293] *Čelebići* Appeals Judgement, para. 303.
[294] *Blaškić* Appeals Judgement, para. 69.
[295] *Čelebići* Judgement, para. 383, confirmed by the Appeals Chamber in the *Čelebići* Appeals Judgement, para. 239.
[296] *Čelebići* Appeals Judgement, paras. 226, 230; *Blaškić* Appeals Judgement, paras. 62 and 63.
[297] *Čelebići* Appeals Judgement, para. 241.
[298] *Čelebići* Appeals Judgement, para. 238.

Case: IT-01-47-AR72

BEFORE THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Mehmet Güney

Registrar:
Mr. Hans Holthuis

Decision of:
16 July 2003

PROSECUTOR
v

Enver HADZIHASANOVIC, Mehmed ALAGIC and Amir KUBURA

DECISION ON INTERLOCUTORY APPEAL CHALLENGING JURISDICTION IN RELATION TO COMMAND RESPONSIBILITY

Counsel for the Prosecutor

Mr. Ekkehard Withopf

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Mr. Fahrudin Ibrisimovic and Mr. Rodney Dixon for Amir Kubura

I. PRELIMINARY

Bosnia and Herzegovina.

7. The amended indictment does not describe the "armed conflict" to which it refers as international or internal. The Prosecution has since stated that it has pleaded the existence of an "unclassified" armed conflict in Bosnia and Herzegovina.[7] The Appeals Chamber takes no position on whether the amended indictment should be treated as pleading only an internal armed conflict; it will proceed on the assumption that it can relate to such a conflict. Further, the amended indictment charges the Appellants with superior responsibility pursuant to Article 7(3) only.

8. In the interlocutory appeal, the Appellants request an oral hearing.[8] On 12 December 2002, Mr. Ilias Bantekas of the School of Law, University of Westminster, England, filed an application for leave to submit to the Appeals Chamber an *amicus* brief on the issue of the application of Article 7(3) of the Statute to internal armed conflicts. The Appeals Chamber, in view of the extensive submissions filed by the parties before both the Trial Chamber and the Appeals Chamber (18 briefs in total) and the substantial discussion in the impugned decision of the issues now under appeal, does not consider it necessary to hold a hearing on the appeal or to call any *amicus* pursuant to Rule 74 of the Rules.[9]

9. The Appeals Chamber will now consider the two points on which the bench of three appellate Judges has found that the interlocutory appeal is valid. In doing so, it desires to affirm its conception that its decision has to bear a reasoned relationship to those points, that its reasoning has to take account of relevant arguments of the parties, but that it is not obliged to deal *seriatim* with each and every argument raised by either side.

II. COMMAND RESPONSIBILITY IN INTERNAL ARMED CONFLICTS

10. As regards the first point on which the bench of three appellate Judges found that the interlocutory appeal raised a valid issue, the Appellants make many arguments but submit in substance that the Trial Chamber erred in two respects, in that:[10]

a) it wrongly found that there was a basis in customary international law for the applicability of the doctrine of command responsibility in internal armed conflicts at the time material to the indictment; and

b) it failed to respect the principle of legality in reaching its conclusion that it had jurisdiction in the present case.

The Appeals Chamber will consider these issues in the order above-mentioned.

(a) Whether customary international law provides for command responsibility in internal armed conflicts

11. As to this issue, there are two uncontested points of law. The first is the principle that serious violations of international humanitarian law in an internal armed conflict incur individual criminal responsibility under customary international law;[11] the finding of the Appeals Chamber to this effect in the *Tadic* Jurisdiction Decision remains a leading authority.[12] The second point is that, at all times relevant to this case, the doctrine of command responsibility was part of customary international law relating to international armed conflict.[13] Where the parties disagree is on the question whether the doctrine applies, as part of customary international law, in an internal armed conflict.[14]

12. In considering this question, the Appeals Chamber is aware that it is incorrect to assume that, under customary international law, all the rules applicable to an international armed conflict automatically apply to an internal armed conflict. More particularly, it appreciates that to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*. However, it also considers that, where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle. Also, in determining whether a principle is part of customary international law and, if so, what are its parameters, the Appeals Chamber may follow in the usual way what the Tribunal has held in its previous decisions.

13. Prohibitions on the doing of certain acts in the course of an internal armed conflict are imposed by Article 3 common to the Geneva Conventions of 1949, which has long been accepted as having customary status.[15] In the *Tadic* Jurisdiction Decision, the Appeals Chamber found that "customary international law imposes criminal responsibility for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife".[16] Likewise, at all times material to this case, customary international law included the concept of command responsibility in relation to war crimes committed in the course of an international armed conflict.[17] Thus, the concept would have applied to war crimes corresponding to the prohibitions listed in common Article 3 when committed in the course of an international armed conflict. It is difficult to see why the concept would not equally apply to breaches of the same prohibitions when committed in the course of an internal armed conflict.

14. In the view of the Appeals Chamber, the matter rests on the dual principle of responsible command and its corollary command responsibility.[18] The origin and interrelationship of these ideas merit much discussion. Here, however, it is sufficient to note that the principle of responsible command was incorporated by the provision in Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 reading:

> The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates ...

Article 43(1) of the 1977 Additional Protocol I to the Geneva Conventions likewise provided that the "armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, ..."

15. The position is no different as regards internal armed conflicts. Responsible command was an integral notion of the prohibition imposed by Article 3 common to the 1949 Geneva Conventions against the doing of certain things in the course of an internal armed conflict. Referring to the criteria for determining whether there was an "armed conflict not of an international character" within the meaning of that provision, the *ICRC Commentary* spoke, authoritatively, of a revolting party possessing "an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the" convention.[19] Article 1(1) of Protocol II Additional to the Geneva Conventions likewise spoke of a Contracting Party's "armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations ...".

16. Thus, whether Article 3 of the Statute is referring to war crimes committed in the course of international armed conflict or to war crimes committed in the course of internal armed conflict under Article 3 common to the Geneva Conventions, it assumes that there is an organized military force. It is evident that there cannot be an organized military force save on the basis of responsible command. It is also reasonable to hold that it is responsible command which leads to command responsibility. Command responsibility is the most effective method by which international criminal law can enforce responsible command.

17. It is true that, domestically, most States have not legislated for command responsibility to be the counterpart of responsible command in internal conflict. This, however, does not affect the fact that, at the international level, they have accepted that, as a matter of customary international law, relevant aspects of international law (including the concept of command responsibility) govern the conduct of an internal armed conflict, though of course not all aspects of international law apply. The relevant aspects of international law unquestionably regard a military force engaged in an internal armed conflict as organized and therefore as being under responsible command. In the absence of anything to the contrary, it is the task of a court to interpret the underlying State practice and *opinio juris* (relating to the requirement that such a military force be organized) as bearing its normal meaning that military organization implies responsible command and that responsible command in turn implies command responsibility.

18. In short, wherever customary international law recognizes that a war crime can be committed by a member of an organised military force, it also recognizes that a commander can be penally sanctioned if he knew or had reason to know that his subordinate was about to commit a prohibited act or had done so and the commander failed to take the necessary and reasonable measures to prevent such an act or to punish the subordinate. Customary international law recognizes that some war crimes can be committed by a member of an organised military force in the course of an internal armed conflict; it therefore also

recognizes that there can be command responsibility in respect of such crimes.

19. The Appellants argue that international law developed to regulate the relations between States on the basis of reciprocity and that command responsibility for acts committed in the course of an internal conflict does not raise any questions of reciprocity.[20] The Appeals Chamber does not consider that the matter depends on notions of reciprocity. In the course of development, States have come to consider that they have a common interest in the observance of certain minimum standards of conduct in certain matters;[21] this includes certain aspects of conduct in an internal armed conflict. To that extent, internal armed conflict is now the concern of international law without any question of reciprocity.

20. Thus, the fact that it was in the course of an internal armed conflict that a war crime was about to be committed or was committed is not relevant to the responsibility of the commander; that only goes to the characteristics of the particular crime and not to the responsibility of the commander. The basis of the commander's responsibility lies in his obligations as commander of troops making up an organised military force under his command, and not in the particular theatre in which the act was committed by a member of that military force.

21. As against the foregoing, the Appellants argue that "a clear distinction must also be made between the principle of '*responsible command*' and '*command responsibility*'."[22] They contend that the Trial Chamber confused the two concepts when it concluded that the inclusion of the principle of responsible command in Additional Protocol II connoted command responsibility.[23] The Prosecution responds that "the doctrine of command responsibility is a logical consequence of the imposition of individual criminal responsibility for serious violations of international humanitarian law committed by members of forces acting under a responsible command."[24]

22. The Appeals Chamber recognizes that there is a difference between the concepts of responsible command and command responsibility. The difference is due to the fact that the concept of responsible command looks to the duties comprised in the idea of command, whereas that of command responsibility looks at liability flowing from breach of those duties. But, as the foregoing shows, the elements of command responsibility are derived from the elements of responsible command.

23. The Appeals Chamber recalls the United States Supreme Court's decision in the matter of *Yamashita v. Styer*, which, delivered by Chief Justice Stone, states :

> The question is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war....
>
> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of the commander would almost certainly result in violations which it is the purpose of the law of war to prevent....*Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war*

by commanders who are to some extent responsible for their subordinates.

> This is recognized by the Annex to the Fourth Hague Convention of 1907, respecting the laws and customs of war on land...Similarly Article 19 of the Tenth Hague Convention ... provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out"...And Article 26 of the Geneva Red Cross Convention of 1929...for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commander-in-chief of the belligerent armies to provide for the details of execution of the foregoing Articles, (of the convention(as well as for the unforeseen cases."[25]

The court then concluded that these provisions imposed on a commander an affirmative duty to take appropriate measures to protect prisoners of war and the civilian population, and that the duty of a commander "has heretofore been recognized, and its breach penalized by our own military tribunals".[26] Thus, the duties comprised in responsible command are generally enforced through command responsibility. The latter flows from the former.

24. This view is consistent with Article 7(3) of the Statute in its application to Article 3 thereof. Article 7 (3) provides:

> The fact that any of the acts referred to in Article 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[27]

The Appellants accept that a "plain reading of Article 7(3) *may* lead to the inference that it could apply in internal conflict, since it appears to cover all violations in the Statute, some of which may be committed in internal conflict."[28] That is right; the provision *does* cover violations in internal armed conflict. The effect of the Appellant's submissions is that, to the extent that it does so, the provision is *ultra vires;* in their view, "internationality is required."[29]

25. For the reasons given, the Appeals Chamber does not consider that Article 7(3) is *ultra vires* to the extent that it applies to internal armed conflicts . It will merely emphasise that, if the doctrine of command responsibility is inapplicable to the case of an internal armed conflict, Article 7(3) of the Statute, which clearly assumes such a hypothesis, is *pro tanto* defeated.

26. The applicability of command responsibility to internal armed conflict is not disputed in the cases of the tribunals established for Rwanda, Sierra Leone and East Timor. It is said that these tribunals were established after the ICTY. However, in the view of the Appeals Chamber, the establishment of these bodies was consistent with the proposition that customary international law previously included the principle that command responsibility applied in respect of an internal armed conflict.

27. Taken as a whole, the Appeals Chamber agrees with the survey and analysis made by the Trial Chamber of various sources (including decided cases) concerning the development of State practice and *opinio juris* on the question whether command responsibility forms part of customary international law in relation to war crimes committed in the course of an internal armed conflict, and rejects the submissions of the Appellants on these points. The Appeals Chamber will not therefore enter into such matters. It will diverge from this position only for the purpose of dealing with one argument.

28. The Appellants have placed reliance on the fact that the doctrine of command responsibility was referred to in Articles 86 and 87 of the 1977 Protocol I Additional to the Geneva Conventions of 1949[30] but was not referred to in Protocol II. The former being directed to international armed conflicts while the latter is directed to internal armed conflicts, the Appellants contend that the difference tends to support the view that State practice regarded command responsibility as part of customary international law relating to international armed conflicts and did not regard command responsibility as part of customary international law relating to internal armed conflicts.

29. The Appeals Chamber affirms the view of the Trial Chamber that command responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore, as the Trial Chamber considered, Articles 86 and 87 of Protocol I were in this respect only declaring the existing position, and not constituting it. In like manner, the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts. The Appeals Chamber considers that, at the time relevant to this indictment, it was, and that this conclusion is not overthrown by the play of factors responsible for the silence which, for any of a number of reasons, sometimes occurs over the codification of an accepted point in the drafting of an international instrument.

30. Were it otherwise, the Appeals Chamber would have to uphold that, "as argued by the Defence, it is not a crime for a commander in an internal conflict to fail to prevent or punish the killings committed by his subordinates,"[31] *i.e.,* even if the commander knows or has reason to know of the killings. The Appeals Chamber does not consider that it is required to sustain so improbable a view in contemporary international law; more particularly, it finds that such a view is not consistent with its reasoning in the *Tadic* Jurisdiction Decision [32] and in the *Celebici* Appeal Judgment,[33] or with the reasoning of the Trial Chamber in *Aleksovski.* *(footnote 34)*

31. In the opinion of the Appeals Chamber, the Trial Chamber was correct in holding, after a thorough examination of the matter, that command responsibility was at all times material to this case a part of customary international law in its application to war crimes committed in the course of an internal armed conflict.

(b) The principle of legality

32. As to this issue, the Appellants contend that, if command responsibility for war crimes committed in the course of an internal armed conflict was not part of customary international law at the time when the acts were allegedly done by the Appellants, the principle of legality was necessarily breached.[35] It being clear from the Secretary-General's Report that the Statute was restricted to customary international law, it would follow that the Appellants were indicted for something that was not a crime under customary international law at the time when the relevant acts were allegedly committed.

33. It does not appear to the Appeals Chamber that this argument can stand if it is held, as the Appeals Chamber holds, that at all material times it was part of customary international law that there could be command responsibility in respect of war crimes committed in the course of an internal armed conflict. The argument assumes that such responsibility did not form part of customary international law at the material times. If the assumption goes, so does the argument which is based on it.

34. The Appellants argued before the Trial Chamber, and they seem to have retained the argument before the Appeals Chamber[36], that the principle of legality requires that the crime charged be set out in a law that is accessible and that it be foreseeable that the conduct in question may be criminally sanctioned at the time when the crime was allegedly committed. The Appeals Chamber agrees with the answers given by the Trial Chamber. As to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, in the case of an international tribunal such as this, accessibility does not exclude reliance being placed on a law which is based on custom.[37] The *Tadic* Jurisdiction Decision shows that individual criminal responsibility can attach to a breach of a customary prohibition of certain conduct.[38]

35. The Appellants further argue that the principle of legality requires the existence of a conventional as well as a customary basis for an incrimination.[39] The Appeals Chamber also agrees with the Trial Chamber's rejection of this argument. The obligation of the Tribunal to rely on customary international law excludes any necessity to cite conventional law where customary international law is relied on.[40] Contrary to the arguments of the Appellants, there is nothing in the Secretary-General's Report, to which the Statute of the Tribunal was attached in draft, which requires both a customary basis and a conventional one for an incrimination.

36. Lastly, the Appellants argue that the Trial Chamber confused responsibility under Article 7(1) of the Statute with responsibility under Article 7(3).[41] In the opinion of the Appeals Chamber, there is no basis for such a contention: the Trial Chamber was clear about the difference.

III. COMMAND RESPONSIBILITY FOR CRIMES COMMITTED BEFORE THE SUPERIOR-SUBORDINATE RELATIONSHIP EXISTS

37. The Appeals Chamber will now consider the second point on which the interlocutory appeal has been found to be valid by the bench of three appellate Judges, namely, the responsibility of a superior for acts which were committed before he became the superior of the persons who committed them.

38. The amended indictment alleges that Amir Kubura took up his position as acting commander of the Bosnian Army, 3rd Corps, 7th Muslim Mountain Brigade on 1 April 1993. Paragraph 58 charges him with being "criminally responsible in relation to those crimes that were committed by troops of the ABiH 3rd Corps 7th Muslim Mountain Brigade prior to his assignment on 1 April 1993 (...) Amir Kubura knew or had reason to know about these crimes. After he assumed command, he was under the duty to punish the perpetrators."[42] In effect, he is charged with command responsibility in connection with offences committed or started more than two months before he became the commander of the troops on 1 April 1993.[43]

39. Under count 1, he is charged with command responsibility for, among other events, the Dusina killings in the Zenica Municipality on 26 January 1993.[44] On count 4, he is charged with command responsibility in connection with cruel treatment of prisoners by his subordinates at the Zenica Music School between about 26 January 1993 to at least January 1994. Counts 5 and 6 charge him with command responsibility in connection with wanton destruction and plunder of property allegedly committed at, among others, Dusina in January 1993. With the exception of count 4, the rest of the charges concern events that started and ended before Kubura became the commander of the troops allegedly involved in those events. Count 4 includes a period of time commencing before but continuing after Kubura became the commander.

40. So, the issue is whether command responsibility extends to acts committed by subordinates prior to the assumption of command by the commander.

41. The Appellants argue that, as a matter of principle, there is no basis in conventional or customary law for holding a commander criminally responsible for the acts of persons who were not his subordinates when they committed the acts.[45] In their submission, the express terms of Article 7(3) of the Statute require that an accused be the superior when the subordinate commits the offence.[46] They submit that a finding to the contrary of what the practice shows would have far-reaching consequences, in that any superior who had effective control over the perpetrators months or years after the offences were committed could be held criminally liable for not punishing the perpetrators.[47] The proper person to be prosecuted is the commander who had effective control over the perpetrator at the time the offences were committed, and who failed to prevent or to punish the crimes.[48]

42. The appellant Kubura also argues, first, that, if the liability of superiors for acts of perpetrators who subsequently become their subordinates had been envisaged, the Statute would have specifically provided for such liability in Article 7(3).[49] Secondly, Article 86 (2) of Additional Protocol I (as well as the Commentary of the International Committee of the Red Cross on that provision) does not provide for liability for offences committed before command was assumed; emphasis is placed on the coincidence of the superior-subordinate relationship and the commission of the offences.[50] Thirdly, the case law of the International Tribunal, as embodied in the ^*elebi ci* Trial and Appeal Judgements as well as in the *Kordic* Trial Judgement, supports the contention that the superior-subordinate relationship must exist at the time of the offence.[51] Fourthly, Article 28 (a) of the Rome Statute of the International Criminal

Court limits the responsibility of superiors to the time when the offences were committed.[52] Lastly, there are no provisions in national legislation or military codes that hold a superior in internal armed conflicts criminally responsible for offences committed by persons who subsequently came under the superior's command.[53]

43. In its brief filed before the Trial Chamber, the Prosecution cites the *Kordic* Trial Judgement, which states:

> The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.[54]

The Prosecution later submits that "the material fact for determination is therefore not *who* was in command at the time of the crime, but *when* a commander became aware of the crime, yet failed to take the 'reasonable and necessary measures' to punish the violation".[55] Further, "the Prosecution case is that the troops commanded by Alagi (*sic*(from April 1993 had a history of unpunished criminality".[56] The cruel treatment alleged in counts 3 and 4 of the amended indictment started before but continued after the appellant Kubura assumed command.[57] The Prosecution also submits that "the lack of a known precedent for a finding of guilt for failing to punish subordinates for offences committed before assuming command cannot prevent charging an accused in this manner".[58]

44. In considering the issue of whether command responsibility exists in relation to crimes committed by a subordinate prior to an accused's assumption of command over that subordinate, the Appeals Chamber observes that it has always been the approach of this Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to ascertain the state of customary law in force at the time the crimes were committed.[59]

45. In this particular case, no practice can be found, nor is there any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate.

46. In fact, there are indications that militate against the existence of a customary rule establishing such criminal responsibility. For example, Article 28 of the Rome Statute of the International Criminal Court provides that:

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

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> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces *were committing or about to commit* such crimes; *and*
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[60]

Under the Rome Statute, therefore, command responsibility can only exist if a commander knew or should have known that his subordinates were committing crimes, or were about to do so. This language necessarily excludes criminal liability on the basis of crimes committed by a subordinate prior to an individual's assumption of command over that subordinate.

47. Another example can be found in the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I). Article 86(2) of the Protocol states that "[t]he fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." Again, the language of this article envisions a situation in which a breach was in the process of being committed, or was going to be committed; breaches committed before the superior assumed command over the perpetrator are not included within its scope.

48. The International Law Commission, in its Report on the work of its forty-eighth session (6 May–26 July 1996)[61], stated that "[t]he principle of individual criminal responsibility under which a military commander is held responsible for his failure to prevent or repress the unlawful conduct of his subordinates is elaborated in article 86 of Protocol I." Similarly, in the *Celebici* Appeal Judgment, the Appeals Chamber stated that the "criminal offence based on command responsibility is defined in Article 86(2) only."[62]

49. It should also be mentioned that Article 6 of the Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission at its forty-eighth session, reads as follows:

> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, *in the circumstances at the time*, that the subordinate *was committing or was going to commit* such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.[63]

Once again, the emphasis is on the superior-subordinate relationship existing at the time the subordinate

was committing or was going to commit a crime. Crimes committed by a subordinate in the past, prior to his superior's assumption of command, are clearly excluded.

50. Consideration can also be given to the *Kuntze* case[64], before the Nuernberg Military Tribunals. The Appeals Chamber considers that this case also constitutes an indication that would run contrary to the existence of a customary rule establishing command responsibility for crimes committed before a superior's assumption of command over the perpetrator,[65] and that it could certainly not be brought to support the opposite view.

51. Having examined the above authorities, the Appeals Chamber holds that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate. The Appeals Chamber is aware that views on this issue may differ. However, the Appeals Chamber holds the view that this Tribunal can impose criminal responsibility only if the crime charged was clearly established under customary law at the time the events in issue occurred.[66] In case of doubt, criminal responsibility cannot be found to exist, thereby preserving full respect for the principle of legality.

52. The Appeals Chamber has carefully considered the thoughtful dissenting opinions of Judges Shahabuddeen and Hunt. Several of the general points Judge Hunt makes at the outset of his dissent about the nature of customary law rules – for example, that customary international law, like the common law, may change over time and that clearly established rules may be applied to new factual situations clearly falling within their ambit – are common ground between the Appeals Chamber and the dissenting Judges.[67] It is quite a different matter, however, to stretch an existing customary principle to establish criminal responsibility for conduct falling beyond the established principle. Whether the principle of command responsibility extends to crimes committed prior to the assumption of command is a difficult legal question, and reasonable minds may certainly debate the point. To assert, as the dissenting Judges do, that such a dereliction *clearly* carries individual criminal liability under existing principle seems indefensible. It is trite to observe that in international criminal law, imposition of criminal liability must rest on a positive and solid foundation of a customary law principle. It falls to the distinguished dissenting Judges to show that such a foundation exists; it does not fall to the Appeals Chamber to demonstrate that it does not.

53. It is telling that the dissenting opinions do not mention a single direct and explicit statement in a military manual, or in a commentary to a military manual, or in the case law, or in the abundant literature on command responsibility, suggesting that the customary law principle of command responsibility imposes on a military commander criminal responsibility for crimes committed by his subordinates before he has assumed command. In this respect, the dissents thus give added strength to the Appeals Chamber's view. Though, as the dissents note, some manuals contain language which is broad enough to encompass responsibility for punishing both command and pre-command crimes, there is no textual support confirming direct support for the latter. And, of course, other manuals and other texts, especially Article 86 of Additional Protocol I and the Rome Statute of the ICC, go the other way. For example, the Canadian Defence Ministry's Manual on the Law of Armed Conflict provides that "[s]

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-01-48-A
		Date:	16 October 2007
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IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **16 October 2007**

PROSECUTOR

v.

SEFER HALILOVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Mr. Arthur Buck
Ms. Laurel Baig
Mr. Xavier Tracol
Mr. Matteo Costi

Counsel for Sefer Halilović:

Mr. Peter Morrissey
Mr. Guénaël Mettraux

evidence concerning his high-ranking position in the ABiH and his position as Team Leader of the Inspection Team.[153]

59. As a preliminary matter, the Appeals Chamber notes that, in paragraph 56 of the Trial Judgement, the Trial Chamber correctly set out the elements that must be satisfied to hold a superior responsible under Article 7(3) of the Statute:

> i. The existence of a superior-subordinate relationship;
>
> ii. the superior knew or had reason to know that the criminal act was about to be or had been committed; and
>
> iii. the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Regarding the first of these elements, the Appeals Chamber recalls that the concept of effective control over a subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[154] Against this backdrop, the Appeals Chamber recalls that the necessity of proving that the perpetrator was the "subordinate" of the accused (against whom charges have been brought under Article 7(3) of the Statute) does not require direct or formal subordination. Rather, the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of a superior-subordinate relationship for the purpose of superior responsibility, will almost invariably not be satisfied unless such a relationship of subordination exists.[155] The Appeals Chamber considers that a material ability to prevent and punish may also exist outside a superior-subordinate relationship relevant for Article 7(3) of the Statute. For example, a police officer may be able to "prevent and punish" crimes under his jurisdiction, but this would not as such make him a superior (in the sense of Article 7(3) of the Statute) vis-à-vis any perpetrator within that jurisdiction. The Trial Chamber's analysis of the law on the first element of superior responsibility is consistent with this approach.[156]

60. At paragraph 57 of the Trial Judgement, the Trial Chamber stated that "[i]t is the position of command over the perpetrator which forms the legal basis for the superior's duty to act, and for his

[153] Respondent's Brief, paras 51-52; *see* also Respondent's Brief, paras 57-58.
[154] *Čelebići* Appeal Judgement, para. 256.
[155] *Čelebići* Appeal Judgement, para. 303.
[156] *See* Trial Judgement, paras 57-63.

Staff, one of [ABiH Commander] Rasim Delić's deputies and was the most senior ranking Commander [as opposed to officer] in Herzegovina at that time for the Operation". A plain reading of this sentence leads to the conclusion that this paragraph may not be read as an alternative basis for the allegation that Halilović had effective control over the units subordinated to him (the allegation expressed in paragraph 38 of the Indictment), but rather as a mere argument in support of this allegation. The same is true for paragraph 37 of the Indictment.

85. Paragraph 39 of the Indictment further elaborates on paragraph 38 and sets out examples of how Halilović "demonstrated both formal *de jure* and *de facto* power, by his command and control in military matters". There is no clear indication in this paragraph that Halilović's role as Team Leader of the Inspection Team constitutes an alternative basis for a finding of effective control. In fact, paragraph 39 of the Indictment does not even refer to his role as Team Leader of the Inspection Team. Moreover, the exercise of effective control by reason of Halilović's position as the most senior ranking officer in Herzegovina cannot be said to have been pleaded implicitly in this paragraph either, mainly because, for the purposes of criminal responsibility as a superior, *de jure* power is not synonymous with effective control. In fact, the former may not in itself amount to the latter. The same applies with respect to *de facto* power: a *de facto* superior must be found to wield substantially similar powers of control as *de jure* superiors who exercise effective control over subordinates to be held criminally responsible for their acts. It therefore cannot be said that pleading the exercise of both *de jure* and *de facto* power amounts to pleading effective control.[233]

86. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged.[234] In this respect, in line with the principles of pleading recognised by the Appeals Chambers of the International Tribunal and the ICTR set out above, the Indictment pleads that Halilović had effective control over the units subordinated to him. The manner in which such control was exercised might encompass facts which are not required to be alleged as long as there is a clear indication that he possessed effective control at the time of the crimes.[235] With respect to the degree of specificity with which the material facts must be pleaded, Chambers of the International Tribunal have held that each of the material facts must usually be pleaded expressly, although in

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[233] *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, para. 17 (footnotes omitted), citing and elaborating on the principle enshrined in *Čelebići* Appeal Judgement, paras 196-198 and 266.

[234] *Ntagerura et al.* Appeal Judgement, para. 121; *Krnojelac* Appeal Judgement, para. 132; *Kupreškić et al.* Appeal Judgement, para. 89.

[235] *Cf. Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR72, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 8 December 2005, para. 10.

that none of these arguments warrant the summary dismissal of sub-ground 5, and, as a result, denies Halilović's request.

(c) The Trial Chamber's interpretation of the *in dubio pro reo* principle

107. The Prosecution first avers that the Trial Chamber erred in law in stating, at paragraph 12 of the Trial Judgement, that "[a]ny ambiguity or doubt has been resolved in favour of the Accused in accordance with the principle of *in dubio pro reo*",[289] rather than referring to any *reasonable* ambiguity or doubt.[290] Since this error, the Prosecution argues, calls into question *all* of the findings of the Trial Chamber,[291] the Appeals Chamber should re-evaluate all of the evidence at trial applying the correct standard of proof.[292] Halilović responds that, when read in its full context (including footnotes 24 and 25, to which the Prosecution fails to refer), the passage in paragraph 12 of the Trial Judgement clarifies that it is only *reasonable* doubts that will be considered in determining whether the Prosecution has proven its case.[293] Moreover, even if a legal error had been established, the Prosecution identified no instance where this standard was applied by the Trial Chamber. In practice, Halilović argues, in assessing whether he had effective control over the perpetrators of the crimes committed in Grabovica, the Trial Chamber did explicitly – at paragraph 747 of the Trial Judgement – set out the appropriate standard.[294]

108. Paragraph 12 of the Trial Judgement in its entirety reads as follows:

> Article 21(3) of the Statute provides that the Accused shall be presumed innocent until proven guilty. The Prosecution therefore bears the burden of establishing the guilt of the Accused, and, in accordance with Rule 87(A) of the Rules, the Prosecution must do so beyond reasonable doubt. In determining whether the Prosecution has done so with respect to the Count in the Indictment, the Trial Chamber has carefully considered whether there is any reasonable interpretation of the evidence admitted other than the guilt of the Accused Any [sic] ambiguity or doubt has been resolved in favour of the Accused in accordance with the principle of *in dubio pro reo*.[295]

109. When the portion of the Trial Judgement identified by the Prosecution as a basis for its allegation is read in context with the rest of the paragraph as a whole, including the footnote references to the jurisprudence of the International Tribunal and that of the ICTR,[296] it is clear that

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[289] Prosecution Appeal Brief, para. 2.133, quoting Trial Judgement, para. 12 (footnote omitted).
[290] Prosecution Notice of Appeal, para. 4(v); Prosecution Appeal Brief, para. 2.122.
[291] Prosecution Appeal Brief, paras 2.134-2.135.
[292] Prosecution Appeal Brief, para. 2.136.
[293] Respondent's Brief, paras 209-210, citing Trial Judgement, para. 12 and fns 24-25.
[294] Respondent's Brief, para. 211. *See* also Respondent's Brief, para. 212.
[295] Trial Judgement, para. 12 (footnotes omitted).
[296] The Appeals Chamber notes the following statement in fn. 24 of the Trial Judgement: "The Trial Chamber interprets the standard 'beyond reasonable doubt' to mean a high degree of probability; it does not mean certainty or proof beyond the shadow of doubt". The Appeals Chamber further notes that the references in fn. 25, related to the last sentence in paragraph 12 of the Trial Judgement, include: *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998 (filed 16 October 1998), para. 73; *Čelebići* Trial Judgement, para. 601; *Akayesu* Trial Judgement, para. 319.

the Trial Chamber considered only *reasonable* doubts as relevant in determining whether the Prosecution had proven its case. The reference to "[a]ny ambiguity or doubt" should be read in light of the caveat that "the Trial Chamber has carefully considered whether there is any reasonable interpretation of the evidence admitted other than the guilt of the Accused", which is a way to express the appropriate standard. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in law at paragraph 12 of the Trial Judgement.

110. The fact that the Trial Chamber properly expressed the standard of proof in the section of the Trial Judgement containing its general considerations on the evaluation of evidence does not in principle prevent the Prosecution from raising this allegation of error of law with regard to specific factual findings. However, since in its submissions under sub-ground 5 the Prosecution does not provide specific reference to factual findings where the Trial Chamber allegedly misapplied the *in dubio pro reo* principle, the Appeals Chamber will address this allegation only insofar as it has been raised with regard to specific factual findings under other sub-grounds of appeal.

(d) The Trial Chamber's application of the "beyond reasonable doubt" standard

111. The second error alleged by the Prosecution under sub-ground 5 relates to the principle, enshrined in Rule 87(A) of the Rules, that guilt must be proven beyond reasonable doubt. According to the Prosecution, in application of this principle, all elements of the crime as well as all requirements for a specific mode of responsibility must be proven beyond reasonable doubt in order for an accused to be convicted.[297] The Prosecution explicitly refers to the *Ntagerura et al.* Appeal Judgement in this respect, which states that the beyond reasonable doubt standard is applicable to all facts "indispensable for entering a conviction".[298] However, the Prosecution submits that the Trial Chamber wrongly applied the standard of proof beyond reasonable doubt to "predicate facts".[299]

112. As a preliminary matter, the Appeals Chamber makes the following terminological observations. A predicate fact is a fact from which a presumption or inference arises, and it is also termed "foundational fact" or "evidentiary fact".[300] However, for the purposes of the present judgement and in light of the Prosecution's submissions,[301] the Appeals Chamber understands the expression "predicate facts" to encompass those factual allegations that are not essential to prove the elements of the crime or the mode of responsibility alleged.

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[297] Prosecution Appeal Brief, paras 2.124 and 2.126.
[298] AT. 10-11.
[299] Prosecution Appeal Brief, para. 2.121. *See* also Prosecution Notice of Appeal, para. 4(v) and AT. 11.
[300] Black's Law Dictionary, 7th Edition (St. Paul, West Group, 1999).
[301] Prosecution Notice of Appeal, para. 4(v): Prosecution Appeal Brief, para. 2.121, and heading (A), p. 46 and paras 2.124-2.125; Prosecution Reply Brief, heading (A), p. 18 and para. 3.26.

209. When submitting that Halilović exercised effective control over the perpetrators, the Prosecution relied specifically on Halilović's material ability to punish as "the most important discussion ... because it focuses directly on the effective control test".[588] In its analysis of sub-ground 4, the Appeals Chamber has found that it was not unreasonable for the Trial Chamber to conclude that Halilović lacked the material ability to punish the persons who committed the crimes in Grabovica.[589]

210. In any event, even assuming that Halilović had the ability to contribute to an investigation or to the punishment of the perpetrators of the crimes committed in Grabovica, these abilities can only amount to effective control relevant for Article 7(3) of the Statute if they are the consequence of a relationship of subordination between Halilović and these perpetrators.[590] Indeed, the Appeals Chamber recalls that the material ability to punish and its corresponding duty to punish can only amount to effective control over the perpetrators if they are premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators. In this regard, the ability to exercise effective control in the sense of a material power to prevent or punish necessitates a pre-existing relationship of subordination, hierarchy or chain of command.[591] Of course, the concepts of subordination, hierarchy and chains of command need not be established in the sense of formal organisational structures so long as the fundamental requirement of effective control over the subordinate, in the sense of material ability to prevent or punish criminal conduct, is satisfied.[592]

211. In the present case, the Prosecution has failed to show how Halilović's alleged position as *de facto* commander of Operation Neretva established a chain of command or a hierarchical relationship between him and the perpetrators amounting to a superior-subordinate relationship in which he could have exercised effective control over the perpetrators, in the sense of material ability to prevent or punish crimes. In particular, the Prosecution has failed to show how Halilović's

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[586] AT. 147. *See* also AT. 15-16 and 43
[587] AT. 147. *See* also AT. 23 and 41.
[588] AT. 32.
[589] *See supra*, para. 194.
[590] *See supra*, para. 59.
[591] *Čelebići* Appeal Judgement, para. 303, where the Appeals Chamber explained that the doctrine of command responsibility "developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others". This approach also underlies the reasoning in the *Blaškić* Appeal Judgement, paras 372ff: the Appeals Chamber first ascertained whether Blaškić had "command authority" over the Military Police (an authority it found he could have for *ad hoc* missions pursuant to specific requests, paras 375-381), before assessing whether he had effective control over said Military Police (paras 382 ff). In the *Kajelijeli* Appeal Judgement (paras 85-86), the ICTR Appeals Chamber first recalled that "a superior is one who possesses power or authority over subordinates either *de jure* or *de facto*" (para. 85), before outlining the threshold to be reached in establishing a superior-subordinate relationship, namely "that it be found beyond reasonable doubt that the accused was able to exercise effective control over his or her subordinates" (para. 86). *See* also *Blagojević and Jokić* Appeal Judgement, paras 301-303.
[592] *Čelebići* Appeal Judgement, para. 254.

role as Chief of Staff of the Main Staff of the Supreme Command of the ABiH[593] (and allegedly the most senior ABiH officer in Herzegovina) or his functions within the Inspection Team created such a chain of command.[594]

212. In fact, the most relevant issue in relation to these two positions is the authority and responsibility broadly associated with the functions of Chief-of-Staff.[595] In this context, the Appeals Chamber refers to the findings of the Military Tribunal in *United States v. Wilhelm von Leeb et al.*[596] As a commander-in-chief of an Army group, "the duties imposed upon [von Leeb] were exclusively operational and his headquarters and staff were strictly operational in their functions".[597] Therefore, "his authority in th[e] field [of executive power] was more in the nature of a right to intervene than a direct responsibility".[598] The Military Tribunal found that, under the circumstances of the case, "it [was] not considered [...] that criminal responsibility attache[d] to him merely on the theory of subordination and over-all command".[599]

213. In the present case, the Appeals Chamber considers that the Prosecution has failed to show that no reasonable trier of fact could have reached the conclusion that the order establishing the Inspection Team did not create any type of subordination, hierarchy or chain of command between Halilović and the perpetrators going beyond Halilović's authority as Chief of Staff, or that Halilović had duties and responsibilities which were "exclusively operational".[600]

214. In particular, considering that criminal responsibility does not attach to a military official merely on the basis of his "over-all command", the Appeals Chamber finds that, even assuming Halilović was a *de facto* superior of the perpetrators of the murders in Grabovica, the Prosecution has failed to show that the Trial Chamber erred in finding that the mandate of the Inspection Team did not include duties or obligations related to the effective prevention or punishment of crimes (which would form the required basis for Halilović's effective control over the perpetrators).[601] The Appeals Chamber considers that, while it is true that the Inspection Team suggested the initiation of

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[593] The Appeals Chamber notes that the Trial Chamber discussed extensively Halilović's role within the structure of the Main Staff, but made no ultimate finding as to his *de jure* or *de facto* position therein (Trial Judgement, paras 105 to 111). The Trial Chamber only held that Halilović's position "within the structure of the Main Staff was circumscribed as a result of the 8 June and 18 July Decisions" (Trial Judgement, para. 369).
[594] *Cf. supra*, para. 70, regarding the alleged subordination of the 9th Brigade and its commander Ališpago to Halilović.
[595] The Prosecution argued that the Inspection Team was appointed to perform a role of "central control" over the planned combat operation (AT. 30).
[596] *United States v. Wilhelm von Leeb et al.* ("*High Command* Case"), in TWC, Vol. XI.
[597] *High Command* Case, p. 554.
[598] *High Command* Case, p. 554.
[599] *High Command* Case, p. 555.
[600] *See* Trial Judgement, paras 198-205, assessing Delić's order of 30 August 1993 to form an Inspection Team.
[601] The Appeals Chamber notes that, of course, the distinction outlined above between a pre-existing *de facto* superior position, on the one side, and effective control, on the other, does not necessarily mean that findings on both these

some criminal proceedings in its Final Report,[602] a reasonable trier of fact could reach the conclusion that these mere "suggestions", in the context of an "estimate of the overall situation in the Neretva valley",[603] did not establish beyond reasonable doubt even a "very limited degree" of effective control of Halilović over the perpetrators.[604]

215. The Appeals Chamber therefore finds that, even assuming that (i) a *de facto* IKM was established, (ii) the name of the military operation in question was "Neretva", and (iii) the participants at the Zenica meeting discussed who would be commander of this operation and planned a specific and detailed operation to liberate Mostar,[605] the Prosecution has not shown that the Trial Chamber erred in concluding that the Prosecution did not prove beyond reasonable doubt that Halilović had the material ability to prevent or punish the crimes committed in Grabovica.

216. Therefore, the Prosecution failed to show that no reasonable trier of fact could have reached the conclusion that Halilović, as a commander of Operation Neretva, did not have the required degree of "effective control" over the perpetrators to establish his superior responsibility under Article 7(3) of the Statute. For the foregoing reasons, the first ground of appeal is dismissed.

217. Consequently, considering that the Prosecution has failed to show that the Trial Chamber erred in finding that the first element of superior responsibility had not been met, the Appeals Chamber need not address the Prosecution's arguments advanced under the remaining grounds of appeal.[606] These grounds, which concern the other two elements required to establish superior responsibility under Article 7(3) of the Statute, intrinsically hinge upon the outcome of the first ground of appeal.[607]

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requirements will not be based in whole or in part, in certain cases, on the same evidence related to the ability to prevent and punish.

[602] Trial Judgement, para. 209, referring to Exhibit 130, pp 4-5.

[603] Exhibit 130, p. 3.

[604] *Cf. Blaškić* Appeal Judgement, para. 499.

[605] *See supra*, para. 125, sub (ii) and (iii).

[606] Likewise, the Trial Chamber was not required to enter a finding to the effect that Halilović had failed to *punish* the perpetrators of the crimes, since it had found that Halilović had no effective control based on a superior-subordinate relationship over the troops which committed the crimes in Grabovica.

[607] The Appeals Chamber recalls that the Prosecution's second and third grounds of appeal concern the other two requirements of superior responsibility under Article 7(3) of the Statute, namely whether Halilović knew or had reason to know that a criminal act was about to be or had been committed and whether Halilović failed to prevent or punish the criminal conduct (Prosecution Notice of Appeal, paras 5-8). The fourth ground of appeal relates to the admission into evidence of a report by a military expert witness. The Prosecution Notice of Appeal, para. 9, argued under the fourth ground of appeal that the admission of the military expert's report and his proposed testimony would have affected the findings of the Trial Chamber on the existence of a superior-subordinate relationship (Trial Judgement, paras 363-372, 736-747 and 752) and on whether Halilović knew or had reason to know that the criminal act was about to be or had been committed (Trial Judgement, paras 485-525). These parts of the fourth ground of appeal were withdrawn in the Prosecution Appeal Brief, fn. 344. Consequently, according to the Prosecution, the admission of this evidence would only have affected the third element of superior responsibility under Article 7(3) of the Statute (Prosecution Notice of Appeal, para. 9, citing Trial Judgement, paras 97-100, 660-701 and 743-747).

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No. IT-01-48-T Date: 16 November 2005 Original: English

IN TRIAL CHAMBER I, SECTION A

Before: **Judge Liu Daqun, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge Amin El Mahdi

Registrar: **Mr. Hans Holthuis**

Judgement of: **16 November 2005**

PROSECUTOR

v.

SEFER HALILOVIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Philip Weiner
Ms. Sureta Chana
Mr. David Re
Mr. Manoj Sachdeva

Counsel for the Accused:

Mr. Peter Morrissey
Mr. Guénaël Mettraux

> The doctrine of superior responsibility makes a superior responsible not for his acts sanctioned by Article 7(1) of the Statute but for his failure to act. A superior is held responsible for the acts of his subordinates if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes.[128]

The Trial Chamber also recalls the Partially Dissenting Opinion of Judge Shahabuddeen in the *Hadžihasanović* Appeals Chamber Decision, stating:

> The position of the appellants seems to be influenced by their belief that Article 7(3) of the Statute has the effect, as they say, of making the commander "guilty of an offence committed by others even though he neither possessed the applicable *mens rea* nor had any involvement whatsoever in the *actus reus*." No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so.[129]

54. The Trial Chamber finds that under Article 7(3) command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus "for the acts of his subordinates" as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of[130] the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed. The Trial Chamber considers that this is still in keeping with the logic of the weight which international humanitarian law places on protection values.

3. The Elements of Command Responsibility

55. The principle of individual criminal responsibility of commanders for failure to prevent or to punish crimes committed by their subordinates is an established principle of customary international law.[131] Article 7(3) of the Statute is applicable to all acts referred to in Articles 2 to 5 thereof and applies to both international and non-international armed conflicts.[132]

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128 *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement"), para. 67. The Trial Chamber notes that this statement was not challenged in the Appeals Judgement.

129 *Hadžihasanović* Appeals Chamber Decision, para. 32.

130 The Trial Chamber notes that different forms of expression than "for" the crimes of subordinates have been used, for example, the *Hadžihasanović* Appeals Chamber Decision, used the term "in respect of", *ibid.*, para. 18.

131 *See, e.g.*, *Čelebići* Appeal Judgement para. 195; *Čelebići* Trial Judgement, para. 343.

132 For application of the principle of command responsibility to both international and non-international armed conflicts, *see Hadžihasanović* Appeals Chamber Decision, para. 31. The Appeals Chamber has held that

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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991	Case No.	IT-04-84-A
		Date:	19 July 2010
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. John Hocking**

Judgement: **19 July 2010**

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:
Mr. Peter Kremer
Mr. Marwan Dalal
Ms. Elena Martin Salgado

Counsel for Ramush Haradinaj:
Mr. Ben Emmerson
Mr. Rodney Dixon

Counsel for Idriz Balaj:
Mr. Gregor Guy-Smith
Ms. Colleen Rohan

Counsel for Lahi Brahimaj:
Mr. Richard Harvey
Mr. Paul Troop

26 of the Indictment. The Appeals Chamber therefore orders that Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj be retried on these counts.[159]

51. The Appeals Chamber, however, will not construe the Prosecution's Appeal as a request to quash the convictions of Lahi Brahimaj on two of the above counts for which he was convicted, namely Counts 28 and 32. Lahi Brahimaj will therefore not be re-tried in relation to those two counts.

B. Alleged Errors Relating to the Murders of Sister "S", the Mother of Witness 4, and Sister "M" (Ground 2)

52. The Trial Chamber found that: (a) KLA soldiers murdered sister "S", the mother of Witness 4, and sister "M"; (b) these murders were closely related to the armed conflict in Kosovo/Kosova; and (c) the victims were not taking active part in hostilities at the time the murders were committed.[160] The Trial Chamber further found that Idriz Balaj's actions were "a link in the chain of events" leading to their murders, given that he "brought and kept them in the vicinity of the perpetrators".[161] However, the Trial Chamber, by majority, acquitted Idriz Balaj of aiding and abetting the commission of the murders of sister "S", the mother of Witness 4, and sister "M"[162] and accordingly found him not guilty under Count 14 of the Indictment.[163] The Trial Chamber reasoned that there was a lack of sufficient evidence regarding the events that occurred after the three women ended up in KLA custody and therefore that the Trial Chamber lacked "a sufficient basis to assess the relevance and importance of Idriz Balaj's acts". The Trial Chamber further reasoned that "there is no evidence that Idriz Balaj knowingly contributed to or facilitated the commission of any of these murders, especially as there is no evidence that Idriz Balaj was aware at the time that these murders were or would be committed."[164]

53. The Prosecution challenges this verdict, arguing that the Trial Chamber erred when it held that the *mens rea* and *actus reus* requirements of aiding and abetting were not satisfied.[165]

54. In relation to the *mens rea* requirement for aiding and abetting, the Prosecution submits that the Trial Chamber erred by applying an incorrect legal standard when it concluded that this

[159] The Appeals Chamber notes that on re-trial, the latest version of the Rules (IT/32/Rev. 44 of 10 December 2009) are to be applied by the Trial Chamber.
[160] Trial Judgement, paras 239- 240.
[161] Trial Judgement, para. 242.
[162] Trial Judgement, para. 242.
[163] Trial Judgement, para. 503. Count 14 of the Indictment charges Idriz Balaj with a Violation of the Laws or Customs of War, Murder and Cruel Treatment, as recognized by Common Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Article 3 and Article 7(1) of the Statute. Indictment, para. 70.
[164] Trial Judgement, para. 242.
[165] Prosecution's Appeal Brief, para. 45.

requirement was not established.[166] The Prosecution argues that the Trial Chamber required it to prove that Idriz Balaj was "aware [...] of a certainty" that the principal crime would be committed, when it should have only required a showing that Idriz Balaj was aware of a probability.[167] The Prosecution argues that this awareness of a probability test was confirmed by the ICTR Appeals Chamber in the *Ndindabahizi* case.[168] It submits that, because the *mens rea* required for planning, instigating, and ordering liability is "awareness of a substantial likelihood" and because aiding and abetting liability is not more serious than these other forms of liability, it would not make sense to "require a higher *mens rea* for aiding and abetting".[169] Moreover, the Prosecution argues that the awareness of a probability test must logically be the "test for both elements of the *mens rea* for aiding and abetting: awareness regarding the occurrence of the crime and awareness regarding the assisting conduct."[170] Finally, the Prosecution avers that, "[h]ad the Trial Chamber used the correct awareness of a probability standard, it would have concluded that [Idriz] Balaj had the required *mens rea* for aiding and abetting."[171]

55. In support of its argument, the Prosecution points to evidence that Idriz Balaj, as head of the Black Eagles, must have been aware that the Black Eagles and the KLA generally had a "reputation for violence."[172] In particular, the Prosecution argues that Idriz Balaj, a person with authority in the KLA, was involved in harassing the family about its connections to the Serbian police.[173] The Prosecution further argues that "[m]urder was a considered option for [Idriz] Balaj", as demonstrated by the fact that he had threatened to kill sister "S" if she did not kill someone else and that another KLA soldier told the mother of Witness 4 that she would be killed if she attempted to travel.[174] Finally, the Prosecution points to evidence that it describes as demonstrating that Idriz Balaj was aware of the vulnerability of the victims, given that he was in command of the KLA soldiers who targeted the family at night, and that the victims were unarmed females who did not have a husband or father in the house.[175]

56. Idriz Balaj responds that the Prosecution "has failed to establish [that] the Trial Chamber applied an incorrect legal standard and [has] also failed to demonstrate beyond a reasonable doubt

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[166] Prosecution's Appeal Brief, paras 58-70. The Prosecution abandons its alternative claim originally pleaded in its Notice of Appeal that the Trial Chamber committed a factual error in its assessment of the *mens rea* requirement. Prosecution's Appeal Brief, para. 45, fn. 121.
[167] Prosecution's Appeal Brief, paras 59-62.
[168] Prosecution's Appeal Brief, para. 59, referring to *Ndindabahizi* Appeal Judgement, para. 122.
[169] Prosecution's Appeal Brief, para. 60.
[170] Prosecution's Appeal Brief, para. 61.
[171] Prosecution's Appeal Brief, para. 63.
[172] Prosecution's Appeal Brief, paras 68-69.
[173] Prosecution's Appeal Brief, para. 66.
[174] Prosecution's Appeal Brief, para. 65.
[175] Prosecution's Appeal Brief, para. 67.

that the evidence proved Mr. Balaj had the requisite *mens rea* for aiding and abetting."[176] He argues that the Trial Chamber applied the correct legal standard of "knowledge or awareness that his or her conduct assisted or facilitated the commission of the crime",[177] and properly concluded that this standard could not be met where there was no evidence that Idriz Balaj was aware that these murders were "even contemplated" at the time that he acted.[178]

57. The Appeals Chamber notes that, in relation to the *mens rea* element of aiding and abetting, the Trial Chamber articulated the legal standard as follows:

> The aider and abettor must have knowledge that his or her acts assist in the commission of the crime of the principal perpetrator. The aider and abettor must also be aware of the principal perpetrator's criminal acts, although not their legal characterization, and his or her criminal state of mind. The aider and abettor does not, however, need to know either the precise crime that was intended or the one that was actually committed; it is sufficient that he or she be aware that one of a number of crimes will probably be committed, if one of those crimes is in fact committed.[179]

The Appeals Chamber further notes that the Trial Chamber, by majority, found that "there is no evidence that Idriz Balaj knowingly contributed to or facilitated the commission of any of these murders, especially as there is no evidence that Idriz Balaj was aware at that time that these murders were or would be committed."[180]

58. The Appeals Chamber considers it firmly established that, to satisfy the *mens rea* requirement for aiding and abetting, "[i]t must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal" (for example, murder, extermination, rape, torture)[181] and that the aider and abettor was "aware of the essential elements of the crime which was ultimately committed by the principal".[182] Where the *mens rea* of the principal perpetrator is an element of the principal crime, the aider and abettor need not share the intent of the principal perpetrator,[183] but he or she must be aware of the intent of the principal perpetrator.[184] *Mens rea* can be established if the aider and abettor is not certain which of a number of crimes will ultimately be committed.[185] In this regard, where an accused "is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has

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[176] Balaj's Response Brief, para. 65.
[177] Balaj's Response Brief, para. 69.
[178] Balaj's Response Brief, para. 70.
[179] Trial Judgement, para. 145 (internal citations omitted).
[180] Trial Judgement, para. 242.
[181] *Aleksovski* Appeal Judgement, para. 163 (citing *Tadić* Appeal Judgement, para. 229); *see also Blaškić* Appeal Judgement, para. 45 (citing *Vasiljević* Appeal Judgement, para. 102); *Krnojelac* Appeal Judgement, para. 51.
[182] *Orić* Appeal Judgement, para. 43 (citing *Simić* Appeal Judgement, para. 86); *Aleksovski* Appeal Judgement, para. 162.
[183] *Krstić* Appeal Judgement, para. 140; *Krnojelac* Appeal Judgement, paras 51-52; *Simić* Appeal Judgement, para. 86.
[184] *Simić* Appeal Judgement, para. 86; *Brđanin* Appeal Judgement, para. 487; *Blagojević and Jokić* Appeal Judgement, para. 127; *Krstić* Appeal Judgment, paras 140-141.
[185] *Blaškić* Appeal Judgement, para. 50 (citing *Blaškić* Trial Judgement, para. 287); *Simić* Appeal Judgement, para. 86.

intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[186] Accordingly, the Trial Chamber correctly set out the legal standard for the *mens rea* of aiding and abetting.[187]

59. Furthermore, the Appeals Chamber can identify no error on the part of the Trial Chamber in its application of the legal standard for the *mens rea* of aiding and abetting.[188] The requirement of knowledge that a crime would be committed by the principal perpetrator is in line with the jurisprudence of the Tribunal as set forth above. Moreover, the Appeals Chamber considers that the Trial Chamber did not reach its conclusion because Idriz Balaj "lacked certainty" that a crime would be committed but rather because it found that there was no evidence at all to establish that he was aware to any standard that by his actions he was assisting in the commission of a crime against the sisters.[189]

60. The Appeals Chamber considers that the evidence referred to by the Prosecution, at best, shows that Idriz Balaj put vulnerable women in contact with KLA soldiers who had a reputation for violence. The Prosecution does not point to any evidence as to what happened to the women between the time that they were last seen alive and the time that they were killed, in particular which KLA soldiers killed them or under what circumstances they were killed. As the Trial Chamber correctly noted, none of the evidence shows that Idriz Balaj was aware that a crime would be committed against the women at the relevant time.[190]

61. Accordingly, the Appeals Chamber concludes that the Trial Chamber did not err in finding that Idriz Balaj lacked the requisite *mens rea* for aiding and abetting the murder of sister "S", sister "M", and the mother of Witness 4. In view of this conclusion, the Appeals Chamber will not consider the Prosecution's contention in relation to the *actus reus* requirement.

62. Consequently, the Appeals Chamber dismisses this ground of appeal and the Trial Chamber's acquittal of Idriz Balaj for Count 14 stands.

[186] *Blaškić* Appeal Judgement, para. 50 (citing *Blaškić* Trial Judgement, para. 287); *Simić* Appeal Judgement, para. 86.
[187] *See* Trial Judgement, para. 145.
[188] *See Blagojević and Jokić* Appeal Judgement, para. 223.
[189] Trial Judgement, para. 242.
[190] Trial Judgement, para. 242.

UNITED NATIONS	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-84-T
		Date:	3 April 2008
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: **Mr Hans Holthuis**

Judgement of: **3 April 2008**

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

JUDGEMENT

Office of the Prosecutor

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Mr Gramsci di Fazio
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Counsel for Ramush Haradinaj

Mr Ben Emmerson, QC
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handed over to the relatives and the commission issued a death certificate.[920] Body R-17 was wearing a blue dress with purple and white patterns over a hand-knitted vest.[921] Body R-17 was a female between 55 and 65 years old and between 156 and 161 centimetres tall.[922] The autopsy revealed a hand-gun bullet entry and exit wound on the left half of the pelvic bone, which, if inflicted in life, could have caused a haemorrhage and led to death.[923] On 19 September 1998, Vera Kovačević identified the body as Darinka Kovać (born Vujošević), based on clothing, the ossification of the spinal column and signs of a chronic, degenerative bone disease suffered in life, which caused severe ossification of the spinal column.[924] Vera Kovačević told the team that Vukosava Marković and her sister Darinka Kovać went missing on 21 April 1998.[925] Bodies R-10 and R-17 were handed over to the relatives and a death certificate was issued.[926] The witness did not take a DNA sample from R-17, because of the specific nature of the traditional identification.[927]

196. As referred to above, the Trial Chamber has heard hearsay evidence from Vera Kovačević that Vukosava Marković and Darinka Kovać went missing on 21 April 1998. In September 1998, two sets of remains were identified by traditional means as belonging to these two women. Both sets of remains had been found near the concrete wall at the Radonjić/Radoniq canal. In addition to general physical characteristics, the identification of Vukosava Marković was based in part on traces of bone injuries found on the remains that matched injuries sustained in life in a car crash. Likewise, in addition to general physical characteristics, the identification of Darinka Kovać was based in part on the symptoms of a bone disease, present in the remains, that she had suffered in life. The identification further considered a set of upper dentures found with the remains, that Darinka Kovać was known to wear. Also, for both sets of remains, Vera Kovačević identified pieces of clothing as ones that she had made herself. There are some discrepancies between the accounts of Vera Kovačević and Dušan Dunjić, concerning the identification of the clothing of Vukosava Marković. Although the

[920] P618 (Dušan Dunjić, witness statement, 8 June 2007), para. 308; P635 (Death certificates), pp. 5-6; P672 (Autopsy report R-10), p. 8.
[921] P706 (Autopsy report R-17), p. 3.
[922] P618 (Dušan Dunjić, witness statement, 8 June 2007), para. 399; P706 (Autopsy report R-17), p. 5.
[923] P618 (Dušan Dunjić, witness statement, 8 June 2007), para. 401; P706 (Autopsy report R-17), pp. 2, 6.
[924] P618 (Dušan Dunjić, witness statement, 8 June 2007), paras 404-408; Dušan Dunjić, T. 7208, 7350; P706 (Autopsy report R-17), pp. 2, 6-7.
[925] P618 (Dušan Dunjić, witness statement, 8 June 2007), para. 305; P672 (Autopsy Report R-10), p. 7.
[926] P618 (Dušan Dunjić, witness statement, 8 June 2007), paras 308, 409; Dušan Dunjić, T. 7351; P635 (Death certificates), pp. 5-6, 9-10; P672 (Autopsy report R-10), p. 8; P706 (Autopsy report R-17), p. 7.

accounts differ, they are not necessarily contradictory and certain discrepancies concern ambiguous details such as the exact colour of clothing. Therefore, the Trial Chamber does not consider these discrepancies significant and notes that the identification of clothing was only one of the factors considered in the identification of the remains. As the remains could not be retrieved, they could not have been identified by DNA analysis. The Trial Chamber has heard evidence of traditional identification of other sets of remains which was later contradicted by DNA analysis. Nevertheless, considering the strong grounds for the traditional identification and the fact that the two sets of remains were discovered in close proximity to each other, the Trial Chamber finds that the remains labelled R-10 belong to Vukosava Marković, and the remains labelled R-17 belong to Darinka Kovać. The forensic medical evidence suggests that Vukosava Marković and Darinka Kovać were murdered. In section 6.1, above, the Trial Chamber has explained that the fact that a body was found in the Radonjić/Radoniq canal area is not in itself conclusive as to who committed the killing or with which group, if any, the perpetrator was affiliated. The Trial Chamber has not received any evidence about either of the women being in KLA custody. By late April 1998, Vukosava Marković and Darinka Kovać were among the last remaining Serbs in the village of Gornji Ratiš/Ratishë ë Eperm, which had fallen under KLA control on or around 21 April 1998. Further, Miloica Vlahović testified that she had heard from a man named Muhamet that Vukosava Marković and Darinka Kovać were killed in July 1998. Miloica Vlahović did not clarify the basis of Muhamet's information. Thus, the evidence is unsourced, and possibly multiple hearsay. Even if the two women went missing in KLA controlled territory and were among the last Serbs remaining in their village in late April 1998, this fact alone could not reasonably exclude the possibility that other forces or persons, unaffiliated with the KLA, committed the killing.

197. For these reasons, even assuming that Vukosava Marković and Darinka Kovać were murdered, the Trial Chamber finds that the evidence before it does not allow for a conclusion beyond a reasonable doubt as to who committed the murders of the two women, with which group, if any, the perpetrator was affiliated, or whether the murders occurred in KLA custody. The Trial Chamber has heard no evidence concerning Idriz Balaj's involvement in the death of either of the two women. The Trial Chamber concludes that all three Accused should be acquitted of this charge.

[927] Dušan Dunjić, T. 7350; P706 (Autopsy report R-17), pp. 6-7.

Đakovica/Gjakovë municipality.[1547] In September 1998, officials at the MUP in Đakovica/Gjakovë told the witness that they had arrested Lëk and Krist Pervorfi, two KLA members from Dujak/Dujakë who had abducted Zdravko Radunović in Dujak/Dujakë.[1548] The officials further informed the witness that the two men had handed Zdravko Radunović over to their commander named "Vuk", and that Zdravko Radunović had subsequently been taken to Glođane/Gllogjan, in Dečani/Deçan municipality, where Ramush Haradinaj was in charge.[1549] In January 1999, the MUP in Peć/Pejë told the witness that Lëk and Krist Pervorfi had stated that Zdravko Radunović had been killed and that his remains had had been disposed of at Lake Radonjić/Radoniq.[1550]

316. The Trial Chamber has also received forensic medical evidence with regard to Zdravko Radunović (remains labelled "R-8/1"). ICMP DNA analysis identified the remains labelled R-8/1 as those of Zdravko Radunović.[1551] An autopsy conducted on 5 December 2003 described totally skeletonized, disarticulated and largely incomplete human remains.[1552] The cause of death could not be ascertained.[1553] Dušan Dunjić[1554] testified that remains R-8/1 were incomplete, with many bones missing.[1555] The remains had mistakenly been placed in the same body bag as body R-8.[1556] The part of the skull that was found showed a trace of a bullet exit wound.[1557]

317. As referred to above, the Trial Chamber received direct evidence that Zdravko Radunović was last seen on the morning of 16 July 1998 when he left for work, and last heard from during a telephone conversation at 1:30 p.m. on the same day, when he indicated that he was leaving Đakovica/Gjakovë for Dobrić/Dobriq. The MUP subsequently informed Witness 68 that Zdravko Radunović was abducted by KLA soldiers in Dujak/Dujakë, transferred to Glođane/Gllogjan, killed, and disposed of at

[1547] P1016 (Witness 68, witness statement, 9 October 2007), paras 10-11.
[1548] P1016 (Witness 68, witness statement, 9 October 2007), paras 12, 14-16; Witness 68, T. 9265-9268, 9273-9274.
[1549] Witness 68, T. 9267-9268.
[1550] Witness 68, T. 9266-9267, 9269, 9271-9272.
[1551] Agreed Facts, 26 November 2007, No. 52.
[1552] Agreed Facts, 26 November 2007, Nos 53-54.
[1553] Agreed Facts, 26 November 2007, No. 55.
[1554] P618 (Dušan Dunjić, witness statement, 8 June 2007), paras 2-3, 23, 40, 151; P620 (CV of Dušan Dunjić), p. 2.
[1555] P618 (Dušan Dunjić, witness statement, 8 June 2007), para. 278; P665 (Photographs of R-8 and R-8/1).
[1556] P618 (Dušan Dunjić, witness statement, 8 June 2007), para. 276; P659 (Autopsy report R-8), p. 1; P662 (Photographs of R-8 and R-8/1); P663 (Autopsy report R-8/1), p. 1.

Lake Radonjić/Radoniq. This hearsay account of Witness 68 is the only evidence before the Trial Chamber about the alleged abduction and subsequent events. It does not spell out the circumstances under which the MUP learned about the abduction. Moreover, it is multiple hearsay and Witness 68 does not specify her source. For these reasons the Trial Chamber will not rely on Witness 68's hearsay account of the alleged abduction and subsequent events. In September 1998, Zdravko Radunović's body was found at the Radonjić/Radoniq canal.

318. While at one autopsy, conducted on 5 December 2003, the cause of death of Zdravko Radunović could not be ascertained, Dunjić's autopsy report in 1998 noticed a trace of a bullet exit wound on the part of the skull that was found. Even assuming that Zdravko Radunović was murdered, KLA involvement has to be ascertained to prove the charges of this Count. In section 6.1, above, the Trial Chamber has explained that the fact that a body was found in the Radonjić/Radoniq canal area is not in itself conclusive as to who committed the killing or with which group, if any, the perpetrator was affiliated. The fact that Zdravko Radunović went to visit relatives in Dobrić/Dobriq, because they were under KLA attack a few days before, cannot establish a sufficient link between his disappearance and the KLA. As explained above, the Trial Chamber will not rely on Witness 68's hearsay account on the alleged abduction and subsequent events. For these reasons, the Trial Chamber finds that the evidence before it does not allow for a conclusion beyond a reasonable doubt as to who committed the murder, with which group, if any, the perpetrator was affiliated, or whether the murder occurred in KLA custody. The Trial Chamber therefore concludes that all three Accused should be acquitted of this charge.

6.12.8 Murder of Velizar Stošić

319. All three Accused are charged, as participants in a joint criminal enterprise, with the murder of Velizar Stošić in violation of the laws or customs of war. The Trial Chamber has heard relevant evidence from Miomir Stošić, as well as forensic medical evidence.

[1557] P618 (Dušan Dunjić, witness statement, 8 June 2007), para. 281; P663 (Autopsy report R-8/1), pp. 1-2, 4; P666 (Photographs of R-8/1).

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-95-10-A
		Date:	5 July 2001
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Patricia M. Wald
Judge Fausto Pocar

Registrar: **Mr. Hans Holthuis**

Judgement of: **5 July 2001**

PROSECUTOR

v.

GORAN JELISI]

JUDGEMENT

Counsel for the prosecution:

Mr. Upawansa Yapa
Mr. Geoffrey Nice
Mr. Morten Bergsmo
Mr. Fabricio Guariglia

Counsel for the defence:

Mr. William Clegg
Mr. Jovan Babi}

26. However, as indicated above, the Trial Chamber also decided against the right of the prosecution to be heard on the substantive question of whether its evidence was insufficient to sustain a conviction. The Trial Chamber's decision was rendered orally on 19 October 1999, and then put in writing on 14 December 1999. Taking the two together, it is clear that the Trial Chamber considered that, where it was acting *proprio motu*, the prosecution had no right to be heard at all; such a right was not accorded by the Rules and could not be based upon the principle *audi alteram partem*.[52] Was this decision correct?

27. In the view of the Appeals Chamber, the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made.[53] Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial.[54] The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber. The availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the prosecution and from its argument on the applicable law.[55]

28. The prosecution therefore had a right to be heard on the question of whether the evidence was sufficient to sustain a conviction;[56] it was denied that right. Counsel for the respondent rightly concedes this.[57]

29. The prosecution's first ground of appeal succeeds. The question of remedy is discussed under the prosecution's third ground of appeal.

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[52] Trial transcript, 19 October 1999, p. 2330. (*Audi alteram partem* means to hear the other side.)
[53] See generally *R. v. Barking and Dagenham Justices*, ex parte *Director of Public Prosecutions* [1995] Crim LR 953 ("*Barking* case"), and *Director of Public Prosecution v. Cosier*, Q.B.D., 5 April 2000 ("*Cosier* case").
[54] See *Cosier* case, *supra*.
[55] See *Cosier* case, *supra*. For a more general observation on the importance of not deciding without first hearing counsel's arguments, see Judge *ad hoc* Barwick's dissenting opinion in *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 442.
[56] See *Barking* and *Cosier* cases, *supra*.
[57] Skeleton argument, paras 2.1-2.4, pp. 2-3.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-14/2-A
		Date:	17 December 2004
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Hans Holthuis**

Judgement of: **17 December 2004**

PROSECUTOR

v.

DARIO KORDIĆ
AND
MARIO ČERKEZ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Helen Brady
Ms. Marie-Ursula Kind and Ms. Michelle Jarvis

Counsel for Dario Kordić:

Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr. and Mr. Stephen M. Sayers

Counsel for Mario Čerkez:

Mr. Božidar Kovačić and Mr. Goran Mikuličić

III. APPLICABLE LAW

A. Planning, instigating and ordering pursuant to Article 7(1) of the Statute

25. The Appeals Chamber notes that the Trial Chamber convicted Kordić for planning, instigating, and ordering crimes pursuant to Article 7(1) of the Statute.[18] The Trial Chamber's legal definitions of these modes of responsibility have not been appealed by any of the Parties. However, the Appeals Chamber deems it necessary to set out and clarify the applicable law in relation to these modes of responsibility insofar as it is necessary for its own decision.

26. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[19] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.

27. The *actus reus* of "instigating" means to prompt another person to commit an offence.[20] While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[21]

28. The *actus reus* of "ordering" means that a person in a position of authority instructs another person to commit an offence.[22] A formal superior-subordinate relationship between the accused and the perpetrator is not required.[23]

29. The *mens rea* for these modes of responsibility is established if the perpetrator acted with direct intent in relation to his own planning, instigating, or ordering.

30. In addition, the Appeals Chamber has held that a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute. The Appeals Chamber held that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[24]

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[18] Trial Judgement, paras 829, 834.
[19] See Trial Judgement, para. 386.
[20] See Trial Judgement, para. 387.
[21] *Cf.* Trial Judgement, para. 387.
[22] Trial Judgement, para. 388.
[23] Trial Judgement, para. 388.
[24] *Blaškić* Appeal Judgement, para. 42.

31. The Appeals Chamber similarly holds that in relation to "planning", a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.

32. With respect to "instigating", a person who instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to instigating. Instigating with such awareness has to be regarded as accepting that crime.

B. The responsibility under Article 7(1) and Article 7(3) of the Statute

33. In the *Aleksovski* Appeal Judgement, the Appeals Chamber observed that the accused's "superior responsibility as a warden seriously aggravated [his] offences"[25] in relation to those offences of which he was convicted for his direct participation.[26] While the finding of superior responsibility in that case resulted in an aggravation of sentence, there was no entry of conviction under both heads of responsibility in relation to the count in question. In the *Čelebići* Appeal Judgement, the Appeals Chamber stated:

> Where criminal responsibility for an offence is alleged *under one count* pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).[27]

34. The provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute.[28] Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber

[25] *Blaškić* Appeal Judgement, para. 90, referring to *Aleksovski* Appeal Judgement, para. 183.
[26] *Blaškić* Appeal Judgement, para. 90, referring to *Čelebići* Appeal Judgement, para. 745.
[27] *Blaškić* Appeal Judgement, para. 90, referring to *Čelebići* Appeal Judgement, para. 745 (emphasis added).
[28] *Blaškić* Appeal Judgement, para. 91, referring to the *Blaškić* Trial Judgement, para. 337.

4. Elements of the crimes of unlawful attack against civilians and civilian objects under treaty law

(a) Attack

47. The term attack is defined in Article 49 of Additional Protocol I as "acts of violence against the adversary, whether in offence or in defence".[49] Therefore, in determining whether an unlawful attack on civilians occurred, the issue of who first made use of force is irrelevant.

(b) Prohibited attacks

48. The civilian population as such shall not be the object of attack.[50] This fundamental principle of international customary law is specified in Articles 51(2), and 51(3) of Additional Protocol I. Article 50(1) of Additional Protocol I states that

> [a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

The Appeals Chamber notes that the imperative "in case of doubt" is limited to the expected conduct of a member of the military. However, when the latter's criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution.[51]

49. Article 4A(1), (2), (3) and (6) of Geneva Convention III reads:

> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) that of being commanded by a person responsible for his subordinates ;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

50. Article 43 of Additional Protocol I sets out a definition of armed forces covering the different categories of the above-mentioned Article 4 of Geneva Convention III.[52] Read together,

[49] This definition applies to the crime of unlawful attacks against civilian objects as well.
[50] See in particular, G.A. Res. 2444 and 2675.

Articles 43 and 50 of Additional Protocol I and Article 4A of Geneva Convention III establish that members of armed forces (other than medical personnel and chaplains) and members of militias or volunteer corps forming part of such armed forces are "combatants" and cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war. Furthermore, according to Article 51(3) of Additional Protocol I, civilians are protected against attacks, unless and for the time they take part directly in hostilities. The civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

51. Particular attention has to be paid to the situation of members of a Territorial Defence (TO) and as to whether they are to be considered as combatants at all times during the conflict or only when they directly take part in hostilities, that is, when they participate in acts of war which by nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy's armed forces. The Commentary on the Additional Protocols is instructive on this point and states:

> The Conference considered that all ambiguity should be removed and that it should be explicitly stated that all members of the armed forces (with the two above-mentioned exceptions [medical and religious personnel]) can participate directly in hostilities, i.e., attack and be attacked. The general distinction made in Article 3 of the Hague Regulations, when it provides that armed forces consist of combatants and non-combatants, is therefore no longer used. In fact, in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel, despite their status as members of the armed forces, or to civilians, as they are not members of the armed forces. All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. If he is wounded, sick or shipwrecked, he is entitled to the protection of the First and Second Conventions (Article 44, paragraph 8), and, if he is captured, he is entitled to the protection of the Third Convention (Article 44, paragraph 1).[53]

In light of the above the Appeals Chamber considers that members of the armed forces resting in their homes in the area of the conflict, as well as members of the TO residing in their homes, remain combatants whether or not they are in combat, or for the time being armed.

[51] See *Blaškić* Appeal Judgement, para. 111.
[52] Commentary on the Additional Protocols, para. 1916.
[53] Commentary on the Additional Protocols, p. 515, para. 1677.

52. It is, however, accepted that attacks aimed at military objectives, including objects and combatants, may cause "collateral civilian damage". International customary law recognises that in the conduct of military operations during armed conflicts a distinction must be drawn at all times between persons actively taking part in the hostilities and civilian population and provides that

- the civilian populations as such shall not be the object of military operations, and

- every effort be made to spare the civilian populations from the ravages of war, and

- all necessary precautions should be taken to avoid injury, loss or damage to the civilian population.[54]

Nevertheless, international customary law recognises that this does not imply that collateral damage is unlawful *per se*.

53. Article 52(1) of Additional Protocol I prohibits explicitly attacks or reprisals on civilian objects. It defines civilian objects as "all objects which are not military objectives". Further, Article 52(1) defines military objectives as "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". Moreover, Article 52(3) of Additional Protocol I provides that in case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Appeals Chamber notes that the imperative "in case of doubt" is limited to the expected conduct of a member of the military. However, when the latter's criminal responsibility is at issue, the burden of proof as to whether an object is a civilian one rests on the Prosecution.

54. The Appeals Chamber clarifies that the prohibition against attacking civilians and civilian objects would not be a crime when justified by military necessity. The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants, between civilian objects and military objectives and accordingly to direct military operations only against military objectives. Article 48 of Additional Protocol I enunciates the principle of distinction as a basic rule. In its Advisory Opinion on the Legality of Nuclear Weapons, the International Court of Justice ("ICJ") described the principle of distinction, along with the principle of protection of the civilian population, as "the cardinal principles contained in

the texts constituting the fabric of humanitarian law" and stated that "States must never make civilians the object of attack."[55] As the ICJ held: "These fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".[56]

(c) Is a particular result of the attack required?

55. The Trial Chamber stated that an element of the conviction for the crime of unlawful attack directed against civilians or civilian objects under Article 3 of the Statute is that the attacks must be shown to have caused deaths and/or serious bodily injuries or extensive damage to civilian objects.[57]

56. The Appeals Chamber notes that some uncertainty has arisen in the jurisprudence of the International Tribunal as to whether a perpetrator incurs criminal responsibility under the Statute for such unlawful attack prohibited under Articles 51 and 52 of Additional Protocol I, if the attacks result in non-serious civilian casualties or damage, or none at all.[58]

57. The Appeals Chamber finds that the Trial Chamber was correct to state that, at the times the acts of unlawful attack were committed in this case, they must be shown to have resulted in serious injury to body or health to incur criminal responsibility, for the reasons that follow.

(i) Preliminary considerations

58. The plain language of Article 51(2) of Additional Protocol I states that "the civilian population as such, as well as individual civilians, shall not be the object of attack" and makes no reference to any requirement of a demonstration of actual injury for a finding of a breach under Article 51(2) of Additional Protocol I. Likewise, Article 52(1) of Additional Protocol I merely provides without elaboration that "civilian objects shall not be the object of attack [...]." However, under Article 85(3) of Additional Protocol I, "making the civilian population or individual civilians the object of attack" becomes a grave breach if it results in death or serious injury to body or health.

(ii) State of customary international law during the Indictment period

[54] See in particular G.A. Res. 2675.
[55] *Nuclear Weapons* Case, para. 78. The International Court of Justice further asserted that "these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".
[56] *Nuclear Weapons* Case, para. 78.
[57] Trial Judgement, para. 328.
[58] *Cf. Galić* Trial Judgement, para. 43; *Blaškić* Trial Judgement, para. 180. In the *Jokić* Sentencing Judgement, the Trial Chamber held that attacks directed against cultural property are as such, regardless of the result, prohibited under Additional Protocols I and II, para. 50.

59. It is well-established that when promulgated, the prohibition in Articles 51 and 52 of Additional Protocol I of attacks on civilians and civilian objects reflected the current status of customary international law[59] embodying the customary international law principle of protection of civilians in situations of conflict.[60] That principle is rooted in Article 25 of the Hague Regulations, which states that "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."[61] In Resolution 2444 (1968), the General Assembly unanimously stated that "it is prohibited to launch attacks against the civilian populations as such" and that all governmental and other authorities responsible for action in armed conflicts are to observe this rule.[62] In 1970, the General Assembly re-affirmed this fundamental principle stating that "civilian populations as such should not be the object of military operations."[63] The Appeals Chamber notes that in none of these declarations of customary international law reflected in Articles 51 and 52 of Additional Protocol I is the prohibition of attacks on civilians and civilian objects explicitly combined with statements regarding a finding of actual injury to civilians or damage to civilian objects.

60. Similarly, an examination of international instruments prior to Additional Protocol I, shows that neither the Nuremberg Charter (1945),[64] the Tokyo Charter (1946),[65] the Control Council Law No. 10 (1945),[66] nor the Nuremberg Principles (1950)[67] explicitly referred to unlawful attack on civilians or civilian objects as war crimes, let alone made any reference to a result requirement; instead, they generally referred to violations of the laws or customs of war as found in the Hague Conventions as a punishable war crime.

61. Furthermore, the ILC's Draft Code of Offences against the Peace and Security of Mankind (1954) referred generally to acts in violation of the laws or customs of war.[68] Its successor, the Draft Code of Crimes against the Peace and Security of Mankind (1991)[69] was slightly more explicit, noting that "exceptionally serious war crimes" include wilful attacks on property of exceptional religious, historical or cultural value without making reference to a result requirement.[70]

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[59] *Blaškić* Appeal Judgement, para. 157, referring to *Strugar et al.* Appeal Decision, para. 10; *Martić* Decision, para. 10.
[60] *Blaškić* Appeal Judgement, para. 157, referring to *Tadić* Appeal Decision on Jurisdiction, para. 127; *Kupreškić et al.* Trial Judgement, para. 521.
[61] *Cf. Blaškić* Appeal Judgement, para. 158.
[62] G.A. Res. 2444, UNGAOR, 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).
[63] G.A. Res. 2675, UNGAOR, 25th Session, Supp. No. 28 U.N. Doc. A/8028 (1970).
[64] Article 6(a).
[65] Article 5(b).
[66] Article II(1)(a).
[67] Principle 6(b).
[68] Article 2(12).
[69] Report of the International Law Commission, 43rd Session, UNGAOR, 46th Session, Supp. No. 10, U.N. Doc. A/46/10 (1991).
[70] Article 22(2)(f).

However, nothing was said with regard to unlawful attack on civilians or other civilian objects or, for that matter, a result requirement.

62. Thus, it could be argued that the drafters of Articles 51 and 52 of Additional Protocol I intended that one did not have to show a particular result in order for a breach (not a grave breach) to be found, when considered in the context of other separate offences proscribed under Additional Protocol I such as wilful killing, causing serious bodily injury, and wanton destruction. Such reading of Articles 51 and 52 of Additional Protocol I could no doubt be reconciled with the underlying humanitarian purpose of Geneva Convention IV, which is to ensure the protection of civilians when and wherever possible. In that case, punishment of an unlawful attack on civilians or civilian objects itself, regardless of the result, would be based on the concrete endangerment of civilian life and/or property, as the perpetrator can no longer control the result of an unlawful attack once launched; thus the mere undertaking of such an *in concreto* or *in abstracto* extremely dangerous attack would be penalized for good reasons.

63. However, the Appeals Chamber notes that the omission of a result element for a violation of Articles 51 and 52 of Additional Protocol I appears to be deliberate in light of the language later found in Article 85 of Additional Protocol I, which highlights the elements required where a breach of Article 51(2) of Additional Protocol I amounts to another category of breach labelled a "grave breach". Article 85(3)(a) of Additional Protocol I states in relevant part, that "acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: making the civilian population or individual civilians the object of attack." Thus, under Article 85(3)(a) of Additional Protocol I, the drafters expressly included the requirement of a showing of actual injury as an element of the crime of "making the civilian population or individual civilians the object of attack" when considering it to be a grave breach and not merely "a breach" of Additional Protocol I. Similarly, under Article 85(4)(d) of Additional Protocol I, deliberate attacks on civilian objects such as historic monuments, works of art and places of worship are considered to be grave breaches of the Additional Protocol only insofar as the attack results in extensive destruction.

64. The Appeals Chamber also takes into consideration Article 85(1) of Additional Protocol I which refers to Article 146 of Geneva Convention IV, the provision that distinguishes breaches from grave breaches, requiring that grave breaches must be repressed, which implies the obligation to enact legislation laying down effective penal sanctions for perpetrators of such breaches.[71] For other than grave breaches of Geneva Convention IV or Additional Protocol I, the Contracting

Parties merely undertake to "suppress" them, meaning that "such conduct can and should lead to administrative, disciplinary or even penal sanctions – in accordance with the general principle that every punishment should be proportional to the severity of the breach".[72] In light of the option given to Contracting Parties as to the means for suppressing "other" breaches of Additional Protocol I, the Appeals Chamber finds that it is not clear from the plain language of Additional Protocol I whether violations of Articles 51 and 52 would constitute crimes under international humanitarian law.

65. For the reasons set out above, the Appeals Chamber finds that attacks in violation of Articles 51 and 52 of Additional Protocol I are clearly unlawful even without causing serious harm as provided for in Article 85 of Additional Protocol I. Under the language of these articles, their criminalisation as a matter of international law depends on the practice of the Contracting States under Article 85 of Additional Protocol I.

66. The Appeals Chamber finds that at the time the unlawful attack occurred in this case, there was no basis for finding that, as a matter of customary international law, State practice or *opinio iuris* translated the prohibitions under Articles 51 and 52 of Additional Protocol I into international crimes, such that unlawful attacks were largely penalized regardless of the showing of a serious result. State practice was not settled as some required the showing of serious injury, death or damage as a result under their national penal legislation, while others did not.[73]

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[71] For a general view on the repression system see Commentary on the Additional Protocols, pp 974-75, paras 3400-04, and p. 1010, para. 3538.

[72] *Ibid.*, p. 975, para. 3402.

[73] See, *e.g.*, (national legislation requiring a result or only punishing grave breaches under international humanitarian law, partly adopted after the period relevant for this case): Geneva Conventions Act No. 103 of 1957 of Australia, Part II(2)(e) (as amended by the Geneva Conventions Amendment Act No. 27 of 1991); Geneva Conventions Act, R.S.C. 1985, c. G-3, s. 3; Act IV of 1978 of the Criminal Code of the Republic of Hungary, Section 160; Russian Federation - Soviet Minister of Defence Order No. 75 of 16 February 1990 on the publication of the Geneva Conventions of 12 August 1949 relative to the protection of victims of war and their Additional Protocols, Chap. VII, Section 14; The Basic Penal Code of the Republic of Croatia (consolidated text), Narodne novine (Official Gazette), no. 53/1991, Art. 120; Criminal Code of the People's Republic of China (as revised on 14 March, 1997), Arts. 446, 451; Geneva Conventions Act 1957 (c.52) (as amended by the Geneva Conventions (Amendment) Act 1995 (c.27)) of the United Kingdom of Great Britain and Northern Ireland, Section 1; United States Code, Title 18, Chap. 118, Section 2441 (War Crimes Act of 1996, 18 U.S.C. Section 2441 (2004)).
See also (national legislation penalizing attacks on civilians or civilian objects without an explicit result requirement): the Military Penal Code of Norway, 1902, Section 108 (as amended by Act of 12 June 1981); the Criminal Military Code of War of Italy (C.P.M.G.), 1941, Book III, Title IV, Section 2, Art. 185; the Military Penal Code of Spain, Law (Ley Orgánica) 13/1985 of 9 December 1985, Art. 78; Swedish Penal Code, 1990, Chap. 22, Section 6; the Wartime Offences Act of The Netherlands, Art. 8 (adopted on 10 July 1952, Staatsblad (Stb.) 408, as amended by acts dated 2 July 1964, 243; 8 April 1971, Stb. 210; 10 March 1984, Stb. 91; 27 March 1986, Stb. 139; 29 September 1988, Stb. 478; 14 June 1990, Stb. 369 and 372); Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire de Belgique, Chapitre Premier, Art. 1ter, alinéas 8*bis et* 11.
National case law sentencing persons for unlawful attacks on civilians and civilian objects under the national penal legislation indicates that under the facts, serious injury, death, or destruction as a result of the unlawful attacks was often at issue. See, *e.g.*, Decision of Zadar District Court of Croatia, 24 April 1997, K. 74/96 (unpublished) (sentencing 19 soldiers and commanders in absentia under Art. 120 of the Basic Penal Code to 15-20 years imprisonment for massive attacks on civilians and civilian and cultural property resulting in destruction and death); Decision of Split

(iii) Conclusion

67. For the above-mentioned reasons, the Appeals Chamber is not satisfied that at the relevant time, a violation of Articles 51 and 52 of Additional Protocol I incurred individual criminal responsibility under Article 3 of the Statute without causing death, serious injury to body or health, or results listed in Article 3 of the Statute, or being of the same gravity. Therefore, the Appeals Chamber will consider in the Judgement that criminal responsibility for unlawful attack on civilians or civilian objects does require the proof of such a result emanating from an unlawful attack.

68. For this reason, the Appeals Chamber will adequately consider whether the attacks on civilians and civilian objects caused death, serious injury, or any other criminal act listed in Article 3 of the Statute, or any consequence being of the same gravity, to civilians.

5. Unlawful confinement of civilians

69. As the Appeals Chamber noted in *Čelebići*, the offence of unlawful confinement of a civilian, a grave breach of the Geneva Conventions which is recognised under Article 2(g) of the Statute, is not further defined in the Statute, but clear guidance can be found in the provisions of Geneva Convention IV.[74] The confinement of civilians during armed conflict may be permissible in limited cases, but will be unlawful if the detaining party does not comply with the provisions of Article 42 of Geneva Convention IV, which states:

District Court of Croatia, 26 May 1997, K. 15/95 (unpublished) (sentencing 39 soldiers and commanders, 27 of whom were sentenced *in absentia* to 5-20 years imprisonment under Art. 120 of the Basic Penal Code for unlawful attacks on civilians and civilian objects resulting in *inter alia* ill-treatment, killing, and destruction). See also the *Kappler* case, Military Court of Rome, 20 July 1948, Il Foro Italiano, 1949 (11), pp 160-168, aff'd by the Supreme Military Court, 25 October 1952 (available at <<http://www.difesa.it/NR/exeres/8A30B849-DBEF-4C29-820D-33ABBFD9B12D.htm>>, last visited in December 2004), and the *Haas and Priebke* case, Military Court of Appeal of Rome, 7 March 1998, (available at << http://www.difesa.it/NR/exeres/3F2713E5-EF43-494E-B294-EAD39B317AA2.htm>> , last visited in December 2004), aff'd by Court of Cassation, First Criminal Section, 16 November 1998 (available at <<http://www.difesa.it/NR/exeres/B3D0BAC9-9D01-4679-8BCF-A6CE37AF4E48.htm>>, last visited in December 2004).

Further evidence of the unsettled nature of State *opinio juris* and practice as to whether or not there is a result element required for the prosecution of the crimes of unlawful attack on civilians and civilian objects (at the time the crimes were committed in this case) is evidenced by the controversial negotiations as late as 1999 by State delegates to the Working Group on the Elements of Crimes for the Rome Statute for the International Criminal Court (see PCNICC/1999/DP.4/Add.2; PCNICC/1999/WGEC/DP.12; PCNICC/1999/DP.20; and PCNICC/1999/WGEC/DP.9). Initially, the United States and Japan proposed a result element for the crime of unlawful attack on civilians, while Switzerland and Spain proposed no such requirement. Following the ensuing debates, the State delegates eventually unanimously agreed that no result element is required for a finding of unlawful attack on civilians under Art. 8(2)(b)(i) of the Rome Statute. Similarly, with regard to the crime of unlawful attacks on civilian objects, the Japanese delegation initially proposed a requirement of resulting damage as an element. However, the United States and Switzerland did not propose such an element. In the end, the Working Group unanimously agreed that there should be no resulting damage requirement under Art. 8(2)(b)(ii) of the Rome Statute for the crime of unlawful attacks on civilian objects (see Lee, Roy S., ed., The International Criminal Court, (Transnational Publishers, 2001), pp 140-144). The Appeals Chamber considers that these unanimous agreements on the elements for the crimes of unlawful attack on civilians and civilian objects by the State delegates to the 1999 Preparatory Commission for the ICC may be indicative of a progressive development of international law on this issue.

[74] *Čelebići* Appeal Judgement, para. 320.

trial.[261] The basis of Čerkez's argument is that there was no reason in this case to depart from the procedural practice of the International Tribunal, which would have allowed Čerkez more time.[262]

188. Regarding the general allegations of the Prosecution's late and new disclosure of evidence, the Prosecution submits that where this occurred, it was not through fault of the Prosecution, but due to objective reasons[263], and that where Čerkez sought access to materials not subject to the disclosure obligations of the Prosecution, he could have employed the solution available to him under Rule 66(B) but decided not to do so.[264] As to the "Zagreb Materials", the Prosecution explained at trial the reasons for the late disclosure, stating that they had only recently been received from the Republic of Croatia, and had been provided to the defence as soon as possible.[265]

189. The Prosecution responds further that, as regards Čerkez's claim of an unfair trial for lack of time to prepare, Čerkez has failed to prove that the Trial Chamber erred in law in not granting him an extension of time.[266]

190. In a decision of 1 December 2000, the Trial Chamber considered the arguments of the parties regarding the admission of the Zagreb Materials. The Trial Chamber correctly stated the relevant test for the admission of new evidence[267], and proceeded to exclude a large number of exhibits from admissibility for various reasons, *inter alia*: (1) the document(s) had already been admitted; (2) the material had already been produced in other proceedings before the International Tribunal and therefore had been available to the Prosecution when it presented its case; (3) the material was not sufficiently significant to warrant admission at so late a stage of the proceedings; (4) the material was cumulative and did not add to the voluminous material already in evidence; or (5) the material was based on anonymous sources or hearsay statements that were incapable of then being tested by cross-examination. Furthermore, the probative value of some of the evidence was found to be so reduced that it is substantially outweighed by the need to ensure a fair trial; "to admit it at this stage of the proceedings would violate the accused's right to a fair trial" as the Defence would have had no opportunity to cross-examine witness.[268] The Trial Chamber voiced its disapproval of any conduct of the Prosecution threatening the defence's ability to prepare its

[261] Čerkez Appeal Brief, p. 36.
[262] See, section IV.D.2.(b) *infra*.
[263] Prosecution Response, para. 9.7, notably the "consistent pattern of obstructionism adopted by Croatia's previous regime." See footnote 619.
[264] Prosecution Response, para. 9.10.
[265] T. 26552, 26559.
[266] Prosecution Response, para. 9.3. The Trial Chamber refused Čerkez's oral request for an extension of time, T. 26562.
[267] *Prosecutor v. Kordić and Čerkez*, Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts, 1 December 2000, Case No.: IT-95-14/2-T, 1 December 2000, para. 36; T. 27358.
[268] *Prosecutor v. Kordić and Čerkez*, Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts, Case No.: IT-95-14/2-T, 1 December 2000, para. 40.

case.[269] Yet, in considering its duty to ensure that a trial be fair and at the same time expeditious, the Trial Chamber declined to grant an adjournment and effectively refused to admit the majority of the evidence, thereby expressing that the interests of the defence could thus be safeguarded.

191. In connection with Čerkez's general allegations of the Prosecution's late and new disclosure of evidence, the Appeals Chamber does not find that the Prosecution disclosed evidence late so as to ambush the Accused. The Prosecution has amply demonstrated that circumstances beyond its control were at play in securing evidence from the Republic of Croatia.

192. The Appeals Chamber considers, however, that Rule 127(A) of the Rules requires the moving party to show good cause for an extension of time. Already in its decision of 11 September 2001, the Appeals Chamber considered Čerkez's motion and identified the misapprehension in this approach:

> It cannot be "good cause" for an extension of time to be granted to Čerkez to file his Respondent's Brief to the prosecution's Appellant's Brief simply because the prosecution has shown "good cause" for an extension of time to file its Respondent's Brief to the Appellant's Briefs filed by Čerkez and Kordić. That is to read into the right to equality of *arms* a right to equality of *relief*, even when the circumstances are quite different in each case and provide no basis whatsoever for granting equal relief.[270]

193. For this argument to succeed, Čerkez must prove that by not granting him an extension of time which would have enabled him to testify, the Trial Chamber committed an error of law. He has failed to do so. This argument is dismissed.

(b) Did alleged late and new disclosure preclude Čerkez from preparing his final trial brief?

194. Čerkez submits that the Trial Chamber erred by not allowing him the delay he requested in order to prepare his Final Trial Brief properly.[271] According to Čerkez, the Trial Chamber's decision[272] to deny an extension of time to prepare his Final Trial Brief or testimony was "flagrantly *in contrario* to the present practice of the Tribunal", especially in the context of the Prosecution's "almost continuous disclosure process".[273] Because his right to an expeditious trial is secondary to his right to adequate time, and in light of new evidence constantly being disclosed by the Prosecution, Čerkez argues that he was deprived adequate time and facilities for the preparation of his Final Trial Brief.

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[269] T. 26554-57.
[270] *Prosecutor v. Kordić and Čerkez*; Decision on Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, Case No.: IT-95-14/2-A, 11 September 2001, para. 9 (emphasis in original).
[271] The Trial Chamber's Decision denying the motion for an extension was given orally on 20 November 2000, T. 27196.
[272] Čerkez Appeal Brief, pp 33-40.
[273] Čerkez Appeal Brief, pp 34, 37.

Prosecution highlights the Trial Chamber's conclusion at paragraph 630 of the Trial Judgement that there was indeed "confirmation" of Witness AT's testimony[416] and that Kordić's submission implying that only direct evidence actually placing Kordić at the meetings can constitute corroboration of Witness AT's testimony is simply incorrect.[417]

273. As to Kordić's interpretation of the 18 September 2000 Decision, the Prosecution avers that corroborative evidence is not limited to that which mirrors the primary testimony specifically; rather, it is evidence which tends to convince the trier of fact that a witness is telling the truth.[418]

274. The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence.[419] In *Kupreškić et al.*, the Appeals Chamber emphasized that a Trial Chamber is required to provide a fully reasoned opinion, and that where a finding of guilt was made in a case on the basis of identification evidence given by a single witness under difficult circumstances, the Trial Chamber must be especially rigorous in the discharge of that obligation.[420] A Trial Chamber may thus convict an accused on the basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness. Any appeal based on the absence of corroboration must therefore necessarily be against the weight attached by a Trial Chamber to the evidence in question.

275. As regards the decision of 18 September 2000, the Appeals Chamber recalls that in *Kupreškić et al.*, it held that "[i]t follows from the jurisprudence of the Appeals Chambers of both the ICTY and ICTR that the testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration."[421]

276. It is incorrect to suggest that circumstantial evidence cannot be regarded as corroborative. In this case, the Trial Chamber specifically determined to what extent Witness AT's testimony was confirmed by other evidence.[422] The Appeals Chamber notes that Witness AT's testimony was given live and under solemn declaration, and was subject to cross-examination.

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[416] Prosecution Response, para. 3.8; Appeals Hearing, T. 360-361.
[417] Prosecution Response, paras 3.48-3.58.
[418] Appeals Hearing, T. 358.
[419] *Čelebići* Appeal Judgement, para. 506: "there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence. What matters is the reliability and credibility accorded to the testimony". See also *Kunarac* Appeal Judgement, para. 268; and *Aleksovski* Appeal Judgement, para. 62: "the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration."
[420] *Kupreškić et al.* Appeal Judgement, para. 135.
[421] *Kupreškić et al.* Appeal Judgement, para. 33.
[422] Trial Judgement, para. 630.

was based on his role in a campaign and not on his involvement in the day-to-day operations of the attacks.[1399]

973. The Appeals Chamber notes that the Trial Chamber did not make an explicit finding that Kordić had the requisite *mens rea*. The Trial Chamber only found "that in those cases where Kordić participated in the HVO attacks, he intended to commit the crimes associated with them and did so. His role was a political leader and his responsibility under Article 7(1) was to plan, instigate and order the crimes."[1400]

974. The Appeals Chamber notes that the Trial Chamber held in relation to persecutions that

> there was a campaign of persecution throughout the Indictment period in Central Bosnia (and beyond) aimed at the Bosnian Muslims. This campaign was led by the HDZ-BiH and conducted through the instruments of the HZ H-B and the HVO and orchestrated from Zagreb.[1401]

The Appeals Chamber concluded that there was persecutions in Busovača in January 1993, in the Lašva Valley in April 1993, and in Kiseljak in June 1993, and deemed it not to be necessary to identify the main orchestrators of this campaign. Only the responsibility of Kordić is relevant for the Appeals Chamber. It considers that following the meeting on 15 April 1993, a general plan existed to expel the Muslim civilians and to destroy civilian houses, a plan which had no military justification, but was aimed at the civilian population.

975. At the meeting on 15 April 1993, the order to attack at 05:30 a.m. and the order that "all Muslim men of military age were to be killed while the civilians were not to be killed, but expelled and the houses set on fire" were discussed, and the Trial Chamber found at paragraph 631 of the Trial Judgement that Kordić was present at the meeting of politicians which authorised the 16 April 1993 attack; that he thus participated as the senior regional politician in the planning of the military operation and attack against Ahmići (and other Lašva Valley villages), an operation which was aimed at "cleansing" these areas of Muslims.

976. The Appeals Chamber considers that this general plan included the whole of the Lašva Valley and that the crimes explicitly discussed were to kill military aged men, expel civilians, and destroy houses. For these crimes Kordić had direct intent. Kordić approved the general plan knowing that these crimes would be committed, and with the awareness of the substantial likelihood that other crimes such as killings of civilians, unlawful detention of civilians, and plunder would be

[1399] Prosecution Response, paras 5.24-5.26.
[1400] Trial Judgement, para. 834.
[1401] Trial Judgement, para. 827.

committed in the execution of this general plan.[1402] Planning with such awareness has to be regarded as accepting these crimes.

5. Kiseljak municipality

(a) April 1993

977. Kordić argues that he was not convicted in relation to Stupni Do because the Trial Chamber concluded that he did not have control of Kiseljak, and since he did not have control in October 1993 over a specific limited operation, he could not have had control over the municipality during the April attack and the June offensives. He also relies on the testimony of Brigadier Wingfield-Heyes that Kiseljak was cut off from the Lašva Valley.

978. The Prosecution responds that there is a clear difference with the Stupni Do case: Kordić's conviction for the attacks on Kiseljak arose from his active participation in the common design to cleanse the Lašva Valley of Muslims.[1403]

979. The Appeals Chamber finds that the fact that Kordić was acquitted for Stupni Do does not affect his conviction for the attacks in Kiseljak municipality in April 1993 and dismisses Kordić's arguments in this part.

980. With regard to the April 1993 attacks in Kiseljak municipality, the Trial Chamber found that "Blaškić would not have launched the attacks without political approval which the Trial Chamber accepts meant the approval of the local leadership in the person of Dario Kordić. The clear inference is that the latter was thus associated with the giving of orders to attack the villages, including Rotilj."[1404]

981. The Appeals Chamber is of the view that the Trial Chamber's presumption that the reference to the fact that "we have informed the leadership of the HZ H-B of everything"[1405] leads to the conclusion that Kordić must have approved the order, is in itself insufficient for a reasonable trier of fact to find that Kordić is criminally responsible. Kordić's responsibility for the crimes committed in Kiseljak municipality in connection with the HVO military attack on 18 April 1993 emanates from the Trial Chamber finding that Kordić was at the meeting of politicians which authorised the 16 April 1993 attacks, and that he thus participated as the senior regional politician in

[1402] Trial Judgement, para. 377.
[1403] Prosecution Response, para. 5.35.
[1404] Trial Judgement, para. 669.
[1405] Trial Judgement, para. 668 (footnotes omitted).

3. Conclusion

1092. For the foregoing reasons, the Appeals Chamber sentences Čerkez to 6 years of imprisonment.

XI. DISPOSITION

For the foregoing reasons,

THE APPEALS CHAMBER

PURSUANT to Article 25 of the Statute and Rule 117 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 17, 18, and 19 May 2004;

SITTING in open session;

WITH RESPECT TO THE PROSECUTION'S GROUNDS OF APPEAL:

NOTES that the Prosecution's first ground of appeal has become moot as it has been withdrawn;

REJECTS the Prosecution's remaining four grounds of appeal;

WITH RESPECT TO KORDIĆ'S GROUNDS OF APPEAL:

REJECTS Kordić's first, second, fifth and sixth grounds of appeal;

ALLOWS the ground of appeal concerning his responsibility for crimes committed in Novi Travnik in October 1992, **AND REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 38 and 39;

ALLOWS, in part, the ground of appeal concerning his responsibility for crimes committed in Busovača in January 1993, **REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 10 and 12, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 3 (unlawful attack on civilians, a violation of the laws or customs of war), 4 (unlawful attack on civilian objects, a violation of the laws or customs of war), 7 (murder, a crime against humanity), 8 (wilful killing, a grave breach of the Geneva Conventions of 1949), 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war) and 39 (plunder of public or private property, a violation of the laws or customs of war);

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-95-14/2-T

Date: 26 February 2001

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Richard May, Presiding**
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar: **Mr. Hans Holthuis**

Date: **26 February 2001**

PROSECUTOR

v.

DARIO KORDI]
&
MARIO ^ERKEZ

JUDGEMENT

The Office of the Prosecutor:

Mr. Geoffrey Nice, Q.C.
Mr. Patrick Lopez-Terres
Mr. Kenneth R. Scott
Ms. Susan Somers
Mr. Fabricio Guariglia

Counsel for the Accused:

Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr., Mr. Stephen M. Sayers, Mr. Robert Stein and Mr. Christopher G. Browning, Jr., for Dario Kordi}

Mr. Božidar Kova~i} and Mr. Goran Mikuli~i}, for Mario ^erkez

406. In other words, not only persons in formal positions of command but also persons found to be "effectively" in command of more informal structures, with the power to prevent and punish the commission of crimes of persons in fact under their control, may be held criminally responsible on the basis of their superior authority.[568] In the absence of a formal appointment, it is the actual exercise of authority which is fundamental for the purpose of incurring criminal responsibility,[569] and in particular a showing of effective control:

> Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility. ... The showing of effective control is required in cases involving both *de jure* and *de facto* superiors.[570]

Moreover, the Appeals Chamber defined effective control as "a material ability to prevent or punish criminal conduct, however that control is exercised".[571]

407. Analysing "command" as referring to "powers that attach to a military superior", and control as having a "wider meaning", which also includes the reference to the "powers wielded by civilian leaders",[572] the Appeals Chamber held that the rule that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control is not controversial.[573]

408. That a superior-subordinate relationship is needed before a person in a position of superior authority may be held liable under the doctrine of command responsibility may seem self-evident. The Trial Chamber in *^elebi}i* held that the "law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops."[574] The type of relationship required, however, may vary. The Appeals Chamber in *^elebi}i* agreed with the Trial Chamber that the relationship of subordination may be direct or indirect. The *^elebi}i* Trial Chamber held:

> The requirement of the existence of a "superior-subordinate relationship" which, in the words of the Commentary to Additional Protocol I, should be seen "in terms of a hierarchy encompassing the concept of control", is particularly problematic in situations such as that of the former

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[568] *^elebi}i* Appeal Judgement, para. 198.
[569] *See* para. 736, *^elebi}i* Trial Judgement, endorsed by the *^elebi}i* Appeal Judgement, paras. 194-95.
[570] *^elebi}i* Appeal Judgement, para. 196. The Appeals Chamber referred to Article 28 of the ICC Statute which "reaffirmed" the standard of effective control.
[571] *^elebi}i* Appeal Judgement, para. 256; *see also ^elebi}i* Trial Judgement, paras. 378 and 395, and *Bla{ki}* Trial Judgement, para. 302 (referred to in *^elebi}i* Appeal Judgement, para. 190).
[572] Thus, "If "command" implies formal appointment, "control" is less restrictive as to the source from where it originates." *^elebi}i* Appeal Judgement, para. 196.
[573] *^elebi}i* Appeal Judgement, para. 196. *See also ^elebi}i* Trial Judgement's analysis of Second World War cases in support of this finding, paras. 355-363.
[574] *^elebi}i* Trial Judgement, para. 647. The Trial Chamber went on to state in the same paragraph that "actual control of the subordinate is a necessary requirement of the superior-subordinate relationship."

the basis of the command responsibility doctrine.[582] It did not disturb the Trial Chamber's conclusion that Zejnil Delali}'s role at the municipal level in the defence effort and in the release of prisoners of war allowed him to be characterised as a highly influential individual but did not render him a superior.[583]

414. While civilians occupying positions of authority in relation to a portion of a territory may be held responsible under the principle of superior responsibility, they will incur criminal responsibility only if they are found to possess the necessary powers of control over the actual perpetrators. The *^elebi}i* Trial Chamber persuasively held:

> While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.[584]

415. It follows that a government official will only be held liable under the doctrine of command responsibility if he was part of a superior-subordinate relationship, even if that relationship is an indirect one. Even though arguably effective control may be achieved through substantial influence, a demonstration of such powers of influence will not be sufficient in the absence of a showing that he had effective control over subordinates, in the sense of possessing the material ability to prevent subordinate offences or punish subordinate offenders after the commission of the crimes. For instance, a government official who knows that civilians are used to perform forced labour or as human shields will be held liable only if it is demonstrated that he has effective control over the persons who are subjecting the civilians to such treatment. A showing that the official merely was generally an influential person will not be sufficient. In contrast, a government official specifically in charge of the treatment of prisoners used for forced labour or as human shields, as well as a military commander in command of formations which are holding the prisoners, may be held liable on the basis of superior responsibility because of the existence of a chain of command.

416. In sum, only those superiors, either *de jure* or *de facto*, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of subordinates may incur criminal responsibility. The Appeals Chamber found that the

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[581] *^elebi}i* Appeal Judgement, para. 266 (emphasis in original).
[582] The Appeals Chamber referred to a number of cases in the course of its analysis of the Prosecution's argument on "substantial influence". *^elebi}i* Appeal Judgement, paras. 258- 66.
[583] The Trial Chamber found that Delali} merely provided logistical support: he was a "well-placed influential individual, clearly involved in the local effort to contribute to the defence of the Bosnian State. This effort and the recognition which accompanied it did not create a relationship of superior and subordinate between him and those who interacted with him." *^elebi}i* Trial Judgement, para. 658. *See also ^elebi}i* Appeal Judgement, paras. 267-68.
[584] *^elebi}i* Trial Judgement, para. 377.

difficulties involved in the assessment of its reliability; the defence had been given full opportunity to challenge the evidence; and, it was not the exclusive basis for the court's decision.[1202]

629. Moreover, it is essentially a matter of common sense that a witness with an interest to serve (particularly an interest to get his sentence reduced) may seek to inculpate others and exculpate himself. On the other hand, it does not follow that such a witness is incapable of telling the truth. In each case it is necessary to consider the witness's evidence and all the circumstances, particularly the extent to which evidence is confirmed.

630. Thus, in deciding whether to accept the evidence of Witness AT the Trial Chamber must determine to what extent his evidence is confirmed by other evidence. In fact, there is no direct evidence supporting his account of the meeting. However, there is circumstantial evidence which does so. First, as will be seen, the events of the day in Ahmi}i followed the plan which he described. Secondly, no such plan could have been put into operation without prior meetings and without political approval. Next, no meeting of this importance of politicians in the La{va Valley would have taken place without Dario Kordi} being present. These matters, by themselves, would not be sufficient to lead the Trial Chamber to accept the witness's evidence. However, the account which he gave was a coherent one which was given fluently (in the manner of a person recalling incidents rather than one making them up) and was not shaken in cross-examination. Such inconsistencies as are relied on by the Defence are not of such significance as to make his evidence unbelievable. Furthermore, the Trial Chamber saw and heard the witness giving his evidence and thus had the opportunity of observing his demeanour. Although he could not bring himself to tell the full truth of his own involvement in the attack, and the Trial Chamber finds that he was mistaken in his evidence about the use of the mosque for defence purposes (which is not supported by the evidence of other witnesses) the Trial Chamber is satisfied that he did tell the truth about the preparations for the Ahmi}i attack, including the meetings at Hotel Vitez and the subsequent briefings.

631. In those circumstances, and in the absence of evidence to the contrary, the Trial Chamber is satisfied that Dario Kordi} was present at the meetings of politicians which authorised the 16 April 1993 attack. He thus participated as the senior regional politician in the planning of the military operation and attack against Ahmi}i (and the other La{va Valley villages), an operation which was aimed at 'cleansing' these areas of Muslims. The Chamber is satisfied that the meeting would have approved of Bla{ki}'s order to kill all the military-age men, expel the civilians and set the houses on fire: such an order would not have been given without political approval. Kordi} was thus

[1202] X v. UK No. 7306/75, 7 DR 115 (1976).

associated with the giving of that order. (However, the Chamber cannot be sure that the second order, that there be no living witnesses, was not Ljubi~i}'s own order, made without reference to any prior order.) The Chamber is also satisfied that Mario ^erkez, as Commander of the Vite{ka Brigade, was present at the military meeting which followed the politicians' meeting.

632. Witness AT stated that the entry in the CBOZ Duty Officer's log for the morning of 16 April 1993 to the effect that the Muslims attacked the Croats was a fabrication.[1203] The witness reiterated that the Croats carried out a planned attack on the Muslims on 16 April in the territory of Vitez municipality.[1204] On the other hand, the Defence contends that the attack was instigated by the Muslims. The Prosecution called evidence from survivors, UNPROFOR officers and international observers which tends to confirm the evidence of Witness AT about the Croat plan of attack and the order to shoot all Muslim men of military age:

(i) When Witness AQ's husband went to the front door on hearing shots outside he himself was shot dead.[1205]

(ii) The house of Nura Pezer and her family came under attack and was set on fire. Her son went outside, raised his hands in the air, but was shot and killed. She had to leave her husband behind in the house because he was wounded. She later found out that he had been shot in the head.[1206]

(iii) Witness U's father surrendered and told the soldier not to shoot: he took his wallet with a large sum of German marks in it from the safe. The soldier took the wallet but then the father and the witness's brother were shot dead.[1207]

(iv) Abdulah Ahmi}'s brother was killed outside the family house in an explosion and shooting. When the witness and his father went out his father was shot dead and the witness himself was shot in the head. (The witness survived, as he also did a hand grenade attack the following day.)[1208] While hiding the witness could see military

[1203] T. 27697-700. Log, Ex. Z610.1, p. 69.
[1204] *Ibid.*, pp. 70-100.
[1205] T. 16262-67.
[1206] T. 15448-55, 15459-62.
[1207] T. 10204-06.
[1208] T. 3568-84.

666. International observers saw the destruction in the villages in the next few days. An officer of the Canadian battalion of UNPROFOR, Captain Lanthier, drove through the Kiseljak pocket and saw many looted and burned houses. The villages were deserted. His impression was that the attack on Rotilj had been carried out according to infantry platoon tactics for fighting in built-up areas.[1331] When ECMM Monitors visited the villages they found almost all the Muslims had left and their houses had been burned[1332] and they concluded that ethnic cleansing had taken place in the area.[1333] (It should be noted in this connection that the CBOZ Duty Officer recorded Colonel Bla{ki} as saying on 20 April, with reference to Gominonica, that the police would be used for "cleansing".)[1334]

667. No defence evidence was called about this HVO offensive. The Trial Chamber concludes that it was part of the general offensive launched by the HVO against the Muslims in this area and in relation to Rotilj the underlying offences in Counts 3-4 and 7-13 are made out.

668. In connecting Dario Kordi} with these attacks the Prosecution relies on an order sent by Colonel Bla{ki} to the Ban Jela~i} Brigade in Kiseljak on 18 April 1993, instructing the Brigade to take Gomionica that night and stating that the situation is generally under control and "we have informed the leadership of the HZ H-B of everything. We are in constant contact with the leadership".[1335] The Prosecution comments that there was limited possibility of contact with Mate Boban given the communications difficulties relied on by the Defence and there is no document before the Trial Chamber on such a topic: therefore, the only leadership to whom Bla{ki} could have been referring was the local leadership, i.e., Kordi}, and the CBOZ Duty Officer's log confirms this.[1336]

669. The Trial Chamber finds that Dario Kordi} was involved in these attacks in a municipality about 25 kilometers from Busova~a. The attacks occurred two days after the attacks on the Muslim villages of the La{va Valley and were part of the pattern of attacks on the Muslims of Central Bosnia. Bla{ki} would not have launched the attacks without political approval which the Trial Chamber accepts meant the approval of the local leadership in the person of Dario Kordi}. The

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[1329] Ex. Z1888 is a map of the Kiseljak villages. Lt. Col. Landry listed the seven victims (two aged over 60 and one aged 16): T. 15299-300.
[1330] Witness TW07, *Bla{ki}* T. 7936.
[1331] Witness TW18, *Bla{ki}* T. 8295, 8337.
[1332] Report, Ex. Z847.
[1333] Major Baggesen, T. 7558-59.
[1334] Ex. Z610.1, p. 148.
[1335] Ex. Z733.
[1336] Prosecution Final Brief, para. 289.

clear inference is that the latter was thus associated with the giving of orders to attack the villages, including Rotilj.

9. The Shelling of Zenica

670. On 19 April 1993 the market-place in Zenica was shelled, killing 15 people and injuring another 50. The prosecution case is that the HVO were responsible for the shelling and, hence, the unlawful attack on the town. Their case is that the purpose of the attack was to demonstrate the military capability of the HVO and to threaten the ABiH and force it to stop its counter-attacks.[1337] The prosecution evidence was as follows.

671. Six artillery shells were fired into Vitez between 12 noon and 12.30 p.m. on 19 April 1993. They landed in the area of the market-place, which was described by one witness, who went to the scene, as a busy market and pedestrian street area with shops, stalls and coffee bars, where, at about midday, there would be many people, pedestrians, shoppers and people going to the mosque.[1338] Another witness described the area as containing 30-40 cafes in it and a department store and estimated that there could have been 2-3,000 people there at the time.[1339] It appears, however, that the intended target of the shelling may have been the radio station, Radio Zenica. A technician from the radio station gave evidence that on 19 April he received a telephone call from a person wanting directions to Radio Zenica. When asked why, the man said they were going to shell the station in 10 minutes and told the witness to take shelter. Sometime later the witness saw smoke coming from not far away. People were stampeding in a panic and dragging wounded people away. The witness heard three or four shells: one landed close by the radio station. After the shelling the witness received a phone call from a man who said: "*Balija*, you haven't been hit yet. We are going to shell you again".[1340]

672. Two Danish members of the ECMM, Major Baggesen and Mr. Laustsen, were in Zenica at the time of the shelling. They visited the scene shortly after the shelling and took photographs.[1341] These photographs show scenes of devastation in the market area, bodies lying on the ground, destroyed cars, a demolished bus shelter and damaged buildings. One witness identified 13 corpses

[1337] Col. Watters, T. 5714-17; Ex. Z738.
[1338] Witness TW19, *Bla{ki}* T. 5291.
[1339] Witness TW28, *Bla{ki}* T. 5946.
[1340] Salih Hamzi}, T. 13200-07.
[1341] Ex. Z2277.1-4, Ex. Z2281, Z2282.1-3: video recording, Ex. Z2258.

B. Counts 3 – 44: Unlawful Attacks, Wilful Killing, Inhuman Treatment, Detention and Destruction

832. The prosecution case on these counts is that Kordi} was responsible for planning and ordering the crimes which were committed by HVO units implementing his commands and instructions. The coordinated fashion and number of crimes is an indication of the existence of an organised scheme. Kordi} had the necessary *mens rea* since he intended the crimes or accepted the risk that they would be committed.[1771] On the other hand the Kordi} Final Brief begins by asserting that the case deals with crimes committed by soldiers whereas Dario Kordi} was a local political leader who helped his community organise itself for defence: the core issue is the "lack of linkage" of any credible evidence that the accused had any criminal responsibility for crimes by soldiers.[1772]

833. The prosecution case against ^erkez is that he planned and ordered these crimes, intending that they should be committed or instigated them by failing to prevent or punish them; alternatively, he was an aider and abetter.[1773] The defence case is that there is no evidence implicating the accused in any of these offences.[1774]

834. The Trial Chamber finds that in those cases where Kordi} participated in the HVO attacks he intended to commit the crimes associated with them and did so. His role was as political leader and his responsibility under Article 7(1) was to plan, instigate and order the crimes. In making this finding the Trial Chamber relies on the evidence already referred to in relation to persecution. As a result the Trial Chamber finds the accused Dario Kordi} liable under Article 7(1) on the following counts:

(a) Count 3 (unlawful attacks on civilians) and Count 4 (unlawful attacks on civilian objects), Count 7 (murder) and Count 8 (wilful killing), Count 10 (inhumane acts) and Count 12 (inhuman treatment) in relation to the following locations and dates as set out in the Indictment: Busova~a (January 1993); Vitez, Stari Vitez, Ve~eriska-Donja Ve~eriska, Ahmi}i, Nadioci, Piri}i, [anti}i, and Rotilj (April 1993); Tulica[1775] and Han Plo~a-Grahovci (June 1993).[1776]

(b) On Count 21 (imprisonment) and Count 22 (unlawful confinement of civilians) in the following locations: Kaonik Prison, Vitez Cinema Complex, Veterinary Station, SDK

[1771] Prosecution Final Brief, para. 444.
[1772] Kordi} Final Brief, pp. 1-3.
[1773] Prosecution Final Brief, paras. 454-57.
[1774] ^erkez Final Brief, p. 49.
[1775] Counts 7, 8, 10, 12 (only).
[1776] Counts 7, 8, 10, 12 (only).

offices, Chess Club, Dubravica Elementary School, Kiseljak municipal buildings and barracks and Rotilj village.

(c) On Count 38 (wanton destruction not justified by military necessity) and Count 39 (plunder of public or private property) in relation to the following locations: Novi Travnik (October 1992); Busova~a (January 1993); Kiseljak, Svinjarevo, Gomionica, Polje Vi{njica, Rotilj (April 1993); Tulica, Han Plo~a-Grahovci (June 1993); and Vitez, Stari Vitez, Ahmi}i and Ve~eriska-Donja Ve~eriska (April 1993). And on Count 38, alone, in the following locations: Merdani (January 1993); and O~ehni}i, Vi{nijca, Behri}i, Gromiljak, Nadioci, Piri}i, [anti}i and Ga}ice (April 1993). And on Count 39, alone, in Lon~ari (April 1993).

(d) On Count 43 (destruction or wilful damage to institutions dedicated to religion or education) in the following locations: Ahmi}i and Stari Vitez (April 1993) and Han Plo~a (June 1993).

835. In relation to the remaining locations in which offences are alleged to have been committed in the above Counts and on Counts 9, 11, 13, 23, 24, 25, 26, 27, 28 and 37, the Trial Chamber finds Dario Kordi} not liable under Article 7(1).

836. The Trial Chamber finds that in those cases where ^erkez participated in attacks as Commander of the Vite{ka Brigade, he committed the crimes associated with them, intending to commit the crimes. His responsibility as Commander of the Brigade was as a co-perpetrator in crimes which he committed. As a result the Trial Chamber finds the accused, Mario ^erkez, liable under Article 7(1) on the following counts:

(a) Count 5 (unlawful attacks on civilians) and Count 6 (unlawful attacks on civilian objects), Count 14 (murder), and Count 15 (wilful killing), Count 17 (inhumane acts), Count 19 (inhuman treatment) in relation to the following locations Vitez, Stari Vitez, Stari Vitez and Ve~eriska-Donja Ve~eriska; and Count 41 (wanton destruction not justified by military necessity) and Count 42 (plunder of public or private property) in relation to the following locations: Vitez, Stari Vitez and Donja Ve~eriska;

(b) on Count 29 (imprisonment), Count 30 (unlawful confinement of civilians), Count 31 (inhuman treatment), Count 33 (taking civilians as hostages) and Count 35 (inhuman treatment) in relation to the following locations: Vitez Cinema Complex, Veterinary Station, SDK offices and Chess Club);

III. FINDINGS AS TO RESPONSIBILITY UNDER ARTICLE 7(3) OF THE STATUTE

A. Dario Kordi}

838. Dario Kordi} was a civilian and a politician with tremendous influence and power in Central Bosnia. He occupied an important position in the leadership of the HZ H-B, but was not in the top echelon, being answerable to Mate Boban.

839. While he played an important role in military matters, even at times issuing orders, and exercising authority over HVO forces, he was, and remained throughout the Indictment period, a civilian, who was not part of the formal command structure of the HVO.

840. Although liability under Article 7(3) may attach to civilians as well as military personnel, once it is established that the requisite power to prevent or punish exists, the Chamber holds that great care must be taken in assessing the evidence to determine command responsibility in respect of civilians, lest an injustice is done. In the first place, it is established that substantial influence (such as Kordi} had), by itself, is not indicative of a sufficient degree of control for liability under Article 7(3).[1777] Secondly, while liability under Article 7(3) may attach not only to persons in formal positions of command, but also to those who are effectively in command of more informal structures,[1778] the Chamber finds that Kordi} lacked effective control, which the Appeals Chamber in the *Celebi}i* case defined as "a material ability to prevent or punish criminal conduct, however that control is exercised".[1779]

841. In sum, the Chamber finds that Kordi} was neither a commander nor a superior in respect of the HVO, since he possessed neither the authority to prevent the crimes that were committed, nor to punish the perpetrators of those crimes,[1780] and as such, he is not liable under Article 7(3) of the Statute.

[1777] *See* previous discussion in this Judgement of the *Celebi}i* Appeals Chamber's endorsement of this finding by the *Celebi}i* Trial Chamber.
[1778] *Celebi}i* Appeal Judgement, para. 198.
[1779] *Celebi}i* Appeal Judgement, para. 256.
[1780] *See* previous discussion of the definition of a commander or superior at paragraph 192 of the *Celebi}i* Appeal Judgement.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-00-39-A
		Date:	17 March 2009
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Acting Registrar: **Mr. John Hocking**

Judgement of: **17 March 2009**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter M. Kremer QC
Ms. Shelagh McCall
Ms. Barbara Goy
Ms. Katharina Margetts
Mr. Steffen Wirth
Ms. Anna Kotzeva
Mr. Matteo Costi
Ms. Julia Thibord

Momčilo Krajišnik *pro se*

Counsel for Momčilo Krajišnik on JCE:
Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz

Amicus Curiae:
Mr. Colin Nicholls QC

impossible that the three Judges of the Trial Chamber were able to deliberate carefully on the voluminous evidence and produce such a comprehensive Trial Judgement in less than a month.[343]

131. The Prosecution responds that there is no objective evidence to establish bias or error in the Trial Chamber's fact finding based solely on the number of days of deliberation. The Prosecution submits that *Amicus Curiae* does not demonstrate how preparatory work has overreached into the area of deliberation, he simply asserts that the period of time was "self-evidently insufficient".[344] However, general comments on the length of deliberation do not support a valid ground of appeal; instead, "the alleging party must show some manifest error on the face of the findings demonstrating where the chamber has erred, or giving rise to a reasonable inference that the deliberative process was compromised as alleged".[345] The Prosecution concludes:

> *Amicus curiae* does not show any failure to take relevant materials into account, or where account has been taken of irrelevant material. He does not show objective bias by pointing to manifestly unreasonable findings of fact or law which show a concluded view was reached prior to the close of the case.[346]

132. *Amicus Curiae* replies that "[t]he permissible period of non-delegable deliberation here is so short that the reasonable observer might well apprehend that significant conclusions on the evidence had either been reached prior to the close of the parties' cases or were made by people other than the Trial Judges."[347]

(b) Analysis

133. The Appeals Chamber recalls that before taking up duties, every Judge of the Tribunal solemnly declares that he will perform his or her duties and exercise his or her powers honourably, faithfully, impartially and conscientiously.[348] There is a strong presumption that the Judges act in accordance with this oath.[349] A party must adduce sufficient evidence to rebut this presumption.[350] The Appeals Chamber is not convinced that *Amicus Curiae* has done so here.

> assessments and conclusions in respect of earlier evidence would already have been reached. Not only does this give an appearance of bias, it might also result in actual bias.

[343] *Amicus Curiae*'s Appeal Brief, paras 123-124.
[344] Prosecution's Response to *Amicus Curiae*, paras 48-49.
[345] Prosecution's Response to *Amicus Curiae*, para. 49. *See* also *ibid.*, para. 50, quoting para. 19 of *SZHNE v. Minister of Immigration and Multicultural & Indigenous Affairs*, [2006] FCA 597, 22 May 2006 (Australia):

> The fact that a judgement is delivered *ex tempore* is not itself an appealable error. The proper question is whether the evidence and submissions of a party were properly considered and not how long the evidence and submissions were under consideration.

[346] Prosecution's Response to *Amicus Curiae*, para. 51.
[347] *Amicus Curiae*'s Reply, para. 33.
[348] Rule 14 of the Rules.
[349] *Furundžija* Appeal Judgement, para. 197.
[350] *Ibid.*

134. Just as general observations on the length of the Trial Judgement, or of particular parts of the Trial Judgement, usually do not suffice to show an error of law because of a lack of reasoned opinion,[351] general comments on the length of the deliberations are insufficient to show improprieties in the deliberative process. Here, *Amicus Curiae* claims that it was impossible to deliberate properly on such a complex case in only 18 working days, but he brings no evidence to substantiate this claim. In particular, he fails to show that conclusions were reached by other persons than the Judges or that preparatory work overreached into the area of deliberation. In this connection, the Appeals Chamber considers that in cases of the size and complexity of the case at stake, given that as a matter of fairness judgements must be issued in a reasonable time, preparatory work can and should be done as the case goes. This is not to suggest that decisions should be taken by others than the Judges or that any improper decisions should be taken by the Judges in advance of hearing all the evidence. However, there are numerous steps than can and should be taken which will place the Bench in the best situation possible following closing arguments to prepare a reasoned, clear and concise judgement within a reasonable time frame. Against this background, the Appeals Chamber cannot infer that the deliberation process was corrupted. This sub-ground is dismissed.

8. Concluding remark

135. The Appeals Chamber has dismissed *Amicus Curiae*'s assertion that Krajišnik's trial was unfair. That said, the Appeals Chamber notes that certain aspects of the conduct of the trial were not free from defects and may have created an appearance of unfairness. However, based on a holistic assessment of the trial record and the additional evidence on appeal, the Appeals Chamber is not satisfied that *Amicus Curiae* has shown that these defects amount to a miscarriage of justice which would undermine the fairness of the trial received by Krajišnik. This ground of appeal is therefore dismissed in its entirety.

B. Alleged failure to provide a reasoned opinion (Ground 2)

1. Submissions

136. *Amicus Curiae* submits that the Trial Chamber erred in law by failing to provide a sufficiently reasoned judgement,[352] opting for an "illustrative approach" instead of giving reasons as to why certain witnesses or exhibits were found credible and others not.[353] He argues in particular

[351] *Kvočka et al.* Appeal Judgement, para. 25.
[352] *Amicus Curiae*'s Notice of Appeal, paras 25-28; *Amicus Curiae*'s Appeal Brief, paras 125-138.
[353] *Amicus Curiae*'s Appeal Brief, paras 129-132. In this connection, *Amicus Curiae* refers specifically to paragraphs 292 and 889 of the Trial Judgement.

175. In light of these scarce – or entirely absent – findings, the Appeals Chamber is not able to conclude with the necessary preciseness how and at which point in time the common objective of the JCE expanded to include other crimes that originally were not included in it, and, consequently, on what basis the Trial Chamber imputed those expanded crimes to Krajišnik.

176. Neither the Appeals Chamber nor the Parties can be required to engage in speculation on the meaning of the Trial Chamber's findings – or lack thereof – in relation to such a central element of Krajišnik's individual criminal responsibility as the scope of the common objective of the JCE. Aside from merely stating that the common objective was "fluid",[440] the Trial Chamber was required to precisely find how and when the scope of the common objective broadened in order to impute individual criminal responsibility to Krajišnik for those crimes that were not included in the original plan, *i.e* the expanded crimes.

177. In conclusion, the Appeals Chamber finds that the Trial Chamber committed a legal error[441] in failing to make the findings necessary for Krajišnik's conviction in relation to the following expanded crimes, which were not included in the original common objective of the JCE:

- persecution (count 3) with the underlying acts of the imposition and maintenance of restrictive and discriminatory measures; killings during and after attacks; cruel or inhumane treatment during and after attacks; unlawful detention; killings related to detention facilities; cruel or inhumane treatment in detention facilities; inhumane living conditions in detention facilities; forced labour at front lines; use of human shields; appropriation or plunder of property; and destruction of private property, cultural monuments, and sacred sites;
- extermination (count 4); and
- murder (count 5).[442]

178. Consequently, the Appeals Chamber grants sub-ground 3(B) submitted by *Amicus Curiae* to the extent that Krajišnik cannot be held liable for the above-mentioned expanded crimes that fell outside the original common objective of the JCE, which only encompassed the crimes of deportation and forcible transfer under Counts 7 and 8 of the Indictment as well as their incorporation as underlying acts of persecution under Count 3 of the Indictment. Thus, Krajišnik's

[440] Trial Judgement, para. 1098.
[441] As to the effect of this legal error, *see infra* III.C.11.
[442] Trial Judgement, paras 1095-1119. The "original" crimes of the JCE are: persecution (Count 3) with the underlying acts of deportation or forced transfer; deportation (Count 7); and inhumane acts (forced transfer, Count 8) (*ibid.*, para. 1097).

convictions for expanded crimes under Counts 3, 4 and 5 are quashed. The remainder of this part of sub-ground 3 (B) is dismissed.

3. Conclusion of the JCE (further sub-ground 3(B))

(a) Submissions

179. *Amicus Curiae* argues that the Trial Chamber erred in law "by failing to specify when the final crimes occurred which were committed pursuant to the JCE".[443] The Prosecution responds that the Trial Chamber did not have to make an explicit finding as to when the JCE ended because

> [w]hether members of the JCE (or others on their behalf) continued to act after the expiry of the indictment period is irrelevant. What matters is that the Chamber found that a JCE existed when the crimes were committed and that all of the crimes for which Krajišnik was convicted were committed pursuant to the common criminal objective.[444]

(b) Analysis

180. It is not entirely clear what *Amicus Curiae* seeks to argue here. To the extent that he asserts that the Trial Chamber had to specify when the JCE ended, this contention must be rejected. Indeed, all that the Trial Chamber had to find is that the crimes for which Krajišnik was convicted were committed pursuant to the JCE; this it did.[445] To the extent that *Amicus Curiae* avers that the Trial Judgement does not clearly state the crimes for which Krajišnik is being held liable because it does not explicitly identify the final crimes for which Krajišnik is being held responsible, this contention must also be rejected. Indeed, the Trial Chamber specified that Krajišnik was being held liable for the "crimes mentioned in part 5" of the Trial Judgement.[446] The Appeals Chamber notes that this part of the Trial Judgement details a number of crimes which occurred between April 1992 and 30 December 1992.[447] Therefore, the Appeals Chamber is satisfied that the Trial Chamber sufficiently specified the crimes for which Krajišnik was being held liable. Therefore, this part of sub-ground 3(B) is dismissed.

4. Type of JCE (sub-ground 3(C))

181. In sub-ground 3(C), *Amicus Curiae* contends that the Trial Chamber erred in law in convicting Krajišnik for the crimes referred to in Counts 3 (persecution as a crime against

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[443] *Amicus Curiae*'s Appeal Brief, para. 143.
[444] Prosecution's Response to *Amicus Curiae*, para. 71.
[445] *See* Trial Judgement, paras 1078 and following.
[446] Trial Judgement, para. 1078.
[447] This is in keeping with the Indictment, which charged crimes occurring between 1 July 1991 and 30 December 1992: Indictment, paras 15, 18, 24, 27, as well as the schedules.

the bases for its inference as to the intent of Krajišnik and other JCE members with respect to the expanded crimes. This does not constitute an error of law.

201. *Amicus Curiae* also submits that the Trial Chamber erred in law and fact by basing its conclusion on Krajišnik's *mens rea* directly on findings of knowledge and substantial assistance, and in concluding that Krajišnik possessed the requisite *mens rea* to commit the JCE crimes – both the *original* crimes and the *expanded* crimes.[502]

202. The Appeals Chamber notes that the Trial Chamber was cautious in drawing inferences on Krajišnik's intent. The Trial Chamber was plainly aware that, before entering a factual finding on the basis of circumstantial evidence, it had to determine whether other reasonable inferences were possible.[503] It stressed that "knowledge combined with continuing participation *can* be conclusive as to a person's intent" and stated that therefore the "information the Accused received during this period is an *important element* for the determination of his responsibility".[504]

203. As set out above,[505] the Trial Chamber did not make the necessary findings with respect to the JCE members' *mens rea* in relation to the *expanded* crimes. The Trial Chamber found that these crimes became encompassed by the common objective when leading members of the JCE were informed about them, took no effective measures to prevent their recurrence, and persisted in the implementation of the common objective of the JCE.[506] The Trial Chamber did not find, however, at *which point in time* the leading members of the JCE became aware of each of the various expanded crimes. Similarly, there are no findings as to when the members of the local component became aware of the expanded crimes. In the absence of such findings, the Appeals Chamber has found that the Trial Chamber committed a legal error by convicting Krajišnik for the expanded crimes.[507]

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[502] *Amicus Curiae*'s Appeal Brief, paras 162 (citing footnote 39 of the Separate Opinion of Judge David Hunt in *Ojdanić* Decision on Joint Criminal Enterprise), 163, 212-215. *Amicus Curiae*'s Reply, para. 53. With respect to *Amicus Curiae*'s submission that the Trial Chamber failed to make the necessary findings with respect to Krajišnik's intent for the first commissions of the expanded crimes *see supra* III.C.2.

[503] Trial Judgement, para. 1196:

> In making its findings, the Trial Chamber relied to some extent on inferences from circumstantial evidence. A finding must be more than reasonable inference from the circumstances. It must be the *only* reasonable inference. (Emphasis in original, references omitted).

See also Trial Judgement, para. 1201 ("An accused must be acquitted if there is any reasonable explanation of the evidence accepted by the Chamber other than the guilt of the accused").

[504] Trial Judgement, para. 890 (emphasis added). *See* also *ibid.*, paras 892-893.

[505] *See supra* III.C.2.

[506] Trial Judgement, para. 1098.

[507] *See supra* III.C.2.

elsewhere.[1748] In remaining parts, insofar as it is developed, this argument appears to be simply another attempt by JCE counsel to distance Krajišnik from the crimes and thereby show the inappropriateness of qualifying his liability as "commission". For reasons stated above, that argument fails. This sub-ground is dismissed.

(d) JCE and the *nullum crimen sine lege* principle (sub-ground 1(D))

(i) Submissions

667. Given the "flaws" of JCE described in his previous sub-grounds, JCE counsel submit that Krajišnik lacked proper notice that he faced JCE liability.[1749] They argue that the acts or omissions underlying his conviction took place in 1992, while the concept of JCE liability did not arise until the *Tadić* Appeal Judgement in 1999,[1750] and that the concept has expanded beyond the low-level mob violence in *Tadić*, to include high-level officials with only tenuous connections to the crimes.[1751] Therefore, JCE counsel argue, the imposition of JCE liability conflicts with the *nullum crimen sine lege* principle and is vulnerable to political influence.[1752]

668. The Prosecution responds that the egregious nature of Krajišnik's crimes, Article 26 of the Criminal Code of the Federal Republic of Yugoslavia, the extensive state practice noted in *Tadić* and the many domestic jurisdictions providing for such a form of liability under various names running parallel to custom, provided Krajišnik with notice that he would have incurred JCE liability.[1753]

(ii) Analysis

669. As a preliminary matter, the Appeals Chamber notes that Krajišnik did not challenge but, in fact, expressly recognised at trial that the fact that *Tadić* was rendered after his alleged acts took place does not lead to a conflict between JCE and the *nullum crimen sine lege* principle.[1754] Therefore, as far as JCE counsel now argue that the *Tadić* Appeal Judgement violated that principle, Krajišnik may be deemed to have waived his right to bring this challenge on appeal.[1755] In any

[1748] *See supra* III.C.2.
[1749] Dershowitz Brief, para. 28; AT. 205.
[1750] Dershowitz Brief, paras 28, 30.
[1751] Dershowitz Brief, para. 28; AT. 194-195.
[1752] Dershowitz Brief, paras 29-30, citing Secretary-General's Report, para. 34; AT. 234-235.
[1753] Prosecution's Response to Dershowitz, para. 10, referencing *Ojdanić* Decision on Joint Criminal Enterprise, para. 43.
[1754] Defence Final Trial Brief, para. 134, referencing *Ojdanić* Decision on Joint Criminal Enterprise, para. 8.
[1755] *See Blaškić* Appeal Judgement, para. 222; *Niyitegeka* Appeal Judgement, para. 200; *Akayesu* Appeal Judgement, para. 361; *Furundžija* Appeal Judgement, para. 174.

event, JCE counsel fail to address the jurisprudence holding that the notion of JCE as established in *Tadić* does not violate the *nullum crimen sine lege* principle.[1756]

670. Regarding JCE counsel's challenge that the alleged "expansion" of JCE after *Tadić* violates the principle, which challenge Krajišnik did raise at trial,[1757] the Appeals Chamber first recalls that when it interprets the JCE doctrine, it does not create new law. Instead, similarly to other provisions under the Statute, it merely identifies what the proper interpretation of that doctrine has always been, even though not previously expressed that way.[1758] This does not contravene the *nullum crimen sine lege* principle, which

> "does not prevent a court from interpreting and clarifying the elements of a particular crime." Nor does it preclude the progressive development of the law by the court. But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification.[1759]

671. Turning to the present case, the Appeals Chamber notes that, although *Tadić* concerned a relatively low-level accused, the legal elements of JCE set out in that case remain the same in a case where JCE is applied to a high-level accused. Therefore, JCE counsel are wrong to speak about an "expansion" of JCE to cases such as the one of Krajišnik. Moreover, the Appeals Chamber considers that, while pronounced in relation to acts allegedly committed in 1999, its holding in the *Ojdanić* Decision on Joint Criminal Enterprise applies also to Krajišnik in this case:

> Article 26 of the Criminal Law of the Federal Republic of Yugoslavia, coupled with the extensive state practice noted in *Tadić*, the many domestic jurisdictions which provide for such a form of liability under various names and which forms of liability run parallel to custom, and the egregious nature of the crimes charged would have provided notice to anyone that the acts committed by the accused [...] would have engaged criminal responsibility on the basis of participation in a joint criminal enterprise.[1760]

672. JCE counsel's additional argument that the imposition of JCE liability is vulnerable to political influence is unsupported and dismissed. This sub-ground is dismissed.

[1756] *Stakić* Appeal Judgement, para. 101; *Ojdanić* Decision on Joint Criminal Enterprise, para. 41.
[1757] Defence Final Trial Brief, para. 134(b).
[1758] *See Kordić and Čerkez* Appeal Judgement, para. 310; *Aleksovski* Appeal Judgement, para. 135.
[1759] *Ojdanić* Decision on Joint Criminal Enterprise, para. 38 (footnotes omitted).
[1760] *Ojdanić* Decision on Joint Criminal Enterprise, para. 43 (footnote omitted).

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case: IT-00-39-T

Date: 27 September 2006

Original: English

TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Joaquín Martín Canivell
Judge Claude Hanoteau

Registrar: Mr Hans Holthuis

Judgement of: 27 September 2006

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

JUDGEMENT

Office of the Prosecutor

Mr Mark Harmon
Mr Alan Tieger
Mr Stephen Margetts
Mr Fergal Gaynor
Ms Carolyn Edgerton
Ms Katrina Gustafson

Defence Counsel

Mr Nicholas Stewart, QC
Mr David Josse

1190. *Hearsay*. Evidence of events occurring outside the testifying witness's own direct experience constitutes hearsay. The jurisprudence of the Tribunal is that hearsay evidence is not inadmissible per se. A variety of documents – for example, witness statements admitted pursuant to Rule 92 bis – have been admitted on the footing that their content is generally accurate. The Chamber has carefully examined whether the proffered hearsay evidence is relevant, reliable, and has probative value.[2293] For example, in those cases where a witness did not specify the source of the hearsay, the Chamber has generally not relied on the hearsay.

1191. *Corroboration*. The testimony of a single witness on a material fact does not, as a matter of law, require corroboration.[2294] Sometimes, however, the lack of corroboration allows the Chamber not to consider the evidence.

1192. *Inconsistencies/discrepancies*. The time elapsed between the events of 1991/92 and the dates on which witnesses in this case gave statements or testimony naturally has led to an erosion of memory, which in turn is the cause of occasional discrepancies between viva voce testimonies and prior written statements.[2295] The Chamber is aware that other causes might also explain such discrepancies. Where discrepancies were minor, the Chamber generally did not treat them as diminishing a witness's credibility or reliability.[2296] The Chamber took into account the effects of the passage of time also when faced with minor imprecisions in the testimony of witnesses. In the course of questioning, a witness would sometimes recall details previously forgotten, or provide reasonable explanations of what had appeared to be a discrepancy or inconsistency in his or her evidence.[2297] But some discrepancies were serious enough to necessitate caution, or to discredit a witness's testimony, at least in part.

1193. *Expert versus fact witnesses*. Expert witnesses are distinguished from witnesses of fact. The testimony of a witness of fact is generally limited to matters about which the witness had personal knowledge, although this does not always exclude certain opinions and conclusions, especially if they could be developed on the basis of experience. An expert is a person who, by virtue of specialized knowledge or skill, can assist the Chamber to understand or determine an issue in dispute.[2298] Expert witnesses are afforded leeway to give opinions and draw conclusions within their field of expertise. According to the Chamber's practice, the central item of evidence, is the expert's report. On 17 May 2005, the Chamber instructed the party calling an expert witness to limit its examination to matters of central importance to the case which are likely to be controversial and which require further explanation, clarification, or illustration in terms of how the opinion was arrived at by the expert.[2299] Documentation utilized in this process may be admitted into evidence, but not all documentation underlying the expert report will be admitted into

[2293] *Prosecutor v. Duško Tadić*, Decision on Defence Motion on Hearsay, 5 August 1996, paras 15-19; *Brđanin* Trial Judgement, para. 28.
[2294] *Aleksovski* Appeal Judgement, para. 62; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 132.
[2295] *Kunarac et al.* Trial Judgement, para. 564; *Krnojelac* Trial Judgement, para. 69; *Naletilić and Martinović* Trial Judgement, para. 10; *Simić et al.* Trial Judgement, paras 22, 24.
[2296] *Čelebići* Appeal Judgement, paras 496-8; *Furundžija* Trial Judgement, para. 113; *Kunarac et al.* Trial Judgement, para. 564; *Kupreškić et al.* Appeal Judgement, para. 31; *Simić et al.* Trial Judgement, para. 24.
[2297] *Furundžija* Appeal Judgement, paras 105-8; *Brđanin* Trial Judgement para. 22.
[2298] *Prosecutor v. Stanislav Galić*, Decision Concerning the Expert Witness Ewa Tabeau and Richard Philipps, 3 July 2002, p. 2; *Prosecutor v. Blagojević et al.*, Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003, para. 19.
[2299] Guidance on exhibits for expert witnesses, T. 13085-6.

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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-00-39-PT
Date: 28th February 2003
Original: English

IN TRIAL CHAMBER I

Before: **Judge Liu Daqun, Presiding**
Judge El Mahdi
Judge Alphons Orie

Registrar: **Mr. Hans Holthuis**

Decision of: **28th February 2003**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

DECISION ON PROSECUTION MOTIONS FOR JUDICIAL NOTICE OF ADJUDICATED FACTS AND FOR ADMISSION OF WRITTEN STATEMENTS OF WITNESSES PURSUANT TO RULE 92*bis*

Office of the Prosecutor
Mr. Mark B. Harmon
Mr. Alan Tieger

Counsel for the Accused
Mr. Deyan R. Brashich
Mr. Goran Nešković

(i) it is *distinct, concrete and identifiable*;

(ii) it is restricted to *factual* findings and does not include *legal* characterizations;

(iii) it was *contested* at trial and forms part of a judgement which has either *not been appealed* or has been *finally settled* on appeal; or

(iv) it was *contested* at trial and now forms part of a judgement which is under appeal, but falls within issues which are *not in dispute* during the appeal;

(v) it does *not attest to criminal responsibility* of the Accused;

(vi) it is *not the subject of (reasonable) dispute* between the Parties in the present case;

(vii) it is *not based on plea agreements* in previous cases; and

(viii) it does not impact on the *right of the Accused to a fair trial.*

16. Turning then to the second question of the *legal consequences* of taking judicial notice of certain facts, the Chamber notes that Rule 94 does not itself establish the procedural legal implications of judicial notice of such facts. Judicial notice of "*facts of common knowledge*" under Rule 94(A) normally implies that such facts *cannot* be challenged during trial. Rule 94(B), however, allows for judicial notice of information based on sources which are substantially different in character from the facts contemplated in Rule 94(A). By taking judicial notice of an *adjudicated fact*, thus, the Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial – *unless* the other party brings out new evidence and successfully challenges and disproves the fact at trial.[13] In other words, the procedural legal impact of taking judicial notice of an adjudicated fact is *not* that the fact cannot be challenged or refuted at trial, but rather that the *burden of proof to disqualify the fact is shifted* to the disputing party. The general principle of criminal law that it is always for the Prosecutor to prove the criminal responsibility of the Accused is not, to be sure, affected by this particular Rule-based exception in relation to judicial notice of adjudicated facts; these facts *have* already been subject to judicial review, and both parties are still allowed – in order to safeguard the fairness of the trial – to challenge the fact during trial by submitting evidence that calls into question the veracity of the adjudicated facts.

17. If, during trial, a Party wishes to dispute an adjudicated fact of which the Trial Chamber has taken judicial notice, accordingly, that Party must then bring out the evidence in support of its contest and request the Chamber to entertain the challenge. If the Chamber admits the challenge, the other Party will be provided with an opportunity to respond within a short time frame set out by the Chamber and the Chamber will then decide on the matter.

[13] *Prosecutor v. Pasko Ljubičić*, "Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts", IT-00-41-PT, 23rd January 2003.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-97-25-A
		Date:	17 September 2003
		Original:	English French

IN THE APPEALS CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Wolfgang Schomburg
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Carmel Agius

Registrar: **Mr. Hans Holthuis**

Judgement of: **17 September 2003**

PROSECUTOR

v.

MILORAD KRNOJELAC

JUDGEMENT

The Office of the Prosecutor:
Mr Christopher Staker
Ms Helen Brady
Mr Anthony Carmona
Ms Norul Rashid

Defence Counsel:
Mr Mihajlo Bakrač
Mr Miroslav Vasić

admitted to habitually meeting with detainees and confirmed that, during these conversations, the detainees discussed the living conditions at the KP Dom.[67] The Appeals Chamber reiterates that the Judgment contains many findings of fact detailing the living conditions imposed upon the non-Serb detainees. The Appeals Chamber also observes that the Trial Chamber expressly held that it was obvious to Krnojelac, as it would have been to anyone at the KP Dom, that the disparity between the treatment of the non-Serb and Serb detainees was deliberate and was effected by the intention of the principal offenders to discriminate against the non-Serb detainees on religious and political grounds.[68] The Appeals Chamber points out that Krnojelac does not try to show that the Trial Chamber's findings were unreasonable and therefore dismisses the arguments on this point.

3. Third sub-ground: the *mens rea* of the aider and abettor in an act of persecution

49. The Appeals Chamber will now turn to examine the third sub-ground of Krnojelac's second ground of appeal. Krnojelac alleges an error of law which raises the issue of whether, in order to establish the *mens rea* of the aider and abettor in an act of persecution, it is enough to show that the individual concerned voluntarily aided or encouraged the principal offender in the knowledge that the latter was acting with discriminatory intent or whether it must also be shown that the aider and abettor too had that intent.

50. Krnojelac argues that, for the crime of persecution, the aider and abettor must have the same guilty discriminatory intent as the principal offenders[69] and that it was not established that he had this intent.[70] The Prosecution disputes the merits of this test and argues that the test identified by the Trial Chamber should be applied, that is, that the aider and abettor must know that the principal offender has the intent to commit the crimes and, in so doing, to discriminate.[71] In the alternative, the Prosecution submits that, should the ground raised by Krnojelac be upheld, the Appeals Chamber should substitute the conviction on count 1 of the Indictment (persecution based on imprisonment) with another on count 11 (imprisonment as a crime against humanity).[72]

51. The Appeals Chamber draws attention to the distinction between the mental element required for aiding and abetting and that required for co-perpetration. In the case of aiding and abetting, the requisite mental element is knowledge that the acts committed by the aider and abettor

[67] Judgment, para. 169.
[68] Judgment, para. 490.
[69] Defence Brief, paras. 132 to 136. NB: The *Kordić* Judgement shares this view, although this is not always so in the case-law.
[70] *Ibid.*, paras. 137 to 147 and 150.
[71] Prosecution Response, paras. 3.24 to 3.25 and 3.27 to 3.43.
[72] *Ibid.*, paras. 3.44 to 3.48.

further the perpetration of a specific crime by the principal offender. In the case of co-perpetration, the intent to perpetrate the crime or to pursue the joint criminal purpose must be shown.[73] The Appeals Chamber also recalls that in the *Aleksovski* Appeals Judgement it followed the *Furundžija* Judgement and held that "it is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that [...] the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal."[74] The Appeals Chamber also stated that "the aider and abettor [must be aware] of the essential elements of the crime committed by the principal (including his relevant *mens rea*)." The Appeals Chamber notes that no cogent reason was given which would justify this case-law being amended.[75]

52. The Appeals Chamber considers that the aider and abettor in persecution, an offence with a specific intent, must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration. The Appeals Chamber points out that this is the very criterion applied by the Trial Chamber in this case in paragraphs 489 and 490 of the Judgment. The Appeals Chamber states that the third sub-ground of Krnojelac's second ground of appeal is also therefore ill-founded.

53. Accordingly, the Appeals Chamber dismisses the second ground of appeal.

B. Krnojelac's fifth ground of appeal: superior responsibility for the beatings inflicted on detainees

54. Krnojelac submits that the Trial Chamber erred in finding him guilty of inhumane acts and cruel treatment based on beatings as a superior within the meaning of Article 7(3) of the Statute.[76] He asks the Appeals Chamber to overturn the convictions on counts 5 and 7 of the Indictment.[77]

55. Generally, Krnojelac argues that the Trial Chamber erred in concluding that he knew that beatings were being inflicted on the detainees. He challenges the three main parts of the evidence discussed below on which the Trial Chamber relied in determining whether he had the requisite

[73] See *Tadić* Appeals Judgement, para. 229.
[74] *Aleksovski* Appeals Judgement, para. 162.
[75] *Ibid.*, para. 107. See also para. 109: "It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts."
[76] Defence Brief, para. 188.
[77] *Ibid.*, para. 207.

torture and murders might be committed (as knowledge of the beatings constitutes sufficient information to alert him to the risk of acts of torture and murders being committed) and that, since he did not open any investigation in order to ascertain whether such crimes had been or were about to be committed, Krnojelac had the requisite *mens rea* to incur liability pursuant to Article 7(3) of the Statute for torture and murders.[183] On this point, the Appeals Chamber considers it appropriate to provide the following clarification.

154. The *Čelebići* Appeals Judgement defines the "had reason to know" standard by setting out that "[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know' [...] This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."[184]

155. The Appeals Chamber finds that this case-law shows only that, with regard to a specific offence (torture for example), the information available to the superior need not contain specific details on the unlawful acts which have been or are about to be committed. It may not be inferred from this case-law that, where one offence (the "first offence") has a material element in common with another (the "second offence") but the second offence contains an additional element not present in the first, it suffices that the superior has alarming information regarding the first offence in order to be held responsible for the second on the basis of Article 7(3) of the Statute (such as for example, in the case of offences of cruel treatment and torture where torture subsumes the lesser offence of cruel treatment).[185] Such an inference is not admissible with regard to the principles

[183] Without it being very explicit, the Prosecution sometimes seems to support this argument. As for the alleged error regarding torture, the Prosecution made the following submissions at the appeal hearing: "Our proposition is a very simple one. Applying *Čelebići* to the facts of this case can lead to only one reasonable conclusion, and that is that by actually knowing of the beatings going on within KP Dom, he was on notice of the risk that at least some of them may have resulted in torture. His knowledge of the beatings in this KP Dom environment was enough to alert him to the need for additional information or to conduct an investigation *to ascertain whether torture by beatings was being committed by his subordinates*." (T(A), 14 May 2003, p. 72). Regarding the murders, the Prosecution stated at the appeal hearing: "when one looks at the peculiarities of these beatings, the peculiarities of the harsh treatment meted out against these individuals, the only difference between the beatings as found and the murders has to do in terms of what was the inevitable effect. In one case it was a case of beatings that resulted in incapacitation. In another, it was a case of certain beatings that resulted in death. In other words, a level of behaviour, a level of deportment, if I may so describe it, that is of the same genus and of the same type. And significantly, one would consider that when one looks at what in fact is the definition of murder, isn't murder dealing with in fact acts with intent to cause grievous bodily harm? Isn't that what murder is? So does it mean that because, for example, that final step is not reached, that you are not put on inquiry [...]" (T(A), 14 May 2003, pp. 116 and 117).
[184] *Čelebići* Appeals Judgement, para. 238.
[185] Judgment, para. 314.

governing individual criminal responsibility. In other words, and again using the above example of the crime of torture, in order to determine whether an accused "had reason to know" that his subordinates had committed or were about to commit acts of torture, the court must ascertain whether he had sufficiently alarming information (bearing in mind that, as set out above, such information need not be specific) to alert him to the risk of acts of torture being committed, that is of beatings being inflicted not arbitrarily but for one of the prohibited purposes of torture. Thus, it is not enough that an accused has sufficient information about beatings inflicted by his subordinates; he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture.

156. The Appeals Chamber reiterates that an assessment of the mental element required by Article 7(3) of the Statute should, in any event, be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.[186]

157. Having provided this clarification, the Appeals Chamber will now analyse the Prosecution's submissions in support of each ground of appeal.

1. Third ground of appeal: error in the Trial Chamber's findings of fact regarding the acts of torture committed at the KP Dom

158. Apart from the finding that Krnojelac held a position of superior authority in the KP Dom,[187] the Prosecution restates some of the Trial Chamber's other findings of fact in support of this ground of appeal,[188] in particular:

- that Krnojelac's subordinates tortured some of the detainees;[189]
- that Krnojelac knew or had reason to know that Muslim detainees were being beaten or otherwise generally mistreated;[190]
- that Krnojelac knew that a detainee by the name of Ekrem Zeković had been tortured.[191]

159. In essence, the Prosecution challenges the Trial Chamber's findings in paragraph 313 of the Judgment which reads as follows:

[186] *Čelebići* Appeals Judgement, para. 239.
[187] As stated previously, the Prosecution refers to paragraphs 107 and 318 of the Judgment.
[188] Prosecution's Notice of Appeal, p. 3.
[189] The Prosecution refers to paragraphs 226 to 236, 239 to 242, 249 to 253, 254 to 255, 256 to 258, 262, 268, 277, 282, 300 and 305 of the Judgment. See Prosecution Brief, para. 4.2.
[190] The Prosecution refers to paragraphs 308 to 312 of the Judgment. See Prosecution Brief, para. 4.3.
[191] The Prosecution refers to paragraph 312 of the Judgment. See Prosecution Brief, para. 4.7.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

Case No: IT-98-33-A

Date: 19 April 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement: **19 April 2004**

PROSECUTOR

v.

RADISLAV KRSTIĆ

JUDGEMENT

Counsel for the Prosecution:

Mr. Norman Farrell
Mr. Mathias Marcussen
Ms. Magda Karagiannakis
Mr. Xavier Tracol
Mr. Dan Moylan

Counsel for the Defendant:

Mr. Nenad Petrušić
Mr. Norman Sepenuk

(f) The Appeals Chamber's preliminary conclusion regarding the Trial Chamber's finding of Radislav Krstić's genocidal intent

134. As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator.

E. The Criminal Responsibility of Radislav Krstić: Aiding and Abetting Genocide

135. The issue that arises now is the level of Radislav Krstić's criminal responsibility in the circumstances as properly established. All of the crimes that followed the fall of Srebrenica occurred in the Drina Corps zone of responsibility. There was no evidence that the Drina Corps devised or instigated any of the atrocities, and the evidence strongly suggested that the criminal activity was being directed by some members of the VRS Main Staff under the direction of General Mladić.[221] At the time the executions commenced Krstić was engaged in preparing for combat activities at Žepa and, from 14 July 1995 onwards, directing the attack itself.[222]

136. At trial the Defence had argued that, given the involvement of General Mladić, Radislav Krstić could do nothing to prevail upon General Mladić and stop the executions.[223] The Trial Chamber however found evidence of General Mladić's orders being challenged by the Drina Corps Command, and in particular, evidence of Krstić countering an order issued by the Main Staff.[224] The Trial Chamber also found evidence of Radislav Krstić's continued loyalty to General Mladić despite his knowledge of General Mladić's role in the genocide at Srebrenica.[225]

137. As has been found above, it was reasonable for the Trial Chamber to conclude that, at least from 15 July 1995, Radislav Krstić had knowledge of the genocidal intent of some of the Members of the VRS Main Staff. Radislav Krstić was aware that the Main Staff had insufficient resources of its own to carry out the executions and that, without the use of Drina Corps resources, the Main

[221] *Ibid.*, para. 290.
[222] *Ibid.*, para. 378.
[223] *Ibid.*, para. 416.
[224] *Ibid.*, para. 416, 417.
[225] *Ibid.*, para. 417.

Staff would not have been able to implement its genocidal plan. Krstić knew that by allowing Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstić was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources. The criminal liability of Krstić is therefore more properly expressed as that of an aider and abettor to genocide, and not as that of a perpetrator.[226] This charge is fairly encompassed by the indictment, which alleged that Radislav Krstić aided and abetted in the planning, preparation or execution of genocide against the Bosnian Muslims in Srebrenica.[227]

138. Krstić's responsibility is accurately characterized as aiding and abetting genocide under Article 7(1) of the Statute, not as complicity in genocide under Article 4(3)(e). The charge of complicity was also alleged in the indictment, as Count 2.[228] The Trial Chamber did not enter a conviction on this count, concluding that Radislav Krstić's responsibility was that of a principal perpetrator.[229] As the Trial Chamber observed, there is an overlap between Article 4(3) as the general provision enumerating punishable forms of participation in genocide and Article 7(1) as the general provision for criminal liability which applies to all the offences punishable under the Statute, including the offence of genocide.[230] There is support for a position that Article 4(3) may be the more specific provision (*lex specialis*) in relation to Article 7(1).[231] There is, however, also authority indicating that modes of participation enumerated in Article 7(1) should be read, as the Tribunal's Statute directs, into Article 4(3), and so the proper characterization of such individual's criminal liability would be that of aiding and abetting genocide.[232]

139. The Appeals Chamber concludes that the latter approach is the correct one in this case. Article 7(1) of the Statute, which allows liability to attach to an aider and abettor, expressly applies that mode of liability to any "crime referred to in articles 2 to 5 of the present Statute," including the offence of genocide prohibited by Article 4. Because the Statute must be interpreted with the utmost respect to the language used by the legislator, the Appeals Chamber may not conclude that the consequent overlap between Article 7(1) and Article 4(3)(e) is a result of an inadvertence on the part of the legislator where another explanation, consonant with the language used by the Statute, is

[226] *See Krnojelac* Appeal Judgement, para. 52; *Vasiljević* Appeal Judgement, para. 102.
[227] Indictment, paras. 18, 23.
[228] Indictment, paras. 21 - 26. The Appeals Chamber notes that there was ample discussion on the issue of aiding and abetting versus complicity to genocide during the Appeals hearing, in response to questions posed by the bench. T 431-437.
[229] Trial Judgement, paras. 642 – 644.
[230] *See ibid.*, para. 640; *see also Semanza* Trial Judgement, paras. 394 - 395 & n. 655.
[231] *See Stakić* Trial Judgement, para. 531; *Stakić* Decision on Rule 98 *Bis* Motion for Judgement of Acquittal, para. 47; *Semanza* Trial Judgement, paras. 394 – 395.
[232] *See Stakić* Trial Judgement, para. 531; *Stakić* Decision on Rule 98 *Bis* Motion for Judgement of Acquittal, para. 47.

possible. In this case, the two provisions can be reconciled, because the terms "complicity" and "accomplice" may encompass conduct broader than that of aiding and abetting.[233] Given the Statute's express statement in Article 7(1) that liability for genocide under Article 4 may attach through the mode of aiding and abetting, Radislav Krstić's responsibility is properly characterized as that of aiding and abetting genocide.[234]

140. This, however, raises the question of whether, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal perpetrator's specific genocidal intent, or whether he must share that intent. The Appeals Chamber has previously explained, on several occasions, that an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime.[235] This principle applies to the Statute's prohibition of genocide, which is also an offence requiring a showing of specific intent. The conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal.

141. Many domestic jurisdictions, both common and civil law, take the same approach with respect to the *mens rea* for aiding and abetting, and often expressly apply it to the prohibition of genocide. Under French law, for example, an aider and abettor need only be aware that he is aiding the principal perpetrator by his contribution,[236] and this general requirement is applied to the specific prohibition of the crime of genocide.[237] German law similarly requires that, in offences mandating a showing of a specific intent (*dolus specialis*), an aider and abettor need not possess the same degree of *mens rea* as the principal perpetrator, but only to be aware of the perpetrator's intent.[238] This general principle is applied to the prohibition of genocide in Section 6 of the German

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[233] *See Krnojelac* Appeal Judgement, para. 70 ("The Appeals Chamber notes first of all that, in the case-law of the Tribunal ... this term [*accomplice*] has different meanings depending on the context and may refer to a *co-perpetrator* or an *aider and abettor*.") (citing *Tadić* Appeal Judgement, paras. 220, 229).

[234] In this Appeal, the Appeals Chamber is concerned solely with the application to Article 4(3) of only one mode of liability deriving from Article 7(1), that of aiding and abetting. The Appeals Chamber expresses no opinion regarding other modes of liability listed in Article 7(1).

[235] *See Krnojelac* Appeal Judgement, para. 52 ("the aider and abettor in persecution, an offence with a specific intent, must be aware . . . of the discriminatory intent of the perpetrators of that crime," but "need not share th[at] intent"); *Vasiljević* Appeal Judgement, para. 142 ("In order to convict [the accused] for aiding and abetting the crime of persecution, the Appeals Chamber must establish that [he] had knowledge that the principal perpetrators of the joint criminal enterprise intended to commit the underlying crimes, and by their acts they intended to discriminate . . . ."); *see also Tadić* Appeal Judgement, para. 229 ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.").

[236] *Code Pénal*, Art. 121-7 ("Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation."); *see also* Cour de Cassation, Chambre criminelle, 1st October 1984, summary 96.

[237] *Code Pénal*, Art. 211-1.

[238] *See* section 27(1) of the German Penal Code (*Strafgesetzbuch*). According to section 2 of the German Code of Crimes Against International Law (CCIL), section 27(1) of the German Penal Code is applicable to crimes of genocide.

because there existed some systems where complicity required intent, and others where it did not. Several delegates [representing Luxembourg, Egypt, Soviet Union, Yugoslavia] said that this was unnecessary, because there had never been any doubt that complicity in genocide must be intentional. The United Kingdom eventually withdrew its amendment, 'since it was understood that, to be punishable, complicity in genocide must be deliberate.'"[246] The texts of the Tribunal's Statute and of the Genocide Convention, combined with the evidence in the Convention's *travaux préparatoires*, provide additional support to the conclusion that the drafters of the Statute opted for applying the notion of aiding and abetting to the prohibition of genocide under Article 4.[247]

143. The fact that the Trial Chamber did not identify individual members of the Main Staff of the VRS as the principal participants in the genocidal enterprise does not negate the finding that Radislav Krstić was aware of their genocidal intent. A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified.[248] In *Vasiljević*, the Appeals Chamber found the accused guilty as an aider and abettor to persecution without having had the alleged principal perpetrator on trial and without having identified two other alleged co-perpetrators.[249] Accordingly, the Trial Chamber's conviction of Krstić as a participant in a joint criminal enterprise to commit genocide is set aside and a conviction for aiding and abetting genocide is entered instead.[250]

144. The Appeals Chamber's examination of Radislav Krstić's participation in the crime of genocide has implications for his criminal responsibility for the murders of the Bosnian Muslim

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[246] William Schabas, *Genocide in International Law*, at 289 (2000) (quoting UN Doc. A/C.6/236 & Corr. 1; UN Doc. A/C.6/SR.87).

[247] As it is not at issue in this case, the Appeals Chamber takes no position on the *mens rea* requirement for the conviction for the offence of complicity in genocide under Article 4(3) of the Statute where this offense strikes broader than the prohibition of aiding and abetting.

[248] *See, e.g., Krnojelac* Trial Judgement, paras. 489-490 (finding a defendant liable for having aided and abetted the crime of persecution, which requires the specific intent to discriminate, where the principal perpetrators of the crime were not identified). Although the Appeals Chamber, on unrelated grounds, increased the defendant's level of responsibility to that of a co-perpetrator, it rejected the defendant's appeal against his conviction as an aider and abettor. *See Krnojelac* Appeal Judgement, paras. 35-53. *See also Stakić* Trial Judgement, para. 534 (stating that "an individual can be prosecuted for complicity even where the perpetrator has not been tried or even identified") (citing *Musema* Trial Judgement, para. 174); *Akayesu* Trial Judgement, para. 531 (same).

[249] *See Vasiljević* Trial Judgement, para. 143.

[250] In entering a conviction against General Krstić as a participant in a joint criminal enterprise to commit genocide under Article 7(1) the Trial Chamber stated that he could also bear responsibility as a Commander pursuant to Article 7(3). The Trial Chamber concluded, however, that a conviction under Article 7(1) sufficiently expressed General Krstić's criminality. Trial Judgement, para. 652. The Appeals Chamber's determination that General Krstić is responsible as an aider and abettor is also based on Article 7(1). Even if General Krstić is also found to be responsible as a Commander, the Appeals Chamber concludes, as did the Trial Chamber, that the mode of liability under Article 7(1) best encapsulates General Krstić's criminality. This is because the most he could have done as a Commander was to report the use of his personnel and assets, in facilitating the killings, to the VRS Main Staff and to his superior, General Mladić, the very people who ordered the executions and were active participants in them. Further, although General Krstić could have tried to punish his subordinates for their participation in facilitating the executions, it is unlikely that he would have had the support of his superiors in doing so. *See Krnojelac* Trial Judgement, para. 127; not disturbed on appeal, *see Krnojelac* Appeal Judgement.

civilians under Article 3, violations of the laws or customs of war, and for extermination and persecution under Article 5, all of which arise from the executions of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995. As the preceding factual examination has established, there was no evidence that Krstić ordered any of these murders, or that he directly participated in them. All the evidence can establish is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them. In these circumstances the criminal responsibility of Radislav Krstić is that of an aider and abettor to the murders, extermination and persecution, and not of a principal co-perpetrator.

F. Radislav Krstić's Criminal Responsibility for the Opportunistic Crimes Committed at Potočari

145. The Defence also contests the findings of the Trial Chamber in relation to Krstić's criminal responsibility for the crimes committed on 12 and 13 July 1995 at Potočari. The Trial Chamber found that Radislav Krstić was a participant in a joint criminal enterprise to forcibly remove the Bosnian Muslim civilians from Potočari, and so incurred criminal responsibility for the murders, beatings and abuses committed there as natural and foreseeable consequences of that joint criminal enterprise. The Defence argues that these crimes were not natural and foreseeable consequences of the ethnic cleansing campaign, and that the Trial Chamber's finding that Krstić was aware of them is contrary to the presumption of innocence.

146. According to the Defence, the evidence established that he was at Potočari on 12 July 1995 for at most two hours. There was no evidence to support the conclusion of the Trial Chamber that he had "first-hand knowledge that the refugees were being mistreated by VRS or other armed forces," or that he witnessed the inhumane conditions of the White House and the killing of civilians there. The Defence argues that, to the contrary, the evidence establishes that there were orders from the military authorities to treat the civilians humanely.[251] The Defence refers to an order of 9 July 1995 issued by Mr. Karadžić as Supreme Commander of the Serb forces, which expressly provided that the civilian population was to be treated in accordance with the Geneva Conventions,[252] the evidence of Drazen Erdemović that soldiers entering the town of Srebrenica were explicitly told not to fire at civilians,[253] the intercept of 12 July 1995 in which Radislav Krstić stated that nothing must happen to the civilians transported from

[251] Defence Appeal Brief, paras. 143 - 156.
[252] *Ibid.*, para. 154; Exh. D432.
[253] *Ibid.*, para. 154; Trial Testimony of Drazen Erdemović, T, p. 3083 (14 April 2000).

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-98-33-T
		Date:	02 August 2001
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

RADISLAV KRSTIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Peter McCloskey
Mr. Andrew Cayley
Ms. Magda Karagiannakis

Counsel for the Accused:

Mr. Nenad Petrušic
Mr. Tomislav Višnji}

H. Criminal Responsibility of General Krsti}

1. Introduction

600. The Prosecution alleges that General Krsti} is criminally responsible for his participation in the crimes charged in the indictment, pursuant to Article 7(1) of the Statute,[1339] which states that:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

601. The Trial Chambers of the ICTY and the ICTR and the Appeals Chamber of the ICTY have identified the elements of the various heads of individual criminal responsibility in Article 7(1) of the Statute.[1340] The essential findings in the jurisprudence may be briefly summarised as follows:

- "Planning" means that one or more persons design the commission of a crime at both the preparatory and execution phases;[1341]
- "Instigating" means prompting another to commit an offence;[1342]
- "Ordering" entails a person in a position of authority using that position to convince another to commit an offence;[1343]
- "Committing" covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law;[1344]
- "Aiding and abetting" means rendering a substantial contribution to the commission of a crime;[1345] and
- "Joint criminal enterprise" liability is a form of criminal responsibility which the Appeals Chamber found to be implicitly included in Article 7(1) of the Statute. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime;[1346]

[1339] Para. 18 of the Indictment. In its Final Trial Brief (para. 27), the Prosecution makes reference to each head - except "committing" - mentioned in Article 7(1) as well as the "common purpose doctrine" (discussed below) as a basis for General Krsti}'s guilt.
[1340] *Cf.* Article 6(1) of the Statute of the ICTR. In its Final Trial Brief (para. 3), the Prosecution incorporates by reference its submissions on Article 7 in its Pre-Trial Brief (paras 13-86). Likewise, the Defence's submissions on Article 7 in its Pre-Trial Brief (paras 13-29) are incorporated in its Final Trial Brief (para. 2).
[1341] *Akayesu* Judgement, para. 480; *Blaškic* Judgement, para. 279; *Kordic and Cerkez* Judgement, para. 386.
[1342] *Akayesu* Judgement, para. 482; *Blaškic* Judgement, para. 280; *Kordic and Cerkez* Judgement, para. 387.
[1343] *Akayesu* Judgement, para. 483; *Blaškic* Judgement, para. 281; *Kordic and Cerkez* Judgement, para. 388.
[1344] *Tadic* Appeal Judgement, para. 188; *Kunarac* et al. Judgement, para. 390.
[1345] *Aleksovski* Appeal Judgement, paras. 162-164.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-16-A

Date: 23 October 2001

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Patricia Wald, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Fausto Pocar
Judge Liu Daqun

Registrar: **Mr. Hans Holthuis**

Judgement of: **23 October 2001**

PROSECUTOR

v

ZORAN KUPRE[KI]
MIRJAN KUPRE[KI]
VLATKO KUPRE[KI]
DRAGO JOSIPOVI]
VLADIMIR ŠANTIC

APPEAL JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. Anthony Carmona
Mr. Fabricio Guariglia
Ms. Sonja Boelaert-Suominen
Ms. Norul Rashid

Counsel for the Defendants:

Mr. Ranko Radovi}, Mr. Tomislav Pasari} for Zoran Kupre{ki}
Ms. Jadranka Slokovi}-Glumac, Ms. Desanka Vranjican for Mirjan Kupre{ki}
Mr. Anthony Abell, Mr. John Livingston for Vlatko Kupre{ki}
Mr. William Clegg Q.C., Ms. Valerie Charbit for Drago Josipovi}
Mr. Petar Pavkovi} for Vladimir [anti}

19. Accepting the testimony of Witness EE, the Trial Chamber concluded that [anti}, on 16 April 1993, participated in the attack on and the burning of Musafer Pu{}ul's house, which resulted, *inter alia*, in the murder of Musafer Pu{}ul.[26] The Trial Chamber held that [anti} "played an active role in the killing of Bosnian Muslim civilians in Ahmi}i, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmi}i-[anti}i region."[27]

20. The Trial Chamber found [anti} guilty of persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1); murder as a crime against humanity pursuant to Article 5(a) of the Statute (count 16); and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (count 18). [anti} was sentenced to 25 years of imprisonment on count 1, 15 years of imprisonment on count 16, and 10 years of imprisonment on count 18, to be served concurrently.

III. GENERAL ISSUES

A. Appropriate grounds of appeal

21. In view of the nature of the arguments advanced by some of the parties to this appeal, the Appeals Chamber considers it appropriate to discuss initially the issue of the grounds of appeal that an appellant can legitimately raise. Such a discussion begins with Article 25 of the Statute, which provides the authority for the Appeals Chamber's function to hear appeals. This provision states:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following two grounds:
>
> (a) an error on a question of law invalidating the decision; or
>
> (b) an error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

22. As has been held by the Appeals Chamber on numerous occasions, an appeal is not an opportunity for the parties to reargue their cases. It does not involve a trial *de novo*.[28] On appeal, parties must limit their arguments to matters that fall within the scope of Article 25 of the Statute. The general rule is that the Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the judgement, or factual errors occasioning a miscarriage of justice, apart from the exceptional situation where a party has raised a legal issue that is of general significance to the

[26] Trial Judgement, paras 503 and 862.
[27] Trial Judgement, para. 862.
[28] *Tadi}* Rule 115 Decision, para. 41 (referring to *Prosecutor* v *Erdemovi}*, Case No.: IT-96-22-A, Judgement, 7 October 1997, para. 15); *Furund`ija* Appeal Judgement, para. 40; *Tadi}* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 29.

Tribunal's jurisprudence.[29] Only in such a rare case may the Appeals Chamber consider it appropriate to make an exception to the general rule.

23. Some of the parties in the instant case have advanced arguments that do not fall within the scope of Article 25 of the Statute and to which the exception to the general rule does not apply. For example, Zoran Kupre{ki} appears to take issue with certain general allegations set out in paragraph 9 of the Amended Indictment, such as the accusations that he helped prepare the April attack on Ahmi}i- [anti}i by participating in military training; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village; and concealing from the other residents that the attack was imminent.[30] A review of the factual and legal findings pertaining to Zoran Kupre{ki} demonstrate that these allegations did not play a part in his conviction on count 1 (persecution). In such a situation, the argument does not have the potential to affect the outcome of this appeal and, therefore, does not constitute an appropriate ground of appeal. Zoran Kupre{ki} further complains that the Trial Chamber failed to establish whether he was a perpetrator or a co-perpetrator of the crime for which he was convicted.[31] The Appeals Chamber considers this argument to be misconceived. The Trial Chamber found in paragraph 782 of the Trial Judgement that he, in the commission of persecution, "acted as a co-perpetrator...within the meaning of Article 7(1) of the Statute".

24. The Appeals Chamber finds that these arguments made by Zoran Kupre{ki} illustrate grounds of appeal that cannot appropriately be argued on appeal since they fail to raise errors of law or fact that invalidate the judgement or that have occasioned a miscarriage of justice. Accordingly, they are dismissed.

25. In a similar vein, the Appeals Chamber dismisses Zoran and Mirjan Kupre{ki}'s common argument that the Trial Chamber incorrectly attributed the defence of reciprocity (*tu quoque*) to them. The Trial Chamber rejected this as a legitimate defence. The Trial Judgement stated that "[d]efence counsel have indirectly or implicitly relied upon the *tu quoque* principle".[32] Zoran and Mirjan Kupre{ki} have both emphatically denied that they raised such a defence before the Trial Chamber. It may well have been that neither Zoran nor Mirjan Kupre{ki} intended to raise this particular defence, but that the Trial Chamber interpreted their arguments to fall under the *tu*

[29] *Tadi}* Appeal Judgement, para. 247.
[30] Zoran Kupre{ki} Appeal Brief, para. 10. Zoran Kupre{ki} also takes issue with the allegation that he helped prepare the onslaught on Ahmi}i by preparing his home and the homes of his relatives as staging areas and firing locations for the attack. Due to the fact that this allegation did play a part in his conviction it is dealt with in substance *infra* paras. 233-241.
[31] Zoran Kupre{ki} Appeal Brief, para. 143. *See also* para. 146 (restating the argument that the Trial Chamber failed to establish whether he was considered to be a perpetrator or a co-perpetrator).
[32] Trial Judgement, para. 515.

B. Reconsideration of factual findings made by the Trial Chamber

1. General principles

28. Under this heading, the Appeals Chamber will discuss the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber. The vast majority of the grounds of appeal raised by the Defendants in this case concerns alleged errors of fact. Several of the parties to the present appeal have also raised questions of a more general nature relating to the Appeals Chamber's review of errors of fact under Article 25(1)(b) of the Statute.[36] In light thereof, the Appeals Chamber considers it appropriate to elaborate upon this matter.

29. In order for the Appeals Chamber to overturn a factual finding by the Trial Chamber, an appellant must demonstrate that the Trial Chamber committed a factual error and the error resulted in a miscarriage of justice.[37] The appellant must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[38] Consequently, it is not each and every error of fact that will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but only one that has occasioned a miscarriage of justice.[39]

30. Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[40]

31. As stated above, it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to "admit any relevant evidence which it

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[36] *See, e.g.*, Josipovi} Appeal Brief, 8 and 20; Zoran Kupre{ki} Appeal Brief, para. 42 (questioning the probative value of a single identification witness); Zoran Kupre{ki} Appeal Brief, para. 83 (questioning acceptability of evidence in light of factors such as the passage of time between the events and the testimony, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place); Zoran Kupre{ki} Appeal Brief, para. 12 (arguing that the Trial Chamber is obliged to refer to all pieces of evidence relied upon or to refer to all pieces of possibly contradictory evidence); Zoran Kupre{ki} Appeal Brief, paras 23 and 50 (questioning reasoning as to why the evidence of one witness is preferred but not the evidence of another).
[37] *Furundžija* Appeal Judgement, para. 37 (citing *Serushago* Sentencing Appeal Judgement, para. 22).
[38] *Furund`ija* Appeal Judgement, para. 37 (quoting Black's Law Dictionary (7th ed., 1999)).
[39] *Furund`ija* Appeal Judgement, para. 37.
[40] *Tadi}* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63; *^elebi}i* Appeal Judgement, paras 434 and 491; *Tadi}* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 30.

to find that Vlatko Kupreškic's employment with the police continued until the time of the Ahmici attack in April 1993. Therefore, in the light of the additional evidence, the Appeals Chamber finds that no reasonable tribunal of fact could conclude that Vlatko Kupreškic was an active operations officer at the time of the attack. That finding therefore cannot be sustained.

2. Unloading weapons from a car in front of his house in October 1992

275. At trial, Witness T testified that in October 1992, just before dusk, she saw Vlatko Kupreškic, his wife and a man unload weapons from a Yugo car and take them into Vlatko Kupreškic's house.[442]

276. Vlatko Kupre{ki} alleges that the Trial Chamber erred in accepting, beyond reasonable doubt, the correctness of Witness T's allegation that weapons were being taken into the house. There was, he argues, no evidence as to what type of weapons the witness saw, the sighting was made at dusk and, furthermore, the distance between Witness T and Vlatko Kupreškic was some 50 metres. In combination, maintains Vlatko Kupre{ki}, these factors raise a significant risk that the observation was inaccurate. Moreover, during cross-examination of Witness T at trial, defence counsel failed to challenge her purported observation of Vlatko Kupreškic.[443] However, the Defendant does rely upon Witness T's acceptance, under cross-examination, that in October 1992 there was tension in the Vitez area of Bosnia-Herzegovina between Croats and Serbs, rather than Croats and Muslims.[444] Consequently, according to Vlatko Kupre{ki}, Witness T's testimony cannot be used to support a finding that he was involved in the Muslim attack in April 1993.[445] The Prosecution counters that Witness T's evidence is "cogent and compelling".[446] No new evidence was admitted on appeal in relation to this issue. Rather, Vlatko Kupre{ki} asks the Appeals Chamber to find that the Trial Chamber erred in reaching this conclusion on the basis of the original trial record.

277. As to the complaint that the witness was not cross-examined on her observation, responsibility for the failure to challenge Witness T's purported observation must rest with defence counsel. However, so far as the witness' vague reference to "weapons" is concerned, responsibility must rest with the Prosecution, which failed to elicit, from its own witness, any clarification of what the term "weapons" meant. The Appeals Chamber finds that the probative value of this vague

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[441] Rule 115 Decision of 11 April 2001, para. 30.
[442] Trial Transcript, 2946.
[443] Vlatko Kupreškic Appeal Brief, para. 22 (a)-(f); Appeal Transcript, 629.
[444] Trial Transcript, 2978.
[445] Vlatko Kupreškic Appeal Brief, para. 23; Appeal Transcript, 630.
[446] Prosecution Response, para. 28.3.

testimony as evidence of an act specifically directed to assist, encourage or lend moral support to the perpetration of persecutory acts is very low indeed. This is particularly so considering that an act of aiding and abetting must have had a substantial effect on the commission of persecutory acts. There was no evidence that the "weapons", whatever they were, were ever used during the Ahmici attack. Also, the length of time between Witness T's observations and the attack on Ahmici the following April (some six months), diminishes the likelihood that the weapons were intended to be used for attacking the local Muslim population. In sum, the Appeals Chamber finds that the Trial Chamber erred in using the evidence of Witness T that she saw Vlatko Kupreškic unloading weapons from his car in October 1992 in order to support an inference that he thereby assisted with the April 1993 attack on Ahmici.

3. Vlatko Kupreškic was in front of the Hotel Vitez on 15 April 1993

278. Evidence as to Vlatko Kupreškic's presence in front of the Hotel Vitez on 15 April 1993 came from a single witness: Witness B.[447] He testified that he saw Vlatko Kupreškic at the Hotel Vitez three to five times between October 1992 and April 1993. Further, on 15 April, while travelling past the hotel in a car at around 2 or 3 p.m., he saw Vlatko Kupreškic standing in civilian clothes with two or three men in uniform. He specified that Vlatko Kupreškic was not more than 30 metres away from the front door of the entrance to the hotel.

(a) The additional evidence

279. The evidence of Witness AT casts additional light on the events at the Hotel Vitez on 15 April 1993. According to Witness AT, General Blaškic held two meetings at the Hotel Vitez during which the plan to attack Ahmici on 16 April was announced. One meeting involved the civilian leaders of the HVO and at the other, the military leaders were in attendance. Witness AT notes that Mirko Samija, Chief of Police of Vitez Police Station, was present at both meetings.

(b) Discussion

280. Vlatko Kupre{ki} argues that Witness B's observations were made in difficult circumstances. He was in a moving car and the distance between his vehicle and the person observed was some 30 metres. In such circumstance, the Defendant suggests, there was "an even chance of mistaken identification".[448] Further, the sighting could only have been fleeting, and the image obscured.[449]

[447] Trial Transcript, 728-927.
[448] Appeal Transcript, 628; Vlatko Kupreškic Appeal Brief, para. 41 (k).
[449] Vlatko Kupreškic Appeal Brief, para. 41 (l).

evidence of Witness H, Josipovic has not demonstrated any such omission on the Trial Chamber's part relevant to the testimony of Witness EE. Rather, it is obvious from the paragraph just cited that the Trial Chamber was fully aware that Witness EE was mistaken in her identification of two of the six attackers and, indeed, made a specific finding to that effect. The Trial Chamber, nonetheless, accepted that Witness EE was accurate in her identification of two of the other attackers: Josipovic and [antic. Thus, in essence, Josipovic simply asks the Appeals Chamber to re-examine the same issue addressed by the Trial Chamber and reach a different conclusion, namely, that Witness EE was mistaken in her identification of him because she was mistaken in her identification of two other men.

332. It is of course open to a Trial Chamber, and indeed any tribunal of fact, to reject part of a witness' testimony and accept the rest. It is clearly possible for a witness to be correct in her assessment of certain facts and incorrect about others. In the present case, the Trial Chamber heard evidence from Witness EE as to who had attacked her home and killed her husband on 16 April 1993. It found her a "trustworthy and careful witness who identified the two accused in a statement made within three weeks of these offences and has not, in any way, retracted it."[511] The Trial Chamber did not accept Witness EE's evidence as to the presence of Alilovi} and Katava in Ahmici that morning. This does not, however, preclude the Trial Chamber from relying on the evidence of Witness EE to find that Josipovi} and [antic did attack her house on 16 April 1993. Indeed, the Trial Chamber's finding that [antic was present during the attack, despite his assertion of alibi at trial, has subsequently been borne out by Witness AT's testimony.

333. The jurisprudence of this Tribunal confirms that it is not unreasonable for a tribunal of fact to accept some, but reject other, parts of a witness' testimony.[512] The situation before the Appeals Chamber in the present case is akin to those cases within the jury system where a jury returns different verdicts on different counts even though the evidence for all counts comes from one witness. In the instant case, had Alilovi} and Katava been on trial with Josipovi} they would, based on the alibi evidence, have most certainly been acquitted.

334. During its analysis of the complaints raised by Zoran and Mirjan Kupreškic about the Trial Chamber's assessment of Witness H's evidence, the Appeals Chamber emphasised the importance of assessing the credibility of a witness in light of the trial record as a whole. The Appeals

[511] Trial Judgement, para. 503.

[512] *Prosecutor* v *Tadi}*, Case No.: IT-94-1-T, Opinion and Judgement, 7 May 1997, paras 296-302. The same applies in domestic courts. For example, in England and Wales, in cases where different counts depend on the uncorroborated evidence of the same witness and the credibility of the witness is put in issue, different verdicts on the different counts would not render the convictions unsafe. *See* Archbold: Criminal Pleadings, Evidence and Practice 2000, § 7-70 (P.J. Richardson *et al.* ed., 2000) (citing to *R.* v *Bell* [1997] 6 *Archbold News* 2 CA, *R.* v *Van der Molen* [1997] Crim.L.R. 604, and *R.* v *Clarke and Fletcher* [1997] 9 *Archbold News* 2, CA); *see also R.* v *Markuleski* [2001] NSWCCA 290.

sentences of imprisonment received were less than his.[703] He argues similarly, with regard to certain cases before the ICTY.[704]

441. The Prosecution responds that the Trial Chamber's discussion of Šantic's sentence clearly illustrates that it followed its standard sentencing policy and that the principles enunciated by it, have been repeatedly confirmed by the Appeals Chamber.[705] It submits that Šantic "does not even offer the minimum elements that would justify a comparison" between his case and those cited.[706] It maintains that, as for comparison with cases before the Tribunal, there is no identifiable penal regime in the Tribunal and, as long as they stay within boundaries established by the Statute and the Rules, "Trial Chambers have unfettered discretion to apply the sentence they deem most appropriate for the case before them."[707]

442. The Appeals Chamber notes Šantic's submission that "the gravity of the offence is the decisive factor in imposing the sentence...The gravity of the crime includes the discussion of the consequences of the crime when imposing the sentence."[708] The Appeals Chamber concurs. In sentencing, a Trial Chamber must start from the position that "the gravity of the offence is the primary consideration in imposing sentence."[709] In this case, the Trial Chamber acted no differently. Indeed, the following principle in the Trial Judgement has now been endorsed in several decisions by the Appeals Chamber:

> The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[710]

443. In considering the inherent gravity of a crime, a Trial Chamber is under no obligation to expressly compare the case of one accused to that of another. Counsel on behalf of all the Defendants submitted that "[i]t must be fundamentally fair for people who have committed like crimes in like circumstances to receive like sentences."[711] The Appeals Chamber again does not dispute this assertion. However, although it has expressly found in a previous case that it "does not

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[703] Šantic Appeal Brief, para. 3.6.
[704] Šantic Appeal Brief, para. 3.7.
[705] Prosecution Response, paras 35.4-35.7.
[706] Prosecution Response, para. 39.10. The Prosecution submits that he fails to cite minimum elements "that would justify a comparison...such as demonstration of close similarity of criminal culpability, gravity of the crime, or degree of participation."
[707] Prosecution Response, para. 39.11.
[708] Šantic Appeal Brief, para. 3.6
[709] *Celebici* Appeal Judgement, para. 731.
[710] Trial Judgement, para. 852. This principle has since been endorsed in the *Celebici* Appeal Judgement, para. 731 and the *Aleksovski* Appeal Judgement, para. 182. Although this paragraph is contained within the section devoted to Zoran and Mirjan Kupreškic, the Appeals Chamber considers that it is a principle that must have been applied by the Trial Chamber in its consideration of the sentences of the Defendants collectively, being general in nature.
[711] Appeal Transcript, 576.

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-16-T
Date: 14 January 2000
Original: English

IN THE TRIAL CHAMBER

Before: **Judge Antonio Cassese, Presiding**
Judge Richard May
Judge Florence Ndepele Mwachande Mumba

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **14 January 2000**

PROSECUTOR

v.

Zoran KUPRE[KI],
Mirjan KUPRE[KI],
Vlatko KUPRE[KI],
Drago JOSIPOVI],
Dragan PAPI],
Vladimir [ANTI], also known as "VLADO"

JUDGEMENT

The Office of the Prosecutor:

Mr. Franck Terrier
Mr. Michael Blaxill

Counsel for the Accused:

Mr. Ranko Radovi}, Mr. Tomislav Pasari}, for Zoran Kupre{ki}
Ms. Jadranka Slokovi}-Gluma}, Ms. Desanka Vranjican, for Mirjan Kupre{ki}
Mr. Borislav Krajina, Mr. Želimar Par, for Vlatko Kupre{ki}
Mr. Luko [u{ak, Ms. Goranka Herljevic, for Drago Josipovi}
Mr. Petar Puli{eli}, Ms. Nika Pinter, for Dragan Papi}
Mr. Petar Pavkovi}, Mr. Mirko Vrdoljak, for Vladimir Šanti}

the company of a group of soldiers, in front of his shop with soldiers, or on the balcony of his house.[391]

3. Findings of the Trial Chamber

333. The Trial Chamber considers that the Prosecution has adduced convincing evidence to show that the attack on Ahmici on 16 April 1993 was planned by HVO forces and the special unit of the Croatian Military Police called the Jokers. The Croatian inhabitants of Ahmici, or at least those of them who belonged to the HVO or were in contact with Croatian armed forces, knew that in the early morning of the 16 April 1993, Croatian forces would initiate a massive military attack. It is plausible to maintain that they acquired the conviction that an attack would be carried out at least on the occasion of the meeting that was held around 2.30 a.m., on 16 April, in Jozo Livancic's house. The Trial Chamber regards as credible the evidence led by the Prosecution to the effect that by 15 April many signs already indicated that a military operation was in the offing, and that many Croats were aware of this.

334. The Trial Chamber finds that the attack was carried out by military units of the HVO and members of the Jokers. The able-bodied Croatian inhabitants of Ahmici provided assistance and support in various forms. Some of them took part in the military operations against the Muslims. It is also true, however, that a few Croatian inhabitants of Ahmici endeavoured to save Muslim friends or neighbours by prompting them to escape and helping them in such attempts, or at any rate by providing them with suggestions as to how to avoid being killed.

335. The attackers targeted Muslim civilians and their houses. The Trial Chamber considers it to have been proved that there were no Muslim military forces in Ahmici nor any military establishment belonging to the BiH army. In addition to the men not of military age, the elderly, women and children, there were also able-bodied Muslims who were members on leave from the BiH army, or reservists who participated in the village guards. When the Croatian forces initiated the attack, not more than 10-15 Muslims in

[391] T. 11802 and T. 11817.

in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust in and respect for the developing system of international criminal justice.

849. The Trial Chamber also supports the purpose of rehabilitation for persons convicted in the hope that in future, if faced with similar circumstances, they will uphold the rule of law.

3. Factors Relevant to Sentencing in Respect of Each Accused

850. The Trial Chamber will next consider the various factors which influence the determination of appropriate sentences for each accused convicted, in accordance with the provisions of Article 24 of the Statute and Rule 101 of the Rules of Procedure and Evidence.

(a) Zoran Kupre{ki} and Mirjan Kupre{ki}

851. Zoran Kupre{ki} and Mirjan Kupre{ki} have been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute).

852. The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime. Zoran and Mirjan Kupre{ki} have been found guilty of persecution in the form of the expulsion of Muslim civilians, including women and children from Ahmi}i-[anti}i and its environs, the destruction of Bosnian Muslim homes and property and their active presence in the area whilst armed. In particular, they entered the house and expelled the family of Suhret Ahmi}. This is in spite of the fact that even as late as March 1993 both attended Muslim holiday celebrations. Of the two accused, Zoran Kupre{ki} played a more leading role as the local commander.

853. The fact that Zoran Kupre{ki} and Mirjan Kupre{ki} voluntarily surrendered to the International Tribunal on 6 October 1997 is a factor in mitigation of their sentence.

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UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-98-30/1-A
		Date:	28 February 2005
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

MIROSLAV KVOČKA
MLAĐO RADIĆ
ZORAN ŽIGIĆ
DRAGOLJUB PRCAĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Anthony Carmona
Ms. Helen Brady
Ms. Norul Rashid
Mr. David Re
Ms. Kelly Howick

Counsel for the Accused:

Mr. Krstan Simić for Miroslav Kvočka
Mr. Toma Fila for Mlado Radić
Mr. Slobodan Stojanović for Zoran Žigić
Mr. Goran Rodić for Dragoljub Prcać

opinion will not be defective as a result of a failure to refer to a witness, even one whose evidence contradicts the findings of the Trial Chamber.[72] In the Prosecution's view, the Trial Chamber is only required to make findings of those facts which are essential to a determination of guilt on a particular point, and is not required to make findings in relation to other facts which are not essential, even if they were expressly alleged in the indictment.[73]

23. The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98*ter*(C) of the Rules.[74] However, this requirement relates to the Trial Chamber's Judgement; the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial. The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record.[75] It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective. Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.[76] If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings. It is therefore not possible to draw any inferences about the quality of a judgement from the length of particular parts of a judgement in relation to other judgements or parts of the same judgement.

24. The Appeals Chamber notes that, in certain cases, the requirements to be met by the Trial Chamber are higher. As an example of a complex issue, the Appeals Chamber considered the appraisal of witness testimony with regard to the identity of the accused:

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[71] *Ibid.*, para. 2.17.
[72] *Ibid.*, para. 2.18.
[73] *Ibid.*, para. 2.19.
[74] *Furundžija* Appeal Judgement, para. 69; *Kunarac et al.* Appeal Judgement, para. 41.
[75] *Čelebići* Appeal Judgement, para. 498; *Kupreškić et al.* Appeal Judgement, para. 39; *Kordić and Čerkez* Appeal Judgement, para. 382. *See* also above, para. 23.
[76] *Čelebići* Appeal Judgement, paras 481, 498; *Kupreškić et al.* Appeal Judgement, para. 32.

the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.

91. The Appeals Chamber emphasizes that joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself.[203] Therefore, it would be inaccurate to refer to aiding and abetting a joint criminal enterprise. The aider and abettor assists the principal perpetrator or perpetrators in committing the crime.

92. The Appeals Chamber notes that the distinction between these two forms of participation is important, both to accurately describe the crime and to fix an appropriate sentence. Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise.[204]

3. What level of contribution is required to show participation in a joint criminal enterprise?

93. Each of the Appellants raises questions concerning the level of contribution required to be a participant in a joint criminal enterprise.[205]

94. The Prosecution responds that the determination of what types of conduct amount to a significant contribution is, as stated in the Trial Judgement, to be based on the facts.[206] It further states that "any participation which enables the system to run more smoothly or without disruption would constitute a case of significant contribution".[207]

95. The Trial Chamber held that:

> [P]ersons who work in a job or participate in a system in which crimes are committed on such a large scale and systematic basis incur individual criminal responsibility if they knowingly participate in the criminal endeavor, and their acts or omissions significantly assist or facilitate the commission of crimes.[208]

It stressed that not everyone working in a detention camp where conditions are abusive automatically becomes liable as a participant in a joint criminal enterprise:

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[203] *Prosecutor v. Milutinović et al.*, Case No.: IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, 21 May 2003, para. 20.
[204] *Vasiljević* Appeal Judgement, para. 102; *Krnojelac* Appeal Judgement, para. 75 ("[T]he acts of a participant in a joint criminal enterprise are more serious than those of an aider and abettor since a participant in a joint criminal enterprise shares the intent of the principal offender whereas an aider and abettor need only be aware of that intent.")
[205] *See e.g.* Radić Appeal Brief, para. 62; Radić Reply Brief, paras 32-37; Prcać Appeal Brief, paras 147-149, 348; Kvočka Appeal Brief, paras 163-164, Žigić Appeal Brief, paras 406-408.
[206] Prosecution Respondent's Brief, para. 3.24.
[207] *Ibid.*, para. 3.9.
[208] Trial Judgement, para. 308.

respect, like a superior. She saw Kvočka going round the camp, positioning the guards. She had never heard anyone refuse to act upon Kvočka's word. Kvočka shared an office with Željko Meakić, and when Željko Meakić was off duty, Kvočka would take his place.[337]

153. The Appeals Chamber finds that Kvočka did not advance relevant objections to Witness J's testimony. She admitted freely that she was not certain about the exact dates of her observations,[338] but such uncertainty is understandable when a witness gives evidence about events after several years. The alleged personal motive for a false accusation remains vague and is not supported by any evidence. Even if such a motive existed, the mere existence of a personal conflict between a witness and an accused does not render the witness' evidence *per se* unreliable. The fact that the witness, after testifying before the Trial Chamber, chose to appear in public, does not have an impact on the reliability of her testimony; Kvočka does not claim that she applied for protective measures under false pretences. The Appeals Chamber, therefore, finds that Kvočka's arguments with regard to Witness J are without merit.

(b) Witness Azedin Oklopčić

154. Kvočka submits that the testimony of Azedin Oklopčić, that Kvočka and Meakić had a particular status because they took 24-hour shifts, whereas other guards and shift leaders took 12-hour shifts, should not have been accepted. He argues that this statement was not confirmed by any other witness.[339] The Prosecution replies that although the witness was incorrect on this detail of Kvočka's and Meakić's shifts, the Trial Chamber relied on other sufficiently compelling evidence to find that Kvočka occupied a position of influence and authority.[340]

155. The Appeals Chamber acknowledges that Azedin Oklopčić stated that Željko Meakić and Kvočka took turns every 24 hours, as opposed to the shift leaders and the guards.[341] However, even if this statement is incorrect, this would not raise any doubts as to the reliability of Azedin Oklopčić's evidence. Kvočka had stated that he had no fixed schedule, and that his working times in the camp were irregular.[342] It was, therefore, easy for an observer to be mistaken about Kvočka's working schedule. Moreover, Azedin Oklopčić did not rely on this particular observation for his conclusion that Kvočka was the deputy commander of the camp. He stated that he believed that Kvočka was the deputy commander because the guards and shift leaders treated him respectfully.

[336] *Ibid.*, T. 4742.
[337] *Ibid.*
[338] *Ibid.*, T. 4743.
[339] Kvočka Appeal Brief, para. 49(e).
[340] Prosecution Respondent's Brief, para. 5.37.
[341] Azedin Oklopčić, T. 1757.
[342] Miroslav Kvočka, T. 8154.

He observed that the guard leaders would go to see him and Željko Meakić for consultations, and that he distributed food and cigarettes among the guards. Finally, Azedin Oklopčić remarked that the shift changeover would always take place in the presence of the commander or the deputy commander, and that he had seen Kvočka on several of these occasions.[343] The reasoning that Kvočka distributed food and cigarettes among the guards may not be conclusive, if assessed on its own. However, viewed in their entirety, Azedin Oklopčić's reasons for his assumption that Kvočka held the position of deputy commander are not unreasonable. The Appeals Chamber finds that the Trial Chamber could reasonably rely on the evidence given by Azedin Oklopčić to support its findings.

(c) Witness AJ

156. Kvočka argues that the Trial Chamber erred in accepting the testimony of Witness AJ that Kvočka was a deputy commander of the camp, because he approved the change of the witness's location. He submits that this conclusion is erroneous, because any guard had the authority to assign a detainee to a specific location, as shown by the testimony of Witness AN and Nusret Sivac.[344] The Prosecution responds that Witness AJ testified that he was informed by a guard that Kvočka was in a position to decide if he could be detained in another location, which was not inconsistent with Witness AN's evidence that guards could send detainees to various places of detention after interrogation.[345]

157. The relevant part of Witness AJ's testimony reads as follows:

> I got this from Miroslav Kvocka, because he [an unknown guard] said, "Interrogation and then to the pista." And I said, "Well, I'd like to go where I was before." And he said, "You have to ask Kvocka about that." Then it happened by chance that Kvocka happened to be there, and I asked him, and he gave me a piece of paper. He wrote -- what he wrote on it, I don't remember. But I gave this piece of paper to the man over there on guard. Who it was, I can't really remember now, but I gave him the piece of paper, and then I went to Mujo's rooms.[346]

From this statement it becomes clear that the guard, who had been asked by Witness AJ first, did not have the competence to allow Witness AJ to change his place, whereas Kvočka did. The witness called Kvočka explicitly a commander, even if he was unsure about the exact command structure in the camp.[347] The Appeals Chamber finds that a reasonable Trial Chamber could infer from this testimony that Kvočka had more authority than a simple guard.

[343] Azedin Oklopčić, T. 1756-1757.
[344] Kvočka Appeal Brief, para. 49(c).
[345] Prosecution Respondent's Brief, para. 5.35.
[346] Witness AJ, T. 1610-1611.
[347] *Ibid.*, T. 1596.

perpetrator in a joint criminal enterprise had been satisfied. He requests the Appeals Chamber to set aside the Trial Chamber's finding on this point.

179. The Appeals Chamber finds that Kvočka's arguments in support of this ground need to be somewhat restructured in order to be more clearly assessed. To this end, the Appeals Chamber decided not to follow the order in which Kvočka presented his arguments in his Appeal Brief but rather favoured a methodical approach, first, to the issues relating to the *actus reus*, and then to those relating to the *mens rea*.

180. The Appeals Chamber proposes to rule at the outset on one of the arguments put forward by Kvočka in this ground of appeal. In his Brief in Reply, Kvočka submits that the present case does not involve concentration camps, and that consequently, his responsibility must fall under the first category of joint criminal enterprise.[391] He also argues that the Prosecution did not prove beyond reasonable doubt the existence of such an enterprise, nor the existence of a common plan shared by him and others.[392]

181. A close analysis of the Trial Judgement shows that the Trial Chamber contemplated Kvočka's responsibility under the second category of joint criminal enterprise:

> Although the first two categories enunciated by *Tadic* are quite similar, and all three are applicable to this case to some degree, the second category, which embraces the post war "concentration camp" cases, best resonates with the facts of this case and is the one upon which the Trial Chamber will focus most of its attention. The Trial Chamber will examine and elaborate upon the standards to be applied in assessing criminal liability of participants in a detention facility which operates as a joint criminal enterprise.[393]

182. The Appeals Chamber wishes to point out that, although commonly referred to as the "category known as concentration camps", the second category of joint criminal enterprise, known as systemic, covers all cases relating to an organised system with a common criminal purpose perpetrated against the detainees. This concept of criminal responsibility has been shaped by the case-law derived from concentration camp cases from the Second World War, but reference to the concentration camps is circumstantial and in no way limits the application of this mode of responsibility to those detention camps similar to concentration camps.[394]

183. The Trial Chamber found that Omarska camp was a joint criminal enterprise the purpose of which was to persecute and subjugate non-Serb detainees.[395] Kvočka did not succeed in

[391] Kvočka Reply Brief, para.93.
[392] *Ibid.*, para.101 and also paras 102-103.
[393] Trial Judgement, para. 268 (emphasis added, footnote omitted).
[394] *See* also *Krnojelac* Appeal Judgement, para. 89.
[395] Trial Judgement, para. 320

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-98-30/1-T

Date: 2 November 2001

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

MIROSLAV KVO^KA
MILOJICA KOS
MLA\O RADI]
ZORAN ŽIGI]
DRAGOLJUB PRCA]

JUDGEMENT

The Office of the Prosecutor:

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Mr. Kapila Waidyaratne
Mr. Daniel Saxon

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Mr. Krstan Simi} for Mr. Kvo~ka
Mr. @arko Nikoli} for Mr. Kos
Mr. Toma Fila for Mr. Radi}
Mr. Slobodan Stojanovi} for Mr. @igi}
Mr. Jovan Simi} for Mr. Prca}

748. The extreme gravity of the crimes committed by @igi} has already been noted by the Trial Chamber. The Defense asserts that many of the crimes were committed when Zigic was intoxicated. The Trial Chamber rejects @igi}'s claim that intoxication should be a mitigating factor and instead finds it an aggravating factor. However, because the issue was not raised by the Prosecution, it declines to treat it as an aggravating factor in this case.

749. @igi} was transferred to the Tribunal on 16 April 1998 and thus he has been in the custody of the Tribunal for just over 3½ years.

750. The Trial Chamber sentences @igi} to 25 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served.[1187]

[1187] @igi} was in Bosnian Serb custody from 1996 until April 1998. This time should not be deducted, as it was served as punishment for another crime.

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UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-03-66-A
		Date:	27 September 2007
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **27 September 2007**

PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

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Ms. Shelagh McCall
Mr. Steffen Wirth
Ms. Kristina Carey
Ms. Katharina Margetts
Ms. Barbara Goy

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Mr. Michael Mansfield Q.C.
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Mr. Richard Harvey

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Mr. Michael Topolski Q.C.
Mr. Steven Powles

(a) Whether the applicability of *in dubio pro reo* is limited to ultimate conclusions of guilt

21. The Appeals Chamber is satisfied that the principle of *in dubio pro reo*, as a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt,[43] applies to findings required for conviction, such as those which make up the elements of the crime charged. This approach is consistent with the case-law of the International Tribunal and is a logical approach, given that, in the context of issues of fact, the principle is essentially just one aspect of the requirement that guilt must be found beyond a reasonable doubt.[44] In *Naletilić and Martinović*, the Appeals Chamber recognized the applicability of this principle to the *mens rea* requirement of knowledge of the existence of an armed conflict.[45] Similarly, the *Naletilić and Martinović* Trial Chamber applied the principle in the context of the crime of torture: It held that the evidence did not allow the Trial Chamber to distinguish between beatings that were inflicted with a specific purpose – which is required to establish the crime of torture - and beatings that may have been inflicted for reasons of pure cruelty, but not with a specific purpose. Consequently, the Trial Chamber found *in dubio pro reo* that the specific purpose necessary for torture had not been established beyond reasonable doubt.[46] Further, the principle of *in dubio pro reo* is not applied to individual pieces of evidence and findings of fact on which the judgement does not rely. For example, in *Kvočka et al.*, the Appeals Chamber dismissed Prcać's argument that the Trial Chamber failed to apply the principle when it found that Prcać was an administrative assistant at the Omarska camp.[47] The Appeals Chamber held that the finding that Prcać was an administrative assistant was not a fact aimed at conviction or an element of the crime charged, and thus the *in dubio pro reo* inquiry did not apply.

(b) Application of the *in dubio pro reo* principle

22. The Appeals Chamber is not satisified that Haradin Bala has established that the Trial Chamber misapplied the principle of *in dubio pro reo* to his identification as the guard known as Shala. The Trial Chamber reasonably assessed all of the evidence, including the failure of three eye-witnesses to identify Haradin Bala,[48] his alibi and his health at the relevant time,[49] and concluded

[43] *See Čelebići* Trial Judgement, para. 601. *See also* Christine V. D. Wyngaert (ed.), Criminal Procedure Systems in the European Community Butterworths, London (1993) at 21 (Belgium), 148 (Germany), 324 (Portugal), and Christoph J. M. Safferling, Towards an International Criminal Procedure, OUP, New York (2001) at 260.
[44] *See Naletilić and Martinović* Appeal Judgement, para. 120; *Stakić* Appeal Judgement, paras 102-103. *Naletilić and Martinović* Trial Judgement, footnote 1100. *See also Tadić* Appeal Decision on Jurisdiction, para. 143.
[45] *Naletilić and Martinović* Appeal Judgement, para. 120.
[46] *Naletilić and Martinović* Trial Judgement, fn. 1100.
[47] *Kvočka et al.* Appeal Judgement, paras 623-624.
[48] Trial Judgement, paras 627-628.
[49] Trial Judgement, paras 649-650.

3. Whether the Trial Chamber failed to provide a reasoned opinion for the rejection of Haradin Bala's alibi

80. Haradin Bala submits that the Trial Chamber failed to provide a reasoned opinion for its rejection of his alibi that he was not in Llapushnik/Lapušnik in June and July of 1998.[195] The Prosecution claims this assertion should be summarily rejected as unsubstantiated.[196]

81. The fair trial requirements of the Statute include the right of each accused to a reasoned opinion by the Trial Chamber under Article 23 of the Statute and Rule 98*ter*(C) of the Rules.[197] A reasoned opinion ensures that the accused can exercise his or her right of appeal and that the Appeals Chamber can carry out its statutory duty under Article 25 to review these appeals.[198] The reasoned opinion requirement, however, relates to a Trial Chamber's judgement rather than to each and every submission made at trial.[199]

82. The Trial Chamber, in a nine-page section of the Trial Judgement entitled "Haradin Bala's alibi", thoroughly considered Haradin Bala's alibi evidence, first addressing the alibi that he was not in the crime area when the crimes were committed[200] and then addressing the alibi that he was physically incapable of committing these crimes.[201] It described his submissions;[202] assessed the evidence presented by witnesses Kadri Dugolli, Elmi Sopi, Shefki Bala, Skender Bylykbaski, Avdullah Puka, Dr. Zequir Gashi, Ferat Sopi, and Ruzhdi Karpuzi; explained whether it found the witnesses' testimony credible and persuasive and, if not, why not; and pointed out inconsistencies.[203] Thus, the Trial Judgement offers a reasoned opinion for its rejection of Haradin Bala's alibi.

83. Consequently, Haradin Bala's sixth ground of appeal is dismissed.

E. Haradin Bala's eighth ground of appeal: alleged error in finding Witnesses L04 and L06 credible

84. Haradin Bala submits that the Trial Chamber erred in fact when it found Witnesses L04 and L06 to be credible as there were obvious inconsistencies between their 9 January 2005 post-

[195] Bala Appeal Brief, para. 226.
[196] Prosecution Response Brief, para. 4.19.
[197] *Naletilić and Martinović* Appeal Judgement, para. 603; *Kvočka et al.* Appeal Judgement, para. 23; *Kunarac et al.* Appeal Judgement, para. 41.
[198] *Naletilić and Martinović* Appeal Judgement, para. 603; *Kunarac et al.* Appeal Judgement, para. 41.
[199] *Naletilić and Martinović* Appeal Judgement, para. 603; *Kvočka et al.* Appeal Judgement, para. 23.
[200] Trial Judgement, paras 634-647.
[201] Trial Judgement, paras 648-649.
[202] Trial Judgement, paras 634, 636, 639, 642, 643, 646, 648.
[203] *See Čelebići* Appeal Judgement, para. 581.

121. In the alternative to Haradin Bala's criminal responsibility as a member of the systemic joint criminal enterprise, the Prosecution submits that he aided and abetted the cruel treatment and torture of detainees in the prison camp.[315]

122. The Appeals Chamber notes that the Indictment charges Haradin Bala with criminal responsibility under Article 7(1) of the Statute for having, *inter alia*, aided and abetted in the commission of these crimes.[316] This form of participation has been litigated at trial and the Trial Chamber found Haradin Bala guilty of having aided and abetted the torture of Witness L12 and an incident of cruel treatment of Witness L04. However, the Trial Chamber did not find him criminally responsible for having aided and abetted any other incident of cruel treatment or torture.[317]

123. The Appeals Chamber is not satisfied, however, that it is the only reasonable inference from the evidence that, in addition to the convictions for aiding and abetting already entered by the Trial Chamber, Haradin Bala incurs criminal responsibility for having aided and abetted the other instances of cruel treatment and torture of detainees in the Llapushnik/Lapušnik prison camp. While the findings of the Trial Chamber show that Haradin Bala played a pivotal role in the functioning of the prison camp,[318] it was open for a trier of fact to conclude that the evidence did not show beyond a reasonable doubt that Haradin Bala knowingly provided substantial assistance as an aider and abettor to each act of cruel treatment or torture in the prison camp. Apart from the evidence in relation to Haradin Bala's participation as a committer or an aider and abettor in specific incidents of cruel treatment and torture, which the Trial Chamber duly considered in paragraphs 654 through 663 of the Trial Judgement, it is a reasonable inference from the evidence to find that Haradin Bala did not provide substantial assistance with respect to other crimes.

2. Conclusion

124. Consequently, the Prosecution's first ground of appeal is rejected in its entirety.

B. Second ground of appeal: Sentence

125. In the alternative to its first ground of appeal, the Prosecution argues that the Trial Chamber erred in exercising its sentencing discretion by sentencing Haradin Bala to the manifestly inadequate sentence of 13 years of imprisonment.[319] The Prosecution argues that the Trial Chamber's error was three-fold. First, the sentence does not reflect the gravity of Haradin Bala's

[315] Prosecution Appeal Brief, para. 4.12.
[316] Indictment, para. 13.
[317] Trial Judgement, paras 653-663.
[318] Trial Judgement, paras 247, 251, 276 and 652.
[319] Prosecution Appeal Brief, para. 4.15.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-03-66-T

Date: 30 November 2005

Original: English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr Hans Holthuis**

Judgement of: **30 November 2005**

PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

JUDGEMENT

The Office of the Prosecutor:

Mr Alex Whiting
Mr Julian Nicholls
Mr Colin Black
Mr Milbert Shin

Counsel for the Accused:

Mr Michael Mansfield Q.C. and Mr Karim A.A. Khan for Fatmir Limaj
Mr Gregor D. Guy-Smith and Mr Richard Harvey for Haradin Bala
Mr Michael Topolski Q.C. and Mr Steven Powles for Isak Musliu

of the JCE were "a natural and foreseeable consequence thereof" must be assessed in relation to the knowledge of a particular accused.[1680]

(c) Planning

513. It has been said that "planning" implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phases.[1681] The *actus reus* of "planning" requires that one or more persons plan or design the criminal conduct constituting one or more crimes provided for in the Statute, which are later perpetrated.[1682] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[1683] A person who plans an act or omission with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute for planning.[1684]

(d) Instigating

514. In the jurisprudence of the Tribunal, the term "instigating" has been defined to mean "prompting another to commit an offence."[1685] Both acts and omissions may constitute instigating, which covers express and implied conduct.[1686] A *nexus* between the instigation and the perpetration must be demonstrated;[1687] but it need not be shown that the crime would not have occurred without the accused's involvement.[1688] The *actus reus* is satisfied if it is shown that the conduct of the accused was a factor substantially contributing to the perpetrator's conduct.[1689] The requisite *mens rea* for "instigating" is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed in the execution of that instigation.[1690]

1680 *Kvočka* Appeals Judgement, para 86.
1681 *Brđanin* Trial Judgement, para 268; *Krstić* Trial Judgement, para 601; *Stakić* Trial Judgement, para 443.
1682 *Kordić* Appeals Judgement, para 26, citing *Kordić* Trial Judgement, para 386.
1683 *Kordić* Appeals Judgement, para 26.
1684 *Kordić* Appeals Judgement, para 31.
1685 *Krstić* Trial Judgement, para 601; *Akayesu* Trial Judgement, para 482; *Blaškić* Trial Judgement, para 280; *Kordić* Appeals Judgement, para 27; *Kordić* Trial Judgement, para 387.
1686 *Brđanin* Trial Judgement, para 269; *Blaškić* Trial Judgement, para 280.
1687 *Brđanin* Trial Judgement, para 269; *Blaškić* Trial Judgement para 280.
1688 *Kordić* Appeals Judgement, para 27.
1689 *Kordić* Appeals Judgement, para 27.
1690 *Kordić* Appeals Judgement, para 32.

to improve the conditions. It was a case of too little, too rarely. Occasionally, and irregularly, he would supervise the emptying of the bucket in each of the storage room and cowshed which served as a toilet for all detainees.[2228] In the beginning there was not even a bucket. However, this was not done frequently enough and the buckets overflowed. In the cowshed, at least, chained detainees and those tied to each other were left with no option but to soil themselves in their clothing. Haradin Bala did nothing to enable medical care for the many who were in need of it, even though he knew that a clinic was nearby.[2229] Haradin Bala personally participated thus, through his omissions, in the maintenance and enforcement of the conditions of detention to which the prisoners were subjected, a material element of the crime of cruel treatment. As those conditions were maintained over many weeks, during which Haradin Bala frequently entered the rooms where prisoners were kept and at times provided assistance to them, his failure to do so on numerous other occasions leaves the Chamber persuaded that he had an intent to maintain those conditions of detention. Accordingly, in the Chamber's finding, it has been established that Haradin Bala committed, together with other persons, the crime of cruel treatment.

653. The Chamber has found, in respect of some of the acts of mistreatment and killing charged in the Indictment, that the elements of the crimes of cruel treatment, torture and murder, as violations of the laws or customs of war under Article 3 of the Statute, have been established. In some of these cases there is no evidence of Haradin Bala's direct involvement in the commission of the crime. The evidence demonstrates, however, that Haradin Bala took action which was to some extent related to the commission of others of those crimes.

654. The first incident relates to the mistreatment of L06 which the Chamber has found to constitute cruel treatment and torture.[2230] In the testimony of L10, L06 was taken out of the room by Shala, who in the finding of the Chamber was the Accused Haradin Bala, and, when L06 was brought back, he said he had been beaten. L06 himself stated that Haradin Bala only untied his chains on the day preceding the night when he was beaten and that he was taken out of the room and back by other persons.[2231] The accounts given by L06 and L10 differ as far as the role played by Haradin Bala is concerned. Because of L06's direct involvement in the incident, the Chamber is not prepared to prefer L10's account as more reliable in this particular respect. The Chamber proceeds, therefore, on the basis that the only action of Haradin Bala that might relate to the beating of L06 was untying L06's chains a few hours before the mistreatment. However, the link between his action and the actual mistreatment is far from clear. Even though the name of Shala was

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2228 *See supra*, para 286.

2229 As established above, Haradin Bala himself visited the clinic of Dr Zeqir Gashi, located in Llapushnik/Lapusnik. *See supra*, para 648.

2230 *See supra*, paras 305-306.

mentioned by L06 in the context of the particular incident of beating, it has not been established whether the untying of L06's chains was in any way related to the subsequent beating. For these reasons, the Prosecution has not established that Haradin Bala participated in any way in the actual beating of L06.

655. L10 testified to being mistreated by Shala, who was identified as Haradin Bala. As found earlier in this decision, Haradin Bala pointed a gun at L10's head and threatened him.[2232] The incident has been found to constitute the offence of cruel treatment. The direct participation of Haradin Bala in the commission of this crime has been established. He can only have acted with the intent of inflicting mental suffering upon L10. Accordingly, the Chamber finds Haradin Bala responsible for having perpetrated the crime of cruel treatment in this instance.

656. A further incident involving Haradin Bala relates to the mistreatment of L04 which the Chamber has found constituted cruel treatment.[2233] L04 stated that Shala was told by Tamuli to untie L04. As established earlier, L04 was then blindfolded, taken out of the room and beaten by individuals L04 believed to be Tamuli and Qerqiz.[2234] Shala had an automatic weapon and was guarding the door. He, however, did not personally join in the beating of L04.[2235] The Chamber accepts the evidence of L04 on the circumstances of his mistreatment. It finds that Haradin Bala did not inflict physical suffering on L04. He did, however, provide practical assistance to the direct perpetrators of the offence of cruel treatment. He better ensured there was no prospect of L04 escaping from the beating, or of the beating being seen or disrupted by third persons. In the Chamber's finding, Haradin Bala's involvement had thus a "substantial effect on the commission"[2236] of the crime of cruel treatment. In the circumstances, Haradin Bala could not have been ignorant of the intentions of the direct perpetrators. He certainly knew that a crime was being committed. Nonetheless, he remained and so he facilitated its commission. He is therefore responsible for aiding the crime of cruel treatment in respect of L04.[2237]

657. As indicated earlier in this decision, Shala, identified in the evidence as Haradin Bala, participated directly in another incident regarding L04 and L10. Haradin Bala forced L04 and L10, as well as another individual, to bury the bodies of three persons including Agim Ademi. There are some differences between the detail of the accounts of that event given by L10 and L04. They are nonetheless consistent with respect to the essential features of what occurred, especially the conduct

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2231 *See supra*, para 304.
2232 *See supra*, para 299.
2233 *See supra*, paras 311; 313.
2234 *See supra*, para 311.
2235 L04, T 1175-1176.
2236 *See supra*, para 517.
2237 *See Čelebići* Trial Judgement, para 842.

of Haradin Bala, to whom both witnesses referred as Shala. Shala blindfolded them and took them in a car to the place where they were required to dig a grave. L04 and L10 and another individual received a pickaxe and shovels, with which they carried out the task given to them by Shala. They buried three bodies in the hole.[2238] Shala warned them that if they said anything about it, they would be shot.[2239] As discussed earlier, this incident caused psychological suffering of L04 and L10, which, in the Chamber's finding, in the circumstances amounted to cruel treatment. The physical perpetration of the crime by Haradin Bala has been established. Haradin Bala must have been aware of the substantial likelihood that psychological suffering would be inflicted as a result of forcing L04 and L10 to bury the bodies of fellow detainees, especially given the apparent injuries to and condition of the bodies. Haradin Bala is accordingly responsible for having directly perpetrated that crime.

658. Two incidents of mistreatment of L12 have been established. The first one occurred upon his arrival at the prison camp. In the Chamber's finding, Haradin Bala, referred to in L12's evidence as Shala, chained L12 to the wall and beat him with a stick until L12 lost consciousness. As has been established, even though the evidence does not reveal that Haradin Bala was unable to engage in strenuous activities, such as a prolonged beating of a person, it is of relevance that his ability to do so was adversely affected.[2240] The evidence concerning the role Haradin Bala played in this incident is, however, consistent and persuasive. The evidence of L12 as the victim of the incident is consistent with that of L04, who witnessed the incident, and confirmed the length and effect of the beating. Haradin Bala thus physically perpetrated the offence of cruel treatment in this case, despite his state of health. The circumstances of the incident and, in particular, the severity and duration of the beating, leave the Chamber satisfied that Haradin Bala acted with the intent to inflict physical suffering on L12. Haradin Bala is therefore, in the finding of the Chamber, responsible for having committed the offence of cruel treatment in connection with this incident. In the other case of mistreatment of L12 established earlier in this decision, L12 was beaten in a barn. Haradin Bala blindfolded L12 and brought him to a barn, where the beating took place.[2241] L12 testified that Shala was present during the incident.[2242] The Chamber accepts L12's evidence, however, that Haradin Bala's involvement in the incident was limited to bringing L12 to the perpetrators and being present while the beating was taking place. The Chamber finds that by bringing L12 to the barn and being present throughout the beating by others, Haradin Bala did contribute to the commission of the crime substantially enough to regard his participation as aiding

[2238] *See supra*, paras 299; 312 and 399-401.
[2239] L10, T 2946.
[2240] *See supra*, para 648.
[2241] *See supra*, para 316.

the offence committed by the direct perpetrators. In the circumstances, Haradin Bala must have become aware, at least at the time of the beating, that the assailants were committing a crime and of their state of mind. Accordingly, he possessed the *mens rea* required for aiding and abetting. As established earlier, this incident constitutes the elements of both cruel treatment and torture. However, as will be discussed shortly, the Chamber can enter a conviction only in respect of the charge of torture (Count 4).

659. Reference to Haradin Bala has been made in the evidence concerning the mistreatment of Emin Emini. L10 testified that Shala, together with two other men, took Emin Emini out of the storage room for the purpose of beating him. However, for reasons discussed earlier, despite this evidence, it is not possible to determine the identity of the individuals who took Emin Emini out of the storage room.[2243] Nor does the evidence suggest that Haradin Bala himself beat Emini.

660. As has been indicated, the evidence concerning the mistreatment and death of Fehmi Xhema is affected by a number of discrepancies. In particular, it is not established whether Haradin Bala was among those who took Fehmi Xhema out of the storage room and brought him back after the beating. As discussed earlier, the Chamber assessed that both L06 and L10, who gave differing accounts of mistreatment of Fehmi Xhema, were honest witnesses.[2244] In the absence of other evidence on the matter, there are no grounds for giving preference to either of these accounts. The Chamber therefore finds, in favour of the Accused Haradin Bala, that he did not participate in the mistreatment of Fehmi Xhema, either directly or by providing assistance.

661. The accounts given by L06 and L10 identify the involvement of Haradin Bala in the removal of, what they believed, was the dead body of Fehmi Xhema. Both L06 and L10 stated that Shala and two other soldiers came to the storage room to take away the body of Fehmi Xhema.[2245] The accounts differ, however, as to the time of that event. L06 testified that Fehmi Xhema, whom he believed to be dead at that time, remained in the room for three days before he was taken away.[2246] L10 stated that the body was removed on the day following day after the critical beating.[2247] The Chamber is persuaded, despite these differences, that one of the three soldiers who removed the near dead Fehmi Xhema from the storage room was Haradin Bala. As indicated earlier, Fehmi Xhema was subsequently shot.[2248] The evidence, however, does not make it possible

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[2242] L12 stated that Shala should know what the individuals who beat L12 were talking about because he was there; L12, T 1808.
[2243] *See supra*, para 412.
[2244] *See supra*, paras 327-331.
[2245] L06, T 1013; L10, T 2942.
[2246] L06, T 1013
[2247] L10, T 2942.
[2248] *See supra*, para 336.

to establish the identity of those who shot Fehmi Xhema. It has not been established that those were the same people who removed Fehmi Xhema from the storage room for the last time. Moreover, the time of the death of Fehmi Xhema cannot be determined. It is therefore unclear whether the purpose of removing Fehmi Xhema from the storage room by the three soldiers, including Haradin Bala, was his immediate execution. In view of the absence of evidence on these issues, the Chamber is not persuaded that Haradin Bala participated in the shooting of Fehmi Xhema. Nor has it been established that he provided assistance to the murderers.

662. As discussed earlier, Haradin Bala ordered three detainees, including L04 and L10, to bury three bodies, including the body of Agim Ademi. There is no evidence, however, indicating that he directly participated in the killing of any one of the three. It could be inferred from the established circumstances of the incident that Haradin Bala was aware that Agim Ademi he had been shot. It is the evidence that a gunshot injury was visible. As a prison guard, he must also have known that Agim Ademi had been detained in the prison camp. There is nothing to suggest, however, that Haradin Bala had agreed to provide assistance at the time of the planning, preparation or execution of the crime,[2249] or in respect of the other two detainees. Even though the probability of such a prior agreement is clear, it could also be reasonably inferred from the evidence that Haradin Bala learned about the killings afterwards and was only ordered to remove the bodies from the prison camp. In the Chamber's finding, the evidence does not establish that Haradin Bala aided the commission of murder of Agim Ademi, or of the other two detainees.

663. As indicated earlier, the Prosecution suggested that the bodies L04 and L10 were forced to bury, together with the body of Agim Ademi, were those of Jefta Petković and Žvonko Marinković.[2250] The Chamber has found earlier that the evidence does not support the contention that the body of Jefta Petković, whose murder was established, was one of those L04 and L10 buried on the order of Haradin Bala. Accordingly, no link has been established between the murder of Jefta Petković and the Accused Haradin Bala.

b. Murder in the Berishe/Berisa Mountains (Count 10)

664. The Chamber has held that Haradin Bala and Murrizi, and possibly a third KLA soldier, were directly involved in shooting at the remaining small group of prisoners, who were among those they had forced to march into the Berishe/Berisa Mountains on 25 or 26 July 1998 and who remained after the first group was released.[2251] It has been established that nine of those prisoners

[2249] *See Blagojević* Trial Judgement, para 731.
[2250] *See supra*, para 390.
[2251] *See supra*, para 454.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-95-11-T

Date: 12 June 2007

Original: English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Janet Nosworthy
Judge Frank Höpfel

Registrar: **Mr. Hans Holthuis**

Judgement of: **12 June 2007**

PROSECUTOR

v.

MILAN MARTIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Alex Whiting
Ms. Anna Richterova
Mr. Colin Black
Ms. Nisha Valabhji

Counsel for Milan Martić:

Mr. Predrag Milovančević
Mr. Nikola Perović

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although he neither possesses expertise in this area nor personal knowledge of the information.[49] Accordingly, the Trial Chamber has attached no weight whatsoever to such views, conclusions and analyses of Ari Kerkkanen.

36. Witness MM-003 testified from 8 to 10 March 2006. In its Final Trial Brief, the Prosecution accepted that the evidence of Witness MM-003 should be examined "with care" since "he sought and received assistance from the OTP in order to remain in the country where he is now living".[50] The Defence submitted that this would be a factor negating the credibility of his testimony.[51] On 9 April 2007, the Prosecution sent a letter to the Defence disclosing details of its assistance provided to Witness MM-003 in his asylum case.[52]

37. Witness MM-079 testified on 31 March, 3 and 4 April 2006. In its Final Trial Brief, the Prosecution acknowledged that the evidence of Witness MM-079 should be "scrutinized with care" since "he said that he hoped to receive the assistance of the OTP to remain in the country where he is relocated."[53] Witness MM-079 testified that after his lawyer had suggested that he contact the Tribunal to seek assistance with his asylum, he was interviewed by the Prosecution, and that he was subsequently informed that the Prosecution had written a letter to the authorities of the state where he currently lives to ask that he be allowed to stay there until he finishes testifying at the Tribunal.[54] The Trial Chamber notes that the Defence did not raise objections as to the credibility of this witness.

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

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[48] Ex. 459, pp 2-4.
[49] Prosecution's Reply to Defense Response to Prosecution's Motion for Admission of Statement of Witness MM-014 Pursuant to Rule 89 (F), filed confidentially on 19 Apr 2006, para. 6, where the Prosecution acknowledges that Ari Kerkkanen lacks expertise.
[50] Prosecution Final Trial Brief, para. 44.
[51] Witness MM-003, 10 Mar 2006, T. 2175-2188; Defence Closing Argument, 11 Jan 2007, T. 11330-11331.
[52] Letter from Alex Whiting to Predrag Milovančević, dated 9 April 2007. The Trial Chamber was copied on this letter.
[53] Prosecution Final Trial Brief, para. 85; Witness MM-079, 31 Mar 2006, T. 3025-3028.
[54] Witness MM-079, 31 Mar 2006, T. 3025-3026.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991	Case No.	IT-05-87-T
		Date:	26 February 2009
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Iain Bonomy, Presiding**
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Acting Registrar: **Mr. John Hocking**

Judgement of: **26 FEBRUARY 2009**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

PUBLIC

JUDGEMENT

Volume 2 of 4

The Office of the Prosecutor:
Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused:
Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

but stated that only the minaret from which the army had been fired upon was destroyed. Delić explained that on that same day in Landovica two soldiers had been killed and one wounded. It was not possible to help the wounded and retrieve the bodies due to the gun-fire that came from the mosque.[718]

264. The fact of significant damage to the mosque in Landovica was also confirmed by the testimony of Prosecution expert witness András Riedlmayer.[719] Riedlmayer viewed the mosque in the course of visits to Kosovo between October 1999 and March 2001, and classified it as "heavily damaged." His report also stated that the damage to the mosque had been caused by partial burning on 27 March 1999, and the mining and shelling of the minaret.[720] However, his information as to how and when the damage to the mosque was inflicted appears to have come from members of the local "Islamic community". The Chamber notes that he was not even asked for his opinion whether the damage he saw was consistent with that account.

265. The Trial Chamber considers that anonymous hearsay from members of the "Islamic community", is not an adequate basis on which to say that Morina's evidence of the circumstances in which the damage was inflicted was corroborated. The Chamber therefore finds that the allegations in relation to the destruction of the mosque in Landovica have not been proven.

5. Srbica/Sërbica, Donji Retimlje/Retia e Ulët, Retimlje/Retia, and Randubrava/Randobrava

266. Latifi, who had fled to Srbica/Sërbica from Pirane/Pirana along with other Kosovo Albanians, testified that on 26 March 1999 a group of policemen came to Srbica/Sërbica and started shooting at the tractors belonging to them. No one was hurt.[721] He stayed in Srbica/Sërbica for a month, during which time the police often came but did not harm or threaten anyone. After three weeks Latifi was told by others that the chief of police from Prizren had come and ordered that all persons who were not from Srbica/Sërbica should leave for Albania. The local Serbs organised buses to transport them, but Latifi and his family stayed in Srbica/Sërbica for another ten days because there was no room for them on the buses.[722] Halil Morina's evidence corroborates Latifi's

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[717] P2523 (transcript from *Prosecutor v. Milošević*, Case No. IT–02–54–T), T. 928.

[718] Božidar Delić, T. 19391 (29 November 2007). *See also* Miloš Vojnović, T. 24198 (12 March 2008); P2574 (War Diary of armoured battalion from 549th Motorised Brigade), p. 1.

[719] András Riedlmayer, T. 5488–5489 (30 October 2006); P1803 (Photograph of the shell of Landovica/Landovicë mosque).

[720] P1777 (Extract from P1789).

[721] Rahim Latifi, T. 4992 (17 October 2006); P2381 (witness statement dated 28 April 1999), p. 3.

[722] Rahim Latifi, T. 4964 (16 October 2006); T. 4993 (17 October 2006); P2381 (witness statement dated 28 April 1999), p. 3.

> from the baby in the cradle to the elderly people in wheelchairs and that's the problem that I have today.[2842]

K54 testified that his unit expelled people from a settlement near Prizren called Petrovo Selo/Petrovasella, following the bombing of the Prizren barracks and so that the settlement could be occupied by the VJ.[2843]

1173. Goran Stoparić, a former member of the paramilitary group known as the Scorpions, described how in late March 1999 his unit was incorporated into the ranks of the SAJ and sent to Kosovo. There members of the unit killed at least a dozen civilians in the town of Podujevo/Podujeva.[2844] Witnesses K54 and K82 recounted an operation in which they participated in the village of Trnje/Tërm (Suva Reka/Suhareka municipality), also in late March 1999, during which their unit burned houses and killed a group of around 15 Kosovo Albanian men, women, and children.[2845] Both witnesses gave evidence that this killing was not an isolated incident, but that other killings occurred throughout the village as it was cleared out by the VJ and MUP.[2846] K54 also described his own participation in the stealing of cars in Kosovo,[2847] and in setting civilian property on fire, on the orders of his superior officer.[2848]

1174. Former chief of the Kosovska Mitrovica SUP, Ljubinko Cvetić, also acknowledged that in the early days of the NATO air campaign members of the police, particularly police reservists, engaged in the expulsion of Kosovo Albanians from their homes. He testified, however, that such expulsions were not part of a policy or plan, and that there were other reasons for the mass movement of the Kosovo Albanian population at this time, such as the NATO bombing and pressure from the KLA.[2849]

1175. The Trial Chamber is mindful of the fact that in some parts of Kosovo, both within the 13 municipalities discussed in this Judgement and elsewhere, people may have left their homes for different reasons, such as instructions from the KLA, the desire to avoid being present while

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[2842] K73, T. 3381–3382 (14 September 2006) (closed session).

[2843] K54, T. 10598 (27 February 2007).

[2844] Goran Stoparić, T. 702–703 (12 July 2006), P2224 (witness statement dated 6 July 2006), paras. 35, 51–56. *See also* Aleksandar Vasiljević, T. 8717 (19 January 2007); 3D1055 (Supreme Command Staff, Report on the Activities of the Slobodana Medić-Boce Paramilitary Formation, 13 May 1999).

[2845] K82, T. 11747–11748 (15 March 2007), P2863 (witness statement), paras. 7–23; K54, T. 10585–10588 (27 February 2007) (private session), P2883 (witness statement dated 26 April 2002), pp. 5–6, P2884 (witness statement dated 16 July 2002), p. 1. *See* para. 470 above for the Chamber's assessment of their credibility.

[2846] K54, P2883 (witness statement dated 26 April 2002), pp. 5–6; K82, P2863 (witness statement), paras. 13–14, 16, 26, 28–29.

[2847] K54, T. 10514 (open session), T. 10515 (private session), T. 10516 (open session) (26 February 2007), P2883 (witness statement dated 26 April 2002), p. 7.

[2848] K54, T. 10590 (27 February 2007), P2883 (witness statement dated 26 April 2002), p. 6.

[2849] Ljubinko Cvetić, T. 8179–8180 (8 December 2006).

combat between the KLA and forces of the FRY and Serbia was taking place, or indeed the fact that NATO was bombing targets close to where they lived. However, despite the arguments by the Defence that these were the primary reasons for the massive movement of people within Kosovo and across the borders with Albania and Macedonia, none of the Kosovo Albanians who testified cited the NATO bombing as among the reasons for their departure, and in only one area of Vučitrn/Vushtrria municipality and another area of Suva Reka/Suhareka municipality discussed above has the Chamber found that people were moving as a consequence of the actions of the KLA. The Chamber gives little weight to anonymous hearsay from VJ and MUP officers about the reasons for the departure of Kosovo Albanians from their homes, and notes in addition that such officers would have been in uniform at the time of any conversations with displaced Kosovo Albanians who might have been reluctant to give these officers the real reasons for their flight. The Kosovo Albanian witnesses, who testified about their own expulsion and that of many others from Kosovo, came from a broad cross-section of that community, generally with no connection to one another beyond their victimisation, and it is inconceivable that they could or would all have concocted such detailed and consistent accounts of the events that they experienced and witnessed.

1176. Furthermore, NATO bombs struck targets across the FRY, with Belgrade suffering the most destruction, according to Spasoje Smiljanić, former Commander of the VJ Air Force and Air Defence, and yet people did not leave Belgrade, or other parts of the FRY, in the massive numbers which fled Kosovo.[2850] The Chamber finds, therefore, that the NATO bombing was not the primary reason for the mass displacement of Kosovo Albanians from Kosovo.

1177. While there was a continuing armed conflict between the KLA and the forces of the FRY and Serbia, at the same time as the NATO air campaign, the Chamber also does not consider that this conflict was the primary cause of the flight of hundreds of thousands of Kosovo Albanians from late March to early June 1999. Indeed, as discussed elsewhere in this Judgement, the conflict between the KLA and the VJ and MUP commenced in mid-1998 and intensified through July, August, and September of that year. While many Kosovo Albanians were displaced at that time, most stayed within the boundaries of Kosovo, and there was not the massive flood of people across the borders that began on 24 March 1999. The Chamber further recalls that, while the KLA was, at various times and in various locations, a force to be reckoned with, its numbers were small in comparison to the quantity of VJ and MUP personnel deployed to Kosovo in March to June 1999, nor did it have the kinds of heavy equipment that the state forces had access to.[2851]

[2850] Spasoje Smiljanić, T. 15776–15777 (17 September 2007).
[2851] *See* Section VI.B.

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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-99-37-AR72

Date: 21 May 2003

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Fausto Pocar
Judge Claude Jorda
Judge David Hunt
Judge Asoka de Zoysa Gunawardana

Registrar: **Mr Hans Holthuis**

Decision of: **21 May 2003**

PROSECUTOR

v

MILAN MILUTINOVIĆ, NIKOLA ŠAINOVIĆ & DRAGOLJUB OJDANIĆ

DECISION ON DRAGOLJUB OJDANIĆ'S MOTION CHALLENGING JURISDICTION – *JOINT CRIMINAL ENTERPRISE*

Counsel for the Prosecutor
Mr Norman Farrell

Counsel for Dragoljub Ojdanić
Mr Tomislav Višnjić, Mr Vojislav Seležan and Mr Peter Robinson

- Finally, if this form of liability were to apply to Ojdanić, it would infringe the principle *nullum crimen sine lege.*

Each point will be addressed in turn, but the Appeals Chamber will first consider the scope of its jurisdiction as far as individual criminal liability is concerned.

Scope of the jurisdiction *ratione personae* of the International Tribunal

9. In his Report to the Security Council, the Secretary-General of the United Nations proposed that the International Tribunal shall apply, as far as crimes within its jurisdiction are concerned, rules of international humanitarian law which are "beyond any doubt part of customary international law".[26] The fact that an offence is listed in the Statute does not therefore create new law and the Tribunal only has jurisdiction over a listed crime if that crime was recognised as such under customary international law at the time it was allegedly committed.[27] The scope of the Tribunal's jurisdiction *ratione materiae* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.[28]

10. As far as the jurisdiction *ratione personae* of the Tribunal is concerned, the Secretary-General's Report does not contain any explicit limitation as to the nature of the law which the Tribunal may apply, other than a statement apparently of general application to the effect that "the International Tribunal would have the task of applying existing international humanitarian law".[29] Contrary to the Defence submission on that point,[30] there is no reference in the Report of the Secretary-General limiting the jurisdiction *ratione personae* of the International Tribunal to forms of liability as provided by customary law.[31] However, the principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the time of the acts charged. And, just as is the case in respect of the Tribunal's jurisdiction *ratione materiae*, that body of law must be reflected in customary international law.

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[26] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), ("Secretary-General's Report"), par 34.

[27] See Secretary-General's Report, par 29.

[28] See, for instance, treatment of "violence to life and person" in the *Vasiljević* Trial Judgment (*Prosecutor v Vasiljević*, Case No. IT98-32-T, Judgment, 29 November 2002, pars 193 *et seq.*). This matter has not been appealed by either party.

[29] Secretary-General's Report, par 29.

[30] Ojdanić's Appeal, pars 26-29. The comment cited by the Defence at par 29 of its Appeal was made by the Secretary-General in relation to the Tribunal's jurisdiction *ratione materiae*, not its jurisdiction *ratione personae*.

[31] See Secretary-General's Report, pars 50-59.

11. What must therefore be established in the present case is whether, at the time the acts were allegedly committed (from "on or about 1 January 1999 [...] until 20 June 1999"[32]), joint criminal enterprise as a form of liability existed under customary international law.

Does the Statute provide for joint criminal enterprise liability ?

12. Article 7(1) of the Statute contemplates various forms of individual criminal responsibility which apply to all crimes which are within the Tribunal's jurisdiction. It provides as follows:

> **Article 7**
> **Individual criminal responsibility**
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

13. This provision contains a list of forms of criminal participation which, all other conditions being met, could entail the criminal responsibility of the accused if he or she were to commit any of the crimes provided for in the Statute in any of the ways contemplated by that article. Article 7(1) does not contain an explicit reference to "joint criminal enterprise". Whether or not that list is exhaustive was not addressed specifically by the Defence. The Defence only claims that that provision does not provide for joint criminal enterprise as a form of criminal liability[33] and that other international instruments, such as the Rome Statute of the International Criminal Court, provided for joint criminal enterprise explicitly when it was intended to be included.[34] Had the drafters intended to include such a form of liability for all crimes within the Tribunal's Statute, the Defence says, the drafters would have done so explicitly.[35]

14. In addition, the Defence claims that this specific form of liability was not contemplated by the drafters of the Tribunal's Statute. The Defence submits that the suggestions made by several member states of the Security Council at the time of the adoption of the Tribunal's Statute that it should include "conspiracy" as a form of criminal liability was rejected.[36] "Conspiracy", the Defence claims, "is precisely the basis of liability for joint criminal enterprise".[37] The Defence says that, where they intended to include "conspiracy" as a form of liability, the drafters did so

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[32] Indictment, par 53.
[33] Ojdanić's Appeal, pars 12-17.
[34] Ibid., par 14-16.
[35] Ojdanić's Appeal, par 30.
[36] Ojdanić's Appeal, par 20.
[37] Ojdanić's Appeal, par 21.

expressly, as for instance in Article 4(3)(b) of the Statute concerning "conspiracy to commit genocide".[38]

15. In response, the Prosecution submits that joint criminal enterprise is provided for both in the Statute and under customary international law.[39] It also says that joint criminal liability is different from both "conspiracy" and membership in a criminal organization and, contrary to both of them, it is a punishable mode of participation in the actual commission of crimes.[40] Conspiracy, the Prosecution says, is a mere agreement or understanding between two or more persons to commit a crime, whilst membership in a criminal organization implies the existence of a stable organizational structure directed at the commission of crimes, irrespective of the actual commission of any such crime.[41] The Prosecution submits further that, individual liability for participation in a joint criminal enterprise arises from "a significant contribution to the execution of a common plan that either entails the commission of a crime, or leads to the commission of a crime, as its natural and foreseeable consequence".[42]

16. As pointed out by the Prosecution, the Appeals Chamber has already had an opportunity to consider this matter in other cases. In the *Tadić* case, the Prosecution had argued on appeal that the Trial Chamber had misdirected itself in the application of the common purpose doctrine.[43] The Prosecution submitted then that the gist of this doctrine is that if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose.[44] In view of the evidence, the Prosecution claimed that the only conclusion reasonably open to the Trial Chamber was that the killing of the five victims was a natural and probable consequence of the attack on the villages of Sivci and Jaskići in which the accused had taken part.[45]

17. In response, the Defence for the accused Duško Tadić did not challenge the existence of this form of liability or its presence under Article 7(1) of the Statute. It submitted, however, that a conviction on that basis would require the Prosecution to establish that the common purpose in which the Appellant is said to have taken part included killing as opposed to ethnic cleansing by other means.[46] Having considered the matter, the Appeals Chamber came to the conclusion that

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[38] Ojdanić's Appeal, par 22.
[39] Prosecution's Response, pars 36-38. In support of its point, the Prosecution undertook a review of a number of domestic jurisdictions and international cases (see pars 44-45).
[40] Prosecution's Response, pars 14-16.
[41] Prosecution's Response, pars 14-15, 25-26.
[42] Prosecution's Response, par 16.
[43] *Tadić* Appeal Judgment, par 173.
[44] *Tadić* Appeal Judgment, par 175.
[45] Ibid.
[46] *Tadić* Appeal Judgment, par 177.

joint criminal enterprise or the common purpose doctrine, as it called it, was provided for in the Statute as a form of liability and that it existed under customary international law at the relevant time (i.e., 1992).[47] The submission by the Defence in the present case that the Appeals Chamber's statement on that point was *obiter dicta* insofar as it went "far beyond that which was necessary to reinstate Tadić's conviction"[48] is incorrect, as it is every Chamber's duty to ascertain that a crime or a form of liability charged in the indictment is both provided for under the Statute and that it existed at the relevant time under customary international law.[49] In the *Tadić* appeal, as pointed out above, the meaning and scope of joint criminal enterprise under the Statute and under customary law was litigated by the parties and joint criminal enterprise in fact formed the *sole* legal basis upon which the Appeals Chamber convicted Tadić.

17. In the *Čelebići* case, the Appeals Chamber interpreted the Prosecution's submissions as suggesting that the Trial Chamber's findings concerning the actions of Hazim Delić should have led to his being convicted under the doctrine of common criminal purpose or joint criminal enterprise.[50] The Appeals Chamber held that it was not satisfied, in that case, that the elements required by that form of criminal liability had been established by the Prosecution beyond reasonable doubt.[51] Finally, in *Furundžija*, the accused Anto Furundžija claimed in his appeal that in order to sustain his conviction as a co-perpetrator of torture, it should have been proved that there was a "direct connection" between his questioning of the victim and the infliction on her of severe pain or suffering.[52] He also submitted that "[w]hat is missing in this case is any allegation *or* proof that [his participation] in any crime, *i.e.*, intentionally acted *in concert with* Accused B in questioning Witness A", and that there was no such allegation contained in the indictment against him, nor was proof offered at the trial in this regard.[53] The Appeals Chamber said that it had identified in the *Tadić* Appeal Judgment the legal elements of co-perpetration in a joint criminal enterprise, and it referred to the definitions of these elements, in particular to the requirement that there must exist a plan, design or purpose underlying the joint criminal enterprise.[54] The conviction based on the joint criminal enterprise charges stood.

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47 *Tadić* Appeal Judgment, pars 220 and 226.
48 Ojdanić's Appeal, par 37.
49 See *Vasiljević* Trial Judgment, par 198, which provides that "Each Trial Chamber is thus obliged to ensure that the law which it applies to a given criminal offence is indeed customary". See also *Delalić* Appeal Judgment, par 170, where the Appeals Chamber said that the Tribunal has jurisdiction over crimes which were already subject to individual criminal responsibility prior to its establishment.
50 *Delalić* Appeal Judgment, par 365.
51 *Delalić* Appeal Judgment, par 366.
52 *Furundžija* Appeal Judgment, par 115
53 Ibid.
54 *Furundžija* Appeal Judgment, par 119.

18. The appellant in this case has advanced no cogent reason why the Appeals Chamber should come to a different conclusion than the one it reached in the *Tadić* case, namely, that joint criminal enterprise was provided for in the Statute of the Tribunal and that it existed under customary international law at the relevant time. The Defence's first contention is that the Appeals Chamber misinterpreted the drafters' intention as, it claims, they would have referred to joint criminal enterprise explicitly had they intended to include such a form of liability within the Tribunal's jurisdiction. As pointed out above, the Statute of the International Tribunal sets the framework within which the Tribunal may exercise its jurisdiction. A crime or a form of liability which is not provided for in the Statute could not form the basis of a conviction before this Tribunal.[55] The reference to that crime or to that form of liability does not need, however, to be explicit to come within the purview of the Tribunal's jurisdiction.[56] The Statute of the ICTY is not and does not purport to be, unlike for instance the Rome Statute of the International Criminal Court, a meticulously detailed code providing explicitly for every possible scenario and every solution thereto. It sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate.

19. As noted in the *Tadić* Appeal Judgment, the Secretary-General's Report provided that "all persons" who participate in the planning, preparation or execution of serious violations of international humanitarian law contribute to the commission of the violation and are therefore individually responsible.[57] Also, and on its face, the list in Article 7(1) appears to be non-exhaustive in nature as the use of the phrase "*or otherwise* aided and abetted" suggests. But the Appeals Chamber does not need to consider whether, outside those forms of liability expressly mentioned in the Statute, other forms of liability could come within Article 7(1). It is indeed satisfied that joint criminal enterprise comes within the terms of that provision.

20. In the present case, Ojdanić is charged as a co-perpetrator in a joint criminal enterprise the purpose of which was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.[58] The Prosecution pointed out in its indictment against Ojdanić that its use of the word "committed" was not intended to suggest that any of the accused physically perpetrated any of the crimes charged, personally. "Committing", the Prosecution wrote, "refers to

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[55] The defence correctly refers to the example of the crime of piracy (Ojdanić's Appeal, par 43).
[56] The Tribunal has accepted, for instance, that Article 3 of the Statute was a residual clause and that crimes which are not explicitly listed in Article 3 of the Statute could nevertheless form part of the Tribunal's jurisdiction (ref to *Tadić*).
[57] *Tadić* Appeal Judgment, par 190, citing Secretary-General's Report, par 54.
[58] Indictment, par 16.

participation in a joint criminal enterprise as a co-perpetrator".[59] Leaving aside the appropriateness of the use of the expression "co-perpetration" in such a context, it would seem therefore that the Prosecution charges co-perpetration in a joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute, rather than as a form of accomplice liability. The Prosecution's approach is correct to the extent that, insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. The Appeals Chamber therefore regards joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute.

21. The Defence suggests that the *Tadić* interpretation of Article 7(1) means that all modes of liability not specifically excluded by the Statute are included therein.[60] It is not necessary to deal with so wide an argument. The Appeals Chamber was satisfied then, and is still satisfied now, that the Statute provides, albeit not explicitly, for joint criminal enterprise as a form of criminal liability and that its elements are based on customary law. In order to come within the Tribunal's jurisdiction *ratione personae*, any form of liability must satisfy three pre-conditions: (i) it must be provided for in the Statute, explicitly or implicitly; (ii) it must have existed under customary international law at the relevant time; (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.

22. The analogy made by the Defence between the present situation and the rejection by the International Military Tribunal ("IMT") in Nuremberg of the common plan or conspiracy doctrine in relation to war crimes and crimes against humanity is indeed relevant to this case, although not for the reason suggested by the Defence.[61] The IMT noted that the indictment charged not only conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity.[62] The IMT pointed out that the Charter did not define as a separate crime any conspiracy except the one to commit acts of aggressive war and it therefore disregarded the charges in Count One of the indictment that the defendants had conspired to commit war crimes and crimes against humanity.[63] As pointed out above, the same logic applies in the context of this Tribunal. One Trial Chamber,

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[59] Indictment, par 16.
[60] Ojdanić's Appeal, par 39. This, the Defence said, "flies in the face of rules of statutory interpretation and the cautious approach to interpretation of liability for crimes set forth in the Report of the Secretary General" (ibid).
[61] Ojdanić's Appeal, pars 24-25
[62] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol 1, p 226 ("IMT Judgment").
[63] Ibid.

for instance, correctly noted that, if it were not satisfied that a given crime was provided for in its Statute, as the IMT had been in relation to conspiracy to commit war crimes and crimes against humanity, this Tribunal would have no choice but to decline to exercise its jurisdiction over such a crime.[64] Unless it is satisfied that a principle of liability is included in the Statute, the Tribunal would not exercise its jurisdiction on the basis of that principle.

23. The Defence's argument that the drafters' exclusion of "conspiracy" from the Statute is evidence that joint criminal enterprise has also been excluded is likewise misguided. Joint criminal enterprise and "conspiracy" are two different forms of liability. Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement.[65] In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise. Thus, even if it were conceded that conspiracy was excluded from the realm of the Tribunal's Statute, that would have no impact on the presence of joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute.

24. The Defence also claims that joint criminal enterprise is akin to a form of criminal liability for membership and that it has become a "vehicle for organizational liability", whereby mere membership in a criminal organization would by itself entail the individual criminal responsibility of the accused.[66] Under such a form of liability, Ojdanić is exposed to being held liable for his membership in an organisation some members of which may have committed crimes he should have foreseen, the Defence suggests.[67] The Defence says that this is precisely the form of organizational – as opposed to individual – liability that the Security Council eschewed when adopting the Tribunal's Statute.[68]

25. Joint criminal enterprise is different from membership of a criminal enterprise which was criminalised as a separate criminal offence in Nuremberg and in subsequent trials held under Control Council Law No 10.[69] As pointed out by the *United Nations War Crimes Commission*,

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[64] *Vasiljević* Trial Judgment, par 202. This finding was not appealed by either party.

[65] XV *Law Reports of Trials of War Criminals*, pp 95 and 97. According to the United Nations War Crimes Commission, "the difference between a charge of conspiracy and one of acting in pursuant of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it." (ibid, pp 97-98).

[66] Ojdanić's Appeal, pars 59-63.

[67] Ojdanić's Appeal, par 65.

[68] Ojdanić's Appeal, par 65.

[69] Article 10 of the Nuremberg Charter provided for this possibility: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring

what was to be punished in relation to the latter was "no mere conspiracy to commit crimes but a knowing and voluntary membership of organisations which did in fact commit crimes, and those on a wide scale".[70] No such offence was included in the Tribunal's Statute. The Secretary-General made it clear that only natural persons (as opposed to juridical entities) were liable under the Tribunal's Statute,[71] and that mere membership in a given criminal organization would not be sufficient to establish individual criminal responsibility:

> The question arises, however, whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this Statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.[72]

26. Criminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter. The Prosecution in the present case made that point clear when it said that Ojdanić was being charged not for his membership in a joint criminal enterprise but for his part in carrying it out.[73] The indictment talks of his "having significantly contributed" to the execution of the joint criminal enterprise by "using the *de jure* and *de facto* powers available to him".[74]

27. The Defence claims further that, if the Tribunal were to read joint criminal enterprise liability into the Statute, it would thereby be violating the principle *in dubio pro reo*, which provides that, in case of doubt as to the content or meaning of a rule, the interpretation most favourable to the accused should be adopted.[75] Ojdanić contends that the application of that principle "would result in restricting the statute to the plain meaning of its terms, and requires that the indictment based upon joint criminal enterprise liability be dismissed".[76] In response, the Prosecution says that this

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individual [sic] to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned." Article 6(1) of the Nuremberg Charter stated that "[t]he Tribunal . . . shall have the power to try and punish persons who, acting in the interest of the European Axis countries, *whether as individuals or as members of organizations*, committed any of the following crimes" (emphasis added). Article II(1)(d) of Control Council Law No 10 provided that "1. Each of the following acts is recognized as a crime: [...] (d) membership in categories of a criminal group or organization declared criminal by the International Military Tribunal".

70 XV *Law Reports of Trials of War Criminals*, pp 98-99.

71 Par 50 of the Secretary-General's Report.

72 Par 51 of the Secretary-General's Report.

73 Prosecution's Response, par 34.

74 Indictment, par 16.

75 Ojdanić's Appeal, par 31.

76 Ojdanić's Appeal, par 34.

principle (*in dubio pro reo*) only applies "where the canons of construction fail to resolve a reasonable doubt in the meaning of a criminal statute".[77]

28. The Appeals Chamber is not satisfied that the present matter mandates the application of this principle of interpretation. The interpretation of Article 7(1) given by the Appeals Chamber in *Tadić*, and the comments made above, simply leave no room for it.[78] Insofar as concerns the question whether joint criminal enterprise is recognised in customary international law, the Appeals Chamber has no doubt that the application of the principle *in dubio pro reo* could help to resolve.

29. Finally, the Defence claims that the Appeals Chamber's finding is, in any case, inconsistent with existing customary law, as existing state practice is too weak to give rise to such a rule.[79] The Appeals Chamber does not propose to revisit its finding in *Tadić* concerning the customary status of ~~this form~~ of liability. It is satisfied that the state practice and *opinio juris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law in 1992 when Tadić committed the crimes for which he had been charged and for which he was eventually convicted.

30. In sum, the Defence has failed to show that there are cogent reasons in the interests of justice[80] for the Appeals Chamber to depart from its finding in the *Tadić* case, that joint criminal enterprise was both provided for in the Statute and that it existed under customary international law was in any way unreasonable at the relevant time. This part of the appeal is therefore rejected.

Meaning and scope of joint criminal enterprise liability charged against Ojdanić

31. The Defence next submits that the Trial Chamber in this case should not have considered itself to be bound by decisions rendered on this issue by the Appeals Chamber in three successive cases – *Tadić*, *Delalić* and *Furundžija* – as, it claims, these decisions do not provide much guidance on this matter.[81] According to the Defence, the pronouncements in both *Delalić* and *Furundžija* constitute an "unremarkable holding of accomplice liability" which does not support joint criminal enterprise liability by virtue of membership in an organisation with a criminal purpose as alleged in the indictment against him.[82] The Appeals Chamber has already pointed out above that joint criminal enterprise is to be regarded, not as a form of accomplice liability, but as a form of "commission" and that liability stems not, as claimed by the Defence, from mere membership of an

[77] Prosecution's Response, par 49, citing *Delalić* Trial Judgment, par 413.
[78] Prosecution's Response, par 49.
[79] Ojdanić's Appeal, pars 44-52.
[80] *Delalić* Appeal Judgment, par 26.
[81] Ojdanić's Appeal, par 54.
[82] Ojdanić's Appeal, pars 54-58.

organisation, but from participating in the commission of a crime as part of a criminal enterprise. And, as far as they provided guidance upon matters relevant to the Trial Chamber's decision, the *ratio decidendi* of the Appeals Chamber's judgments was in fact binding upon the Trial Chamber.[83]

32. Even if the Appeals Chamber in this case declines to revisit the *Tadić* decision, the Defence submits, it should hold that the concept of joint criminal enterprise as developed by later Trial Chambers and the Prosecutor in the present case, expands liability beyond the permitted scope of common purpose doctrine and "into the forbidden realm of organizational liability".[84]

33. As pointed out by the Bench of the Appeals Chamber, this indictment alleges that the crimes mentioned above and charged against Ojdanić were within the object of the joint criminal enterprise or, alternatively, that the offences of murder and persecutions were natural and foreseeable consequences of the joint criminal enterprise and that Ojdanić was aware that such crimes were the likely outcome of the joint criminal enterprise.[85] This description of Ojdanić's actions, as alleged in the indictment, falls squarely within the definition of joint criminal enterprise given by the Appeals Chamber in *Tadić*.[86] The Prosecution may not be said to have gone beyond the realm of the *Tadić* decision and the Defence's submission on that point is rejected.

Does the inclusion of joint criminal liability in the Statute of the International Tribunal infringe the principle *nullum crimen sine lege* ?

34. Ojdanić finally submits that the doctrine of joint criminal enterprise should not be applied in his case for yet another reason. Applying this doctrine to him, he says, would infringe the principle *nullum crimen sine lege*, insofar as it would mean applying law which was created after the acts for which he is charged.[87] The Defence claims that the common purpose doctrine as laid down in the *Tadić* Judgment was only created on 15 July 1999 – after the acts charged in the indictment – and that the concept of joint criminal enterprise did not enter the Tribunal's jurisprudence until the *Krstić* Trial Judgment.[88]

35. In response, the Prosecution submits that "common purpose" and "joint criminal enterprise" are interchangeable terms which apply to a form of liability recognised under Article 7(1) of the

[83] *Prosecutor v Aleksovski*, Case No IT-95-14/1-A, Judgement, 24 March 2000, par 113.
[84] Ojdanić's Appeal, par 66.
[85] Bench Decision, page 2.
[86] *Tadić* Appeal Judgment, pars 220, 227-228.
[87] Ojdanić's Appeal, pars 67-70.
[88] Ojdanić's Appeal, par 67.

Statute, the application of which would not infringe the above-mentioned principle.[89] The Prosecution points out that other Chambers of the International Tribunal, including the Appeals Chamber, have applied this doctrine in relation to events which took place years before Ojdanić's conduct as described in the indictment.[90]

36. First, concerning the terminological matter raised by the Defence, the phrases "common purpose" doctrine on the one hand, and "joint criminal enterprise" on the other, have been used interchangeably and they refer to one and the same thing. The latter term – joint criminal enterprise – is preferred, but it refers to the same form of liability as that known as the common purpose doctrine or liability.

37. Secondly, the principle *nullum crimen sine lege* is, as noted by the International Military Tribunal in Nuremberg, first and foremost, a "principle of justice".[91] It follows from this principle that a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is charged were committed. The Tribunal must further be satisfied that the criminal liability in question was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the head of responsibility selected by the Prosecution.

38. This fundamental principle "does not prevent a court from interpreting and clarifying the elements of a particular crime".[92] Nor does it preclude the progressive development of the law by the court.[93] But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification. This Tribunal must therefore be satisfied that the crime or the form of liability with which an accused is charged was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time, taking into account the specificity of international law when making that assessment.

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89 Prosecution's Response, par 51.
90 Prosecution's Response, par 52.
91 IMT Judgment, p 219.
92 *Aleksovski* Appeal Judgment, pars 126-127; *Delalić* Appeal Judgment, par 173.
93 See, *inter alia, Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), pars 36 and 40 (*ECHR*); *EV v Turkey*, Judgment, 7 Feb 2002, par 52; *SW v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-B (1995), pars 35-36 (*ECHR*). See also *C.R v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-C (1995), par 34 (*ECHR*): "However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."

39. The meaning and scope of the concepts of "foreseeability" and "accessibility" of a norm will, as noted by the European Court of Human Rights,[94] depend a great deal on "the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed".[95] The specificity of international criminal law in that respect has been eloquently noted by one American Military Tribunal in Nuremberg in the *Justice* case:

> Under written constitutions the *ex post facto* rule condemns statutes which define as criminal, acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. [...] International law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the events. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.[96]

40. Has Ojdanić had sufficient notice that if, as claimed in the indictment, he took part in the commission of very serious criminal offences as part of a joint criminal enterprise he could be found criminally liable on that basis? This Tribunal does not apply the law of the former Yugoslavia to the definition of the crimes and forms of liability within its jurisdiction. It does, as pointed out above, apply customary international law in relation to its jurisdiction *ratione materiae*. It may, however, have recourse to domestic law for the purpose of establishing that the accused could reasonably have known that the offence in question or the offence committed in the way charged in the indictment was prohibited and punishable. In the present instance, and contrary to the Defence contention,[97] the law of the Federal Republic of Yugoslavia in force at the time did provide for criminal liability for the foreseeable acts of others in terms strikingly similar to those used to define joint criminal enterprise.[98] Article 26 of the Criminal Code of the Socialist Federal Republic of Yugoslavia provides that:

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[94] See references in previous footnote, including, *Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), (*ECHR*); *EV v Turkey*, Judgment, 7 Feb 2002; *SW v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-B (1995) (*ECHR*); *C.R v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-C (1995).

[95] *Groppera Radio AG and Others v Switzerland*, Judgment, 28 Mar 1990, Ser A 173, par 68.

[96] See, eg, Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No 10, Vol III ("*Justice* case"), pp 974-975.

[97] Ojdanić's Appeal, par 69.

[98] Articles 253 of the Criminal Code of the Socialist Federal Republic of Yugoslavia and Articles 226 of the Criminal Law of the Republic of Serbia to which the Defence refers are irrelevant insofar as they related, not to a form of joint criminal enterprise, but to a form of liability akin to "conspiracy" which, as pointed above, is a different form of liability. As to Article 254 of the Criminal Code of the Socialist Federal Republic of Yugoslavia and Article 227 of the Criminal Law of the Republic of Serbia, they are likewise irrelevant to the extent that they deal with the

> Anybody creating or making use of an organisation, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.[99]

41. Although domestic law (in particular the law of the country of the accused) may provide some notice to the effect that a given act is regarded as criminal under international law, it may not necessarily provide sufficient notice of that fact. Customary law is not always represented by written law and its accessibility may not be as straightforward as would be the case had there been an international criminal code. But rules of customary law may provide sufficient guidance as to the standard the violation of which could entail criminal liability.[100] In the present case, and even if such a domestic provision had not existed, there is a long and consistent stream of judicial decisions, international instruments and domestic legislation[101] which would have permitted any individual to regulate his conduct accordingly and would have given him reasonable notice that, if infringed, that standard could entail his criminal responsibility.[102]

42. Also, due to the lack of any written norms or standards, war crimes courts have often relied upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime. In the *Tadić* Judgment, for instance, the Appeals Chamber noted "the moral gravity" of secondary participants in a joint criminal enterprise to commit serious violations of humanitarian law to justify the criminalisation of their actions.[103] Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.[104]

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setting up or membership in a criminal organisation or criminal agreement, regardless of the commission of any crime in pursuance to that organisation. See, Zoran Stojanović, Komentar Krivičnog Zakona Savezne Republike Jugoslavije, Belgrade 1997, pp 269-270 and Nikola Srzentić and Ljubiša Lazarević, Komentar Krivičnog Zakona Savezne Republike Jugoslavije, Belgrade 1995, pp 806-812

[99] In 1992, the name of the Criminal Code of the Socialist Federal Republic of Yugoslavia was changed to "Criminal Code of the Federal Republic of Yugoslavia" (Official Gazette of the FRY No 35/92). For a commentary to that provision, see Zoran Stojanović, Komentar Krivičnog Zakona Savezne Republike Jugoslavije, Belgrade 1997, p 52.

[100] See *X Ltd and Y v United Kingdom*, D and R 28 (1982), Appl 8710/79, pp 77, 80-81.

[101] Contrary to the Defence submission on that point, the Appeals Chamber has not relied upon domestic legislation and domestic case law to identify custom (Ojdanić's Appeal, par 51). The Appeals Chamber referred to those "only [...] to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems" (*Tadić* Appeal Judgment, par 225). It added that "[i]n the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation" (ibid).

[102] See *Tadić* Appeal Judgment, pars 195 *et seq.*

[103] *Tadić* Appeal Judgment, par 191.

[104] In the *Delalić* case, the Appeals Chamber referred to the ICCPR to state that certain acts could be regarded as "criminal according to the general principles of law recognized by the community of nations" (*Delalić* Appeals

43. Article 26 of the Criminal Law of the Federal Republic of Yugoslavia, coupled with the extensive state practice noted in *Tadić*, the many domestic jurisdictions which provide for such a form of liability under various names and which forms of liability run parallel to custom,[105] and the egregious nature of the crimes charged would have provided notice to anyone that the acts committed by the accused in 1999 would have engaged criminal responsibility on the basis of participation in a joint criminal enterprise.

44. In sum, the Appeals Chamber does not view the concept of joint criminal enterprise as a separate offence in itself, but only as a mode of committing one of the offences prescribed by articles 2 to 5 of the Statute. This part of Ojdanić's appeal is therefore dismissed.

Disposition

45. The Appeals Chamber therefore dismisses the appeal.

Done in both French and English, the English text being authoritative.

Mohamed Shahabuddeen
Presiding

Done this 21st day of May 2003,
At The Hague,
The Netherlands.

Judge Shahabuddeen appends a separate opinion to this decision.
Judge Hunt appends a separate opinion to this decision.

[Seal of the Tribunal]

Chamber Judgment, par 173). The IMT used a similar formulation when addressing the criminalisation of aggressive war: "the attacker must know that he is doing wrong" (IMT Judgment, p 219)

[105] *Tadić* Appeal Judgment, par 225. See also Prosecution's Response, pars 22-24 and 45. In its Reply, the Defence stated its view that the Prosecution did "a wonderfyul job of cataloging the numerous national systems which have some or all of her three forms of collective liability" (Reply, par 14).

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UNITED NATIONS	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-09-92-PT
		Date:	2 May 2012
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: **Mr John Hocking**

Decision of: **2 May 2012**

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

FOURTH DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS CONCERNING THE REBUTTAL EVIDENCE PROCEDURE

Office of the Prosecutor
Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

10. Rule 94 (B) of the Rules provides that:

> At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

11. The Appeals Chamber has held that "by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial".[19] Judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution.[20] Rule 94 (B) of the Rules fosters judicial economy by avoiding the need for evidence in chief to be presented in support of a fact already previously adjudicated.[21] In the case of a Trial Chamber taking judicial notice under this Rule, the legal effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the Defence may then put the point into question by introducing reliable and credible evidence to the contrary.[22]

IV. DISCUSSION

12. Before discussing the merits of the Motion, the Chamber wishes to spend a few words on what seems to be at the heart of the issue.

13. Taking judicial notice of adjudicated facts aims at avoiding presentation of evidence in relation to facts, which a previous Chamber established on the basis of evidence which left no reasonable doubt in the mind of the judges of that Chamber when adjudicating those facts ("previous Chamber"). According to the Tribunal's jurisprudence with regard to the concept of judicial notice of adjudicated facts, a party to the proceedings can propose a fact that has been adjudicated by a previous Chamber ("proposing party"). A Trial Chamber taking judicial notice of such a fact establishes a rebuttable presumption of its accuracy and relieves the proposing party of

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19 *Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4.

20 See *Prosecutor v. Édouard Karemera et al.,* Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera* Decision"), para. 42.

21 See *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal on Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 ("*Karemera* Rebuttal Decision"), para. 20.

22 See *Karemera* Rebuttal Decision, para. 13; *Prosecutor v. Dragomir Milošević*, Case No. IT-98_29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 ("*Milošević* Appeal Decision"), para. 16; *Karemera* Decision, para. 42.

its initial burden to produce evidence on that fact, on the basis of the previous Chamber's factual findings and evaluation of the evidence presented in that case.

14. The other party to the proceedings ("challenging party") may introduce evidence which contradicts a judicially noticed fact, and such evidence may rebut the presumed accuracy of that fact. If such evidence is heard, the proposing party has an interest in seeking to present evidence which rebuts the contradicting evidence, and which supports the accuracy of the fact that was taken judicial notice of.

15. The core issue is that, in taking judicial notice of an adjudicated fact, a Trial Chamber does not take notice of the evidence underlying this fact on which the previous Chamber established that fact. The presentation of contradicting evidence, if sufficiently relevant and probative to be considered pursuant to the criteria of Rule 89 (C),[23] is to be understood as a step to reopen the evidentiary debate on the fact the Chamber took judicial notice of. Therefore, if contradicting evidence is presented, and the proposing party still wishes to meet its burden of persuasion in relation to that fact, the Trial Chamber is invited to strike a balance between a judicially noticed *fact* and *evidence*. As facts in themselves cannot be weighed against contradicting evidence, in order to strike such a balance, the obvious way is to allow the proposing party to submit evidence in relation to the now challenged fact, which can then be weighed against the contradicting evidence. This restores a situation in which the Trial Chamber weighs evidence *pro* and *contra* the judicially noticed fact at issue and makes its own finding.[24]

16. There appears to be no uniform case law on eliciting rebuttal evidence with respect to judicially noticed facts.[25] The Chamber considers, however, that the sequencing order of the presentation of evidence, provided by Rule 85 (A) of the Rules, and the Appeal Chamber's

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[23] See *Karemera* Rebuttal Decision, para. 14.

[24] In this respect, the Chamber considers, in accordance with the Appeals Chamber's jurisprudence, that evidence underlying a challenged judicially noticed fact cannot be found inadmissible on the ground that it has already been considered and rejected by the previous Trial Chamber in making a finding on that fact. See *Karemera* Rebuttal Decision, para. 22.

[25] In the *Lukić* Reconsideration Decision, the Prosecution's request to lead rebuttal evidence on a challenged judicially noticed fact was denied because the Prosecution was considered to have been on notice of the Defence's intention to challenge a fact, since it related to a significant issue, and the Defence opposed the list of adjudicated facts relating to the challenged facts. See para. 18. The *Karadžić* Trial Chamber, on the other hand, held that when the Defence challenges adjudicated facts which were judicially noticed, the Prosecution may still choose to present additional evidence on that point during its rebuttal case. That Trial Chamber held that the Defence's argument, that judicially noticed facts that are not further substantiated with other evidence by the Prosecution will "disappear" once the fact is successfully challenged by the Defence, was "misguided". Further, the Trial Chamber reasoned that accepting this argument would effectively render Rule 94 (B) ineffectual, as the Prosecution would never be able to rely on adjudicated facts if it had notice that the Defence would challenge them. See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Motion to Strike Scheduled Sarajevo Shelling and Sniping Incidents, 27 January 2012 ("*Karadžić* Decision"), para. 11.

jurisprudence on rebuttal evidence, appropriately adjusted for the significant differences at issue in relation to judicially noticed facts, give an answer to the Prosecution's query on the matter.[26]

17. The Trial Chamber in *Prosecutor v. Radovan Karadžić* and Judge Van den Wyngaert in her dissenting opinion appended to the *Lukić* Reconsideration Decision, observed that the purpose of Rule 94 (B) of the Rules would be defeated if the Prosecution could not rely on judicially noticed facts merely because the Defence had notified its intent to challenge them. The Rule would be at risk to become a "dead letter".[27] The Chamber shares this view and considers that even if the challenging party notifies the proposing party of its intention to challenge certain judicially noticed facts, the proposing party may still rely on the legal effect of being relieved of its initial burden to produce evidence on the point, until the moment that the challenging party puts the adjudicated fact into question by *introducing* evidence to the contrary.[28] A requirement that the proposing party, in its case-in chief, must present evidence on judicially noticed facts on the basis of a notification of a future challenge to those facts, would run counter to the very concept of judicial notice of adjudicated facts. Further, the legal effect of judicial notice would not serve its purpose if, when the challenging party presents contradicting evidence, such presentation results in the eradication of the proposing party's possibility to then present its evidence in support of this fact. The proposing party can meaningfully determine what evidence it should present to meet its burden of proof in relation to that fact once that contradicting evidence has been introduced.

18. Prior to the Chamber taking a decision on a motion for judicial notice of adjudicated facts, the challenging party can object to the taking of judicial notice in its response to the proposed facts through a clear identification of a specific challenge that would be brought against these facts during trial. In this respect, the Chamber observes that in its Response, the Defence raised a specific objection to a number of proposed facts, arguing that the interests of justice and the right to a fair and public trial support leading evidence on these facts during trial.[29] Having this specific information enables the Chamber to determine whether, in this case, taking judicial notice would indeed serve judicial economy.[30] By denying to take judicial notice of a number of these facts, the Chamber restored a situation where the Prosecution would need to bring evidence in chief to establish these facts.

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[26] See *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-AR73.1, Decision on the Prosecution's Appeal Against the Trial Chamber's Order to Call Alibi Rebuttal Evidence During the Prosecution's Case in Chief, 16 October 2008, paras 13-14, 22, 24.

[27] *Lukić* Reconsideration Decision, Dissenting Opinion of Judge Christine van den Wyngaert, 9 April 2009, p. 1; *Karadžić* Decision, para. 11.

[28] See *Karemera* Rebuttal Decision, para. 13; *Milošević* Appeal Decision, para. 16; *Karemera* Decision, para. 42.

[29] See First Decision, para. 11.

[30] Thus, the Chamber did not take judicial notice of, for example, proposed fact no. 322; see First Decision, para. 11.

19. Once the Chamber has taken judicial notice of an adjudicated fact, there are, in line with the order of presentation of evidence provided in Rule 85 of the Rules, two stages prior to an envisaged presentation of prosecution evidence in rebuttal, during which the Defence may challenge that judicially noticed fact. First, a judicially noticed fact may be challenged during the presentation of the Prosecution's case, for example during cross-examination of a witness. The Prosecution may then adduce evidence through re-examination of that witness, or by expanding the scope of examination of other Prosecution witnesses or it may move for an amendment to its 65 *ter* (E) lists to add additional witnesses or exhibits. Second, the Defence may lead evidence during the presentation of its case, clearly contradicting a judicially noticed fact. The Prosecution may then introduce evidence through cross-examination of this or other Defence witnesses, or seek leave to present evidence in support of the challenged fact, notifying the Chamber of this intent in due time.

20. The above examples are not to be regarded as an exhaustive list of manners in which the proposing party can introduce evidence in support of the challenged judicially noticed fact. As a matter of principle, at any stage where the challenging party presents evidence contradicting a judicially noticed fact, the proposing party should have an opportunity to elicit evidence addressing the challenge or otherwise supporting the establishment of the fact by the means described above. Such an opportunity may also be given to the proposing party by allowing it to present evidence in rebuttal pursuant to Rule 85 (A) (iii).

21. The Chamber considers that in view of its discussion above, there is no need to discuss the Prosecution's Rebuttal Evidence Procedure.[31]

[31] With regard to part iv) of the Rebuttal Evidence Procedure, the Chamber considers that Rule 65 *ter* (G) of the Rules does not require the Defence to state which judicially noticed facts it intends to challenge or to identify the evidence it will lead to specifically challenge such facts. The Tribunal's case law permits the Defence to challenge judicially noticed facts at any time during the presentation of its case. A clear identification by the Defence in its Rule 65 *ter* (G) Filing, if any, of the judicially noticed facts it intends to challenge and the evidence it will present to this effect, would indeed be in the interests of judicial economy. The Chamber encourages the Defence to contribute to such expediency, but declines to add any additional requirements to those contained in the Rules.

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UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-02-59-S
		Date:	31 March 2004
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Amin El Mahdi
Judge Joaquín Martín Canivell

Registrar: **Mr. Hans Hothuis**

Judgement of: **31 March 2004**

PROSECUTOR

v.

DARKO MRĐA

SENTENCING JUDGEMENT

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Timothy J. Resch

Counsel for Darko Mrđa:

Mr. Vojislav Dimitrijević
Mr. Otmar Wachenheim

imprisonment is to be served" and that "particular consideration shall be given to the proximity to the convicted person's relations."

109. Nevertheless, the fact remains that Darko Mrđa will serve his sentence in a state different from his country of origin and at some distance from his wife and children. This is however a common aspect of the prison sentences imposed by the Tribunal. The Trial Chamber takes into account this factor in determining the length of imprisonment, but it does not consider it to be a mitigating circumstance.

8. Conclusions

110. In light of the above, the Trial Chamber finds that the following are relevant mitigating circumstances to which appropriate weight must be attached:

- Cooperation with the Prosecution;
- Guilty Plea;
- Remorse; and
- Personal circumstances of Darko Mrđa.

111. The Trial Chamber rejects the submissions of the Defence concerning duress, compliance with superior orders and the length of time between the commission of the crimes and the trial. However, the Trial Chamber takes into consideration the fact that Darko Mrđa must serve his sentence in a foreign country in determining his sentence.

D. The General Practice Regarding Prison Sentences in the Courts of the Former Yugoslavia

112. Article 24 of the Statute and Rule 101 of the Rules require the Trial Chamber, when determining sentence, to take into account the general practice regarding prison sentences in the former Yugoslavia.[148]

1. Arguments of the Parties

113. The Prosecution submits that the Trial Chamber should consider the factors set out in Article 41(1) of the SFRY Criminal Code[149] (the "Code") in determining sentence and that these are equivalent to aggravating and mitigating factors, evaluated by the Tribunal.[150]

[148] Rule 101 (B) (iii) of the Rules.

humanity) of which Darko Mrđa was convicted further to his plea of guilty. It then examined the aggravating and mitigating circumstances. Finally, in accordance with the Statute and the Rules, the Trial Chamber took into account of the general sentencing practice of the courts of the former Yugoslavia.

123. In determining the seriousness of the crimes, the Trial Chamber examined the nature of the offences committed, their scale, the role played by Darko Mrđa, and the impact of the crimes upon the victims and their families. It concluded that the sentence should reflect all of the cruelty and inhumanity which characterizes Darko Mrđa's direct participation in the shooting of around 200 civilians, of which all but 12 were killed.

124. Moreover, the Trial Chamber deemed that the civilian status of the victims could not be taken into account as an aggravating factor, as it is already an element of the crimes charged. However, it accepted that a considerable number of victims were in a situation of special vulnerability and found this to be an aggravating factor. Furthermore, the Trial Chamber considered that Darko Mrđa's position of authority was a relevant aggravating circumstance, but did not attach much weight to it. Finally, the Trial Chamber admitted that most of the victims were subjected to such a level of suffering that it should be qualified as an aggravating circumstance.

125. The Trial Chamber gave consideration to a number of mitigating circumstances. It observed that, since his arrest, Darko Mrđa entered a plea of guilty, made a public expression of remorse and actively cooperated with the Prosecution. Moreover, it accorded limited weight in the mitigation of sentence to Darko Mrđa's personal circumstances.

126. The Trial Chamber also took into consideration the fact that Darko Mrđa must serve his sentence in a foreign country in determining the appropriate sentence, but it did not consider it to be a mitigating circumstance.

127. Finally, the Trial Chamber rejected the submissions of the Defence concerning duress, compliance with superior orders and the lapse of time since the commission of the crimes.

B. Credit for Time Served

128. Darko Mrđa has been detained in the UNDU since his arrest and transfer on 13 June 2002. Pursuant to Rule 101 (C) of the Rules, he is entitled to credit for the time spent in detention, which amounts to 658 days.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-13/1-A
		Date:	5 May 2009
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz

Acting Registrar: **Mr. John Hocking**

Judgement of: **5 May 2009**

PROSECUTOR
V.
MILE MRKŠIĆ
VESELIN ŠLJIVANČANIN

PUBLIC

JUDGEMENT

The Office of the Prosecutor:
Ms. Helen Brady
Mr. Paul Rogers
Mr. Marwan Dalal
Ms. Kristina Carey
Ms. Najwa Nabti
Ms. Kyle Wood
Ms. Nicole Lewis

Counsel for Veselin Šljivančanin:
Mr. Novak Lukić and Mr. Stéphane Bourgon

Counsel for Mile Mrkšić:
Mr. Miroslav Vasić and Mr. Vladimir Domazet

20 November 1991.[276] In light of these findings the Appeals Chamber turns to consider whether Šljivančanin's failure to act upon learning of the order to withdraw the JNA troops from Ovčara substantially contributed to the murder of the prisoners of war by the TOs and paramilitaries.

81. Bearing in mind that the basic elements of the mode of liability of aiding and abetting apply regardless of whether this form of liability is charged as "omission",[277] the Appeals Chamber recalls that the *actus reus* of aiding and abetting consists of acts or omissions[278] which assist, encourage or lend moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime.[279] There is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime or that such conduct served as a condition precedent to the commission of the crime.[280] The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[281] Accordingly, in order to determine whether Šljivančanin possessed the requisite *actus reus* for aiding and abetting murder, the Appeals Chamber must be satisfied beyond reasonable doubt that the Prosecution has demonstrated that Šljivančanin substantially contributed to their killing by his inaction[282] and that, when account is taken of the errors committed by the Trial Chamber, all reasonable doubt concerning Šljivančanin's guilt has been eliminated.[283]

(a) Šljivančanin's ability to act

82. The Appeals Chamber further recalls that aiding and abetting by omission implicitly requires that the accused had the ability to act but failed to do so.[284] In order to determine whether Šljivančanin had the ability to act but failed to do so, the Appeals Chamber must be satisfied beyond reasonable doubt that the Prosecution has provided sufficient evidence concerning which means were available to Šljivančanin to fulfil his continuing duty towards the prisoners of war.[285]

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[276] *See supra* para. 62.
[277] *Orić* Appeal Judgement, para. 43. *See supra* para. 49.
[278] *Nahimana et al.* Appeal Judgement, para. 482; *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, para. 47.
[279] *Nahimana et al.* Appeal Judgement, para. 482; *Blagojević and Jokić* Appeal Judgement, para. 127; *Ndindabahizi* Appeal Judgement, para. 117; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 370, fn. 740; *Blaškić* Appeal Judgement, paras 45, 48; *Vasiljević* Appeal Judgement, para. 102; *Čelebići* Appeal Judgement, para. 352; *Tadić* Appeal Judgement, para. 229.
[280] *Blaškić* Appeal Judgment, para. 48.
[281] *Blaškić* Appeal Judgment, para. 48.
[282] *Cf. Ntagerura et al.* Appeal Judgement, para. 321.
[283] *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras 13-14. *See* also *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 13.
[284] *Cf. Ntagerura et al.* Appeal Judgement, para. 335. *See* also *infra* para. 154.
[285] *Cf. Ntagerura et al.* Appeal Judgement, para. 335. (Where the Appeals Chamber also held that the Prosecution had not indicated which possibilities were open to Bagambiki to fulfil his duties under the Rwandan domestic law).

(e) The *mens rea* of aiding and abetting by omission

157. Šljivančanin submits that "aiding and abetting requires an intentional act on the part of the [a]ccused, which can only be matched by a culpable omission, a concept that goes beyond the basic elements of aiding and abetting as defined by the Appeals Chamber".[556] He argues that since the omission would have to be "specifically directed to assist, encourage or lend moral support"[557] to the perpetration of the crime, "only the wilful failure to discharge a duty, which implies the culpable intent of the accused, can lead to individual criminal responsibility, pursuant to Article 7(1) of the Statute".[558] In this regard, Šljivančanin submits that "mere knowledge" that the conduct facilitates the commission of the crime is insufficient to establish aiding and abetting by omission[559] and that the applicable *mens rea* standard must include, at a minimum, proof beyond reasonable doubt that he consciously decided not to act, which amounts to consent.[560] He argues that failure on the part of the Trial Chamber to establish that his omission was intentional and deliberate amounts to a finding of strict liability.[561]

158. The Prosecution responds that Šljivančanin attempts to elevate the mental element of aiding and abetting to a kind of special intent, which has already been specifically rejected by the Appeals Chamber.[562] It submits that the correct test is knowledge in the sense of "awareness of a probability" that the crime will be committed and that the acts or omissions will assist or facilitate in the commission of the crime,[563] and that, in any event, the facts as found by the Trial Chamber would fulfil his proposed criteria.[564]

159. The Appeals Chamber considers that Šljivančanin misapprehends the *mens rea* standard applicable to aiding and abetting. The fact that an "omission must be directed to assist, encourage or lend moral support to the perpetration of a crime" forms part of the *actus reus* not the *mens rea* of aiding and abetting.[565] In addition, the Appeals Chamber has confirmed that "specific direction" is

[556] Šljivančanin Appeal Brief, para. 212.
[557] Šljivančanin Appeal Brief, para. 211, citing *Orić* Appeal Judgement, para. 43. *See* also *Nahimana et al.* Appeal Judgement, para. 482.
[558] Šljivančanin Appeal Brief, para. 214.
[559] Šljivančanin Appeal Brief, para. 245.
[560] *See* Šljivančanin Supplemental Brief in Reply, para. 53. Šljivančanin further contends that the Trial Chamber should have applied the following additional criteria: (i) that he had knowledge of his ability to act; (ii) that he was aware of the essential elements of the crime ultimately committed by the principal; and (iii) that he had knowledge that taking action would obstruct the commission of the crime (*see* Šljivančanin Appeal Brief, para. 247(e)).
[561] Šljivančanin Supplemental Brief in Reply, para. 52.
[562] Prosecution Supplemental Respondent's Brief, para. 13, citing *Blaškić* Appeal Judgement, para. 49. *See* also Prosecution Supplemental Respondent's Brief, paras 12, 14.
[563] Prosecution Supplemental Respondent's Brief, para. 31. *See* also AT. 169, citing *Ndindabahizi* Appeal Judgement, para. 122.
[564] Prosecution Supplemental Respondent's Brief, para. 33. *See* also AT. 172.
[565] *Orić* Appeal Judgement, para. 43.

not an essential ingredient of the *actus reus* of aiding and abetting.[566] It reiterates its finding that the required *mens rea* for aiding and abetting by omission is that: (1) the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator; and (2) he must be aware of the essential elements of the crime which was ultimately committed by the principal.[567] While it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed, if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter.[568] The Appeals Chamber further recalls that it has previously rejected an elevated *mens rea* requirement for aiding and abetting, namely, the proposition that the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.[569] Accordingly, Šljivančanin's arguments are dismissed.

4. Conclusion

160. In light of the foregoing, Šljivančanin's second ground of appeal is dismissed in its entirety.

C. Third Ground of Appeal: Šljivančanin's Legal Duty to Protect the Prisoners of War at Ovčara by Virtue of his Responsibility for the Evacuation of the Vukovar Hospital

161. The Trial Chamber convicted Šljivančanin for aiding and abetting the torture of over 200 prisoners of war held at Ovčara on 20 November 1991.[570] In reaching this conclusion, the Trial Chamber found that Šljivančanin was under a duty to protect the prisoners of war by reason of his responsibility for the evacuation of the Vukovar hospital, and his failure to prevent the commission of crimes against the prisoners of war amounted to a breach of that duty.[571]

162. Šljivančanin argues that the Trial Chamber erred in finding that Mrkšić put him in charge of the evacuation of the Vukovar hospital and thereby entrusted him with a legal duty to protect the prisoners of war at Ovčara.[572] He avers that the Trial Chamber committed the following errors: (1) the Trial Chamber erred in finding that he testified that Mrkšić ordered him to ensure the

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[566] *Blagojević and Jokić* Appeal Judgement, para. 189; *see* also *Blagojević and Jokić* Appeal Judgement para. 188.
[567] *See supra* para. 146.
[568] *Simić* Appeal Judgement, para. 86, citing *Blaškić* Appeal Judgement, para. 50. *See* also *Nahimana et al.* Appeal Judgement, para. 482; *Ndindabahizi* Appeal Judgement, para. 122; *Furundžija* Trial Judgement, para. 246.
[569] *Blaškić* Appeal Judgement, para. 49, citing *Vasiljević* Appeal Judgement, para. 102. *See* also *Blagojević and Jokić* Appeal Judgement, para. 222.
[570] Trial Judgement, paras 674, 689, 715.
[571] Trial Judgement, para. 669. *See* also Trial Judgement, paras 391, 668, 670.
[572] Šljivančanin Notice of Appeal, para. 17; Šljivančanin Appeal Brief, paras 257-259, citing Trial Judgement, para. 400. *See* also AT. 148-150, 200-201.

VIII. PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. In this Judgement, the Appeals Chamber allows the Prosecution's second ground of appeal and the Prosecution's appeal on Šljivančanin's sentence.[1] I agree with the Majority's reasoning and conclusion that the Trial Chamber committed an error of law in finding that Šljivančanin's duty to protect the prisoners of war pursuant to the laws and customs of war came to an end upon Mrkšić's order to withdraw.[2] I am also in agreement with the Majority that the Trial Chamber committed a discernible error in the exercise of its discretion when it found that a sentence of five years' imprisonment adequately reflected the gravity of the crimes committed by Šljivančanin, and in particular, the consequences of the torture upon the victims and their families, the especial vulnerability of the prisoners, and the very large number of victims.[3] However, for the reasons detailed below, I am unable to agree with the rest of the reasoning developed by the Majority in the discussion of the Prosecution's second ground of appeal or with the consequent conviction of Šljivančanin for aiding and abetting murder.[4] I also disagree with the Majority's decision to increase the sentence imposed on Šljivančanin by the Trial Chamber.[5]

2. For the reasons already expressed in my dissenting opinions in *Prosecutor v. Galić*,[6] *Prosecutor v. Semanza*[7] and *Prosecutor v. Rutaganda*,[8] I do not believe that the Appeals Chamber has the power to remedy an error of the Trial Chamber by subsequently entering new or more serious convictions on appeal. Similarly, I do not believe that the Appeals Chamber has the power to impose a new sentence on the accused that is higher than that which was imposed by the Trial Chamber. The Appeals Chamber is bound to apply Article 25(2) of the Statute of the International Tribunal ("ICTY Statute") in such a manner as to comply with fundamental principles of human rights as enshrined in, *inter alia*, the International Covenant on Civil and Political Rights ("ICCPR").[9] Article 14(5) of the ICCPR provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". Accordingly, the right to appeal convictions, not excluding convictions entered for the first time on appeal, should be granted to an accused before the International Tribunal.

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[1] Appeal Judgement, paras 101-103 and 417.
[2] Appeal Judgement, paras 64-74 and 75, first sentence.
[3] Appeal Judgement, para. 413.
[4] Appeal Judgement, paras 61-63 and 76-103.
[5] Appeal Judgement, paras 418-419.
[6] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, Partially Dissenting Opinion of Judge Pocar, p. 187, para. 2.
[7] *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, Dissenting Opinion of Judge Pocar, pp. 131-133.
[8] *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, Dissenting Opinion of Judge Pocar ("*Rutaganda* Dissenting Opinion"), p. 4.
[9] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* 23 March 1976.

11. In addition, I observe that the International Tribunal and the ICTR, established by the Security Council on behalf of the international community to deal with the most serious crimes, stand as examples of best practice for the prosecution of international crimes. These bodies do so at a time of great importance in the history of international criminal law, as evident through the development of the International Criminal Court, currently engaging in its first prosecutions, and the establishment of *ad hoc* and mixed tribunals such as the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia. Accordingly, it is incumbent on the International Tribunal and the ICTR to apply the highest standard of human rights.

12. In conclusion, I consider that, after having found that the Trial Chamber committed an error of law in affirming that Šljivančanin did not have a duty to protect the prisoners of war following Mrkšić's order to withdraw, the Appeal Chambers should have taken a different course in this Judgement. It should have remitted the matter to the Judges of first instance for them to address whether the available evidence would show, beyond reasonable doubt, Šljivančanin's guilt for aiding and abetting murder. This approach was especially compelling in the circumstances of the present case as, in light of its finding that it was not incumbent on Šljivančanin to ensure the safety of prisoners of war, many circumstances of fact were completely unexplored by the Trial Chamber. The Appeals Chamber engages itself in highly fact-intensive evaluations of whether Šljivančanin was aware of Mrkšić's order to withdraw the JNA troops,[22] whether Šljivančanin's failure to act contributed to the murders of the prisoners of war,[23] and whether he realised that the killing of the prisoners of war at Ovčara had become a likely occurrence.[24] The Appeals Chamber enteres a conviction based on the trial record without having observed the witness testimony or the presentation of evidence, factors which may be particularly important in assessing witness credibility. In so doing, the Appeals Chamber enters, for the first time in this case, findings on matters which are primarily within the responsibility of the Trial Chamber, such as finding on issues of fact that are crucial to a verdict of guilt. Such findings are now destined to remain unchallenged, in clear violation of Šljivančanin's right to appeal against convictions.

13. Likewise, remitting the determination of sentence to the Trial Chamber in order to ensure that the right to appeal against sentence is upheld is especially important in the circumstances of this case. In this case, the Appeals Chamber does not consider that the Trial Chamber merely erred by improperly taking into account one of the sentencing factors at issue, or made an error as to some of the facts upon which it exercised its discretion, or failed to correctly note one or more of the legal principles governing sentencing. Rather, the Appeals Chamber finds that the Trial

[22] Appeal Judgement, paras 61-62.
[23] Appeal Judgement, paras 76-100.
[24] Appeal Judgement, para. 63.

UNITED
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	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-98-34-A
		Date:	3 May 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **3 May 2006**

PROSECUTOR

v.

MLADEN NALETILIĆ, *a.k.a.* "TUTA"
VINKO MARTINOVIĆ, *a.k.a.* "ŠTELA"

JUDGEMENT

Counsel for the Prosecutor:

Mr. Norman Farrell
Mr. Peter M. Kremer
Ms. Marie-Ursula Kind
Mr. Xavier Tracol
Mr. Steffen Wirth

Counsel for Naletilić and Martinović:

Mr. Matthew Hennessy and Mr. Christopher Meek for Mladen Naletilić
Mr. Želimir Par and Mr. Kurt Kerns for Vinko Martinović

[customary international] law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts".[255]

113. *Tadić* did not directly address the further question posed by this case: whether the mental state element of Article 2 crimes encompasses knowledge of the international character of the armed conflict. In *Kordić and Čerkez*, the Appeals Chamber provided an affirmative answer to that question, stating that although the accused need not "make a correct legal evaluation as to the international character of the armed conflict", he must be "aware of the *factual* circumstances, *e.g.*, that a foreign state was involved in the armed conflict".[256] The Appeals Chamber considers it necessary to elucidate the matter further. In the Appeals Chamber's view, the conclusion of *Kordić and Čerkez* was correct, and follows logically from the principles established in *Tadić*.

114. The principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence. The specific required mental state will vary, of course, depending on the crime and the mode of liability. But the core principle is the same: for a conduct to entail criminal liability, it must be possible for an individual to determine *ex ante*, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal.[257]

115. The critical question before the Appeals Chamber is therefore this: what conduct constitutes a crime amounting to a "grave breach" of the Geneva Conventions? Is it the mere commission of acts listed in Article 2(a) to (h) of the Statute, such as "wilful killing"? Or is it the commission of such acts on the basis that they were committed in the course of an international armed conflict?

116. The Appeals Chamber concludes that the existence and international character of an armed conflict are both jurisdictional prerequisites (as established in *Tadić*) and substantive elements of crimes pursuant to Article 2 of the Statute. The fact that something is a jurisdictional prerequisite does not mean that it does not at the same time constitute an element of a crime. If certain conduct becomes a crime under the Statute only if it occurs in the context of an international armed conflict, the existence of such a conflict is not merely a jurisdictional prerequisite: it is a substantive element of the crime charged. Thus, the Prosecution's obligation to prove intent also encompasses the accused's knowledge of the facts pertinent to the internationality of an armed conflict.

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[255] *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 83-84.
[256] *Kordić and Čerkez* Appeal Judgement, para. 311.
[257] In some contexts, particularly with respect to a commander's knowledge of his subordinates' crimes, it suffices that an accused had "reason to know" of the facts in question: *see* Article 7(3) of the Statute.

to the Tribunal *cannot* be considered in mitigation of sentence."[1303] However, given that Martinović was involved in criminal proceedings at the time of his transfer,[1304] and that there is some indication that the time saved by facilitating transfer would have been approximately one month,[1305] the Appeals Chamber does not consider that this mitigating circumstance would have been given significant weight. The Trial Chamber thus did not commit an error affecting the judgement.

2. Alleged error regarding assistance and general attitude to others

602. Martinović submits that despite noting his claims that he helped his BH Muslim neighbours, that his general attitude is the same towards BH Muslims and BH Croats, and that BH Muslim detainees were helped by him and wanted to stay with him rather than in other units, the Trial Chamber failed to address them in mitigation when determining his sentence.[1306] Martinović refers to the right of an accused to a reasoned opinion under Article 23 of the Statute as an aspect of the fair trial requirement in Articles 20 and 21 of the Statute and argues that the Trial Chamber cannot simply ignore his submissions.[1307]

603. The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98 *ter*(C).[1308] This right is one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute.[1309] It makes it possible for an individual to exercise their right of appeal[1310] and allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of the evidence.[1311] The Appeals Chamber further recalls that the requirement of a reasoned opinion relates to a Trial Chamber's judgement; a Trial Chamber is under no obligation to justify its findings in relation to each and every submission made during trial.[1312]

604. The Appeals Chamber notes that in an earlier section of the Trial Judgement before the Trial Chamber made its findings on sentencing, the Trial Chamber accepted that Martinović rendered assistance to some, but not the vast majority of BH Muslim prisoners.[1313] This finding has been

[1303] Trial Judgement, para. 761 (emphasis added).
[1304] Trial Judgement, para. 762.
[1305] The Decision of the Zagreb County Court was handed down on 8 June 1999. The Decision of the Supreme Court of the Republic of Croatia was delivered on 8 July 1999 upon appeal by the Public Prosecutor.
[1306] Martinović Appeal Brief, paras 588-589.
[1307] Martinović Appeal Brief, para. 592.
[1308] *Kvočka et al.* Appeal Judgement, para. 23; *Kunarac et al.* Appeal Judgement, para. 41.
[1309] *Kunarac et al.* Appeal Judgement, para. 41.
[1310] *See Hadjianastassiou v. Greece*, European Court of Human Rights, no. 69/1991/321/393, [1992] ECHR Ser. A., No. 252, Judgement of 16 December 1992, para. 33.
[1311] *Kunarac et al.* Appeal Judgement, para. 41.
[1312] *Kvočka et al.* Appeal Judgement, para. 23.
[1313] Trial Judgement, paras 267, 384.

UNITED
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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-02-60/1-A

Date: 8 March 2006

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Judgement of: **8 March 2006**

PROSECUTOR

v.

MOMIR NIKOLIĆ

JUDGEMENT ON SENTENCING APPEAL

Counsel for the Prosecution:

Mr. Peter M. Kremer, QC
Mr. Peter McCloskey
Ms. Marie-Ursula Kind

Counsel for the Appellant:

Mr. Rock Tansey
Mr. R J. Livingston

The Trial Chamber additionally found the following to be elements of a separate aggravating circumstance:

> The Trial Chamber finds that Momir Nikolić was in a position of authority as Assistant Commander and Chief of Security and Intelligence. While his tasks largely consisted of implementing rather than giving orders, Momir Nikolić directed the military police of the Bratunac Brigade, as well as co-ordinated other units; this was of significance to the implementation and completion of the underlying criminal acts committed following the attack on Srebrenica. The role that Nikolić played and the functions that he performed, while not in the capacity of a commander, were of significant importance to the overall "murder operation" that was ongoing. Therefore, the Trial Chamber finds his position and role to be aggravating factors.[163]

61. The Appeals Chamber agrees with the Appellant that the Trial Chamber used the word "role" when considering both the gravity of the offence and the aggravating circumstance. Upon a review of the above cited paragraphs of the Sentencing Judgement,[164] the Appeals Chamber considers that the Trial Chamber took into account the Appellant's active role in the crime in its assessment of the gravity of the offence, and his position of authority and the role he played in the crime as a separate aggravating circumstance. The Appeals Chamber is not satisfied that the Appellant's role taken into account by the Trial Chamber when considering the gravity of the offence and his "role" taken into account in addition to his position of authority as an aggravating factor correspond to different aspects of the role in question. There is no identifiable difference in the facts cited that would lead to such a conclusion; both paragraphs address as a general matter the Appellant's role in the murder operation. Double-counting the Appellant's role in the crimes is impermissible as doing so allows the same factor to detrimentally influence the Appellant's sentence twice. However, although the Trial Chamber therefore erred in its double-counting of the Appellant's "role" in the offence, the Appeals Chamber notes that the Trial Chamber's reference to the Appellant's "position of authority" in paragraph 135 of the Sentencing Judgement did not amount to double counting. The Appellant's abuse of his position of authority is distinct from his role in the crimes, and the Trial Chamber referred to the former only as an aggravating factor.

62. The Appeals Chamber concludes that the Trial Chamber committed a discernible error in taking into account twice in sentencing the role the Appellant played in the commission of the crimes. As it impacted on the Trial Chamber's determination of the sentence, the Appeals Chamber will take this error into account when revising the Appellant's sentence.

63. The Appellant's third ground of appeal is accordingly upheld.

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[163] *Ibid.*, para. 135.

[164] *Ibid.*, paras 123, 135. The Appeals Chamber further notes that the Trial Chamber explicitly stated again in paragraph 139 of the Sentencing Judgement that it considered not only his position of authority but also his role as an aggravating circumstance: "In summary, the Trial Chamber finds that the following aggravating circumstances have been proven beyond reasonable doubt: the position of authority and role of Momir Nikolić [...]".

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-03-68-A
		Date:	3 July 2008
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Hans Holthuis**

Judgement of: **3 July 2008**

PROSECUTOR

v.

NASER ORIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Ms. Michelle Jarvis
Ms. Christine Dahl
Mr. Paul Rogers
Ms. Laurel Baig
Ms. Nicole Lewis
Ms. Najwa Nabti

Counsel for Naser Orić:

Ms. Vasvija Vidović
Mr. John Jones

superior could possibly be held responsible under Article 7(3) in relation to his subordinate's criminal responsibility under the same article.[90]

40. The Trial Chamber did consider, however, that an accused may be held responsible under Article 7(3) of the Statute for a subordinate's commission by omission[91] and aiding and abetting.[92] With respect to aiding and abetting, the Trial Chamber further held that this mode of liability may take the form of encouragement or approval, as well as omission.[93]

41. The Appeals Chamber considers that the Trial Chamber did not hold Atif Krdžić criminally responsible for commission by omission. At a minimum, the *actus reus* of commission by omission requires an elevated degree of "concrete influence".[94] Such was not the case here, where the Trial Chamber merely found that Atif Krdžić's absence from the detention facilities "coincide[d] with more killings and more maltreatment".[95] Furthermore, the Trial Chamber clearly distinguished Atif Krdžić from the principal perpetrators who physically committed the crimes.[96]

42. Turning to whether the Trial Chamber applied the theory of aiding and abetting by tacit approval and encouragement, the Appeals Chamber notes that in cases where this theory has been applied, the combination of a position of authority and physical presence at the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement.[97] Here, the Trial Chamber did not find that Atif Krdžić was present at the scene of the crimes. Rather, it focused on his "conspicuous absence" from the detention facilities, and how it "coincide[d] with more killings and more maltreatment."[98] Similarly, the Trial Chamber emphasised the absence of evidence "of any supervision over the guards, of any disciplinary measures against them, or of any visit by Atif Krdžić, or a person assigned by him, for that matter at any time."[99] The Appeals Chamber therefore finds that the Trial Chamber did not hold Atif Krdžić criminally responsible for aiding and abetting by tacit approval and encouragement.

43. The Prosecution submits that the Trial Chamber found Atif Krdžić responsible for aiding and abetting by omission.[100] The Appeals Chamber recalls that omission proper may lead to

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[90] *See* Trial Judgement, paras. 299-301.
[91] Trial Judgement, para. 302.
[92] Trial Judgement, para. 301.
[93] Trial Judgement, paras. 283, 303.
[94] *See Blaškić* Appeal Judgement, para. 664.
[95] Trial Judgement, para. 496.
[96] *See supra*, paras. 24, 25, 27-30.
[97] *Brđanin* Appeal Judgement, para. 273, with references at fns. 553, 555. *See also Kayishema and Ruzindana* Appeal Judgement, paras. 201-202.
[98] Trial Judgement, para. 496.
[99] Trial Judgement, para. 495.
[100] Prosecution Response Brief, para. 126, 151; Prosecution Written Submissions of 25 March 2008, paras. 1-4; AT. 1 April 2008, pp. 9-11. Orić disputes the existence of a notion of aiding and abetting by "pure omission" in international

individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act.[101] The Appeals Chamber has never set out the requirements for a conviction for omission in detail.[102] However, at a minimum, the offender's conduct would have to meet the basic elements of aiding and abetting. Thus, his omission must be directed to assist, encourage or lend moral support to the perpetration of a crime and have a substantial effect upon the perpetration of the crime (*actus reus*).[103] The aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator[104] and must be aware of the essential elements of the crime which was ultimately committed by the principal (*mens rea*).[105]

44. The Trial Chamber found a legal duty to act on the part of Atif Krdžić as Commander of the Military Police, and that his omissions "coincide[d] with more killings and more mistreatment".[106] However, it does not follow from the fact that Atif Krdžić's omissions "coincided" with an increase in crimes that his omissions had a "substantial effect" thereupon, as required for liability for aiding and abetting to incur. The Trial Chamber remained silent on the issue.

45. Regarding Atif Krdžić's *mens rea*, the Trial Chamber found that "there is no reason why Atif Krdžić [...] should not have become aware of the crimes committed, except for wilful blindness".[107] Atif Krdžić was thus found to have been aware of the crimes committed by the principal perpetrators. However, the Trial Chamber made no finding on whether Atif Krdžić knew that his omissions assisted in the crimes. In this regard, the Appeals Chamber notes that the Trial Chamber's finding regarding Atif Krdžić's "conspicuous absence" from the detention facilities[108] refers not to his *mens rea*, but to his failure to comply with his duty to care for the prisoners.[109] The Prosecution understands this finding in the same way.[110]

46. The Appeals Chamber therefore finds that the Trial Chamber did not hold Atif Krdžić criminally responsible for aiding and abetting by omission.

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humanitarian law and that a superior can be held responsible for subordinates who aid and abet by omission: AT. 1 April, pp. 60-62, 131-136.

[101] *Brđanin* Appeal Judgement, para. 274; *Galić* Appeal Judgement, para. 175; *Ntagerura et al.* Appeal Judgement, paras. 334, 370; *Blaškić* Appeal Judgement, para. 663.

[102] *Cf. Simić* Appeal Judgement, para. 85, fn. 259; *Blaškić* Appeal Judgement, para. 47.

[103] *See, e.g., Nahimana et al.* Appeal Judgement, para. 482; *Simić* Appeal Judgement, para. 85.

[104] *See* for the general definition of aiding and abetting, *e.g., Seromba* Appeal Judgement, para. 56; *Nahimana et al.* Appeal Judgement, para. 482; *Blagojević and Jokić* Appeal Judgement, para. 127.

[105] *Cf. Simić* Appeal Judgement, para. 86; *Aleksovski* Appeal Judgement, para. 162.

[106] Trial Judgement, paras. 490, 495, 496.

[107] Trial Judgement, para. 496.

[108] Trial Judgement, para. 496.

[109] *See* Trial Judgement, para. 495.

[110] *See* AT. 1 April 2008, p. 10.

47. Having considered the Trial Judgement as a whole, the Appeals Chamber is left with only a small number of general findings – for instance, that Atif Krdžić might have been "wilfully blind" to the crimes and that he was "conspicuously absent" from the detention facilities – without any indication of whether and how they relate to any form of criminal liability under the International Tribunal's Statute. These scattered fragments do not allow the Appeals Chamber to conclude on what basis the Trial Chamber found Orić's only identified culpable subordinate criminally responsible. Such finding would have been required to determine Orić's guilt. For these reasons, the Appeals Chamber finds that the Trial Chamber erred in failing to resolve the issue of whether Orić's subordinate incurred criminal responsibility.

48. In the absence of a finding on the basis on which Orić's only identified culpable subordinate was found criminally responsible, Orić's convictions under Article 7(3) of the Statute cannot stand. The Trial Chamber's error therefore invalidates the decision.

49. Having granted Orić's appeal in this part, the Appeals Chamber would not necessarily need to address Orić's arguments pertaining to his knowledge or reason to know of his subordinate's alleged criminal conduct. However, the Appeals Chamber deems it necessary to give full consideration of the issue of Orić's *mens rea* raised under his sub-ground of appeal 1(F)(2).

5. Orić's knowledge or reason to know of his subordinate's alleged criminal conduct (Orić's Ground 1(F)(2))

50. Under his ground of appeal 1(F)(2), Orić submits that there was no evidence that he knew that the Military Police was criminally responsible for the commission of the crimes committed in the detention facilities.[111] Before it can turn to Orić's submissions, the Appeals Chamber must first consider whether the Trial Chamber actually made the challenged finding.

51. The Appeals Chamber recalls that to hold a superior criminally liable under Article 7(3) of the Statute it must be found that he knew or had reason to know of his subordinate's criminal conduct:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[112]

[111] Orić Appeal Brief, paras. 129(e), 130-137. *See also* Prosecution Response Brief, paras. 50 and 53.
[112] Article 7(3) of the Statute.

52. The Appeals Chamber notes that the Trial Chamber made no explicit finding as to whether Orić knew or had reason to know of his subordinate's alleged criminal responsibility for the mistreatment of Serb detainees.[113] As such a pivotal finding was required, the Appeals Chamber will examine whether a holistic reading of the Trial Judgement reveals that the Trial Chamber was satisfied that Orić had the required *mens rea* under Article 7(3) of the Statute.

53. In its analysis of Orić's "imputed knowledge", the Trial Chamber found that Orić "appears to have had no doubt that the killing of a detainee was a matter that concerned him as he discussed it with Hamed Salihović and Ramiz Bećirović with a view to prevent reoccurrence."[114] The Trial Chamber further found that Orić was "instrumental in promoting an investigation of this incident, which ultimately resulted in the removal of Mirzet Halilović, a decision in which the Accused took an active part."[115] The Appeals Chamber considers that these findings imply that the Trial Chamber was satisfied that Orić had knowledge of Mirzet Halilović's criminal conduct, but notes that the latter was not found to be Orić's subordinate.[116]

54. Regarding Orić's only identified culpable subordinate, Atif Krdžić, the Trial Chamber held that Orić "was aware that, responding to problems with the Srebrenica military police, Mirzet Halilović had been replaced by Atif Krdžić as its commander."[117] It also found that Orić knew that his deputy, Zulfo Tursunović, was visiting the Serb detainees at the detention facilities.[118] The Trial Chamber continued: "The reality of the situation is that more Serb detainees were killed and cruelly treated after Atif Krdžić was appointed commander of the Srebrenica military police than before. In addition, this occurred at a time when the Srebrenica military police was assigned a new commander, and was undergoing structural changes, supposedly to resolve previous problems."[119] The Trial Chamber concluded by holding that "[a]gainst the backdrop of the Accused's prior notice, it appears that the Accused did not deem it necessary to verify if further Serb detainees were killed or cruelly treated and acted on that assumption."[120]

55. Read in isolation, these findings might be understood to mean that the Trial Chamber was satisfied that Orić had "prior notice" – in other words, reason to know – that Atif Krdžić would continue his predecessor's failure to ensure that the Serb detainees were not subjected to murder and cruel treatment. However, the Appeals Chamber considers that, read in context, the finding on

[113] *See* Trial Judgement, paras. 533-560.
[114] Trial Judgement, para. 550.
[115] Trial Judgement, para. 550.
[116] Trial Judgement, paras. 492, 532. *See infra*, para. 166.
[117] Trial Judgement, para. 552.
[118] Trial Judgement, para. 552.
[119] Trial Judgement, para. 558. *See also ibid.*, paras. 495, 505-506.
[120] Trial Judgement, para. 558.

Orić's "prior notice" relates to his knowledge that "Serb detainees kept at the Srebrenica Police Station were cruelly treated, and that one of them had been killed."[121] Thus, the finding did not concern Orić's reason to know of his subordinate's conduct, but, instead, his notice of the crimes committed by others at the Srebrenica Police Station.

56. On such a crucial element of the accused's criminal responsibility under Article 7(3) of the Statute as his knowledge or reason to know of his subordinate's criminal conduct, the Appeals Chamber emphasises that neither the Parties nor the Appeals Chamber can be required to engage in this sort of speculative exercise to discern findings from vague statements by the Trial Chamber.

57. The difficulty in detecting the necessary Trial Chamber findings on this issue appears to arise from the approach taken in the Trial Judgement. Rather than examining Orić's knowledge or reason to know of his own subordinate's alleged criminal conduct, the Trial Chamber concentrated its entire analysis on Orić's knowledge of the crimes themselves,[122] which were not physically committed by Atif Krdžić, his only identified culpable subordinate:[123]

> Having established that subsequent to 27 November 1992, a superior-subordinate relationship existed between the Accused and *the head of the Srebrenica military police* ultimately responsible for the murder and cruel treatment, the Trial Chamber must now examine to what extent, if any, the Accused had knowledge or should have been aware of *the occurrence of murder and cruel treatment at the Srebrenica Police Station and the Building* between December 1992 and March 1993.[124]

This approach was ultimately reflected in the Trial Chamber's conclusion as to Orić's *mens rea*, which was squarely limited to the question of whether he knew or had reason to know of the actual crimes committed at the two detention facilities, to the exclusion of any finding on his knowledge of the alleged criminal conduct of his subordinate, Atif Krdžić.[125]

58. The Prosecution submits that, in the context of crimes such as those at issue which occur in a prison setting, knowledge of the crimes and knowledge of the subordinates' criminal conduct "are one and the same."[126] It argues that "[a]s soon as Orić knew or had reason to know that prisoners were being mistreated and killed, he must also be considered to have known that his subordinates in charge of the prisoners were criminally responsible for that mistreatment."[127]

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[121] Trial Judgement, para. 557. *See also ibid.*, para. 550: "His knowledge about this killing incident, as well as of the cruel treatment of the other detainees, put him on notice that the security and the well-being of all Serbs detained henceforth in Srebrenica was at risk".
[122] Trial Judgement, paras. 533-560. *See also ibid.*, paras. 574, 576, 577.
[123] *See supra*, paras. 24, 25, 33-35.
[124] Trial Judgement, para. 533 (emphasis added; footnote omitted).
[125] Trial Judgement, para. 560.
[126] AT. 1 April 2008, p. 22.
[127] Prosecution Written Submissions of 25 March 2008, para. 19. *See also ibid.*, para. 18; AT. 1 April 2008, pp. 23-24; AT. 2 April 2008, pp. 192-193.

59. The Appeals Chamber stresses that knowledge of a crime and knowledge of a person's criminal conduct are, in law and in fact, distinct matters. Although the latter may, depending on the circumstances, be inferred from the former, the Appeals Chamber notes that such an inference was not made by the Trial Chamber.[128] Its enquiry was limited to Orić's knowledge or reason to know of the crimes committed in the detention facilities, and so was its conclusion. Therefore, the Appeals Chamber need not consider the Prosecution's assertion that Orić knew or had reason to know of the crimes themselves.[129]

60. In conclusion, the Appeals Chamber finds that, in order to establish Orić's responsibility under Article 7(3) of the Statute, the Trial Chamber was under the obligation to make a finding on whether he knew or had reason to know that Atif Krdžić, the only identified culpable subordinate, was about to or had engaged in criminal activity. The Trial Chamber's failure to do so constitutes an error of law.

6. Conclusion

61. The Appeals Chamber grants Orić's grounds 1(E)(1) and 5 insofar as he alleges therein that the Trial Chamber failed to resolve the issue of his subordinate's criminal responsibility. In relation to Orić's sub-ground of appeal 1(F)(2), the Appeals Chamber finds that the Trial Chamber also failed to resolve the issue of whether Orić knew or had reason to know that his subordinate was about to or had committed crimes. These errors invalidate the Trial Chamber's decision to find Orić criminally responsible for failing to prevent the crimes of murder and cruel treatment committed against Serb detainees between 27 December 1992 and 20 March 1993.

[128] Regarding the possibility of making such an inference in the circumstances of the case, the Appeals Chamber refers to its analysis of the Prosecution's appeal, *infra* paras. 172-174.
[129] *See* AT. 1 April 2008, pp. 19-22, 24-25.

90. The Trial Chamber made no express finding that Orić had *de jure* control over the Military Police between 24 September and 16 October 1992. At this juncture, however, the Appeals Chamber need not determine whether the Trial Chamber erred in failing so to find because, for reasons stated below, it considers the Prosecution's argument to be incorrect in law.

91. It is well established that the Prosecution must prove effective control beyond reasonable doubt in establishing a superior-subordinate relationship within the meaning of Article 7(3) of the Statute.[187] For that purpose, *de jure* authority is not synonymous with effective control.[188] Whereas the possession of *de jure* powers may certainly suggest a material ability to prevent or punish criminal acts of subordinates, it may be neither necessary nor sufficient to prove such ability.[189] If *de jure* power always results in a presumption of effective control, then the Prosecution would be exempted from its burden to prove effective control beyond reasonable doubt.[190] The Appeals Chamber is therefore unable to agree with the Prosecution's proposed legal presumption.

92. The Appeals Chamber acknowledges that its jurisprudence might have suggested otherwise, using the terms "presume" or "*prima facie* evidence of effective control".[191] The import of such language has not always been clear. Although in some common law jurisdictions "*prima facie* evidence" leads by definition to a burden-shifting presumption,[192] the Appeals Chamber underscores that before the International Tribunal the Prosecution still bears the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates.[193] The possession of *de jure* authority, without more, provides only some evidence of such effective control. Before the International Tribunal there is no such presumption to the detriment of an accused.

93. For these reasons, the Appeals Chamber dismisses this part of the Prosecution's appeal.

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[187] As most recently recalled in *Hadžihasanović and Kubura* Appeal Judgement, para. 20.
[188] *Halilović* Appeal Judgement, para. 85.
[189] *See Halilović* Appeal Judgement, para. 85: "In fact, [de jure power] may not in itself amount to [effective control]." *Cf. also Nahimana et al.* Appeal Judgement, paras. 625 and 787, fn. 1837.
[190] *See Hadžihasanović and Kubura* Appeal Judgement, para. 21.
[191] *Čelebići* Appeal Judgement, para. 197; *Hadžihasanović and Kubura* Appeal Judgement, para. 21
[192] *See* Brian Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul: Thomson West, 2004).
[193] *Hadžihasanović and Kubura* Appeal Judgement, para. 21.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No. Date: Original:	IT-03-68-T 30 June 2006 English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Hans Henrik Brydensholt
Judge Albin Eser

Registrar: **Mr. Hans Holthuis**

Judgement of: **30 June 2006**

PROSECUTOR

v.

NASER ORIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Jan Wubben
Ms. Patricia Viseur Sellers
Mr. Gramsci Di Fazio
Ms. JoAnne Richardson
Mr. José Doria

Counsel for the Accused:

Ms. Vasvija Vidović
Mr. John Jones

704. Finally, his speech on the occasion of the second anniversary of the Bajramovići Decision[1992] as well as the description of himself and his role in his book[1993] supports the conclusion that he was significantly more than the commander of the Potočari group only.

705. All of these factors, however, including a certain pattern of destruction and burning of property,[1994] do not necessarily lead to the conclusion that the Accused exercised effective control over the various participating groups of fighters, not to speak of the civilians, who followed the fighters.

706. The evidence on the possible influence of the Accused on the local fighting groups and their respective leaders demonstrates that there may have been some instances where some groups and/or leaders were more amenable than others to put themselves under control and command of the Accused.[1995] Generally speaking, however, until 8 January 1993, in spite of efforts to bring them together under an effective sole command,[1996] the local groups remained relatively independent and voluntary.[1997] The conduct of such leaders as Hakija Meholjić, Akif Ustić, Ejub Golić and Nurif Rizvanović explains how unrealistic and unworkable it was for the Accused to exercise effective control over their respective groups.[1998] The Trial Chamber finds the Accused credible when he stated during his Interview that although he was elected commander, fighters were primarily loyal to their respective commanders, and he was thus unable to command all of the fighting groups in the field,[1999] especially since he was not always present during all the attacks.

707. The picture that emerges from the evidence is not one of an organised army with a fully functioning command structure, but one of pockets of desperate men willing to fight, mainly to defend themselves, that grouped together around trusted leaders, who could provide them with a

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[1992] Ex. P431, "Video", 04:26-08:48.
[1993] Ex. P90, "Srebrenica Testifies and Accuses", by Naser Orić, pp. 86, 93.
[1994] *See* para. VIII.B., "The Facts and Findings".
[1995] Ex. P328, "Interview" of the Accused, tape 8, p. 29; Sead Delić, T. 8764; ex. D300, "Session of the BiH Presidency" of 11 August 1995.
[1996] *See* IV.B., "The Bosnian Muslim Forces in the Srebrenica Area".
[1997] 'Independent' is used here to explain that the local groups could decide not to participate in an attack and that no sanction was available to force them to participate. 'Voluntary' is used to explain that fighters were not formally mobilised and that their participation depended on their own decision, although they may have been under a moral duty to fight: *see* para. 138 *supra*.
[1998] *See* paras 154-160, 164, 167, 169 *supra*.
[1999] Ex. P328, "Interview" of the Accused, tape 3, pp. 12-13, tape 8, p. 18; ex. P329, "Interview" of the Accused, tape 3, pp. 18-19, tape 13, pp. 12-14, tape 17, p. 2; ex. P84, "Memo Pad", joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 23 December 1992, p. 44, with 'Naser' stating: "My commanders do not obey me sufficiently and I must/?resolve this/with them". The Trial Chamber holds that in all likelihood, the person referred to as 'Naser' is the Accused. *See also* Hakija Meholjić, T. 6947-6951, 6972, stating that Zulfo Tursunović and Akif Ustić engaged in combat on their own initiatives and that the witness himself was responsible for his actions.

IT-04-81-T
D29246 - D28597
06 September 2011

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-04-81-T

Date: 6 September 2011

Original: English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Pedro David
Judge Michèle Picard

Registrar: **Mr. John Hocking**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

JUDGEMENT

PUBLIC WITH CONFIDENTIAL ANNEX C

The Office of the Prosecutor:

Mark Harmon
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Counsel for the Accused:

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pursuant to Articles 5 and 3 of the Statute respectively.[254] Common Article 3(1) (a) of the Geneva Conventions provides the basis for the inclusion of murder under Article 3 of the Statute.[255]

H. Individual Criminal Responsibility

1. Responsibility Under Article 7(1) of the Statute – Aiding and Abetting

124. The Prosecution charges Momčilo Perišić with aiding and abetting the planning, preparation or execution of the crimes alleged in Counts 1 to 4 and 9 to 13 of the Indictment pursuant to Article 7(1).[256]

125. Article 7(1) of the Statute provides:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

(a) Aiding and Abetting

(i) *Actus Reus*

126. "Aiding and abetting" consists of acts or omissions directed at providing practical assistance, encouragement or moral support to the perpetration of the crime, which have a substantial effect on the perpetration of the crime.[257] The Appeals Chamber expressly stated that "specific direction" is not a requisite element of the *actus reus* of aiding and abetting.[258] There is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime or that such conduct served as a condition precedent to the commission of

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254 Indictment, pp 14, 17, 21.

255 *Čelebići* Appeal Judgement, paras 136, 419-420; *Tadić* October 1995 Appeal Jurisdiction Decision, paras 87, 89; *Orić* Trial Judgement, para. 344; *Delić* Trial Judgement, para. 43; *Krnojelac* Trial Judgement, para. 52. Common Article 3: "[T]he following acts are and shall remain prohibited at any time and in any place whatsoever [...]: (a) violence to life and person, *in particular murder of all kinds*, mutilation, *cruel treatment* and torture; [...]" (emphasis added).

256 Indictment, pp 14, 21.

257 *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Karera* Appeal Judgement, para. 321; *Blagojević and Jokić* Appeal Judgement, para. 127; *Blaškić* Appeal Judgement, para. 45; *Simić* Appeal Judgement, para. 85. *See also Orić* Appeal Judgement, para. 43. For a thorough analysis of the *actus reus* of aiding and abetting, *see Furundžija* Trial Judgement, paras 192-235.

258 *Mrkšić and Šljivančanin* Appeal Judgement, para. 159. The Appeals Chamber in *Blagojević and Jokić* held that "specific direction" has not always been included as element of the *actus reus* of aiding and abetting and that this may be explained that "such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime" considered that "to the extent that specific direction forms an implicit part of the *actus reus* of aiding and abetting, where the accused knowingly participated in the commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her 'routine duties' will not exculpate the accused", *Blagojević and Jokić* Appeal Judgement, paras 182, 185-189.

the crime.[259] The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been committed[260] and at a location which is removed from that where the principal crime is committed.[261]

127. The aider and abettor is always an accessory to the crime perpetrated by another person, the principal.[262] For an accused to be liable for aiding and abetting, the underlying crime must ultimately be committed by the principal perpetrator. It is however not necessary that the latter be identified or tried, even in cases of crimes requiring specific intent.[263] It is also not necessary that the principal perpetrator be aware of the aider and abettor's contribution to the crime.[264]

128. The determination of whether conduct substantially assists the commission of a crime requires a fact-based inquiry.[265] The Appeals Chamber has determined that the *actus reus* of aiding and abetting may be satisfied by a commander permitting the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime.[266] Furthermore, the fact that the aider and abettor's conduct amounted to no more than his "routine duties" does not exculpate him, if such conduct substantially contributed to the commission of the crime.[267]

(ii) *Mens Rea*

129. The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[268] The aider and abettor must be aware of the "essential elements" of the crime committed by the principal perpetrator, including the state of mind of the principal perpetrator.[269] It is not required, however, that the aider and abettor *share* the *mens rea* required for such crime.[270]

130. As consistently confirmed by the Appeals Chamber:

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259 *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blagojević and Jokić* Appeal Judgement, paras 127, 134; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48. *See also Nahimana et al.* Appeal Judgement, para. 482.

260 *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48.

261 *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blaškić* Appeal Judgement, para. 48.

262 *Tadić* Appeal Judgement, para. 229.

263 *Milutinović et al.* Trial Judgement, para. 92.

264 *Tadić* Appeal Judgement, para. 229; *Milutinović et al.* Trial Judgement, para. 94.

265 *Blagojević and Jokić* Appeal Judgement, para. 134.

266 *Blagojević and Jokić* Appeal Judgement, para. 127. *Krstić* Appeal Judgement, paras 137, 138, 144.

267 *Blagojević and Jokić* Appeal Judgement, para. 189.

268 *Seromba* Appeal Judgement, para. 56; *Blagojević and Jokić* Appeal Judgement, para. 127; *Ntagerura et al.* Appeal Judgement, para. 370; *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, paras 45-46; *Vasiljević* Appeal Judgement, para. 102.

269 *Blagojević and Jokić* Appeal Judgement, para. 221. *See also Orić* Appeal Judgement, para. 43. It is not required that the accused knew the precise crime that was intended and committed by the principal, *see Blaškić* Appeal Judgement, para. 50.

270 *Blagojević and Jokić* Appeal Judgement, para. 221 (emphasis added).

the operation was not successful,[4551] the Majority finds that Perišić's actions show that he intended to and in fact did provide assistance to Mladić and the VRS war-effort in the Sarajevo campaign, at a time when he already knew of the VRS criminal intent in the implementation of its war strategy.

7. Conclusion

1621. The Majority finds that Perišić repeatedly exercised his authority to assist the VRS in waging a war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objective. Perišić's actions substantially facilitated the commission of these crimes because the VRS heavily depended on the VJ's support to function as an army and conduct its operations, including besieging Sarajevo and taking over Srebrenica. The Majority is also satisfied that all of Perišić's actions described above were voluntary.

1622. As found earlier, Perišić urged the FRY SDC to continue its policy of assisting the VRS. He notably oversaw the provision of wide-ranging logistical and technical assistance to the VRS. Without the regular supply of considerable quantities of ammunition and other weaponry, as well as fuel, technical expertise, repair services and personnel training, the VRS would have been hampered in conducting its operations in Sarajevo and Srebrenica.

1623. In addition, the Majority found that the military personnel that Perišić provided for and sustained through the 30th PC included the officers holding positions of command and authority in the VRS Main Staff, as well as well-trained commanding officers of the lower units. The payment of salaries to the VRS's top officers, including Mladić, Dragomir Milošević, Galić, Popović, Gvero, Tolimir, and other principal perpetrators of the crimes charged in Srebrenica and Sarajevo was instrumental in helping the VRS plan and carry out its operations in Sarajevo and Srebrenica. By creating the PCs – a mechanism through which he ensured that these military personnel continued receiving their salaries and enjoying all their benefits in the VJ – Perišić allowed them to carry out their operations in the VRS with limited concern for their basic material needs and those of their families. Perišić sustained the very life line of the VRS and created the conditions for it to implement a war strategy that encompassed the commission of crimes against civilians.

1624. The Majority recognises that the evidence does not establish that the specific weapons used in committing the charged crimes stemmed from the logistical assistance process overseen by Perišić. However, the Majority recalls that the acts of the aider and abettor need not have been "specifically directed" to assist the crimes.[4552] The element of substantial assistance for aiding and

4551 *See supra* paras 1329-1330.

4552 *See supra* paras 126. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 159; *Blagojević and Jokić* Appeal Judgement, paras 192, 195.

assistance to the crimes and that he was aware of the essential elements of the crimes, including the mental state of the principal perpetrators.[4558]

1630. The Majority recalls its finding that the VRS committed the crimes of murder and attacks on civilians for Counts 2 and 4 as a violation of the laws or customs of war, as well as murder and inhumane acts as crimes against humanity for Counts 1 and 3. The Trial Chamber also found that the VRS and/or MUP forces committed the crimes of murder as a violation of the laws or customs of war (Count 10) and murder, inhumane acts, persecutions and exterminations as crimes against humanity (Counts 9, 11, 12 and 13).

1631. The Majority recalls its finding that from the early stages of the war, Perišić was provided with information, from a variety of sources, of the VRS's criminal behaviour and discriminatory intent.[4559] This information related to acts of violence against Bosnian Muslims perpetrated in the BiH theatre of war and made Perišić aware of the VRS's propensity to commit crimes.[4560] With this state of mind, Perišić provided substantial assistance to the VRS in terms of logistic and personnel and this assistance had a substantial effect on the crimes.[4561]

2. Sarajevo

1632. The Majority is satisfied that the general propensity to commit crimes in conjunction with specific information on crimes committed in Sarajevo made Perišić aware that other similar crimes would probably occur, including killing and wounding of civilians and/or persons not taking active part in the hostilities. Notwithstanding this knowledge, Perišić continued to provide significant assistance to the VRS until the end of the siege.

1633. The Majority is also satisfied that Perišić was aware of the essential elements of these crimes, including the mental state of the perpetrators. At the outset, the Majority recalls that Perišić knew that one of the strategic objectives of the Bosnian Serb leadership involved the partition of Sarajevo. Through international reports and cables as well as his intelligence and security organs and media coverage, Perišić soon became aware of the VRS's campaign of sniping and shelling against the civilian population. The Defence argues that at the time of the Indictment it was reasonable to believe that there was no such campaign.[4562] The Majority does not dispute that there were specific instances of sniping and shelling, notably the Markale I incident, where Perišić received conflicting information on the alleged perpetrators. That being noted, extensive evidence

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4558 *See supra* paras 129-131.
4559 *See supra* paras 1456, 1483-1486.
4560 *See supra* paras 1457-1486.
4561 *See supra* paras 1594-1602, 1607-1619, 1621-1627.
4562 *See supra* paras 536-549.

demonstrates that Perišić was put on notice of the general existence of a campaign of sniping and shelling of civilians at the time of his tenure as Chief of the VJ General Staff. The systematic and frequent coverage of crimes committed during the siege of Sarajevo in international reports and media spanning over a period of three years leads the Majority to find that the only reasonable conclusion is that Perišić knew of such a campaign.

1634. The Defence also argues that the UN Commission on Human Right's reports and the Mazowiecki reports were "replete with unsourced hearsay and unattributed conclusions and assumptions" and therefore it would "be entirely reasonable for the VJ, VJ intelligence organs, and Mr. Perišić to discount the report[s] in [their] entirety".[4563] Furthermore, it is the Defence's position that the information dispensed by the international and local news media "was unreliable and biased against the Bosnian Serbs"[4564] with the consequence that the Serbs in general (and in particular military commanders) distrusted the news reporting.[4565]

1635. The Majority is satisfied that the international community as well as international and Serbian media, consistently and for a considerable period of time, documented and reported allegations of crimes committed by the VRS. This information alerted Perišić to the high likelihood that the VRS was committing crimes. The Majority finds that Perišić could not have reasonably discounted this information simply because he considered it biased against the Serbs. The fact that information was, in some instances, biased or one-sided does not undermine the finding that Perišić had notice of the VRS's crimes.

1636. In conclusion, the Majority, Judge Moloto dissenting, finds beyond a reasonable doubt that Perišić knew that his conduct assisted in the commission of crimes in Sarajevo. The mental element of aiding and abetting is therefore established in relation to Counts 1 to 4 of the Indictment.

3. Srebrenica

1637. The Majority recalls its finding that Perišić knew of the escalating tensions and the build-up of the eventual attack on Srebrenica by the VRS.[4566] Since he was alerted to the VRS's propensity to commit crimes, the Majority is satisfied that Perišić also knew that it was very probable that the VRS would forcibly transfer Bosnian Muslims and commit some acts of mistreatment and killings with discriminatory intent once Srebrenica had fallen under their control. Through international documents, including reports, UNSC's resolutions and diplomatic cables as well as daily reports

4563 Defence Final Brief, para. 844.
4564 Defence Final Brief, para. 831.
4565 Defence Final Brief, paras 831-838.
4566 *See supra* paras 1530-1531, 1541.

from his Intelligence organs and media coverage, Perišić also soon became aware of certain crimes perpetrated by the VRS in Srebrenica.[4567] Notwithstanding such knowledge, Perišić continued to provide substantial assistance to the VRS both prior to and during the period crimes were committed in Srebrenica.

1638. The Majority is therefore satisfied beyond reasonable doubt that Perišić knew that his actions provided practical assistance to the crimes of murder, inhumane acts and persecutions and that he was aware of the essential elements of these crimes, including the mental state of the principal perpetrators.

1639. The Trial Chamber will now turn to the question of whether Perišić knew that his assistance to the VRS would assist the commission of the crime of extermination (Count 13). In order to establish that Perišić aided and abetted the crime of extermination, the Trial Chamber must be satisfied that he had the requisite knowledge when he provided practical assistance to the crimes, that the principal perpetrators intended to kill on a large scale.

1640. The Trial Chamber recalls in this regard that, well before July 1995, a variety of sources had put Perišić on notice of the VRS's propensity to commit crimes. The catalogue of such crimes committed in the past by the VRS contained extremely serious ones, including murder, forcible displacements and other inhumane acts as part of a campaign of ethnic cleansing. The Trial Chamber notes, however, that none of the information provided to Perišić on the VRS's criminal conduct alerted him to the fact that the VRS intended to commit a crime on the scale of the one that occurred in Srebrenica in July 1995.

1641. In this regard, the Trial Chamber notes that an internal report of 30 April 1993, which was submitted to the President of the UNSC by the UN Mission in BiH, stated that the failure to reach an agreement between the Bosnian Serbs and the ABiH Commander in the area of Srebrenica, would "most probably" have led to the massacre of 25,000 people.[4568] Similarly, in the wake of a VRS offensive on Goražde, a letter by the permanent representative of BiH to the UNSC in June 1993 stated that "[w]e again, on the basis of past experience, fear the massacre of a civilian

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4567 *See supra* paras 1546-1553, 1557-1563, 1567-1578, 1579. In relation to the Defence argument on unreliability of those reports and the alleged media bias against the Bosnian Serbs (*see* Defence Final Brief, paras 830-838), *see supra* paras 1634-1635.

4568 Ex. P2462, Report of the UNSC Mission Established Pursuant to Resolution 819, 30 April 1993, paras 12, 14, 17.

population".[4569] The Trial Chamber recalls, however, that there is no evidence that Perišić was privy to this information.

1642. The Trial Chamber also received conflicting evidence as to whether the massacre of civilians in Srebrenica was subjectively seen as foreseeable at that time.

1643. Witness Pyers Tucker, who worked as the personal staff officer to the Commander of UNPROFOR for BiH, General Phillipe Morillon,[4570] testified that based on his past experience and knowledge, it was to be expected that the Serb activities in Srebrenica would lead to the civilian population either being removed or killed.[4571] In fact, in his 20 March 1993 report which he sent to the UNPROFOR BiH Command, he assessed the situation in Srebrenica as follows:

> If free passage (with transport) [cannot] be arranged for the refugees in the Srebrenica pocket within the next 7 to 14 days, indications are that the Serbs will carry out a *genocidal "cleansing"* of the entire enclave, resulting in the potential death of up to 80,000 human beings. [...] [The Serbs] are unlikely to stop this offensive until the enclave is cleared one way or another.[4572]

1644. Similarly, witness Muhamed Sacirbey, the Permanent Ambassador of BiH to the United Nations between 1992 and 2000, when asked about his contemporary view as to what may happen in the event of an attack on Srebrenica, testified:

> Starting with the Drina River valley, places like Visoko, Višegrad, Foča, Bijeljina, going into, particularly, Prijedor where we believe many more thousands of people were murdered, this was all more or less done at the same military and political leadership and that continued through much of the war, of course, with the greater intensity during the beginning of the war. But it was from our perspective, that is the perspective of the mission of Bosnia and Herzegovina, and from my conversations with President Izetbegović and other Bosnian leaders, it was a very really possibility that [these] individuals, not only would be expelled, but, in fact, could be massacred.[4573]

1645. On the other hand, Carl Bildt, who served as the EU co-Chairman of the International Conference on the Former Yugoslavia, testified that it was foreseeable that ethnic cleansing would occur in Srebrenica if it was taken over by the VRS.[4574] He nonetheless remarked that the scale of the Srebrenica killings was not foreseeable.[4575]

1646. This evidence reflecting conflicting views does not lead to the only reasonable conclusion that the outright extermination of Srebrenica inhabitants was foreseeable at the time.

4569 Ex. P2469, Letter of the Permanent Representative of BiH to the UN, to the President of the UNSC, 30 May 1993, p. 2.
4570 Pyers Tucker, T. 9088-9089.
4571 Pyers Tucker, T. 9204.
4572 Ex. P2694, BH Command on Srebrenica Evacuation, 20 March 1993, p. 3 (emphasis added).
4573 Muhamed Sacirbey, T. 7457-7458.
4574 Carl Bildt, T. 14321.
4575 Carl Bildt, T. 14322-14323.

cared for and accommodated after they swam across the Drina River into FRY territory in July 1995 around the time of the Srebrenica events.[4903]

1813. The Defence additionally mentions Perišić's post-conflict behaviour, including his support for peace and for democratic forces in the FRY, as well as his opposition to Slobodan Milošević's regime, in particular between 1998 and 2000.[4904] Perišić was a founding member of the opposition party named Movement for a Democratic Serbia.[4905] Moreover, the Defence submits that Perišić participated in the preparation and adoption of the FRY's Law on Cooperation with the ICTY, and was among the persons involved in drafting and signing the decision to transfer Milošević into the Tribunal's custody.[4906]

1814. Finally, the Defence notes that Perišić cooperated with the OTP, voluntarily surrendered into the Tribunal's custody once indicted, and conducted himself appropriately and professionally throughout court proceedings.[4907]

2. Findings of the Trial Chamber

(a) Gravity of the Crimes and the Role of the Accused

(i) Sarajevo

1815. The Trial Chamber has found, Judge Moloto dissenting, that Perišić aided and abetted the campaign of sniping and shelling that took place during the siege of Sarajevo.

1816. It would be difficult to overstate the magnitude of the crimes perpetrated in Sarajevo. The siege lasted for nearly four years during which Sarajevo civilians endured conditions of terror due to the indiscriminate nature of the attacks.[4908] Thousands of men, women and children were killed, and tens of thousands injured.[4909] In particular, Sarajevo civilians were regularly shelled and sniped in the course of Perišić's tenure as Chief of the VJ General Staff, a lengthy time span.[4910]

4903 Defence Final Brief, para. 1155, citing Siniša Borović, T. 14003.
4904 Defence Final Brief, paras 1162-1171.
4905 Defence Final Brief, para. 1168, citing Ex. D373, Memo from the Movement for a Democratic Serbia (undated).
4906 Defence Final Brief, para. 1172, citing Ex. D316, Statement of Zoran Živković, 3 December 2009.
4907 Defence Final Brief, paras 1173-1175.
4908 Sarajevo Adjudicated Facts III, 82-83.
4909 Ex. P137, Witness Statement of General John Wilson, 5 June 1995 and 19 December 2002, para. 53; Ex. P2331, Expert Report of Ewa Tabeau, Death Toll in the Siege of Sarajevo, April 1992 to December 1995: A Study of Mortality Based on Eight Large Data Sources, 18 August 2003, p. 9; Sarajevo Adjudicated Facts I, 154-155; Sarajevo Adjudicated Facts III, 11.
4910 Sarajevo Adjudicated Facts I, 132, 149.

1817. The victims of these shelling and sniping attacks were especially vulnerable. The people of Sarajevo could hardly find refuge. Civilians were targeted in their homes, at places of worship, in hospitals and schools.[4911] Women, children, and the elderly were not spared.[4912]

(ii) Zagreb

1818. The Trial Chamber has held, Judge Moloto dissenting, that Perišić bears individual criminal responsibility for failing to punish his subordinates for the shelling of Zagreb.

1819. The shelling of Zagreb was executed with callous disregard for civilian life. On multiple occasions, the SVK fired Orkan rockets into the centre of Zagreb, unleashing powerful, unguided explosives into a densely populated urban area.[4913] These indiscriminate attacks struck several civilian areas and notably a children's hospital.[4914] They resulted in injuries to over 200 civilians and 7 deaths.[4915] The victims were especially vulnerable.

(iii) Srebrenica

1820. The Trial Chamber, has determined, Judge Moloto dissenting, that Perišić aided and abetted crimes perpetrated in Srebrenica.

1821. The Srebrenica tragedy stands as one of the darkest chapters in European history since World War Two. While the Srebrenica enclave was designated as a safe area, the VRS fiercely attacked civilians,[4916] as it had previously done in Sarajevo. The VRS's victims were, again, numerous[4917] and defenceless.[4918] The Srebrenica atrocities shattered families and left behind countless broken homes.

4911 Sarajevo Adjudicated Facts I 138; Mesud Jusufović, T. 3237; Ex. P520, Transcript of Mesud Jusufović from *Prosecutor v. Stanislav Galić*, T. 6532; Ex. P521, List of High Profile Facilities Set on Fire by Shelling During the War; Ex. P125, Witness Statement of Anda Gotovac, 17 May 2006, para. 6 (the apartment building of Gotovac's brother-in-law Trg Heroja was destroyed and burned by shelling in 1992); Ex. P37, Witness Statement of Enes Jašarević, 10 March 1997, para. 3 (stating that in September 1993, a Serbian tank positioned in Gavrica Brdo fired a shell into his apartment, killing his 11-year-old son); Ex. P57, Witness Statement of Ramiz Hodžić, 22 November 1995, p. 3; Ex. P61, Witness Statement of Đula Leka, 25 February 1996, para. 1.

4912 Sarajevo Adjudicated Facts I, 154, 176.

4913 Zagreb Adjudicated Facts, 8, 39.

4914 Zagreb Adjudicated Fact 39. *See* Ex. P290, Photograph Album of 3 May 1995 Rocket Attack, Žitnjak-Martinci Village, Zagreb; Ex. P302, Map of Zagreb Centre; Ex. P297, Photograph Album of 3 May 1995 Rocket Attack, Zagreb Paediatric Hospital; Ex. P303, Site Documentation and Maps of the Rocket Attacks on the City of Zagreb on 2 and 3 May 1995; Ex. P307, Report of the Zagreb Police Administration, 17 May 1995.

4915 Zagreb Adjudicated Facts, 9, 38, 57, 58.

4916 MP-443, T. 8877; Ex. P2651-P2655, Expert Report of William Haglund on Forensic Investigation of the Cerska Grave Site, Volumes I-V, 15 June 1998; Ex. P2646, Expert Report of William Haglund on Forensic Investigation of the Lazete 2 Grave Site, Volume I, 15 June 1998, pp vii-ix; Dražen Erdemović, T. 7968.

4917 Helge Brunborg, T. 2545, 2562-2564. *See also* Ex. P409, Report by Helge Brunborg, Ewa Tabeau and Arve Hetland, 16 November 2005, p. 6.

1822. However, the Majority recalls the Trial Chamber's finding that Perišić is not culpable for the crime of extermination because it was not foreseeable to him that this crime would occur in Srebrenica. For the same reason, the Majority finds that the fact that "thousands of Bosnian Muslim men and boys were summarily executed" in Srebrenica, as submitted by the Prosecution,[4919] cannot be considered for sentencing purposes.

(iv) Aggravating Circumstances

1823. The Majority finds, beyond a reasonable doubt, that Perišić's high rank in the VJ and the lengthy time span over which the crimes were committed are aggravating overall. In particular, the Majority recalls that the Accused was in charge of the highest professional and staff organ for the preparation and use of the VJ in times of war and peace.[4920]

1824. The Majority emphasises the death of numerous victims and the long-term physical, psychological and emotional suffering inflicted on survivors, as well as victims' relatives and loved ones.[4921] The Trial Chamber recalls that the vulnerability of the victims was taken into consideration in evaluating the gravity of the offences.

1825. With regard to the conviction under Article 7(1), it further takes note of Perišić's military rank and experience,[4922] and of the fact that Perišić wrongfully exercised his authority to aid and abet grave crimes perpetrated by the VRS.

1826. Finally, the Majority considers that Perišić showed callous disregard for the VRS's atrocities. It notably recalls that, while Perišić was aware that crimes were being committed in Srebrenica as early as 13 July 1995, he met with Mladić and Gvero nearby Han Pijesak on 18 July 1995 in a pic-nic area and that there was a "lot of joking around at lunch". Perišić continued approving logistical assistance to the VRS for months after learning of the enormous and monstrous massacre at Srebrenica. The Majority also recalls that, long after the atrocities of Srebrenica were uncovered, Perišić maintained a close relationship with Mladić. In 1997 and 1998, Mladić resided over long periods of time at VJ facilities in Rajac and Stragari and the Accused visited him on several occasions, as well as the fact that in 1997 Perišić attended the wedding of Mladić's son.

4918 Dražen Erdemović, T. 7966; Ex. P2662, Expert Report of Christopher Lawrence on Autopsies of Human Remains from the Dam Site June 1998, Annex EE, pp 2994, 3012. *See* MP-294, T. 9060-9061; Srebrenica Agreed Fact 19 (Schedule D3.6); Srebrenica Agreed Fact 20 (Schedule D3.7).

4919 Prosecution Final Brief, para. 840.

4920 *See* Ex. P197, Law on the VJ, 18 May 1994, Article 5.

4921 *Blaškic* Appeal Judgement, para. 683.

4922 *Aleksovski* Appeal Judgement, para. 183; *Čelebići* Appeal Judgement, para. 745; *Kupreškić et al.* Appeal Judgement, para. 451; *Blaškic* Appeal Judgement, paras 90-91; *Naletilić and Martinović* Appeal Judgement, para. 613; *Hadžihasanović and Kubura* Appeal Judgement, para. 320; *Strugar* Appeal Judgement, para. 353; *D. Milošević* Appeal Judgement, para. 302.

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06 September 2011

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-81-T
		Date:	6 September 2011
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Pedro David
Judge Michèle Picard

Registrar: **Mr. John Hocking**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

JUDGEMENT

PUBLIC WITH CONFIDENTIAL ANNEX C

The Office of the Prosecutor:

Mark Harmon
Daniel Saxon

Counsel for the Accused:

Novak Lukić
Gregor Guy-Smith

XII. DISSENTING OPINION OF JUDGE MOLOTO ON COUNTS 1 TO 4 AND 9 TO 12

1. I respectfully dissent from the Majority's finding as to Momčilo Perišić's individual criminal responsibility pursuant to Article 7(1) of the Statute in relation to Counts 1 to 4 and Counts 9 to 12 of the Indictment.

A. Introductory Remarks

2. The Majority's conclusion that the objective element of aiding and abetting has been met in this case is premised on two findings: (1) that the VRS heavily depended on the VJ for logistical and personnel support; and (2) that the crimes were inextricably linked with the strategy of the Bosnian Serb leadership.

1. VRS Dependence on VJ Logistical and Personnel Support

3. In my view, providing assistance to the VRS to wage war cannot and should not be equated with aiding and abetting the crimes committed during such war. The provision of assistance by Perišić to the VRS is too remote from the crimes committed during the war to qualify as aiding and abetting such crimes. To conclude otherwise, as the Majority has done, is to criminalise the waging of war, which is not a crime according to the Statute of the Tribunal. In addition, it raises the question: where is the cut-off line? For instance, would a manufacturer of weapons who supplies an army with weapons which are then used to commit crimes during a war also be criminally responsible? In this respect, I note that it is immaterial whether the arms are provided for cash or free of charge. It is noteworthy that, notwithstanding numerous opportunities to do so, no superior has been charged before the Tribunal with aiding and abetting the crimes of his soldiers merely for the reason that he supplied them with arms, sent them to war and they committed crimes. Unlike this example, Perišić was not supplying his soldiers, but soldiers of another army, thus placing him in a more remote position in relation to the crimes. Aiding and abetting has always been charged where the conduct of the accused is proximate to the crime committed by the principal perpetrator. Therefore, if a superior who supplies his soldiers is not charged, Perišić, who supplied a different army, should not be charged.

4. While there is no doubt in my mind that the VRS was, to a large degree, dependent upon the VJ to function as an army, I respectfully submit that it is inappropriate to infer *ipso facto* on the notion of dependence that Perišić's assistance had a substantial effect on the commission of crimes. It is noteworthy that the trial record established that the dependence of the VRS on the VJ was not absolute.

crime, which had a *substantial effect* on the perpetration of the crime.[2] I underscore that this definition was first articulated by the Appeals Chamber in the course of drawing a distinction between a case of aiding and abetting and one of JCE.[3] This is an important point which cannot go unnoticed in light of the Majority's reliance upon the Bosnian Serb leadership's strategic objectives to support a finding that the objective element for aiding and abetting has been met. I emphasise that the jurisprudence of this Tribunal has clearly established that in the case of aiding and abetting, proof is not required of the existence or pre-existence of a common concerted plan as compared to the case of acting in pursuance of a JCE where "it is sufficient for the participant to perform acts that in *some way* are directed to the furthering of the common plan or purpose".[4]

9. I respectfully disagree with the Majority's conclusion that "the acts of the aider and abettor need not have been 'specifically directed' to assist the crimes",[5] and stress that the notion of "specific direction" has been consistently cited by this Tribunal in the definition of aiding and abetting.[6] Although the Appeals Chamber in *Blagojević* held that "specific direction" has not been an essential element of the *actus reus* of aiding and abetting,[7] it clarified that the definition in *Tadić* had not been departed from and that whether an act is specifically directed at the commission of the crimes "will often be *implicit* in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime".[8] I interpret the Appeals Chamber in *Blagojević* to say that there is no *additional* requirement in the notion of aiding and abetting beyond the requirement that the assistance given to the principal perpetrator had a substantial effect on the crimes.

10. However, if the notion of "specific direction" is in fact implicit in finding that an accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime, I cannot but conclude that to reach this finding, a direct link needs to be

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2 *Tadić* Appeal Judgement, 229; *Vasiljević* Appeal Judgement, para. 102(i); *Blagojević and Jokić* Appeal Judgement, para. 127; *Blaškić* Appeal Judgement, para. 45; *Simić* Appeal Judgement, para. 85. *See Orić* Appeal Judgement, para. 43. *See also Seromba* Appeal Judgement, para. 44; *Ntagerura et al.* Appeal Judgement, para. 370; *Nahimana et al.* Appeal Judgement, para. 482. *But see Blagojević and Jokić* Appeal Judgement, para. 188 (quoting *Furundžija* Trial Judgement, para. 249). While the Appeals Chamber in *Mrkšić* found specific direction not to be an essential ingredient, I note that it still included the notion of direction in distinguishing the *actus reus* from the *mens rea* of aiding and abetting, *but see Mrkšić and Šlivančanin* Appeal Judgement, para. 159.

3 *Tadić* Appeal Judgment, para. 229.

4 *Tadić* Appeal Judgement, para. 229 (emphasis added); *Vasiljević* Appeal Judgement, para. 102.

5 *See supra* para. 1624.

6 *Vašilijević* Appeal Judgement, para. 102(i); *Blagojević and Jokić* Appeal Judgement, para. 127; *Blaškić* Appeal Judgement, para. 45; *Simić* Appeal Judgement, para. 85. *See Orić* Appeal Judgement, para. 43. *See also Seromba* Appeal Judgement, para. 44; *Ntagerura et al.* Appeal Judgement, para. 370; *Nahimana* Appeal Judgement, para. 482.

7 *Blagojević and Jokić* Appeal Judgement, para. 189. *See also Mrkšić and Šlivančanin* Appeal Judgement, para. 159.

8 *Blagojević and Jokić* Appeal Judgement, para. 189 (emphasis added).

dissolution of the SFRY had started by 25 June 1991,[47] and the conflict broke out in BiH in 1992.[48] In June 1992, the VRS was still in the nascent stages of its formation and the evidence suggests that paramilitary groups were responsible for much of the violence taking place at that time.[49] Perišić made no reference to the VRS in this statement thus, the exodus he referred to cannot necessarily be attributable to the actions of the VRS. This statement therefore does not establish as the only reasonable conclusion that Perišić became aware of the VRS's propensity to commit crimes at that time.

49. On a more general note, both of these statements involve knowledge that the Majority purports Perišić acquired prior to the Indictment period. Even accepting the Majority's interpretation of these statements – which I do not – it is important to recognise that situations during a war can change dramatically over time. What Perišić knew or thought he knew about the activities and propensities of the VRS during the initial break-up of the SFRY cannot be equated with his understanding of circumstances during the later stages of the war.

(b) Evidence Following Perišić's Appointment as Chief of the VJ General Staff

50. I respectfully dissent from the Majority's conclusion that Perišić was aware from the early stages of his appointment as Chief of the VJ General Staff of the VRS's discriminatory intent and criminal conduct in BiH.[50]

(i) Letter from the VRS

51. The congratulatory letter sent from the VRS Krajina Corps Command to Perišić on 26 August 1993 regarding his appointment as Chief of the VJ General Staff – reflecting a desire to unify the VRS and VJ to create a unified Serbian state – did not provide Perišić with knowledge of any sort of discriminatory intent or criminal conduct of the VRS.[51] The letter stated, in relevant part:

> We wish you to settle at your new duty as soon as possible, to choose your associates, transform the army where needed, removing the weaknesses of the old system and the former JNA, creating

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46 Ex. P803, Transcript of Interview with Perišić, 8 December 2003, p. 6.
47 Ex. P350, Report by Robert Donia on the Origins of RS, 30 July 2002, p. 16.
48 Ex. P375, Expert Report of Patrick Treanor Entitled: Belgrade Leadership and Serbs in Croatia and Bosnia, 1 September 2008, p. 16; Ex. P350, Report by Robert Donia on the Origins of RS, 30 July 2002, pp 30-32.
49 Ex. P208, UNSC Resolution 819, 16 April 1993, p. 1; Ex. P212, UNSC Resolution 824, 6 May 1993, p. 1; Ex. P2439, Report of the Special Rapporteur of the Commission on Human Rights, Tadeusz Mazowiecki, on the Situation of Human Rights in the Territory of the Former Yugoslavia, 28 August 1992, p. 4; Ex. P2454, UNSC Resolution 787, 16 November 1992, p. 3.
50 *See supra* para. 1486.
51 *See* Ex. P1801, Letter from 1st Krajina Corps to Perišić, 26 August 1993.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-05-88-T
		Date:	10 June 2010
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: **Mr. John Hocking**

Judgement of: **10 June 2010**

PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC REDACTED

JUDGEMENT
Volume I

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Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Christopher Gosnell and Ms. Tatjana Čmerić for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Vinko Pandurević

during the pre-trial phase.[110] A number of "Stipulations" between the Parties were filed and admitted into the record during the course of trial.[111] The Trial Chamber has treated such stipulations as agreed facts. The Trial Chamber recalls that it is not bound by any agreements reached between the parties,[112] and that it is not obliged to make explicit findings on facts agreed upon by the parties or on undisputed facts; the reference to such facts is by itself indicative that it accepts those facts as true.

(ii) Judicial Notice of Adjudicated Facts

69. The Trial Chamber took judicial notice of hundreds of adjudicated facts from the *Krstić*, *Blagojević*, *Krajišnik*, and *Orić* cases pursuant to Rule 94(B).[113]

70. The Trial Chamber recalls its Prosecution Adjudicated Facts Decision, wherein it had set out the Appeals Chamber finding in the *Slobodan Milošević* case that "by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proved again at trial, but which, subject to that presumption, may be challenged at that trial."[114]

71. Like all rebuttable evidence, judicially noticed adjudicated facts remain subject to challenge by the non-moving party during the course of trial. During its final deliberations, the Trial Chamber has therefore assessed the weight of the relevant facts, taking into consideration the totality of the trial record and, most particularly, any evidence submitted by the non-moving party to rebut the adjudicated fact.[115]

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[110] Rule 65 *ter* (H) provides: "The pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact. In this connection, he or she may order the parties to file written submissions with either the pre-trial Judge or the Trial Chamber."

[111] *See* Annex II (Procedural History), Section B.7.

[112] *See Babić* Sentencing Appeal Judgement, para. 18.

[113] Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 26 Sept 2006 ("Prosecution Adjudicated Facts Decision"); Decision on Popović Motion for Judicial Notice of Adjudicated Facts with Annex, 2 June 2008.

[114] Prosecution Adjudicated Facts Decision, para. 20; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 Oct 2003, p. 4. This holding was reaffirmed by the Appeals Chamber in the *Karemera* case: "In the case of judicial notice under Rule 94(B), the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into question by introducing reliable and credible evidence to the contrary." *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 42.

[115] *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 Mar 2005, para. 17; *see also Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 14 Mar 2006, para. 11 ("Adjudicated facts that are judicially noticed by way of Rule 94(B) of the Rules remain to be assessed by the Trial Chamber to determine what conclusions, if any, can be drawn from them, which will require their consideration together with 7all of the evidence brought at trial.").

omissions on his part which would constitute other Article 7(1) forms of responsibility, except for aiding and abetting which is discussed below, in relation to the crime of forcible transfer.

c. Aiding and Abetting

1497. To aid and abet a crime, the accused must carry out an act, whether a positive act or an omission, to assist, encourage or lend moral support to the perpetration of a crime, and this support has a substantial effect upon the perpetration of such crime.[4725] The requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal.[4726]

1498. At the outset, the Trial Chamber recalls that **Borovčanin** had no involvement in the attack on the Žepa enclave. Turning to the Srebrenica enclave, on 12 July, **Borovčanin** left the 1st Company of the Jahorina Recruits in Potočari to assist in the forcible transfer. He continued to permit them to practically assist on 13 July. The Trial Chamber has considered the evidence as to **Borovčanin**'s subordinate commanders, Jević and Mane and the Jahorina Recruits' role in assisting with the boarding of the Bosnian Muslim women, children, and the elderly onto buses and trucks, separating the men from their families, counting the people as they stepped onto the buses, and patrolling the area in which the Bosnian Muslims were gathered until the forcible transfer was completed.[4727] It finds that they were instrumental in executing the actual physical forcible transfer out of Potočari, and it was a key role they played. By so doing, the Trial Chamber finds that they contributed substantially to the commission of the crime.

1499. The Trial Chamber recalls its majority finding above that **Borovčanin** knew, as of 12 July when he was in Potočari, that a forcible transfer of the civilian population was taking place.[4728] In ordering his commanders and units to participate in the operation to move the population, **Borovčanin** knew that this would assist substantially with the crime of forcible transfer. This knowledge would have only been reinforced on the evening of the 12 July when Jević reported to him on the actions of the unit during that day. [4729]

1500. As found above, the Trial Chamber is not satisfied that **Borovčanin** had any intent to forcibly transfer. Further, the evidence is insufficient to demonstrate that he intended to assist in a forcible transfer. As it is, however, under the jurisprudence of this Tribunal, not only is the accused

[4725] *See supra*, paras. 1014–1015.
[4726] *See supra*, paras. 1016–1017.
[4727] *See supra*, paras. 316, 319–323.
[4728] *See supra*, para. 1494.
[4729] *See supra*, paras. 321, 1447.

frames, the Trial Chamber cannot be satisfied beyond reasonable doubt as to the timing of the shooting which Pepić heard. As a result, the Trial Chamber cannot infer from this evidence, individually or cumulatively with that of the survivors, that the shooting Pepić heard was the reaction to the "burnt-hands" incident, or the ongoing, full-scale execution.[4799]

1532. The Trial Chamber has also considered the hearsay evidence of PW-100 and PW-168. PW-100's statement, albeit not detailed, does provide support for the involvement of the SBP in the full-scale execution in that he refers to all the prisoners destined to be exchanged in Tuzla as having been killed at a "warehouse" by a "regular special police force".[4800] He makes no mention of a separate event triggered by the killing and injury of some police members present at the site and thus the statement supports the participation of the SBP in the full-blown execution. Yet, as noted previously, this statement is vague in content and the source of the hearsay is not identified beyond the person being a member of the Jahorina Recruits. PW-168, on the other hand, recounted a hearsay statement which is more detailed and in which the source is identified. He related that Stupar described that one of the prisoners grabbed a rifle and used it to kill a member of his unit. There was then an incident "whereby the police men and the soldiers who had been there opened fire on the prisoners and killed them".[4801] However, this statement is ambiguous in its content. It could be interpreted to mean the prisoners in the immediate vicinity were killed, *i.e*, the "burnt-hands" incident or all the prisoners at the Kravica Warehouse were killed, *i.e*, full-scale execution. While the Trial Chamber, as noted previously, is satisfied as to the reliability of the evidence, given the lack of detail as to the content and source of PW-100's information and the ambiguity of the statement made to PW-168, combined with the fact that both involve untested hearsay, the Trial Chamber finds the evidence is not sufficient to establish participation on the part of the SBP 2nd Šekovići Detachment in the full massacre at the Kravica Warehouse.

1533. From the totality of the evidence before it, the Trial Chamber finds that a full-scale execution took place at the Kravica Warehouse that evening, after the "burnt-hands" incident occurred.[4802] While there is evidence that there were pauses between the shooting, the length of the pauses is unclear.[4803] It could have ranged from a mere half hour to three hours. In addition, the Trial Chamber is unable on the evidence to establish the time when the full-scale execution began.

1534. As to who executed the Bosnian Muslim prisoners, the evidence is even more unclear. Taken cumulatively, the Trial Chamber finds that one reasonable inference in the circumstances is

[4798] Milenko Pepić, T. 13598 (9 July 2007).
[4799] *See also supra*, paras. 431, 1456.
[4800] PW-100, T. 14835 (5 Sept 2007), T. 14888 (6 Sept 2007).
[4801] PW-168, T. 15877–15878 (closed session) (26 Sep 2007), T. 16527–16528 (closed session) (18 Oct 2007).
[4802] *See supra*, paras. 428–445.

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filed on: 26/09/06

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

Case No.: IT-05-88-T

Date: 26 September 2006

Original: English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: **Mr. Hans Holthuis**

Decision of: **26 September 2006**

PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS WITH ANNEX

Office of the Prosecutor
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Ms. Natacha Fauveau Ivanović for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

19. Finally, some of the proposed adjudicated facts go to issues which are at the core of this case. In balancing judicial economy with the Accused's right to a fair and public trial, the Trial Chamber is of the view that a number of these facts should be excluded in the interests of justice.[64]

C. The legal effect of judicially noticing an adjudicated fact

20. The Appeals Chamber in *Milošević* established the legal effect of judicially noticing an adjudicated fact: "[B]y taking notice of an adjudicated fact a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which subject to that presumption may be challenged at that trial".[65] This holding was recently reaffirmed by the Appeals Chamber in *Karemera*: "In the case of judicial notice under Rule 94(B), the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into question by introducing reliable and credible evidence to the contrary."[66]

21. The logical implication of the *Karemera* Chamber's language is that when a Trial Chamber judicially notices an adjudicated fact, that fact is admitted into evidence.[67] Like all rebuttable evidence, judicially noticed adjudicated facts remain subject to challenge by the non-moving party during the course of trial. Moreover, the Trial Chamber in future relevant deliberations, and particularly in those relating to the final judgement, retains the obligation to assess the facts' weight, "taking into consideration the evidence in the ... case in its entirety".[68] Perhaps most importantly, while the burden of producing evidence is shifted to the accused when the Chamber

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meaning of the term "parcel" became known by examining intercepts between VRS officers, including Beara and Popović. *See Krstić* Appeal Judgement, *supra* note 3, para. 76; *Krstić* Trial Judgement, *supra* note 2, para. 383.

[64] Proposed facts included within this group are the following: 14, 73, 81, 140, 157–163, 229–239, 241–244, 287–288, 290, 292–308, 310, 317–319, 321–324, 326–327, 335, 338, 340–363, 377–389, 391–398, 412–416, 418–422, 424–425, 427–430, 440–445, 447, 449–451, 457, 460, 467–470, 472, 487, 489–492, 494–495, 514–533.

[65] *Milošević* Appeal Decision, *supra* note 18, p. 4 (footnote removed). Popović objects to the accuracy or truthfulness of several proposed facts. *See. e.g.*, Popović Response, paras. 22, 25–26, 35, 37–38, 40, 58, 64, 68, 76, 80, 86–90, 93, 118, 128. Borovčanin also appears to contest the accuracy or truthfulness of certain facts, and proposes his own reformulations to render them "suitable for judicial notice". *See* Borovčanin Response, para. 13. Nevertheless, since any challenge to the accuracy or truthfulness of an adjudicated fact may be made at trial, a challenge on either of these grounds in a response to the motion seeking judicial notice of the fact will ordinarily not suffice, on its own, to justify denial of such notice.

[66] *Karemera et al.* Appeal Decision, *supra* note 18, para. 42 (footnotes removed). *Accord Prlić et al.* Pre-Trial Decision, *supra* note 18, para. 10; *Krajišnik* February 2003 Trial Decision, *supra* note 22, paras. 16–17.

[67] *See Krajišnik* March 2005 Trial Decision, *supra* note 19, p. 10.

[68] *Ibid.*, para. 17. *Accord Prlić et al.* Pre-Trial Decision, *supra* note 18, para. 11 ("Adjudicated facts that are judicially noticed by way of Rule 94(B) of the Rules remain to be assessed by the Trial Chamber to determine what conclusions, if any, can be drawn from them, which will require their consideration together with all of the evidence brought at trial.").

judicially notices an adjudicated fact proposed by the Prosecution, the burden of persuasion—that is, proof beyond a reasonable doubt—always remains on the Prosecution.[69]

IV. CONCLUSION

22. With the foregoing considerations in mind, the Chamber has decided to withhold judicial notice of the following purported adjudicated facts because they do not fulfil at least one of the admissibility requirements established in the jurisprudence of the Tribunal:

(a) Purported facts the formulation of which in the Prosecution Motion differs in a substantial way from their formulation in the original judgement: 89, 129, 275, 320, 325, 339, 370, 411, 417, 423, 426, 471, 479, and 534.

(b) Purported facts that are unclear or misleading in the context in which they are placed in the Prosecution Motion: 59, 225–227, and 390.

(c) Purported facts that may be based, at least in part, on an agreement between the parties to the original proceedings: 25, 141, 143, 150–151, 179–180, 214, 250, 254, and 266.

(d) Purported facts that relate to the acts, conduct, or mental state of one ore more of the Accused: 190–202 and 228.

(e) Purported facts that are or may be subject to pending appeal: 54, 74, 90–91, 98, 117, 135, 148, 240, 289, and 291.

23. In addition, the Trial Chamber exercises its discretion to withhold judicial notice of the following proposed adjudicated facts because, in the circumstances, judicially noticing them would not serve the interests of justice: 13–16, 28, 43, 45, 56, 73, 81, 88, 92, 111, 116, 126–128, 134, 136–137, 139–140, 142, 147, 156–164, 167, 169, 185, 212, 216, 220, 222, 229–239, 241–244, 255, 262, 267, 269, 273, 283, 287–288, 290, 292–308, 310, 317–319, 321–324, 335, 338, 340–363, 377–389, 391–398, 401, 409, 412–416, 418–422, 424–425, 427–430, 435, 440–445, 447, 449–451, 457, 460, 466–470, 472, 487, 489–492, 494–495, 499, and 514–533.

24. The Trial Chamber holds that the remainder of the proposed adjudicated facts are suitable for judicial notice, subject to the reformulations and typographical corrections implemented in the Annex to this Decision. These facts meet all nine of the admissibility requirements discussed above. Moreover, the Chamber considers that judicially noticing these facts, both individually and as a group, will further the interests of justice while not jeopardising the Accused's right to a fair,

[69] *Karemera et al.* Appeal Decision, *supra* note 18, para. 49. The Prosecution correctly states the law on this point, and the contention of Miletić that "judicial notice shifts the Prosecution's burden of proof to the Defence, which runs

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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No. IT-04-74-AR73.6 Date: 23 November 2007 Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Hans Holthuis**

Decision of: **23 November 2007**

PROSECUTOR
v.
Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

Public

DECISION ON APPEALS AGAINST DECISION ADMITTING TRANSCRIPT OF JADRANKO PRLIĆ'S QUESTIONING INTO EVIDENCE

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Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

52. The Appeals Chamber has already held that the right to cross-examination is not absolute.[87] It further noted that

> application of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the victims of the offences charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community) [...] Seen in this way, it is difficult to see how a trial could ever be considered fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.[88]

Of even more relevance for the issue at hand, since the Tribunal's first cases, the jurisprudence has been constant in holding that, under the Tribunal's system, a statement of a person made otherwise than in the proceedings in which it is tendered, whether orally by a witness or in writing is not inadmissible, in particular when the source of hearsay is known and subject to potential evaluation by a Chamber.[89] In particular, the Appeals Chamber found that Trial Chambers have a wide discretion in admitting hearsay evidence, although establishing the reliability of this type of evidence is of paramount importance when hearsay evidence is admitted as substantive evidence in order to prove the truth of its contents.[90]

53. A different matter is, of course, what weight a trier of fact is allowed to give to evidence not subjected to the testing of cross-examination. It is in this matter that the jurisprudence of the ECtHR is valuable, as it has authoritatively stated the principle that "all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence."[91] Unacceptable infringements of the rights of the defence, in this sense, occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial.[92] The ECtHR applied this reasoning to the statement of a co-accused in pre-trial proceedings in a case where neither the applicant nor his lawyer had been given the opportunity to question the co-accused at

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III, p. 711, para. 50, and *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgements and Decisions* 1996-II, p. 470, para. 67. The case law of the ECtHR is retrievable at http://www.echr.coe.int. The Appeals Chamber also notes that all the States on the territory of the former Yugoslavia have ratified the European Convention of Human Rights and Fundamental Freedoms of 4 November 1950 (213 UNTS 221, CETS 005), retrievable at *http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm*.

[87] *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006 ("*Martić* Decision"), para. 12.

[88] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999 ("*Aleksovski* Decision on Admissibility of Evidence"), para. 25, cited with approval in *Martić* Decision, para. 13.

[89] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, paras 5, 7, 15, 18-19; *Aleksovski* Decision on Admissibility of Evidence, paras 14-15; *Kordić and Čerkez* Appeal Judgement, paras 280-284.

[90] *Aleksovski* Decision on Admissibility of Evidence, para. 15.

[91] *A.M. v. Italy*, no. 37019/97, para. 25, ECHR 1999-IX.

[92] Apart from the *A.M.* case, see also *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, paras 43-44 and *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, pp. 14-15, paras 31-33.

any stage of the proceedings.[93] The Appeals Chamber has already had occasion to elaborate on the fact that these principles serve as guidelines before the Tribunal.[94]

54. The Joint Defence further contests the Trial Chamber's conclusion that they had not shown where the December 2001 Transcript contained false accusations.[95] According to the Prosecution, arguments related to weight or the content of the December 2001 Transcript should be disregarded at this time, since the veracity of its content is not something to be considered at the admissibility stage. The Appeals Chamber understands the Impugned Decision to mean that the Trial Chamber in this case did not find *prima facie* elements that would make the December 2001 Transcript patently unreliable and therefore devoid of any probative value.[96]

(iv) Conclusion on the right to cross-examination

55. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in finding that the December 2001 Transcript could be introduced into evidence even if the co-accused might not be able to cross-examine Prlić on it, since as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination.

(c) Constraints on admission of evidence

56. The Joint Defence finally remarks on the issue of the admission of evidence as opposed to its assessment (or weight), averring that the "extremely liberal approach" to admission of evidence adopted by the Trial Chamber throughout the proceedings is not suited to all circumstances. In particular, the Joint Defence suggests that a more rigorous approach – one with "definite constraints" – should be used in admitting written evidence related to the acts and conduct of the accused.[97]

57. The Appeals Chamber notes that the Trial Chamber did refer to the principle according to which untested evidence relating to the acts and conduct of the accused may be admitted into the trial record, but must be corroborated by other evidence in order to form, if it comes to that, a basis for a conviction of an accused.[98] This principle is undoubtedly premised on the recognition that professional judges are better able to weigh evidence and consider it in its proper context than

[93] *Lucà v. Italy*, no. 33354/96, paras 39-45, ECHR 2001-II.
[94] *Martić* Decision, para. 20 and cited references.
[95] Joint Defence Appeal, paras 18-19.
[96] See, for example, *Brđanin* Appeal Judgement, para. 40.
[97] Joint Defence Appeal, paras 20-22. See also Prosecution Response, paras 62-65.
[98] Impugned Decision, para. 18. On the contrary, evidence that could be subject to cross-examination at trial does not require corroboration under Tribunal's law (*Aleksovski* Appeal Judgement, paras 62-63).

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-74-AR73.2
		Date:	4 July 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Decision: **4 July 2006**

PROSECUTOR

v.

Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

DECISION ON JOINT DEFENCE INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S ORAL DECISION OF 8 MAY 2006 RELATING TO CROSS-EXAMINATION BY DEFENCE AND ON ASSOCIATION OF DEFENCE COUNSEL'S REQUEST FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Office of the Prosecutor:

Mr. Kenneth Scott
Mr. Daryl Mundis

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Jadranko Prlić
Ms. Senka Nožica and Mr. Peter Murphy for Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan Praljak
Ms. Vesna Alaburić for Milivoj Petković
Ms. Dijana Tomašegović-Tomić for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

FINDING that in the determination of this Interlocutory Appeal, it is not necessary for the Appeals Chamber to receive submissions from the Association of Defence Counsel;

NOTING that in their Interlocutory Appeal, the Appellants argue that "the Trial Chamber abused its discretion and committed discernible errors by:

(a) severely restricting the fundamental right of the Accused to cross-examine the witnesses against them;

(b) applying rigid time-constraints in preference to using less restrictive methods of control;

(c) effectively requiring the Accused to exercise the right of cross-examination as a group rather than individually, regardless of conflicts of interest, and to bargain with each other for time to cross-examine;

(d) preventing Defence Counsel from affording effective assistance of counsel to the Accused; and

(e) failing to exercise judicial independence by subjugating the right of the Accused to a fair trial to the political and economic pressures imposed upon the Trial Chamber by the UN Security Council through the Completion Strategy."[7]

NOTING that in its Response, the Prosecution opposes the Interlocutory Appeal, arguing that the Decision by the Trial Chamber establishes "a practical and flexible guideline that ensures a fair and expeditious trial, discourages unfocused and irrelevant cross-examination, and facilitates the scheduling of witnesses who must travel internationally to testify before the International Tribunal",[8] that thus far, the application of the rule has been fair and functional and that the Trial Chamber has in fact granted additional time to the Appellants where good cause was shown;[9]

CONSIDERING that the right to cross-examine witnesses is a fundamental right recognized under international human rights law[10] and restated in Article 21(4) of the Statute of this Tribunal;

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[7] Interlocutory Appeal, para. 1.
[8] Response, para. 1.1.
[9] *Ibid.*, para. 1.3.
[10] Article 14(3)(e) International Covenant on Civil and Political Rights; article 6(3)(d) European Convention on Human Rights; article 8(2)(f) American Convention on Human Rights; *see* also *e.g.* Human Rights Committee General Comment No.13 of 1984, para. 12; *Peart and Peart v. Jamaica*, Human Rights Committee, Communication No. 482/1991, UN Doc. CCPR/C/54/D/482/1991, 24 July 1995, paras 11.4-11.5; *Saïdi v. France*, European Court of Human Rights, Application No. 1933/1992, Judgement, 23 August 1993, paras 43-44; *van Mechelen v. The Netherlands*, European Court of Human Rights, Application No. 55/1996, Judgement, 18 March 1997, para. 51; *Krasniki v. The Czech Republic*, European Court of Human Rights, Application No. 51277/99, Judgement, 28 February 2006, para. 75;

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-9-A
		Date:	28 November 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **28 November 2006**

PROSECUTOR

v.

BLAGOJE SIMIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Barbara Goy
Mr. Steffen Wirth

Counsel for the Appellant:

Mr. Igor Pantelić
Mr. Peter Murphy

who raised an objection before the Trial Chamber and was told that the matter would be considered at the time of Judgement.

70. Likewise, the fact that the Appellant did not request an adjournment of the proceedings after having understood that the Prosecution intended to rely on the mode of liability of joint criminal enterprise in no way demonstrates that the Appellant was not or did not feel prejudiced given the Trial Chamber's assurance that the objection to the indictment would be considered at the time of Judgement. The Appellant had good grounds for not doing so. In the Appeals Chamber's opinion, the Appellant's "silence" after the filing of the Rule 98*bis* Response, denounced by the Prosecution during the Appeal Hearing, cannot be held against him.

71. The Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial.[232] An accused cannot be expected to engage in guesswork in order to ascertain what the case against him is, nor can he be expected to prepare alternative or entirely new lines of defence because the Prosecution has failed to make its case clear. Furthermore, the Appeals Chamber reiterates that if indeed it became clear to the Trial Chamber that this was a case of joint criminal enterprise at the time of the third amendment to the indictment in December 2001,[233] when seised of the Appellant's objection to the Prosecution's Motion to Amend the Third Amended Indictment[234] the Trial Chamber was under the obligation to ensure that the Appellant was sufficiently informed of the exact charges against him such that he had an opportunity to conduct investigations and prepare his defence.[235] Any accused before the International Tribunal has a fundamental right to a fair trial, and Chambers are obliged to ensure that this right is not violated.

72. The Appeals Chamber considers that the fact that the Appellant did not seek to recall Prosecution witnesses or ask for an adjournment does not demonstrate that he did not suffer prejudice.

73. Therefore, the Appeals Chamber finds that the Prosecution has not discharged the burden of demonstrating that the Appellant's ability to prepare his defence was not materially impaired by its failure to plead the Appellant's participation in a joint criminal enterprise.

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[232] *Naletilić and Martinović* Appeal Judgement, para. 25; *Kvočka et al.* Appeal Judgement, para. 30; *Ntakirutimana* Appeal Judgement, para. 26; *Niyitegeka* Appeal Judgement, para. 194; *Krnojelac et al.* Appeal Judgement, para. 132 referring to *Kupreškić et al.* Appeal Judgement, para. 92; *Kupreškić et al.* Appeal Judgement, para. 92.
[233] Trial Judgement, para. 154.
[234] *See* Joint Defense Response of 11 December 2001, paras 10 -24.
[235] *See* para. 44 *supra.*

acknowledges that he presented a defence against an allegation of aiding and abetting.[257] In addition, the question of whether the Appellant's responsibility could be characterized as that of an aider and abettor was extensively litigated on appeal.[258] For these reasons, the Appeals Chamber finds it appropriate to ascertain whether the Trial Chamber's findings support the Appellant's responsibility for persecutions under Count 1 of the Fifth Amended Indictment as that of an aider and abettor pursuant to Article 7(1) of the Statute.

B. Applicable Law

85. The Appeals Chamber recalls that the *actus reus* of aiding and abetting consists of acts directed to assist, encourage or lend moral support to the perpetration of a certain specific crime, and which have a substantial effect upon the perpetration of the crime.[259] It is not required that a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime be shown, or that such conduct served as a condition precedent to the commission of the crime.[260] The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[261]

86. The requisite *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal perpetrator.[262] The aider and abettor must be aware of the essential elements of the crime which was ultimately committed by the principal.[263] In relation to the crime of persecutions, an offence with a specific intent, he must thus be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration.[264] However, it is not necessary that the aider and abettor knows either the precise crime that was intended or the one that was, in the event, committed. If he is aware that one of a number of crimes will probably be committed, and

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[257] Appeal Brief, para. 20. *See* also, *ibid.*, para. 26.
[258] *See* Order Re-scheduling Appeal Hearing, p. 3 paras 4-5; AT. 77-78, 119-126, 138.
[259] *Blaškić* Appeal Judgement, para. 48; *Vasiljević* Appeal Judgement, para. 102; *Čelebići* Appeal Judgement, para. 352; *Tadić* Appeal Judgement, para. 229. In the *Blaškić* case the Appeals Chamber left "open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting": *Blaškić* Appeal Judgement, para. 47.
[260] *Blaškić* Appeal Judgment, para. 48.
[261] *Blaškić* Appeal Judgment, para. 48.
[262] *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgment, para. 45.
[263] *Aleksovski* Appeal Judgement, para. 162.
[264] *Krnojelac* Appeal Judgement, para. 52; *Aleksovski* Appeal Judgement, para. 162.

one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.[265]

C. The Appellant's responsibility as an aider and abettor for persecutions (Count 1)

87. Under Count 1, the Trial Chamber convicted the Appellant of persecutions – as a participant in a joint criminal enterprise – based on the following underlying acts:[266] (1) unlawful arrests and detention;[267] (2) cruel and inhumane treatment, including beatings, torture and confinement under inhumane conditions;[268] (3) forced labour;[269] and (4) deportation and forcible transfer.[270]

88. On the basis of the same acts of deportation underlying the persecutions conviction, the Trial Chamber also found the Appellant responsible for deportation as a crime against humanity pursuant to Article 5(d) of the Statute under Count 2.[271] However, finding that a conviction for deportation as a crime against humanity is impermissibly cumulative with a conviction for persecutions through deportation, the Trial Chamber did not enter a conviction for deportation as a crime against humanity under Count 2.[272]

1. Preliminary issues

89. At the outset, the Appeals Chamber will address the Appellant's third, fifth, sixth and seventh grounds of appeal, as they all raise issues of general significance to the Trial Chamber's findings.

(a) The Trial Chamber's findings relating to joint criminal enterprise (Third ground of appeal)

90. The Appellant submits that the Trial Chamber erred in fact in inferring from the evidence that there was a common plan to persecute the non-Serb population of the Municipality of Bosanski Šamac and that he was involved therein.[273] He argues that Judge Lindholm's Dissenting Opinion presents another reasonable inference which is consistent with his innocence.[274] He submits that "[a]t most, the Trial Chamber should have convicted [him] only on the basis of aiding and

[265] *Blaškić* Appeal Judgment, para. 50.
[266] Trial Judgement, para. 1115.
[267] Trial Judgement, para. 997.
[268] Trial Judgement, para. 1010. The Trial Chamber was not satisfied that the Appellant was aware of the cruel and inhumane treatment of non-Serb prisoners in the detention facilities in Crkvina, Brčko and Bijeljina: Trial Judgement, para. 1011.
[269] Trial Judgement, paras 1021-1022.
[270] Trial Judgement, paras 968, 972, 1036-1038.
[271] Trial Judgement, para. 1051.
[272] Trial Judgement, paras 1058, 1116.
[273] Amended Notice of Appeal, para. 5; Appeal Brief, para. 27.

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Case No.: IT-02-54-T

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar:
Mr. Hans Holthuis

Order of:
16 December 2003

PROSECUTOR

v.

SLOBODAN MILOSEVIC

FINAL DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

The Office of the Prosecutor

Ms. Carla Del Ponte Ms. Hildegard Uertz-Retzlaff
Mr. Geoffrey Nice Mr. Dermot Groome

The Accused

Mr. Slobodan Milosevic

Amici Curiae

Mr. Steven Kay, QC
Mr. Branislav Tapuskovic
Prof. Timothy L.H. McCormack

presumption of the accuracy of that fact, which therefore does not have to be proved again at trial, but which can be challenged at trial,[6] i.e. a rebuttable presumption .[7]

III. DISCUSSION

6. The Prosecution, in its further submissions, argues that the adjudicated facts in its Initial Motion are ideally suited to create a "rebuttable presumption" and therefore presses admission of all of the remaining 332 facts[8] pursuant to Rule 94 (B), as interpreted by the Appeals Chamber.

7. The *Amici Curiae*, in their further submissions, argue that it would be a proper exercise of the discretion referred to by the Appeals Chamber to refuse all or some of the outstanding facts, if the Trial Chamber considers that the large number of facts and detail contained in those facts put too onerous a burden of rebuttal upon the Accused.[9] At the heart of this argument is the proposition that the wholesale nature of the application to admit the remaining 332 facts is capable of offending the principle of a fair trial, as enshrined in Articles 20 and 21 of the Statute of the Tribunal.[10]

8. The Trial Chamber finds force in these arguments of the *Amici Curiae*.

9. Furthermore, as we said in our Initial Decision, the wholesale admission of facts taken from a judgement based on an assessment of evidence by another Trial Chamber is not an appropriate exercise of the Trial Chamber's discretion under Rule 94 (B),[11] and this is a matter the Trial Chamber will take into consideration in determining the admissibility of the facts.

10. In the exercise of our discretion, the Trial Chamber may also consider the tendentiousness of the facts sought to be admitted. In particular, there have been areas of evidence the Accused has strongly challenged and which the Trial Chamber, in its determination of applications for the admission of Rule 92 *bis* evidence, has consistently allowed the Accused to cross-examine. The starkest example of this is the evidence of participation by the JNA (or Serb paramilitaries) in the perpetration of crimes alleged in the Indictment. In one decision concerning the admission of transcripts under Rule 92 *bis* (D), the Trial Chamber ruled that witnesses whose evidence concerned the participation by the JNA (or Serb paramilitaries) in the takeover of Foca relating, as it did, to a live issue between the parties (i.e. the role of the JNA and Serb paramilitaries in the takeover of municipalities and villages in Croatia and Bosnia and Herzegovina), must be called for cross-examination by the Accused.[12] Indeed, the Prosecution conceded this point.[13] The Trial Chamber may accordingly take such matters into consideration in the exercise of its discretion to admit the adjudicated facts.

11. An additional issue concerns the basis for the admission of adjudicated facts. As the Appeals Chamber acknowledges in its Decision, the principle behind the exercise by the Chamber of its discretion to admit facts pursuant to Rule 94 (B) is judicial economy.[14] It is clear, however, that the admission on a wholesale basis of the 332 remaining facts the Prosecution seeks now to have admitted, may have the contrary effect on the proceedings. This is because, as the Appeals Chamber states, the admission of a fact only creates a presumption as to the accuracy of that fact, which may be rebutted by

the Accused by way of evidence. Not only does this raise the possibility of placing a heavy burden upon the Accused in the preparation and conduct of his case, but attempts by an accused to rebut these facts may absorb considerable time and resources during the course of the proceedings,[15] thereby not promoting judicial economy or expeditiousness.[16]

12. The Trial Chamber must therefore determine, in the exercise of its discretion, which of the remaining 332 facts are admissible under Rule 94 (B). In doing so, the Chamber will concentrate on the salient facts, exclude those facts which, when taken together, will result in such a large number as to compromise the principle of a fair and expeditious trial. Moreover, the Trial Chamber will apply the other considerations discussed above.[17]

13. The remaining adjudicated facts for which the Prosecution seeks admission are dealt with by category as follows:

(a) Political background (facts 151 to 171)

14. These facts, taken from the *Tadic* and *Celebici* Judgments, cover wide -ranging assertions with respect to the political background of the conflict in Bosnia and Herzegovina, the relevance and role of political parties, the JNA, VRS and TO. The facts are broad and tendentious and when placed in the context of the overall breadth of the application, as well as the Accused's right to rebut the facts, may place an undue burden on the Accused. The Trial Chamber will, in the exercise of its discretion, deny admission of these facts under Rule 94 (B).

(b) Prijedor, including background and general facts, the attack on Kozorac, the existence of an armed conflict and the detention camps (facts 172 to 367)

15. The Trial Chamber has considered the 195 facts concerning the Prijedor municipality and applied the considerations set out above in exercising its discretion. These facts have all been taken from the *Tadic* Judgment. We will admit the following 141 facts as numbered in the Initial Motion: 175-178, 182-188, 190-201, 205-209, 213, 220-223, 243, 260-367. These facts concern relevant matters relating to the Serb takeover of Prijedor; the attack on the Kozorac area, and relevant facts pertaining to the detention of civilians at the Omarska, Keraterm and Trnopolje camps. The remainder of the facts sought to be admitted concerning Prijedor shall be refused. This finding is made in the context of the case as a whole, of which this municipality is a small part. All that is required with respect to the crime base matters is an overall picture. The excluded paragraphs are either not sufficiently significant, too detailed, too numerous or otherwise too tendentious to be admitted in the Trial Chamber's discretion.

(c) Foca, including background, the conflict there, sexual abuse in detention facilities, and the detention of civilians in the KP Dom (facts 369 to 415)

16. The Trial Chamber has already admitted into evidence the testimony of 11 witnesses who have dealt with the range of issues contained in these facts, which the Prosecution now seeks to have admitted.[18]

Case No.: IT-02-54-AR73.5

IN THE APPEALS CHAMBER

Before:
Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Mehmet Güney
Judge Inés Mónica Weinberg De Roca

Registrar:
Mr Hans Holthuis

Decision of:
31 October 2003

PROSECUTOR

v

Slobodan MILOSEVIC

SEPARATE OPINION OF JUDGE SHAHABUDDEEN APPENDED TO THE APPEALS CHAMBER'S DECISION DATED 28 OCTOBER 2003 ON THE PROSECUTION'S INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S 10 APRIL 2003 DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

Counsel for the Prosecutor:

Mr Geoffrey Nice, Ms Hildegard Uertz-Retzlaff and Mr Dermot Groome

The Accused:

Mr Slobodan Milosevic

second category, if indeed it does not belong outright to that category. It is different in four ways from Rule 94(A).

6. First, unlike Rule 94(A), Rule 94(B) is discretionary: the Trial Chamber may or may not decide to take judicial notice. Second, the parties have a right to be heard before the Trial Chamber acts; under Rule 94(A) they have no such right, even though they may be accorded a privilege. Third, Rule 94(B) is based on the circumstance that the fact has been adjudicated in other proceedings or that the documentary evidence has been presented in those proceedings, even though the adjudicated fact or the documentary evidence does not relate to "facts of common knowledge" within the meaning of Rule 94 (A) but rather to "matters *at issue* in the current proceedings". Fourth, Rule 94(B) in consequence relates to a case in which evidence is necessary unless excluded by the taking of judicial notice; evidence is unnecessary in the case of Rule 94(A).

7. It follows that if, in its discretion, the Trial Chamber decides not to use the power given to it by Rule 94(B), evidence of the "matters at issue" has to be given in the ordinary way; if evidence is given in the ordinary way by one party on "matters at issue", the other party unquestionably has a right to rebut the evidence so given . Is that right of rebuttal lost where the Trial Chamber decides instead to take judicial notice of the relevant fact as an adjudicated fact?

8. The circumstance that Rule 94(B) provides for recourse to the mechanism of "judicial notice" does not conceal the real nature of what it is doing; and the real nature of what it is doing is important to the analysis. The provision, on the face of it, is not dealing with matters of common knowledge of which evidence cannot be given if judicial notice is taken of those matters. It is using the device of "judicial notice" to provide for an exemption from the necessity to adduce evidence on matters which are "at issue" between the parties and which therefore need to be proved in the normal way by evidence. This being so, "judicial notice" does not carry the same consequence as in the case of matters of common knowledge.

9. There is argument that the term "judicial notice" should be given the same meaning in the two provisions in which it occurs. No doubt, it is a sound rule of construction to give the same meaning to the same words occurring in different parts of a law . But the rule is not inflexible; as the cases show, it can be varied if a variation is required by the context.[1] In my view, the context in this case requires the term "judicial notice" to bear different meanings in the two provisions under consideration.

10. It is possible that the model on which Rule 94(B) was crafted lies in the circumstance that states legislate to provide for judicial notice to be taken of matters which cannot all be described as matters of common knowledge. But there are three things about such legislation.

11. First, such legislation is concerned with matters which are manifestly capable of accurate verification, even if they are not of common knowledge. That being so , the state legislature has stepped in to say that evidence – though it can otherwise be led - is not necessary, the giving of it being a waste of time. In the instant case, the fact of adjudication is manifestly capable of accurate verification. But the

Case No.: IT-02-54-AR73.5

IN THE APPEALS CHAMBER

Before:
Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Mehmet Güney
Judge Inés Mónica Weinberg De Roca

Registrar:
Mr Hans Holthuis

Decision of:
28 October 2003

PROSECUTOR

v

Slobodan MILOSEVIC

DECISION ON THE PROSECUTION'S INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S 10 APRIL 2003 DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

Counsel for the Prosecutor:

Mr Geoffrey Nice
Ms Hildegard Uertz-Retzlaff
Mr Dermot Groome

The Accused:

Mr Slobodan Milosevic

***Amici Curiae*:**

Mr Steven Kay
Mr Branislav Tapuskovic
Mr Timothy McCormack

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal");

BEING SEISED of the "Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 'Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts'" filed on 21 May 2003 ("Interlocutory Appeal");[1]

NOTING the "Amici Curiae Observations on Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 'Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts'" filed on 30 May 2003 ("Observations");

NOTING the Prosecution's reply to the Observations filed on 3 June 2003 (" Reply");

NOTING the "Prosecution's Request for Early Decision on Appeal of Trial Chamber's 10 April 2003 'Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts'" filed on 16 September 2003;

NOTING that on 12 December 2002, the Prosecution filed a motion before the Trial Chamber seeking to have judicial notice taken of 482 adjudicated facts derived from four cases which had been the subject of final appeal decisions before the International Tribunal ("Prosecution's Motion");[2]

NOTING that on 2 April 2003, the Prosecution filed the "Additional Information regarding the Prosecution Motion for Judicial Notice of Adjudicated Facts, 2 April 2003" ("Additional Information"), whereby it brought to the attention of the Trial Chamber in the present case[3] the fact that on 28 February 2003 the Trial Chamber in another trial, *Prosecutor v. Momcilo Krajisnik*, took judicial notice of approximately 620 facts,[4] and that "all of the facts proposed for judicial notice in the Prosecution's December Submission *[i.e.*, Prosecution's Motion] were among those approximately 620 facts accepted by the *Krajisnik* Chamber";[5]

NOTING that on 10 April 2003, the Trial Chamber decided to admit 130 paragraphs of facts as set out in Annex A to the Prosecution's Motion, and rejected the remaining facts listed in the annex;[6]

NOTING that on 22 April 2003 the Prosecution requested certification from the Trial Chamber to appeal from the Impugned Decision;[7]

NOTING that on 6 May 2003 the Trial Chamber granted the Prosecution's request and certified the interlocutory appeal from the Impugned Decision,[8] acknowledging that one of the Prosecution's reasons

for seeking certification was that the Trial Chamber in the *Krajisnik* Decision had reached a different conclusion from that of the Trial Chamber in the present case;

CONSIDERING that the main issue in this appeal concerns the legal test for the admission of adjudicated facts under Rule 94(B),[9] and that, in considering this issue, the Appeals Chamber will not consider the alleged error in relation to each of the facts rejected by the Impugned Decision, the application of that test to each rejected fact being a matter to be decided by the Trial Chamber on the criteria hereinafter set forth;

CONSIDERING that Rule 94(B) does not define adjudicated facts, nor does Rule 94(A) explain what "facts of common knowledge" are;

CONSIDERING that Rule 94(A) commands the taking of judicial notice and Rule 94(B) gives a discretion to do so, and that, in the case of Rule 94(A), the basis on which judicial notice is taken is that the material is notorious, whereas in the case of Rule 94(B), the basis is that the material, in the case of adjudicated facts, is the subject of an adjudication made by another Chamber;[10]

CONSIDERING that by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial,[11] but which, subject to that presumption, may be challenged at that trial;

FOR THE FOREGOING REASONS, the Appeals Chamber, by majority, Judge Hunt dissenting ,

RETURNS the matter to the Trial Chamber for it to review the taking of judicial notice of the adjudicated facts in accordance with the present decision.

Done in English and French, the English text being authoritative.

Dated this 28th day of October 2003,
At The Hague,
The Netherlands.

_____
Judge Fausto Pocar
Presiding

Judge Hunt appends a dissenting opinion to the present decision.

Other judges reserve the right to append opinions to the present decision.

[Seal of the Tribunal]

A800

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.:	IT-97-24-A
		Date:	22 March 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Judgement of: **22 March 2006**

PROSECUTOR

v.

MILOMIR STAKIĆ

JUDGEMENT

The Office of the Prosecutor:
Mr. Mark J. McKeon
Ms. Helen Brady
Mr. Xavier Tracol
Ms. Barbara Goy
Ms. Katharina Margetts

Counsel for the Appellant:
Mr. Branko Lukić
Mr. John Ostojić

II. THE STANDARD FOR APPELLATE REVIEW

7. On appeal, the Parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute. These criteria are well established by the Appeals Chambers of both the ICTY[16] and the ICTR.[17] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the Tribunal's jurisprudence.[18]

8. Any party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground.[19] Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may conclude for other reasons that there is an error of law.[20]

9. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[21] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[22] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.[23] The Appeals Chamber will not review the entire trial record *de novo*; rather it "will in principle only take into account ... evidence referred to by the Trial Chamber in the body of the Judgement or in a

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[16] *Kvočka* Appeal Judgement, para. 14, citing *Vasiljević* Appeal Judgement, paras 4-12; *Kunarac* Appeal Judgement, paras 35-48; *Kupreškić* Appeal Judgement, para. 29; *Čelebići* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, paras 34-40; *Tadić* Appeal Judgement, para. 64.
[17] *Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, para. 7; *Musema* Appeal Judgement, para. 15; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras 177, 320. Under the Statute of the ICTR, the relevant provision is Article 24.
[18] *Kupreškić* Appeal Judgement, para. 22; *Tadić* Appeal Judgement, para. 247.
[19] *Kvočka* Appeal Judgement para. 16, citing *Krnojelac* Appeal Judgement, para. 10.
[20] *Kvočka* Appeal Judgement, para. 16; *Kordić* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6.; *Kupreškić* Appeal Judgement, para. 26. *See* also *Semanza* Appeal Judgement, para. 7; *Kambanda* Appeal Judgement, para. 98.
[21] *Krnojelac* Appeal Judgement, para. 10.
[22] *Kvočka* Appeal Judgement, para. 17; *Kordić* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15.
[23] *Kvočka* Appeal Judgement, para. 17; *Kordić* Appeal Judgement, para. 17. *Blaškić* Appeal Judgement, para. 15.

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-01-42-A
		Date:	17 July 2008
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Andrésia Vaz, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge O-Gon Kwon

Registrar: **Mr. Hans Holthuis**

Judgement of: **17 July 2008**

PROSECUTOR

v.

PAVLE STRUGAR

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Xavier Tracol
Ms. Laurel Baig

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

(a) Ability to Prevent

255. The Appeals Chamber observes that in establishing that Strugar had the material ability to prevent the unlawful shelling of the Old Town, the Trial Chamber did not merely rely on findings that he could give orders and participate in negotiations. Rather, the Trial Chamber held that as the commander of the 2 OG, Strugar had, and indeed exercised, the authority to give direct combat orders not only to the units under his immediate or first level command, but also to units under his command at a second or further lower level.[634] The Trial Chamber further held that Strugar exercised his authority to give direct combat orders, including his authority to order a unit to cease fire and his authority to prohibit attacks on particular targets.[635] What is more, the Trial Chamber held that he had the authority to order re-subordination of units within the structure of the 2 OG[636] and that the command of the 2 OG retained responsibility for maintaining discipline and for the promotion and removal of officers.[637] Finally, the Trial Chamber was convinced that Strugar's authority to represent the JNA in negotiations with the ECMM and the Crisis Staff of Dubrovnik further illustrated the nature and extent of his material ability to prevent an attack on Dubrovnik by the JNA forces deployed in the region.[638]

256. The Appeals Chamber recalls that whether a superior's orders are in fact followed can be indicative of a superior's effective control over his subordinates.[639] In this regard, the Appeals Chamber notes that in addition to finding that Strugar had the authority to issue orders, the Trial Chamber also established that Strugar's orders were actually followed.[640]

257. The Appeals Chamber notes however that in other parts of the Trial Judgement, the Trial Chamber found that Strugar had issued a number of orders prohibiting the shelling of Dubrovnik or the Old Town and that these orders had not been complied with by his subordinates in November 1991.[641] In addition, the Trial Chamber noted that it had "[heard evidence that in the period October to December 1991 there were problems with discipline in the units of the 2 OG, in particular, incidents of unauthorised opening of fire, refusal to carry out orders, looting, arson and drinking".[642] Although evidence of prior instances of indiscipline and of non-compliance with orders would be clearly relevant to an assessment of whether Strugar had effective control over his subordinates, this evidence was not explicitly considered by the Trial Chamber in its findings on

[634] Trial Judgement, para. 395.
[635] *Ibid.*, para. 396.
[636] *Ibid.*, para. 397.
[637] *Ibid.*, para. 404.
[638] *Ibid.*, para. 398.
[639] See *Halilović* Appeal Judgement, para. 207.
[640] Trial Judgement, paras 399-404.
[641] *Ibid.*, paras 61, 62, 421.
[642] *Ibid.*, fn. 1221.

Strugar's effective control over his subordinates. While Strugar does not raise this issue in his appeal, the Appeals Chamber deems it appropriate to consider it *proprio motu*.

258. After having carefully considered the Trial Chamber's findings and the evidence on which they rely, the Appeals Chamber finds that a reasonable trier of fact could have found that Strugar had the material ability to prevent the commission of crimes by his subordinates, notwithstanding the disciplinary issues in the 3/472 mtbr and the prior instances of non-compliance with his orders. Although the Trial Chamber did not make an explicit finding to this effect, it is apparent that the Trial Chamber considered this evidence as being related to Strugar's on-going failure to comply with his responsibilities as a military commander. The Trial Chamber thus held as follows:

> The extent of the Accused's existing knowledge of the October and November shelling of the Old Town, of the disciplinary problems of the 3/472 mtbr and of its apparent role, at least as revealed by Admiral Jokić's November investigation, in the November shelling of Dubrovnik, especially the Old Town, and of his failure to clarify the intention of his order to attack Srd in regard to the shelling of Dubrovnik or the Old Town are each very relevant. In combination they give rise, in the Chamber's finding to a strong need to make very expressly clear, by an immediate and direct order to those commanding and leading the attacking forces, especially the artillery, the special status of the Old Town and the existing prohibitions on shelling it, and of the limitations or prohibition, if any, on shelling the Old Town intended by the Accused on 6 December 1991.[643]

Given the Trial Chamber's other findings regarding Strugar's apparent sympathy with the military objectives of the attack against Srd[644] and his role in ordering this attack in October, November and December 1991,[645] as well as its findings regarding his ability to issue orders and take disciplinary measures,[646] the Appeals Chamber understands the Trial Judgement as having established that Strugar effectively chose not to act with respect to the non-compliance with his previous orders regarding the shelling of the Old Town. In particular, the Appeals Chamber notes that the Trial Chamber cited the following evidence of Jokić regarding the lack of disciplinary measures taken against the perpetrators of the shelling of the Old Town that his request for two officers to be replaced was left unresolved as "General Strugar did not have any competent officers to offer as replacements" and thus told him "that he would send an officer who was the commander of an armoured unit, but that he would only send this officer later".[647]

259. Having due regard to the nature of the orders which Strugar had the capacity to issue, the nature of the negotiations in which he had the authority to represent the JNA, the nature of his position as the commander of the 2 OG, and the fact that, where it was important to him, his orders

[643] *Ibid.*, para. 422 (footnotes omitted).
[644] *Ibid.*, para. 441.
[645] *Ibid.*, paras 44-50, 164-167.
[646] *Ibid.*, paras 379-414.
[647] Jokić, T. 4000.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-01-42-T

Date: 31 January 2005

Original: English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr. Hans Holthuis**

Judgement of: **31 January 2005**

PROSECUTOR

v.

PAVLE STRUGAR

JUDGEMENT

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Philip Weiner

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

December 1991" compiled by the "Institute for Protection and Conservation of the Historical Monuments" of Dubrovnik (hereinafter "Institute Report").[979] The Institute Report purports to deal with damage between 1 October and 31 December 1991, which of course includes damage caused on 6 December 1991, and subject of the Indictment, but it is necessary to be able to separate damage of 6 December from all other damage. While the Institute Report itself purports to specify damage occurring on 6 December 1991 by the date of damage given for each object surveyed, this specification has been shown not to be always accurate.[980]

322. Although two witnesses, architects Lucjiana Peko and Slobodan Vuković, who personally carried out inspections of the damage sustained by the buildings and structures in the Old Town, vouched generally for the accuracy and reliability of the extracts from the Institute Report,[981] the Chamber notes that the entries in the Institute Report were recorded on the basis of hearsay evidence. In most of the cases, information was collected from unknown persons who are described merely as neighbours or tenants.[982] Whether those neighbours or tenants spoke from personal knowledge or hearsay knowledge is not known.

323. Moreover, the Chamber notes that these two witnesses had not had previous experience in inspecting war damage. Neither they, nor the members of their inspection teams, had expertise in ballistic or criminal investigation.[983] The cross-examination of Slobodan Vuković on the contents of his part of the Institute Report revealed many inaccuracies and material typographical errors.[984] Finally, the Chamber recalls that the Institute Report was originally conceived as, and still bears the title "preliminary report", *i.e.* the expectation of its authors was that a final report on damage would follow.[985] However, no final report has been presented in the case. Colin Kaiser, one of the UNESCO consultants tasked to assist in assessing the damage sustained from the October and

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[978] *See* Annex I, *e.g.* Nos: J11, J14, J15, J17, J22, J23, J25, J34, J39, J46 and J49.

[979] The Institute Report was marked for identification as Exhibit MFI/P51 but was never admitted into evidence in its entirety. However, the extracts from it were admitted as Exhibits P174, P212 and P52. *See Prosecutor v Pavle Strugar*, Case No. IT-01-42-T, Decision on the Admissibility of Certain Documents, 26 May 2004, pp 8-11.

[980] It has been effectively pointed out during the cross-examination of Colin Kaiser that the damage described as damage of 6 December 1991 also included other damage which may have been incurred earlier (T 2556-2574). Colin Kaiser states that although the intention was to catalogue damage from 6 December 1991, it appears that other damage has been recorded. He could not guarantee that all the damage from the earlier period is contained in the report (T 2580-2584); Lucijana Peko, although insisting that during inspections she was able to "distinguish between old damage and recent damage" (T 1910-1911), concedes that she was not asked to distinguish between damage sustained in October/November and December and that, although, she was asked to "register all the damage that was sustained on the 6th of December", the Institute Report includes the damage from all three months, T 1912.

[981] Lucijana Peko confirms the list of buildings (Exhibit P52) which she personally examined, T 1862; 1944; Slobodan Vuković confirms the accuracy of the extracts from the Report on buildings which he personally examined (Exhibit P174), T 5922.

[982] *E.g.* Slobodan Vuković, T 6087-6093, 6101; Lucijana Peko, T 1922 ; 1923-1924.

[983] Slobodan Vuković, T 6045-6047; Lucijana Peko, T 1922-1923. The matter was also raised in the Defence Final Brief, para 519 and the Prosecution Final Brief, paras 201-202.

[984] *See e.g.* Slobodan Vuković, T 6052-6056.

[985] Slobodan Vuković, T 5900-5901, 6080-6081; Lucijana Peko, T 1871, 1891-1895, 1973-1974; Colin Kaiser, T 2555.

further inquiry by the information, *i.e.* that it indicated the need for additional investigation in order to ascertain whether offences were being committed or were about to be committed.[1083]

370. The Appeals Chamber upheld this approach and held that a superior will be criminally responsible by virtue of the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates,[1084] or about to be committed. It was further observed that even general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient.[1085] A superior may be regarded as having "reason to know" if he is in possession of sufficient information to be on notice of the likelihood of illegal acts by his subordinates, i.e., if the information available is sufficient to justify further inquiry.[1086]

371. This Chamber will approach its decision on the basis on this jurisprudence.

(c) Necessary and reasonable measures

372. The question of whether a superior has failed to take all necessary and reasonable measures to prevent the commission of an offence or to punish the perpetrators is intrinsically connected to the question of that superior's position of power. As the Tribunal's definition of a "superior" requires the existence of effective control, whether *de jure* or *de facto*, a superior will be held responsible for failing to take such measures that are within his material possibility. Therefore the question whether a superior had explicit legal capacity to take such measures will be immaterial if he had the material ability to act.[1087]

373. Article 7(3) does not provide a superior with two alternative options, but contains two distinct legal obligations to prevent the commission of the offence and to punish the perpetrators.[1088] The duty to prevent arises for a superior from the moment he acquires knowledge or has reasonable grounds to suspect that a crime is being or is about to be committed, while the duty to punish arises after the commission of the crime.[1089] Therefore, if a superior has knowledge or has reason to know that a crime is being or is about to be committed, he has a duty to prevent the crime from happening and is not entitled to wait and punish afterwards.

1083 *Čelebići* Trial Judgement, para 393; *Kordić* Trial Judgement, para 437.
1084 *Čelebići* Appeals Judgement, para 241; *Blaškić* Appeals Judgement, para 62.
1085 *Čelebići* Appeals Judgement, para 238.
1086 *Kordić* Trial Judgement, para 437.
1087 *Čelebići* Trial Judgement, para 395 (footnotes omitted). *See* also *Kordić* Trial Judgement, para 443.
1088 *Blaškić* Appeals Judgement, para 83.
1089 *Blaškić* Appeals Judgement, para 83; *Kordić* Trial Judgement, paras 445-446.

acts such as those charged *might* be committed by his forces in the execution of his order to attack Srd.[1205] Relevantly, however, the issue posed by Article 7(3) of the Statute is whether the Accused then had reason to know that offences were about to be committed by his forces. The language at first glance, could suggest a definite expectation that an offence will be committed. As the jurisprudence has helped to demonstrate, the operation intended by the provision is, relevantly, that an accused must be shown to have "reason to know" by virtue of information he possesses. This information must be such as at least to put him on notice of the risk of such offences so as to indicate the need for additional information or investigation to ascertain whether such offences were about to be committed. In other words an accused cannot avoid the intended reach of the provision by doing nothing, on the basis that what he knows does not make it entirely certain that his forces were actually about to commit offences, when the information he possesses gives rise to a clear prospect that his forces were about to commit an offence. In such circumstances the accused must at least investigate, *i.e.* take steps *inter alia* to determine whether in truth offences are about to be committed, or indeed by that stage have been committed or are being committed.

417. In the Chamber's assessment of what was known to the Accused at or before the commencement of the attack on Srd, there has been shown to be a real and obvious prospect, a clear possibility, that in the heat and emotion of the attack on Srd, the artillery under his command *might well* get out of hand once again and commit offences of the type charged. It has not been established, however, that the Accused had reason to know that this *would* occur. This is not shown to be a case, for example, where the Accused had information that before the attack his forces planned or intended to shell the Old Town unlawfully, or the like. It is not apparent that additional investigation before the attack could have put the Accused in any better position. Hence, the factual circumstances known to the Accused at the time are such that the issue of "reason to know" calls for a finely balanced assessment by the Chamber. In the final analysis, and giving due weight to the standard of proof required, the Chamber is not persuaded that it has been established that the Accused had reasonable grounds to suspect, before the attack on Srd, that his forces were about to commit offences such as those charged. Rather, he knew only of a risk of them getting out of hand and offending in this way, a risk that was not slight or remote, but nevertheless, in the Chamber's assessment, is not shown to have been so strong as to give rise, in the circumstances, to knowledge that his forces were about to commit an offence, as that notion is understood in the jurisprudence. It has not been established, therefore, that, before the commencement of the attack on Srd, the Accused knew or had reason to know that during the attack his forces would shell the Old Town in a manner constituting an offence.

[1205] *See supra*, para 347.

418. That being so, the Chamber will therefore consider whether, in the course of the attack on Srd on 6 December 1991, what was known to the Accused changed so as to attract the operation of Article 7(3). In the very early stages of the attack, well before the attacking JNA infantry had actually reached the Srd feature and the fort, at a time around 0700 hours as the Chamber has found, the Accused was informed by the Federal Secretary of National Defence General Kadijević of a protest by the ECMM against the shelling of Dubrovnik.[1206] For reasons given earlier, the order of the Accused to attack Srd necessarily involved knowledge by him that JNA artillery might need to act against Croatian defensive positions in Dubrovnik which were threatening the lives of the attacking soldiers and the success of the attack on Srd.[1207] His knowledge, in the Chamber's finding, was that only a limited number of such Croatian defensive positions could exist and that, as the attack progressed, these positions could be subjected to controlled and limited JNA shelling targeted on these positions, or on what were believed by his forces to be such positions.[1208] While a protest such as had been made to General Kadijević could perhaps have arisen from shelling targeted at such Croatian defensive positions, the description that Dubrovnik was being shelled, the extremely early stage in the attack of the protest (before sunrise),[1209] and the circumstance that the seriousness of the situation had been thought by the ECMM to warrant a protest in Belgrade at effectively the highest level, would have put the Accused on notice, in the Chamber's finding, at the least that shelling of Dubrovnik beyond what he had anticipated at that stage by virtue of his order to attack Srd, was then occurring. This knowledge was of a nature, in the Chamber's view, that, when taken together with his earlier knowledge, he was on notice of the clear and strong risk that already his artillery was repeating its previous conduct and committing offences such as those charged. In the Chamber's assessment the risk that this was occurring was so real, and the implications were so serious, that the events concerning General Kadijević ought to have sounded alarm bells to the Accused, such that at the least he saw the urgent need for reliable additional information, *i.e.* for investigation, to better assess the situation to determine whether the JNA artillery were in fact shelling Dubrovnik, especially the Old Town, and doing so without justification, *i.e.* so as to constitute criminal conduct.

419. As the Chamber has found earlier in this decision, already by about 0700 hours, there had been shelling of Dubrovnik by the Accused's forces,[1210] and, at least in respect of the Old Town, shelling that was not targeted at Croatian defensive positions or believed positions.[1211] Unlawful

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[1206] *See supra*, para 160.
[1207] *See supra*, para 343
[1208] *See supra*, para 342.
[1209] The beginning of civil twilight on 6 December 1991 was 0631 hours and sunrise was at 0703 hours, T 8522.
[1210] *See supra*, paras 100-101.
[1211] *See supra*, paras 193-194.

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-94-1-A

Date: 15 July 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **15 July 1999**

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Ms. Brenda J. Hollis
Mr. William Fenrick
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

41. In contrast to the view put forward by the Defence, the Prosecution denies that the Decision on Admissibility of Additional Evidence supports the position that the Appellant did not receive a fair trial. It notes that the majority of the proposed additional evidence was found by the Appeals Chamber to have been available to the Defence at trial. Furthermore, with respect to that portion of the proposed additional evidence which was found not to have been available at trial, it notes that the Appeals Chamber, after careful consideration, found that the interests of justice did not require it to be admitted on appeal. Thus, in the Prosecution's view, rather than showing a denial of fair trial, this decision is consistent with the view that the rights of the Appellant in this respect were not violated by any lack of cooperation on the part of the authorities of the *Republika Srpska*.[69]

42. The Prosecution further emphasises that Defence counsel failed to make a motion for dismissal of the case on the basis that a fair trial was impossible because of lack of cooperation of the authorities of the *Republika Srpska*. It notes that, by not doing so, the Defence failed to give the Trial Chamber the opportunity to take additional measures to overcome the difficulties faced by the Defence. It is submitted that this omission by the Defence further provides an indication that it did not believe that the Appellant's right to a fair trial had been violated.[70]

B. Discussion

1. Applicability of Articles 20(1) and 21(4)(b) of the Statute

43. Article 20(1) of the Statute provides that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious [...]". This provision mirrors the corresponding guarantee provided for in international and regional human rights instruments: the International Covenant on Civil and Political Rights (1966) ("ICCPR"),[71] the European Convention on

[69] T. 96 (20 April 1999).
[70] T. 100 (20 April 1999).
[71] Article 14(1) of the ICCPR provides in part: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]."

Human Rights (1950),[72] and the American Convention on Human Rights (1969).[73] The right to a fair trial is central to the rule of law: it upholds the due process of law. The Defence submits that due process includes not only formal or procedural due process but also substantive due process.[74]

44. The parties do not dispute that the right to a fair trial guaranteed by the Statute covers the principle of equality of arms. This interpretation accords with findings of the Human Rights Committee ("HRC") under the ICCPR. The HRC stated in *Morael v. France*[75] that a fair hearing under Article 14(1) of the ICCPR must at a minimum include, *inter alia*, equality of arms. Similarly, in *Robinson v. Jamaica*[76] and *Wolf v. Panama*[77] the HRC found that there was inequality of arms in violation of the right to a fair trial under Article 14(1) of the ICCPR. Likewise, the case law under the ECHR cited by the Defence accepts that the principle is implicit in the fundamental right of the accused to a fair trial. The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee. The Appeals Chamber finds that there is no reason to distinguish the notion of fair trial under Article 20(1) of the Statute from its equivalent in the ECHR and ICCPR, as interpreted by the relevant judicial and supervisory treaty bodies under those instruments. Consequently, the Chamber holds that the principle of equality of arms falls within the fair trial guarantee under the Statute.

45. What has to be decided in the present appeal is the scope of application of the principle. The Defence alleges that it should include not only procedural equality, but also substantive equality.[78] In its view, matters outside the control of the Trial Chamber can prejudice equality of arms if their effect is to disadvantage one party disproportionately. The Prosecution rejoins that equality of arms refers to the equality of the parties before the Trial Chamber. It argues that the obligation on the Trial Chamber is to ensure that the

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[72] Article 6(1) of the ECHR provides in part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[73] Article 8(1) of the American Convention on Human Rights provides in part:
"Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature."

[74] T. 29-35 (19 April 1999).

[75] *Morael v. France*, Communication No. 207/1986, 28 July 1989, U.N. Doc. CCPR/8/Add/1, 416.

[76] *Robinson v. Jamaica*, Communication No. 223/1987, 30 March 1989, U.N. Doc. CCPR/8/Add.1, 426.

[77] *Wolf v. Panama*, Communication No. 289/1988, 26 March 1992, U.N. Doc. CCPR/11/Add.1, 399.

[78] T. 29-35 (19 April 1999).

parties before it are accorded the same procedural rights and operate under the same procedural conditions in court. According to the Prosecution, the lack of cooperation by the authorities in the *Republika Srpska* could not imperil the equality of arms enjoyed by the Defence at trial because the Trial Chamber had no control over the actions or the lack thereof of those authorities.

46. The Defence contends that the minimum guarantee in Article 21(4)(b) of the Statute to adequate time and facilities for the preparation of defence at trial forms part of the principle of equality of arms, implicit in Article 20(1). It argues that, since the authorities in the *Republika Srpska* failed to cooperate with the Defence, the Appellant did not have adequate facilities for the preparation of his defence, thereby prejudicing his enjoyment of equality of arms.

47. The Appeals Chamber accepts the argument of the Defence that, on this point, the relationship between Article 20(1) and Article 21(4)(b) is of the general to the particular. It also agrees that, as a minimum, a fair trial must entitle the accused to adequate time and facilities for his defence.

48. In deciding on the scope of application of the principle of equality of arms, account must be taken first of the international case law. In *Kaufman v. Belgium*,[79] a civil case, the Eur. Commission H. R. found that equality of arms means that each party must have a reasonable opportunity to defend its interests "under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent".[80] In *Dombo Beheer B.V. v. The Netherlands*,[81] another civil proceeding, the Eur. Court H. R. adopted the view expressed by the Eur. Commission H. R. on equality of arms, holding that "as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".[82] The Court decided in a criminal proceeding, *Delcourt v. Belgium*,[83] that the principle entitled both parties to full equality of treatment, maintaining that the conditions of trial must not "put the accused

[79] *Kaufman v. Belgium*, 50 DR 98.
[80] *Ibid.*, p. 115.
[81] *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274.
[82] *Ibid.*, para. 40.
[83] *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11.

Jaski}i could have been the "unauthorized and unforeseen act of one of the force that entered Sivci".

2. The Individual Criminal Responsibility of the Appellant for the Killings

(a) Article 7(1) of the Statute and the Notion of Common Purpose

185. The question therefore arises whether under international criminal law the Appellant can be held criminally responsible for the killing of the five men from Jaski}i even though there is no evidence that he personally killed any of them. The two central issues are:

(i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and

(ii) what degree of *mens rea* is required in such a case.

186. The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions,[228] in laws,[229] or in judicial decisions.[230] In international criminal law the principle is laid down, *inter alia,* in Article 7(1) of the Statute of the International Tribunal which states that:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be *individually responsible* for the crime. (emphasis added)

This provision is aptly explained by the Report of the Secretary-General on the establishment of the International Tribunal, which states the following:

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[228] An example is provided by Article 27 para. 1 of the Italian Constitution ("*La responsibilità penale è personale.*" ("Criminal responsibility is personal.") (unofficial translation)).

[229] *See* for instance Article 121-1 of the French *Code pénal* ("*Nul n'est responsable pénalement que de son propre fait*"), para. 4 of the Austrian *Strafgesetzbuch* ("*Strafbar ist nur, wer schuldhaft handelt*" ("Only he who is culpable may be punished") (unofficial translation)).

[230] This rather basic proposition is usually tacitly assumed rather than explicitly acknowledged. For an example of where it was expressly stated, however, *see*, for Great Britain, *R. v. Dalloway* (1847) 3 Cox CC 273. *See* also the various decisions of the German Constitutional Court, e.g., BverfGE 6, 389 (439) and 50, 125 (133), as well as decisions of the German Federal Court of Justice (e.g., BGHSt 2, 194 (200)).

> An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the *principle of individual criminal responsibility*. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.[231]

Article 7(1) also sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute.

187. Bearing in mind the preceding general propositions, it must be ascertained whether criminal responsibility for participating in a common criminal purpose falls within the ambit of Article 7(1) of the Statute.

188. This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.

189. An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to *all* those "responsible for serious violations of international humanitarian law" committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or *ordering* to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy*, *incitement*, *attempt* and *complicity*).

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[231] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, 3 May 1993 ("Report of the Secretary-General"), para. 53 (emphasis added).

those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.

193. This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design. It may also be noted that – as will be mentioned below – international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems.

194. However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality. To identify these elements one must turn to customary international law. Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.

195. Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.

196. The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

197. With regard to this category, reference can be made to the *Georg Otto Sandrock et al.* case (also known as the *Almelo Trial*).[233] There a British court found that three Germans who had killed a British prisoner of war were guilty under the doctrine of "common enterprise". It was clear that they all had had the intention of killing the British soldier, although each of them played a different role. They therefore were all co-perpetrators of the crime of murder.[234] Similarly, in the *Hoelzer et al.* case, brought before a Canadian military court, in his summing up the Judge Advocate spoke of a "common enterprise" with regard to the murder of a Canadian prisoner of war by three Germans, and emphasised that the three all knew that the purpose of taking the Canadian to a particular area was to kill him.[235]

198. Another instance of co-perpetratorship of this nature is provided by the case of *Jepsen and others.*[236] A British court had to pronounce upon the responsibility of Jepsen (one of several accused) for the deaths of concentration camp internees who, in the few weeks leading up to the capitulation of Germany in 1945, were in transit to another concentration camp. In this regard, the Prosecutor submitted (and this was not rebutted by the Judge Advocate) that:

> [I]f Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act.[237]

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[233] *Trial of Otto Sandrock and three others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24th-26th November, 1945, UNWCC, vol. I, p. 35).

[234] The accused were German non-commissioned officers who had executed a British prisoner of war and a Dutch civilian in the house of whom the British airman was hiding. On the occasion of each execution one of the Germans had fired the lethal shot, another had given the order and a third had remained by the car used to go to a wood on the outskirts of the Dutch town of Almelo, to prevent people from coming near while the shooting took place. The Prosecutor stated that "the analogy which seemed to him most fitting in this case was that of a gangster crime, every member of the gang being equally responsible with the man who fired the actual shot" (*ibid.*, p. 37). In his summing up the Judge Advocate pointed out that:

> "There is no dispute, as I understand it, that all three [Germans] knew what they were doing and had gone there for the very purpose of having this officer killed; and, as you know, if people are all present together at the same time taking part in a common enterprise which is unlawful, each one in their (*sic*) own way assisting the common purpose of all, they are all equally guilty in point of law" (*see* official transcript, Public Record Office, London, WO 235/8, p. 70; copy on file with the International Tribunal's Library; the report in the UNWCC, vol. I, p. 40 is slightly different).

All the accused were found guilty, but those who had ordered the shooting or carried out the shooting were sentenced to death, whereas the others were sentenced to fifteen years imprisonment (*ibid.*, p. 41).

[235] *Hoelzer et al.*, Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March-6 April 1946, vol. I, pp. 341, 347, 349 (RCAF Binder 181.009 (D2474); copy on file with the International Tribunal's Library).

[236] *Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany* (13-23 August, 1946), judgement of 24 August 1946 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).

[237] *Ibid.*, p. 241.

In a similar vein, the Judge Advocate noted in *Schonfeld* that:

> if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present [...] provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.[238]

199. It can be noted that some cases appear broadly to link the notion of common purpose to that of causation. In this regard, the *Ponzano* case,[239] which concerned the killing of four British prisoners of war in violation of the rules of warfare, can be mentioned. Here, the Judge Advocate adopted the approach suggested by the Prosecutor,[240] and stressed:

> [...] the requirement that an accused, before he can be found guilty, must have been concerned in the offence. [T]o be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [...]. [I]n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means [...].[241]

Further on, the Judge Advocate submitted that while the defendant's involvement in the criminal acts must form a link in the chain of causation, it was not necessary that his participation be a *sine qua non,* or that the offence would not have occurred but for his participation.[242] Consonant with the twin requirements of criminal responsibility under this category, however, the Judge Advocate stressed the necessity of knowledge on the part of the accused as to the intended purpose of the criminal enterprise.[243]

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[238] *Trial of Franz Schonfeld and others*, British Military Court, Essen, June 11th-26th, 1946, UNWCC, vol. XI, p. 68 (summing up of the Judge Advocate).

[239] *Trial of Feurstein and others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).

[240] The Prosecutor had stated the following:

"It is an opening principle of English law, and indeed of all law, that a man is responsible for his acts and is taken to intend the natural and normal consequences of his acts and if these men [...] set the machinery in motion by which the four men were shot, then they are guilty of the crime of killing these men. It does not – it never has been essential for any one of these men to have taken those soldiers out themselves and to have personally executed them or personally dispatched them. That is not at all necessary; all that is necessary to make them responsible is that they set the machinery in motion which ended in the volleys that killed the four men we are concerned with" (*ibid.*, p. 4).

[241] *Ibid.*, summing up of the Judge Advocate, p. 7.

[242] In this regard, the Judge Advocate noted that: "[o]f course, it is quite possible that it [the criminal offence] might have taken place in the absence of all these accused here, but that does not mean the same thing as saying [...] that [the accused] could not be a chain in the link of causation [...]" (*ibid.*, pp. 7-8).

[243] In particular, it was held that in order to be "concerned in the commission of a criminal offence," it was necessary to prove:

200. A final case worthy of mention with regard to this first category is the *Einsatzgruppen* case.[244] With regard to common design, a United States Tribunal sitting at Nuremberg noted that:

> the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility [...].[245]

"that when he did take part in it he knew the intended purpose of it. If any accused were to have given an order for this execution, believing that it was a perfectly legal execution, that these four soldiers had been sentenced to death by a properly constituted court and that therefore an order for the execution was no more than an order to carry out the decision of the court, then that accused would not be guilty because he would not have any guilty knowledge. But where [...] a person was in fact concerned, and [...] he knew the intended purpose of these acts, then that accused is guilty of the offence in the charge" (*ibid.*, p. 8).

The requisite knowledge of each participant, even if deducible only by implication, was also stressed in the *Stalag Luft III* case, *Trial of Max Ernst Friedrich Gustav Wielen and Others*, Proceedings of the Military Court at Hamburg, (1-3 July 1947) (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library), which concerned the killing of fifty officers of the allied air force who had escaped from the Stalag Luft III camp in Silesia. The Prosecutor in his opening remarks stressed that:

"everybody, particularly every policeman of whatever sort it may be, knew quite well that there had been a mass escape of prisoners of war on the 25th March 1944 [...] [such] that every policeman knew that prisoners of war were at large. I think that is important to remember, and particularly with regard to some of the minor members of the Gestapo who are charged before you that is important to remember because they may say they did not know who these people were. They may say they did not know they were escaped prisoners of war but [in fact] they all knew [...]" (*ibid.*, p. 276).

Furthermore, in two cases concerning an accused's participation in the *Kristallnacht* riots, the Supreme Court for the British zone stressed that it was not required that the accused knew about the rioting in the entire *Reich*. It was sufficient that he was aware of the local action, that he approved it, and that he wanted it "as his own" (unofficial translation). The fact that the accused participated consciously in the arbitrary measures directed against the Jews was sufficient to hold him responsible for a crime against humanity (Case no. 66, Strafsenat. Urteil vom 8 Februar 1949 gegen S. StS 120/48, p. 284-290, 286, vol. II). *See* also Case no. 17, vol. I, 94-98, 96, where the Supreme Court held that it was irrelevant that the scale of ill-treatment, deportation and destruction that happened in other parts of the country on that night were not undertaken in this village. It sufficed that the accused participated intentionally in the action and that he was "not unaware of the fact that the local action was a measure designed to instil terror which formed a part of the nation-wide persecution of the Jews" (unofficial translation).

[244] *The United States of America v. Otto Ohlenforf et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, United States Government Printing Office, Washington, 1951, vol. IV, p. 3.

[245] The tribunal went on to say:

"Even though these men [Radetsky, Ruehl, Schubert and Graf] were not in command, they cannot escape the fact that *they were members of Einsatz units whose express mission, well known to all the members, was to carry out a large scale program of murder.* Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not

201. It should be noted that in many post-World War II trials held in other countries, courts took the same approach to instances of crimes in which two or more persons participated with a different degree of involvement. However, they did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration. This applies in particular to Italian[246] and German[247] cases.

202. The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are *Dachau Concentration Camp,*[248] decided by a United States court sitting in Germany and *Belsen,*[249] decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of

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brandish a cutlass. The man who stands at the door of a bank and scans the environs may appear to be the most peaceable of citizens, but if his purpose is to warn his robber confederates inside the bank of the approach of the police, his guilt is clear enough. And if we assume, for the purposes of argument, that the defendants such as Schubert and Graf have succeeded in establishing that their role was an auxiliary one, they are still in no better position than the cook or the robbers' watchman" (*ibid.*, p. 373; emphasis added).

In this connection, the tribunal also addressed the contention that certain of the commanders did not participate directly in the crimes committed, noting that:

"[w]ith respect to the defendants such as Jost and Naumann, [...] it is [...] highly probable that these defendants did not, at least very often, participate personally in executions. And it would indeed be strange had they ?who were persons in authorityg done so. [...] Far from being a defense or even a circumstance in mitigation, the fact that ?these defendantsg did not personally shoot a great many people, but rather devoted themselves to directing the over-all operations of the *Einsatzgruppen*, only serves to establish their deeper responsibility for the crimes of the men under their command" (*ibid.*).

[246] *See* for instance the following decisions of the Italian Court of Cassation relating to crimes committed by militias or forces of the "*Repubblica Sociale Italiana*" against Italian partisans or armed forces: *Annalberti et al.*, 18 June 1949, in *Giustizia penale* 1949, Part II, col. 732, no. 440; *Rigardo et al.* case, 6 July 1949, *ibid.*, cols. 733 and 735, no. 443; *P.M. v. Castoldi*, 11 July 1949, *ibid.*, no. 444; *Imolesi et al.*, 5 May 1949, *ibid.*, col. 734, no. 445. *See* also *Ballestra*, 6 July 1949, *ibid.*, cols. 732-733, no. 442.

[247] *See* for instance the decision of 10 August 1948 of the German Supreme Court for the British Zone in *K. and A.*, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. I, pp. 53-56; the decision of 22 February 1949 in *J. and A.*, *ibid.*, pp. 310-315; the decision of the District Court (*Landgericht*) of Cologne of 22 and 23 January 1946 in *Hessmer et al.*, in *Justiz und NS-Verbrechen*, vol. I, pp. 13-23, at pp. 13, 20; the decision of 21 December 1946 of the District Court (*Landgericht*) of Frankfurt am Main in *M. et al.* (*ibid.*, pp. 135-165, 154) and the judgement of the Court of Appeal (*Oberlandesgericht*) of 12 August 1947 in the same case (*ibid.*, pp. 166-186, 180); as well as the decision of the District Court of Braunschweig of 7 May 1947 in *Affeldt, ibid.*, p. 383-391, 389.

[248] *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15th November-13th December, 1945, UNWCC, vol. XI, p. 5.

[249] *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17th September-17th November, 1945, UNWCC, vol. II, p. 1.

the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.[250] In his summing up in the *Belsen* case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design.[251] The convictions of several of the accused appear to have been explicitly based upon these criteria.[252]

203. This category of cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category, considered above. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective "position of authority" within the concentration camp system and because they had "the power to look after the inmates and make their life satisfactory"[253] but failed to do so.[254] It would seem that in these cases the required *actus reus* was the active

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[250] *See Dachau Concentration Camp* case, UNWCC, vol. XI, p. 14:
"It seems, therefore, that what runs throughout the whole of this case, like a thread, is this: that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute 'acting in pursuance of a common design to violate the laws and usages of war'. Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary".

[251] The Judge Advocate summarised with approval the legal argument of the Prosecutor in the following terms:
"The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened." (*Belsen* case, UNWCC, vol. II, p. 121.)

[252] In particular, the accused Kramer appears to have been convicted on this basis. (*See ibid.*, p. 121: "The Judge Advocate reminded the Court that when they considered the question of guilt and responsibility, the strongest case must surely be against Kramer, and then down the list of accused *according to the positions they held.*" (emphasis added).

[253] *Ibid.*, p.121.

[254] In a similar vein, the *Case against R. Mulka et al.* ("*Auschwitz concentration camp* case") can be mentioned. Although the court reached the same result, it nevertheless did not apply the doctrine of common design but instead tended to treat the defendants as aiders and abettors as long as they remained within the framework provided by their orders and as principal offenders if they acted outside this framework. This meant that if it could not be proved that the accused actually identified himself with the aims of the Nazi

participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime.

204. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this

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regime, then the court would treat him as an aider and abettor because he lacked the specific intent to "want the offence as his own" (*see* in particular the *Bundesgerichtshof* in *Justiz und NS-Verbrechen*, vol. XXI, pp. 838 *ff.*, and especially pp. 881 *ff*). The BGH stated, p. 882:

> "[The view] that everybody who had been involved in the destruction program of the [KZ] Auschwitz and acted in any manner whatsoever in connection with this program participated in the murders and is responsible for all that happened is not correct. It would mean that even acts which did not further the main offence in any concrete manner would be punishable. In consequence even the physician who was in charge of taking care of the guard personnel and who restricted himself to doing only that, would be guilty of aiding and abetting murder. The same would even apply to the doctor who treated prisoners in the camp and saved their lives. Not even those who in their place put little obstacles in the

plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.

205. The case-law in this category has concerned first of all cases of mob violence, that is, situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. Cases illustrative of this category are *Essen Lynching* and *Borkum Island.*

206. As is set forth in more detail below, the requirements which are established by these authorities are two-fold: that of a criminal intention to participate in a common criminal design and the foreseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.

207. The *Essen Lynching* (also called *Essen West*) case was brought before a British military court, although, as was stated by the court, it "was not a trial under English law".[255] Given the importance of this case, it is worth reviewing it at some length. Three British prisoners of war had been lynched by a mob of Germans in the town of Essen-West on 13 December 1944. Seven persons (two servicemen and five civilians) were charged with committing a war crime in that they were concerned in the killing of the three prisoners of war. They included a German captain, Heyer, who had placed the three British airmen under the escort of a German soldier who was to take the prisoners to a *Luftwaffe* unit for interrogation. While the escort with the prisoners was leaving, the captain had ordered that the escort should not interfere if German civilians should molest the prisoners, adding that they ought to be shot, or would be shot. This order had been given to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. According to the summary given by the United Nations War Crimes Commission:

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way of this program of murder, albeit in a subordinate position and without success, would escape punishment. That cannot be right." (unofficial translation).

[255] *Trial of Erich Heyer and six others*, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, vol. I, p. 88, at p. 91.

> [w]hen the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.[256]

208. The Defence laid stress on the need to prove that each of the accused had the intent to kill. The Prosecution took a contrary view. Major Tayleur, the Prosecutor, stated the following:

> My friend [the Defence Counsel] has spoken to you about the intent which is necessary and he says that no evidence of intent to kill has been brought before you. In my submission there has been considerable evidence of intent to kill; but even if there were not, in my submission *to prove this charge you do not have to prove an intent to kill*. If you prove an intent to kill you would prove murder; but you can have an unlawful killing, which would be manslaughter, where there is *not an intent to kill but merely the doing of an unlawful act of violence*. A person might slap another's face with no intent to kill at all but if through some misfortune, for example that person having a weak skull, that person died, in my submission the person striking the blow would be guilty of manslaughter and that would be such killing as would come within the words of this charge. In my submission therefore what you have to be satisfied of – and the onus of proof is of course on the prosecution – is that *each and everyone of the accused, before you can convict him, was concerned in the killing* of these three unidentified airmen in circumstances which the British law would have amounted to either murder or manslaughter.[257]

The Prosecutor then went on to add:

> the allegation of the prosecution is that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen *is guilty in that he is concerned in the killing*. It is impossible to separate any one of these from another; they all make up what is known as lynching. In my submission from the moment they left those barracks those men were doomed and the crowd knew they were doomed and *every person in that crowd who struck a blow is both morally and criminally responsible for the deaths of those three men*.[258]

Since Heyer was convicted, it may be assumed that the court accepted the Prosecution arguments as to the criminal liability of Heyer (no Judge Advocate had been appointed in this case). As for the soldier escorting the airmen, he had a duty not only to prevent the prisoners from escaping but also of seeing that they were not molested; he was sentenced to imprisonment for five years (even though the Prosecutor had suggested that he was not criminally liable). According to the Report of the United Nations War Crimes Commission,

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[256] *Ibid.*, p. 89.
[257] *See* transcript in Public Record Office, London, WO 235/58, p. 65 (emphasis added; copy on file with the International Tribunal's Library).
[258] *Ibid.*, p. 66 (emphasis added).

three civilians "were found guilty [of murder] because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot nor given the blows which caused the death".[259]

209. It would seem warranted to infer from the arguments of the parties and the verdict that the court upheld the notion that all the accused who were found guilty took part, in various degrees, in the killing; not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoners of war. Nevertheless they were all found guilty of murder, because they were all "concerned in the killing". The inference seems therefore justified that the court assumed that the convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder.[260]

210. A similar position was taken by a United States military court in *Kurt Goebell et al.* (also called the *Borkum Island* case). On 4 August 1944, a United States Flying Fortress was forced down on the German island of Borkum. Its seven crew members were taken prisoner and then forced to march, under military guard, through the streets of Borkum. They were first made to pass between members of the Reich's Labour Corps, who beat them with shovels, upon the order of a German officer of the *Reichsarbeitsdienst.* They were then struck by civilians on the street. Later on, while passing through another street, the mayor of Borkum shouted at them inciting the mob to kill them "like dogs". They were

[259] UNWCC, vol. 1, p. 91. In addition to Heyer and the escort (Koenen), three civilians were also convicted. The first of the accused civilians, Boddenberg, admitted to have struck one of the airmen on the bridge, after one of them had already been thrown over the bridge, knowing "that the motives of the crowd against them [the airmen] were deadly, and yet he joined in" (Transcript in Public Record Office, London, WO 235/58, p. 67; copy on file with International Tribunal's Library); the second, Kaufer, was found to have "beaten the airmen" and taken "an active part" in the mob violence against them. Additionally, it was alleged that he tried to pull the rifle away from a subordinate officer to shoot the airmen below the bridge and that he called out words to the effect that the airmen deserved to be shot (*ibid.*, pp. 67-68). The third, Braschoss, was seen hitting one of the airmen on the bridge, descending beneath the bridge to throw the airman, who was still alive, into the stream. He and an accomplice were further alleged to have thrown another of the airmen from the bridge (*ibid.*, p. 68). Two of the accused civilians, Sambol and Hartung, were acquitted; the former because the blows he was alleged to have inflicted were neither particularly severe nor proximate to the airmen's death (comprising one of the earliest to be inflicted) and the latter because it was not proved beyond reasonable doubt that he actually took part in the affray (*ibid.*, pp. 66-67, UNWCC, vol. I, p. 91).

[260] The charge, in a strict legal sense, was the commission of a war crime in violation of the laws and usages of war for being "concerned in the killing" of the airmen rather than murder as this was "not a trial under English law" (*ibid.*, at p. 91). For all intents and purposes, however, the charge appeared to be treated as a murder charge, as it appeared to have been accepted in the course of the proceedings that "as long as everyone realised

then beaten by civilians while the escorting guards, far from protecting them, fostered the assault and took part in the beating. When the airmen reached the city hall one was shot and killed by a German soldier, followed by the others a few minutes later, all shot by German soldiers. The accused included a few senior officers, some privates, the mayor of Borkum, some policemen, a civilian and the leader of the Reich Labour Corps. All were charged with war crimes, in particular both with "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing" of the airmen and with "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in assaults upon" the airmen.[261] In his opening statement the Prosecutor developed the doctrine of common design. He stated the following:

> [I]t is important, as I see it, to determine the guilt of each of these accused in the light of the particular role that each one played. *They did not all participate in exactly the same manner.* Members of mobs seldom do. One will undertake one special or particular action and another will perform another particular action. It is the composite of the actions of all that results in the commission of the crime. Now, all legal authorities agree that where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man *(sic). No distinction is drawn between the one who, by his acts, caused the victims to be subjected to the pleasure of the mob or the one who incited the mob, or the ones who dealt the fatal blows.* This rule of law and common sense must, of necessity, be so. Otherwise, many of the true instigators of crime would never be punished.
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> Who can tell which particular act was the most responsible for the final shooting of these flyers? Can it not be truly said that any one of the acts of any one of these accused may have been the very act that produced the ultimate result? Although the ultimate act might have been something in which the former actor did not directly participate [, e]very time a member of a mob takes any action that is inclined to encourage, that is inclined to give heart to someone else who is present, to participate, then that person has lent his aid to the accomplishment of the final result.[262]

In short, noted the Prosecutor, the accused were "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs".[263] As a consequence, according to the Prosecutor, if it were proved beyond a reasonable doubt "that each one of these accused

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what was meant by the word 'murder' for the purposes of this trial, [there ...] was ?nog difficulty" (*ibid.*, pp. 91-92).

[261] *See* Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal's Library).

[262] *Ibid.*, p. 1186 (emphasis added). *See* also p. 1187.

[263] *Ibid.*, p. 1188. *See*, further note 240 and accompanying text, with regard to the comments made regarding causation in the *Ponzano* case.

played *his part* in mob violence which led to the unlawful killing of the seven American flyers, [...] under the law *each and every one of the accused* [*was*] *guilty of murder*".[264]

211. It bears emphasising that by taking the approach just summarised, the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder. In other words, the Prosecutor adhered to the doctrine of common purpose mentioned above with regard to the first category of cases. It is interesting to note that the various defence counsel denied the applicability of this common design doctrine, not, however, on principle, but merely on the facts of the case. For instance, some denied the existence of a criminal intent to participate in the common design, claiming that mere presence was not sufficient for the determination of the intent to take part in the killings.[265] Other defence counsel claimed that there was no evidence that there was a conspiracy among the German officers,[266] or they argued that, if there had been such a plot, it did not involve the killing of the airmen.[267]

212. In this case too, no Judge Advocate stated the law. However, it may be fairly assumed that in the event, the court upheld the common design doctrine, but in a different form, for it found some defendants guilty of both the killing and assault charges[268] while others were only found guilty of assault.[269]

213. It may be inferred from this case that all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.

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[264] *Ibid.*, p. 1190 (emphasis added). *See* also pp. 1191-1194.
[265] *See* e.g. *ibid.*, pp. 1201, 1203-1206.
[266] *See ibid.*, pp. 1234, 1241, 1243.
[267] *See ibid.*, pp. 1268-1270.
[268] The accused Akkerman, Krolikovski, Schmitz, Wentzel, Seiler and Goebbel were all found guilty on both the killing and assault charges and were sentenced to death, with the exception of Krolikovski, who was sentenced to life imprisonment (*ibid.*, pp. 1280-1286).
[269] The accused Pointner, Witzke, Geyer, Albrecht, Weber, Rommel, Mammenga and Heinemann were found guilty only of assault and received terms of imprisonment ranging between 2 and 25 years (*ibid.*).

214. Mention must now be made of some cases brought before Italian courts after World War II concerning war crimes committed either by civilians or by military personnel belonging to the armed forces of the so-called "*Repubblica Sociale Italiana*" ("RSI"), a *de facto* government under German control established by the Fascist leadership in central and northern Italy, following the declaration of war by Italy against Germany on 13 October 1943. After the war several persons were brought to trial for crimes committed between 1943 and 1945 against prisoners of war, Italian partisans or members of the Italian army fighting against the Germans and the RSI. Some of these trials concerned the question of criminal culpability for acts perpetrated by groups of persons where only one member of the group had actually committed the crime.

215. In *D'Ottavio et al.*, on appeal from the Assize Court of Teramo, the Court of Cassation on 12 March 1947 pronounced upon one of these cases. Some armed civilians had given unlawful pursuit to two prisoners of war who had escaped from a concentration camp, in order to capture them. One member of the group had shot at the prisoners without intending to kill them, but one had been wounded and had subsequently died as a result. The trial court held that all the other members of the group were accountable not only for "illegal restraint" (*sequestro di persona*) but also for manslaughter (*omicidio preterintenzionale*). The Court of Cassation upheld this finding. It held that for this type of criminal liability to arise, it was necessary that there exist not only a material but also a psychological "causal nexus" between the result all the members of the group intended to bring about and the different actions carried out by an individual member of that group. The court went on to point out that:

> [i]ndeed the responsibility of the participant (*concorrente*) [...] is not founded on the notion of objective responsibility [...], but on the fundamental principle of the concurrence of interdependent causes [...]; by virtue of this principle all the participants are accountable for the crime both where they directly cause it and where they indirectly cause it, in keeping with the well-known canon *causa causae est causa causati*.[270]

[270] *See* handwritten text of the (unpublished) judgement, p. 6 (unofficial translation; kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). *See* also *Giustizia penale*, 1948, Part II, col. 66, no. 71 (containing a headnote on the judgement).

The court then noted that in the case at issue:

> [t]here existed a nexus of material causality, as all the participants had directly cooperated in the crime of attempted "illegal restraint" [...] by surrounding and pursuing two prisoners of war on the run, armed with a gun and a rifle, with a view to illegally capturing them. This crime was the indirect cause of a subsequent and different event, namely the shooting (by d'Ottavio alone) at one of the fugitives, resulting in wounding followed by death. Furthermore, there existed psychological causality, as all the participants had the intent to perpetrate and knowledge of the actual perpetration of an attempted illegal restraint, *and foresaw the possible commission of a different crime*. This *foresight* (*previsione*) necessarily followed from the use of weapons: it being predictable (*dovendo prevedersi*) that one of the participants might shoot at the fugitives to attain the common purpose (*lo scopo comune*) of capturing them.[271]

216. In another case (*Aratano et al.*) the Court of Cassation dealt with the following circumstances: a group of RSI militiamen had planned to arrest some partisans, without intending to kill them; however, to frighten the partisans, one of the militiamen fired a few shots into the air. As a result the partisans shot back; a shoot-out ensued and in the event one of the partisans was killed by a member of the RSI militia. The court held that the trial court had erred in convicting all members of the militia of murder. In its view, as the trial court had found that the militiamen had not intended to kill the partisans:

> [I]t was clear that [the murder of one of the partisans] was an unintended event (*evento non voluto*) and consequently could not be attributed to all the participants: the crime committed was more serious than that intended and it proves necessary to resort to categories other than that of voluntary homicide. This Supreme Court has already had the opportunity to state the same principle, where it noted that in order to find a person responsible for a homicide perpetrated in the course of a mopping-up operation carried out by many persons, it was necessary to establish that, in participating in this operation, a voluntary activity also concerning homicide had been brought into being (*fosse stata spiegata un'attività volontaria in relazione anche all'omicidio*) (judgement of 27 August 1947 *in re: Beraschi*).[272]

217. Other cases relate to the applicability of the amnesty law passed by the Presidential Decree of 22 June 1946 no. 4. The amnesty applied among other things to crimes of "collaboration with the occupying Germans" but excluded offences involving murder. In *Tossani* the question was whether the law on amnesty covered a person who had taken part in a mopping-up operation against civilians in the course of which a German soldier had killed a partisan. The Court of Cassation found that the amnesty should apply. It emphasised that the appellant participating in the operation had not taken any active part in it and did not carry weapons; in addition, the killing was found to have been "an exceptional and

[271] *See* handwritten text of the (unpublished) judgement, pp. 6-7 (unofficial translation; emphasis added).
[272] *See* handwritten text of the (unpublished) judgement, pp. 13-14 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). For a headnote on this case *see Archivio penale*, 1949, p. 472.

unforeseen (*imprevisto*) event", for during a search a civilian had escaped to avoid being detained and had been shot at by the German soldier.[273] A similar position was taken by the same court in *Ferrida*. The appellant had participated, "only in his capacity as a nurse," in a mopping-up operation in the course of which some partisans had been killed. The court found that he was not guilty of murder; the law on amnesty was therefore applicable to him.[274] In *Bonati et al.* the appellant argued that the crime of murder, not envisaged by the group of persons concerned, had been perpetrated by another member of that group. The Court of Cassation rejected the appeal, holding that the appellant was also guilty of murder. Although this crime was more grave than that intended by some of the participants (*concorrenti*), it "was in any case a consequence, albeit indirect, of his participation".[275]

218. In these cases courts indisputably applied the notion that a person may be held criminally responsible for a crime committed by another member of a group and not envisaged in the criminal plan. Admittedly, in some of the cases the *mens rea* required for a member of the group to be held responsible for such an action was not clearly spelled out. However, in light of other judgements handed down in the same period on the same matter, although not relating to war crimes, it may nevertheless be assumed that courts required that the event must have been predictable. In this connection it suffices to mention the judgement of the Court of Cassation of 20 July 1949 in *Mannelli,* where the court explained the required causal nexus as follows:

> The relationship of material causality by virtue of which the law makes some of the participants liable for the crime other than that envisaged, must be correctly understood from the viewpoint of logic and law and be strictly differentiated from an incidental relationship (*rapporto di occasionalita'*). Indeed, the cause, whether immediate or mediate, direct or indirect, simultaneous or successive, can never be confused with mere coincidence. For there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, *it is necessary that the latter crime should constitute the logical and predictable development of the former* (*il logico e prevedibile sviluppo del primo*). Instead, where there exists full independence between the two crimes, one may find, depending upon the specific circumstances, a merely incidental relationship (*un rapporto di mera occasionalita'*), but not a causal relationship. In the light of these criteria, he who requests somebody else to wound or kill cannot answer for a robbery perpetrated by the other person, for this crime does not constitute the logical development of

[273] Judgement of 12 September 1946, in *Archivio penale,* 1947, Part II, pp. 88-89.
[274] Judgement of 25 July 1946, in *Archivio penale,* 1947, Part II, p. 88.
[275] *See* handwritten text of the (unpublished) judgement of 5 July 1946, p. 19 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). *See* also *Giustizia penale,* 1945-46, Part II, cols. 530-532.
For cases where the Court of Cassation concluded that the participant was guilty of the more serious crime not envisaged in the common criminal design, *see Torrazzini,* judgement of 18 August 1946, in *Archivio penale* 1947, Part II, p. 89; *Palmia,* judgement of 20 September 1946, *ibid.*

> the intended offence, but a new fact, having its own causal autonomy, and linked to the conduct willed by the instigator (*mandante*) by a merely incidental relationship (emphasis added).[276]

219. The same notion was enunciated by the same Court of Cassation in many other cases.[277] That this was the basic notion upheld by the court seems to be borne out by the fact that the one instance where the same court adopted a different approach is somewhat conspicuous.[278] Accordingly, it would seem that, with regard to the *mens rea* element required for the criminal responsibility of a person for acts committed within a common purpose but not envisaged in the criminal design, that court either applied the notion of an attenuated form of intent (*dolus eventualis*) or required a high degree of carelessness (*culpa*).

220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to

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[276] *See Giustizia penale*, 1950, Part II, cols. 696-697 (emphasis added).

[277] *See* e.g. Court of Cassation, 15 March 1948, *Peveri* case, in *Archivio penale*, 1948, pp. 431-432; Court of Cassation, 20 July 1949, *Mannelli* case, in *Giustizia penale*, 1949, Part II, col. 906, no.599; Court of Cassation, 27 October 1949, *P.M. v. Minafò*, in *Giustizia penale*, 1950, Part II, col. 252, no. 202; 24 February 1950, *Montagnino, ibid.*, col.821; 19 April 1950, *Solesio et al., ibid.*, col. 822. By contrast, in a judgement of 23 October 1946 the same Court of Cassation, in *Minapò et al.*, held that it was immaterial that the participant in a crime had or had not foreseen the criminal conduct carried out by another member of the criminal group (*Giustizia penale*, 1947, Part II, col. 483, no. 382).

[278] In the *Antonini* case (judgement of the Court of Cassation of 29 March 1949), the trial court had found the accused guilty not only of illegally arresting some civilians but also of their subsequent shooting by the Germans, as a "reprisal" for an attack on German troops in Via Rasella, in Rome. According to the trial court the accused, in arresting the civilians, had not intended to bring about their killing, but knew that he thus brought into being a situation likely to lead to their killing. The Court of Cassation reversed this finding,

take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).

221. In addition to the aforementioned case law, the notion of common plan has been upheld in at least two international treaties. The first of these is the International Convention for the Suppression of Terrorist Bombing, adopted by consensus by the United Nations General Assembly through resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998. Pursuant to Article 2(3)(c) of the Convention, offences envisaged in the Convention may be committed by any person who:

> [i]n any other way [other than participating as an accomplice, or organising or directing others to commit an offence] contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

The negotiating process does not shed any light on the reasons behind the adoption of this text.[279] This Convention would seem to be significant because it upholds the notion of a

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holding that for the accused to be found guilty, it was necessary that he had not only foreseen but also willed the killing (*see* text of the judgement in *Giustizia penale*, 1949, Part II, cols. 740-742).

[279] The Report of the Sixth Committee (25 November 1997, A/52/653) and the Official Records of the General Assembly session in which this Convention was adopted made scant reference to Article 2 and did not elaborate upon the doctrine of common purpose (*see* UNGAOR, 72nd plenary meeting, 52nd sess., Mon. 15 December 1997, U.N. Doc. A/52/PV.72). The Japanese delegate during the 33rd meeting of the Sixth Committee nevertheless noted that "some terms used ?in the Conventiong such as [...] 'such contribution' (Article 2, para. 3(c)) were ambiguous" (33rd Meeting of the Sixth Committee, 2 December 1997, UNGAOR A/C.6/52/SR.33, p. 8, para. 77). He concluded that his Government would therefore "interpret 'such contribution' [...] to mean abetment, assistance or other similar acts as defined by Japanese legislation" (*ibid*).

"common criminal purpose" as distinct from that of aiding and abetting (couched in the terms of "participating as an accomplice [in] an offence"). Although the Convention is not yet in force, one should not underestimate the fact that it was adopted by consensus by all the members of the General Assembly. It may therefore be taken to constitute significant evidence of the legal views of a large number of States.

222. A substantially similar notion was subsequently laid down in Article 25 of the Statute of the International Criminal Court, adopted by a Diplomatic Conference in Rome on 17 July 1998 ("Rome Statute").[280] At paragraph 3(d), this provision upholds the doctrine under discussion as follows:

> [In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ...]
>
> (d) In any other way [other than aiding and abetting or otherwise assisting in the commission or attempted commission of a crime] contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> ii. Be made in the knowledge of the intention of the group to commit the crime.

223. The legal weight to be currently attributed to the provisions of the Rome Statute has been correctly set out by Trial Chamber II in *Furund`ija.*[281] There the Trial Chamber pointed out that the Statute is still a non-binding international treaty, for it has not yet entered into force. Nevertheless, it already possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio iuris* of those States. This is consistent

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See also *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, UNGAOR, 52nd sess., 37th supp., A/52/37.

[280] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

[281] "Judgement", *Prosecutor v. Anto Furundžija*, Case No.: IT-95-17/1-T, Trial Chamber II, 10 December 1998, para. 227.

with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting.[282]

224. As pointed out above, the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States. Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. If one of the participants commits a crime not envisaged in the common purpose or common design, he alone will incur criminal responsibility for such a crime. These countries include Germany[283] and the Netherlands.[284] Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them. However, in these countries, if one of the persons taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence. These countries include civil law systems, such as that of France[285] and Italy.[286]

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[282] Even should it be argued that the objective and subjective elements of the crime, laid down in Article 25 (3) of the Rome Statute differ to some extent from those required by the case law cited above, the consequences of this departure may only be appreciable in the long run, once the Court is established. This is due to the inapplicability to Article 25(3) of Article 10 of the Statute, which provides that "?nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". This provision does not embrace Article 25, as this Article appears in Part 2 of the Statute, whereas Article 25 is included in Part 3.

[283] *See* Para. 25(2) of the *Strafgesetzbuch*: "*Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)*". ("If several persons commit a crime as co-perpetrators, each is liable to punishment as a principal perpetrator." (unofficial translation)). The German case law has clearly established the principle whereby if an offence is perpetrated that had not been envisaged in the common criminal plan, only the author of this offence is criminally responsible for it. *See* BGH GA 85, 270. According to the German Federal Court (in BGH GA 85, 270):

> "*Mittäterschaft ist anzunehmen, wenn und soweit das Zusammenwirken der mehreren Beteiligten auf gegenseitigem Einverständnis beruht, während jede rechtsverletzende Handlung eines Mittäters, die über dieses Einverständnis hinausgeht, nur diesem allein zuzurechnen ist*". ("There is co-perpetration (*Mittäterschaft*) when and to the extent that the joint action of the several participants is founded on a reciprocal agreement (*Einverständnis*), whereas any criminal action of a participant (*Mittäter*) going beyond this agreement can only be attributed to that participant." (unofficial translation)).

[284] In the Netherlands, the term designated for this form of criminal liability is "medeplegen". (*See* HR 6 December 1943, *NJ 1944*, 245; HR 17 May 1943, *NJ 1943*, 576; and HR 6 April 1925, *NJ 1925*, 723, W 11393).

[285] *See* Article 121-7 of the *Code pénal*, which reads:

> "*Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation. Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre*". ("Any person who knowingly has assisted in planning or committing a crime or

225. It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that "suggestions have been made that the international tribunal should apply *domestic law* in so far as it *incorporates* customary international humanitarian law".[292] In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation.

226. The Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law

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[289] E.g., in Maine (17 Maine Criminal Code § 57 (1997), Minnesota (Minnesota Statutes § 609.05 (1998)), Iowa (Iowa Code § 703.2 (1997)), Kansas (Kansas Statutes § 21-3205 (19997)), Wisconsin (Wisconsin Statutes § 939.05 (West 1995)). Although there is no clearly defined doctrine of common purpose under the United States' Federal common law, similar principles are promulgated by the Pinkerton doctrine. This doctrine imposes criminal liability for acts committed in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose (*see Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946); *State v. Walton*, 227 Conn. 32; 630 A.2d 990 (1993); *State of Connecticut v. Diaz*, 237 Conn. 518, 679 A. 2d 902 (1996)).

[290] Under Australian law, when two parties embark on a joint criminal enterprise, a party will be liable for an act which he contemplates may be carried out by the other party in the course of the enterprise, even if he has not explicitly or tacitly agreed to the commission of that act (*McAuliffe v. R.* (1995) 183 CLR 108 at 114). The test for determining whether a crime falls within the scope of the relevant joint enterprise is the subjective test of contemplation: "in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one, and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose" (*ibid.*).

[291] Article 22 of the Penal Code states:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

[292] *See* Report of the Secretary-General, para. 36 (emphasis added).

circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.

229. In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.

2. The Defence Case

244. In contrast to the Prosecution's Cross-Appeal, the Defence argues that the Trial Chamber's ruling that a crime against humanity cannot be committed for purely personal reasons is correct. Although it concedes that Article 5 of the Statute does not expressly stipulate that crimes against humanity cannot be committed for purely personal reasons, in its submission, the Trial Chamber nevertheless interpreted Article 5 correctly when it found that crimes against humanity cannot be committed for purely personal motives.[307]

245. The Defence contests the interpretation given to the applicable case law by the Prosecution, arguing that in all the cases cited, the defendants were linked to the system of extermination which formed the underlying predicate of crimes against humanity, and therefore did not commit their crimes for purely personal motives.[308] In other words, the activities of the defendants were linked to the general activities comprising the pogroms against the Jews and thus the Defence submits that the acts of the defendants were not acts committed for purely personal reasons.

246. The Defence also contests the Prosecution's submissions regarding the object and purpose of the Statute of the International Tribunal, arguing, to the contrary, that policy suggests that it would be unjust if a perpetrator of a criminal act guided solely by personal motives was instead to be prosecuted for a crime against humanity.[309]

B. Discussion

247. Neither Party asserts that the Trial Chamber's finding that crimes against humanity cannot be committed for purely personal motives had a bearing on the verdict in terms of Article 25(1) of the Tribunal Statute.[310] Nevertheless this is a matter of general significance for the Tribunal's jurisprudence. It is therefore appropriate for the Appeals Chamber to set forth its views on this matter.

[307] Appellant's Amended Brief on Judgement, para. 4.9; T. 227 (20 April 1999).
[308] Appellant's Amended Brief on Judgement, para. 4.12; T. 229 (20 April 1999).
[309] Appellant's Amended Brief on Judgement, paras. 4.17 – 4.18.

quintessentially genocidal frame of mind, the accused would have to be acquitted of crimes against humanity because he acted for "purely personal" reasons. Similarly, if the same man said that he participated in the genocide only for the "purely personal" reason that he feared losing his job, he would also be entitled to an acquittal. Thus, individuals at both ends of the spectrum would be acquitted. In the final analysis, any accused that played a role in mass murder purely out of self-interest would be acquitted. This shows the meaninglessness of any analysis requiring proof of "non-personal" motives. The Appeals Chamber does not believe, however, that the Trial Chamber meant to reach such a conclusion. Rather, the requirement that the accused's acts be part of a context of large-scale crimes, and that the accused knew of this context, was misstated by the Trial Chamber as a negative requirement that the accused not be acting for personal reasons. The Trial Chamber did not, the Appeals Chamber believes, wish to import a "motive" requirement; it simply duplicated the context and *mens rea* requirement, and confused it with the need for a link with an armed conflict, and thereby seemed to have unjustifiably and inadvertently added a new requirement.

270. The conclusion is therefore warranted that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, "purely personal motives" do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.

C. Conclusion

271. The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related.

272. For the above reasons, however, the Appeals Chamber does not consider it necessary to further require, as a substantive element of *mens rea*, a nexus between the specific acts allegedly committed by the accused and the armed conflict, or to require proof

Before:
Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab Judge Sidhwa

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 octobre 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

the Manual of Military Law (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (***infractions graves***) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (***[c]onstituent des crimes de droit international***) within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions,* Moniteur Belge, (5 August 1993).)

133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflicts entail

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-98-32-A

Date: 25 February 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Date: **25 February 2004**

PROSECUTOR

v.

MITAR VASILJEVIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Steffen Wirth

Counsel for the Accused:

Mr. Vladimir Domazet
Mr. Geert-Jan Knoops

with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.

100. The *actus reus* of the participant in a joint criminal enterprise is common to each of the three above categories and comprises the following three elements: First, a plurality of persons is required. They need not be organised in a military, political or administrative structure.[174] Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.[175] Third, the participation of the accused in the common purpose is required, which involves the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.[176]

101. However, the *mens rea* differs according to the category of joint criminal enterprise under consideration:

- With regard to the basic form of joint criminal enterprise what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).[177]

- With regard to the systemic form of joint criminal enterprise (which, as noted above, is a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this system of ill-treatment.[178]

- With regard to the extended form of joint criminal enterprise, what is required is the *intention* to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a

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[174] *Ibid*, para. 227, referring to the *Essen Lynching* and the *Kurt Goebell* cases.
[175] *Ibid*, where the *Tadić* Appeals Chamber uses the expressions, "purpose," "plan," and "design" interchangeably.
[176] *Ibid*.
[177] *Ibid*, paras 196 and 228. *See* also *Krnojelac* Appeals Judgement, para. 97, where the Appeals Chamber considers that, "by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadić* case. Since the Trial Chamber's findings showed that the system in place at the KP Dom sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber should have examined whether or not Krnojelac knew of the system and agreed to it, without it being necessary to establish that he had entered into an agreement with the guards and soldiers - the principal perpetrators of the crimes committed under the system - to commit those crimes."

crime other than the one which was part of the common design arises "only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*"[179] – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.

2. Differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor

102. Participation in a joint criminal enterprise is a form of "commission" under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution. Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

B. Alleged errors of law

1. Alleged errors of law related to the concept of joint criminal enterprise

103. Before turning to the alleged errors of law of the Trial Chamber concerning the concept of joint criminal enterprise and persecution, the Appeals Chamber will first determine under which category of joint criminal enterprise the Drina River incident falls.

[178] *Ibid*, paras 202, 220 and 228.
[179] *Ibid*, para. 228. *See* also paras 204 and 220.

stopped in Sase that the seven Muslim men were to be killed; vi) the behaviour of the soldiers changed drastically from the moment Milan Lukić ordered them to leave the car;[219] vii) that throughout the entire incident the impression of the two survivors was that no one around Milan Lukić could have influenced him or his decisions;[220] and viii) that the Appellant willingly accompanied Milan Lukić and his group with the seven Muslim men to the Drina River.[221]

131. The Appeals Chamber recalls that the question before it is whether no reasonable tribunal could find that the only reasonable inference available on the evidence cited above was that the Appellant shared the intent to commit murder. The Appeals Chamber considers that when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences. The Appeals Chamber is satisfied that no reasonable tribunal could have found that the only reasonable inference available on the evidence, as cited above, is that the Appellant had the intent to kill the seven Muslim men. The Trial Chamber found that the Appellant assisted Milan Lukić and his men by preventing the seven Muslim men from fleeing.[222] It did not find, however, that the Appellant shot at the Muslim men himself, nor that he exercised control over the firing. Compared to the involvement of Milan Lukić and potentially one or both of the other men, the participation of the Appellant in the overall course of the killings did not reach the same level. The above-mentioned acts of the Appellant were ambiguous as to whether or not the Appellant intended that the seven Muslim men be killed. This conclusion is further supported by the relatively short period of time between the change of attitude of Milan Lukić and the shooting, the strong personality of Milan Lukić compared to the Appellant, as well as the factors mentioned in paragraph 130. The Appeals Chamber, therefore, concludes that the Trial Chamber erred by finding that the only reasonable inference from the evidence was that the Appellant shared the intent to kill the seven Muslim men.

132. The error made by the Trial Chamber led to a miscarriage of justice since, without the proof the Appellant's intent, the Appellant would not be responsible as a co-perpetrator in the joint criminal enterprise. The Appeals Chamber will now consider whether the Appellant is, nevertheless, responsible as an aider and abettor.

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[219] T. 274-275, testimony of witness VG-32.
[220] Judgement, para. 107. Testimony of witnesses VG-14 and VG-32.
[221] *Ibid*, para. 107.
[222] *Cf.* for a comparable situation in a national jurisdiction *Prosecutor v. Novislav Djajić*, 3St 20/96, Supreme Court of Bavaria, 23 May 1997. In this case, the accused was found guilty of, *inter alia*, aiding and abetting 14 murders by standing with a gun in the middle of a semi-circle that Serbs had formed around a group of Muslims who were then shot.

3. Aiding and abetting

133. The Appeals Chamber has found above that the Trial Chamber erred by finding that the only reasonable inference from the evidence was that the Appellant shared the intent to kill the seven Muslim men. The Appellant argues under his fourth ground of appeal that his actions do not in fact amount to aiding and abetting, as he did not facilitate the commission of the crime. He submits that Milan Lukić and the two unidentified men did not need any help from the Appellant at the Vilina Vlas Hotel or at the Drina River,[223] since they had managed to detain the seven Muslim men on the hill of Bikavac by themselves, despite the fact that the seven Muslim men could have resisted.[224] The Appellant infers from this that it would not be logical to conclude that Milan Lukić and his men needed the assistance of the Appellant at the Vilina Vlas Hotel or at the Drina River as the risk that the seven Muslim men might resist was less important at this stage.[225]

134. The Appeals Chamber has already found that the Appellant knew that the seven Muslim men were to be killed; that he walked armed with the group from the place where they had parked the cars to the Drina River; that he pointed his gun at the seven Muslim men; and that he stood behind the Muslim men with his gun together with the other three offenders shortly before the shooting started. The Appeals Chamber believes that the only reasonable inference available on the totality of evidence is that the Appellant knew that his acts would assist the commission of the murders. The Appeals Chamber finds that in preventing the men from escaping on the way to the river bank and during the shooting, the Appellant's actions had a "substantial effect upon the perpetration of the crime."[226]

135. The Appeals Chamber finds that the acts of the Appellant were specifically directed to assist the perpetration of the murders and the inhumane acts and his support had a substantial effect upon the perpetration of the crimes. The Appeals Chamber therefore finds the Appellant guilty for aiding and abetting murder pursuant to Article 3 of the Statute (Count 5). Further, the Appeals Chamber finds the Appellant guilty as an aider and abettor for murder as a crime against humanity pursuant to Article 5(a) of the Statute (Count 4) and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (Count 6). However, the Appellant is not convicted of the murder as a crime against humanity pursuant to Article 5(a) of the Statute (Count 4) and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (Count 6) in accordance with the Tribunal's jurisprudence on cumulative convictions.[227]

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[223] Defence Appeal Brief, para. 216, which refers to the Appellant's arguments in paras 205-212.
[224] *Ibid*, para. 206.
[225] *Ibid*, paras 206-212.
[226] *Tadić* Appeals Judgement, para. 229.
[227] *See* paras 145-147 below.

finds that the Appellant has not shown a discernable error in the exercise of the Trial Chamber's discretion. This sub-ground of appeal is dismissed.

B. The Appeals Chamber's considerations

181. The Trial Chamber imposed a prison sentence of twenty years on the Appellant. The Appeals Chamber has not found in favour of any of the Appellant's alleged errors in relation to the sentence. However, the Appeals Chamber is of the view that the sentence needs to be adjusted due to the Appeals Chamber's finding that the Appellant was responsible as an aider and abettor with respect to murder as a violation of the laws or customs of war under Article 3 of the Statute (Count 5) and persecution by way of murder and inhumane acts as a crime against humanity pursuant to Article 5(h) of the Statute (Count 3), instead of being responsible as a co-perpetrator as was found by the Trial Chamber. The Appeals Chamber considers that it has the mandate to revise the sentence by itself without remitting it to the Trial Chamber.[290]

182. The Appeals Chamber is of the view that aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator.[291] The Appeals Chamber recalls that the sentence to be imposed must reflect the inherent gravity of the criminal conduct of an accused. The Appeals Chamber is of the view that the Appellant committed very serious crimes. Therefore, taking into account the particular circumstances of this case as well as the form and degree of the participation of the Appellant in the crimes, the Appeals Chamber finds that a sentence of 15 years is appropriate.

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matters which may be taken into account in mitigation unless such co-operation is "substantial." Nevertheless, the co-operation which was given by the Accused was indeed modest, and it has been given very little weight," Judgement, para. 299.

[290] *See Krnojelac* Appeals Judgement, paras 263-264; *Jelisić* Appeal Judgement, para. 99; *Aleksovski* Appeal Judgement, para. 99. The Appeals Chamber of the ICTR has in several cases determined that quashing a conviction would not necessarily affect the imposed sentence and may be determined by the Appeal Chamber without remitting it back to the Trial Chamber. *See Musema* Appeals Judgement, paras 372-373.

[291] *Cf. R. v. Price* (2000), 144 C.C.C. (3d) 343 at 358 (Ont. C.A.)(Can.); §3B1.2 of the 2003 United States Sentencing Guidelines, applicable to aiding and abetting through §2X2.1 of the Guidelines: "Based on the defendant's role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels. (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels. In cases falling between (a) and (b), decrease by 3 levels"; Regina v. Dwayne Gordon, CA (Crim Div), [2002] EWCA Crim 1637, 11 June 2002 (England); Article 27 (2) of the 1997 Chinese Penal Code ("An accomplice shall, in comparison with a principal offender, be given a lesser punishment or a mitigated punishment or be exempted from punishment"; Articles 32 (2) and 55 of the 1988 Penal Code of South Korea (Article 32 [2]: "The punishment of accessories shall be mitigated to less than that of the principals"; Article 55 [1] no. 2: "When penal servitude for life or imprisonment for life is to be mitigated, it shall be reduced to limited penal servitude, or limited imprisonment, for not less than seven years; no. 3: When limited penal servitude or limited imprisonment is to be mitigated, it shall be reduced by one-half of the term of the punishment"); Sections 27 (2), 49 of the German Penal Code (Section 27 [2]: "The punishment for the accessory corresponds to the punishment threatened for the perpetrator. It shall be mitigated pursuant to Section 49 subsection [1]"; Section 49 [1]: "If mitigation is prescribed or permitted under this provision, then the following shall apply to such mitigation: 1. Imprisonment for not less than three years shall take the place of imprisonment for life; 2. In cases of imprisonment for a fixed term, at most three-fourths of the maximum term provided may be imposed [...]"); Section 34 (1) no. 6 of the Austrian Penal Code: "it is true that accomplices are normally less blameworthy than principals and therefore deserve less severe sentences".

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

Case: IT-98-32-T

Date: 29 November 2002

Original: English

IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar: Mr Hans Holthuis

Judgment of: 29 November 2002

PROSECUTOR

v

Mitar VASILJEVIC

JUDGMENT

Counsel for the Prosecution:

Mr Dermot Groome
Mr Frédéric Ossogo
Ms Sabine Bauer

Counsel for the Accused:

Mr Vladimir Domazet
Mr RadomirTanaskovic

VIII. VIOLENCE TO LIFE AND PERSON

A. The Law

193. The Accused is charged pursuant to Article 3 of the Statute with "violence to life and person".[524] Common Article 3 of the 1949 Geneva Conventions lists "violence to life and person" as one of the acts which must be prohibited at any time and in any place in the case of an armed conflict not of an international character.[525] The Appeals Chamber in *Tadic* stated that "customary international law imposes criminal liability for all serious violations of common Article 3".[526] This statement satisfies at once the first two requirements which must be met before a Trial Chamber may convict an accused for committing an offence under customary international law, namely, that the conduct in question is regarded as criminal under that body of law and that individual criminal responsibility may be imposed in case of breach. It may also be accepted that "violence to life and person" generally constitutes a "serious" violation of common Article 3.[527] However, the Trial Chamber must further satisfy itself that the criminal conduct in question was sufficiently defined and was sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the criminal heading chosen by the Prosecution, in this case "violence to life and person". From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.[528]

194. The *Blaškic* Trial Chamber defined "violence to life and person" as "a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences".[529] The Trial Chamber added that the *mens rea* for this offence is "characterised once it has been established that

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[524] Counts 7 and 13 of the Indictment.

[525] *See*, Common Article 3(1)(a) of the Geneva Conventions of 12 August 1949. *See*, also, Article 4(2)(a) of Additional Protocol II to the Geneva Conventions of 12 August 1949 and Article 75(2)(a) of Additional Protocol I to the Geneva Conventions of 12 August 1949.

[526] *Tadic* Appeal Jurisdiction Decision par 134.

[527] The Trial Chamber makes no definite finding in that respect.

[528] *See*, eg, *SW v. United Kingdom*, Judgment of 22 Nov 1995, Ser A 335-B, p. 42; *G v France*, Judgment of 27 Sept 1995, Ser A 325-B, p 38; *Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), p 22. Those three decisions are from the ECHR.

[529] *Blaškic* Trial Judgment par 182.

XI. OPINION AND JUDGMENT

The indictment filed in this case on 29 July 1947 charged the 24 defendants enumerated therein with crimes against humanity, war crimes, and membership in criminal organizations. The 24 defendants were made up of 6 SS generals, 5 SS colonels, 6 SS lieutenant colonels, 4 SS majors, and 3 SS junior officers. Since the filing of the indictment the number of the defendants has been reduced to 22. Defendant SS Major Emil Haussmann committed suicide on 31 July 1947, and defendant SS Brigadier General Otto Rasch was severed from the case on 5 February 1948 because of his inability to testify. Although it is assumed that Rasch's disease (paralysis agitans or Parkinsonism) will become progressively worse, his severance from these proceedings is not to be regarded as any adjudication on the question of guilt or innocence.

The acts charged in counts one and two of the indictment are identical in character, but the indictment draws the distinction between acts constituting offenses against civilian populations, including German nationals and nationals of other countries, and the same acts committed as violations of the laws and customs of war involving murder and ill-treatment of prisoners of war and civilian populations of countries under the occupation of Germany. Count three charges the defendants with membership in the SS, SD, and Gestapo, organizations declared criminal by the International Military Tribunal and paragraph I(*d*) of article II of Control Council Law No. 10.

Although the indictment accuses the defendants of the commission of atrocities, persecutions, exterminations, imprisonment, and other inhumane acts, the principle charge in this case is murder. However, as unequivocal as this charge is, questions have arisen which must be definitely resolved so that this decision may add its voice in the present solemn re-affirmation and sound development of international precepts binding upon nations and individuals alike, to the end that never again will humanity witness the sad and miserable spectacle it has beheld and suffered during these last years.

At the outset it must be acknowledged that the facts with which the Tribunal must deal in this opinion are so beyond the experience of normal man and the range of man-made phenomena that only the most complete judicial inquiry, and the most exhaustive trial, could verify and confirm them. Although the principle accusation is murder and, unhappily, man has been killing man ever since

lated how he shot 30 Jews because they had left the ghetto without permission. He did this, he said, under orders from the chief of the Einsatzgruppe, Nebe, who ordered him "to establish an example". At the trial he gave a different explanation of this episode which, however, establishes even a clearer case of guilt. He said that three women had contacted some partisans and, returning to the town, had talked to the thirty Jews in their homes. This, according to the defendant, made them guilty of partisan action and he had them shot. He, of course, also shot the three women. He did, however, accord them a special consideration. He had them blindfolded for the execution and then ordered that they be given a separate grave.

Klingelhoefer has stated that his function in the Einsatzgruppe operation was only that of interpreter. Even if this were true it would not exonerate him from guilt because in locating, evaluating and turning over lists of Communist party functionaries to the executive department of his organization he was aware that the people listed would be executed when found. In this function, therefore, he served as an accessory to the crime.

"Q. I asked you, Witness, didn't you know that when you were giving him these lists of Communist party functionaries that he was going to exterminate all those he could? You either knew it or you didn't know it.

"A. Of course, I did."

But the evidence is clear that Klingelhoefer was no mere interpreter in the grim business of the Einsatzgruppe. He was an active leader and commander. He knew what the Einsatz units were doing to the Jews.

"Q. You told us you knew that if he stayed in the ghetto he was killed. Now, if he left the ghetto, was he then set free?

"A. If he left the ghetto, he violated the directives which were given.

"Q. So that he was killed anyway?

"A. Then he had to be executed, yes."

In his own affidavit the defendant stated:

"While I was assigned by Nebe to the leadership of the Vorkommando Moscow, Nebe ordered me to go from Smolensk to Tatarsk and Mstislavl to get furs for the German troops and to liquidate part of the Jews there. The Jews had already been arrested by order of Hauptsturmfuehrer Egon Noack. The executions proper were carried out by Noack *under my supervision.*" [Emphasis supplied.]

Although the defendant stated several times during his interrogation on the witness stand that he was morally opposed

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CASE No. 66

TRIAL OF FRANZ SCHONFELD AND NINE OTHERS

BRITISH MILITARY COURT, ESSEN,
JUNE 11TH–26TH, 1946

A. OUTLINE OF THE PROCEEDINGS

Franz Schonfeld, Albert Roesener, Karl Paul Schwanz, Karl Otto Klingbeil, Michael Rotschopf, Karl Brendle, Hans Harders, Eugen Rafflenbeul, Werner Koeny and Karl Cremer were charged with committing a war crime in that they, " at Tilburg, on the 9th July, 1944, in violation of the laws and usages of war, were concerned in the killing of " a member of the Royal Air Force, a member of the Royal Canadian Air Force and a member of the Royal Australian Air Force. All pleaded not guilty.

Harders was shown to have been in charge of an office (*Dienststelle*) of the German Security Police at 's Hertogenbosch, Holland, the purpose of which was to track down and suppress the Dutch Resistance Movement. Under his orders came one Hardegan, who was not among the accused, but who had been in charge of squads who went out to make arrests. Under Hardegan's directions came various persons including all the remaining accused.

It was shown that, on Hardegan's orders, three cars left the *Dienststelle* building on July 9th, 1944, containing between them all of the accused except Schonfeld, Klingbeil, Harders and Koeny. The cars proceeded to a house in Tilburg, 49 Diepenstraat, which was then raided by certain members of the party. During the raid, the three airmen, who were in hiding, were shot by Rotschopf. There was no evidence that the victims had been armed.

Miss Leoni van Harssel testified that she and a fellow member of the Dutch Resistance Movement who had been known as Aunt Coba,[1] and who had taken into hiding the three Allied flyers, had been interned by the Germans, and while in internment Aunt Coba had told the witness that on July 9th, 1944, at about 11.15 to 11.30 a.m., she went to the door of Diepenstraat 49, her home, in answer to a ring. A man entered, bearing a weapon. She followed him into the house and saw the three pilots with their hands raised, being backed through the kitchen door. She could not follow further because other Germans had entered the house, but she heard shooting.

Mr. Nico Pulskens, whose house was opposite that of Aunt Coba, stated that on the morning of 9th July, 1944, at about 11.0 to 11.15 a.m. he had

[1] The latter had died before the opening of the trial. Evidence of her statements was admitted in Regulation 8 (i) (a) of the Royal Warrant, which provides : " (a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the Court, unable so to attend without undue delay, the Court may receive secondary evidence as statements made by or attributable to such witness."

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2. THE LAW APPLIED BY THE COURT

During the trial, rules of English law were quoted, particularly by the Judge Advocate, in connection with the possible liability of various accused either as principals in the second degree or under the doctrine of "common design." It may safely be said, however, that the intention was not to try the accused for offences against English law but simply to amplify and define the charge against them and the war crimes which they may have committed. As has been said in the notes to an earlier trial in this series of Reports(1) : "In the present state of vagueness prevailing in many branches of the law of nations, even given the fact that there are no binding precedents in International Law, such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognised to be in amplification of, and not in substitution for, rules of International Law."

The Permanent Court of International Justice was empowered, under Article 38 (3) of its Statute (as is now the International Court of Justice under Article 38 (*c*) of its Charter), to apply the "general principles of law recognised by civilised nations." Professor Gutteridge, in discussing this power, has said that : "All systems of law are incomplete in varying degree, but the problem of filling in the gaps is, perhaps, more acute in the case of the law of nations than in that of private law owing to the absence of an international legislature having power to remedy any deficiencies which may be discovered."(2)

It would not be hard to show that, for instance, the rules of English law regarding complicity in crimes, which are frequently quoted in war crime trials before British Military Courts, will be "found in substance in the majority" of systems of civilised law.(3)

Writing in 1944 of the war crime trials which were then envisaged rather than actual, Professor J. L. Brierly expressed the opinion that :

"In practice courts will probably follow more or less closely the definitions and the procedures of their own municipal law, and in so doing they will be well within the latitude that the laws of war allow. But again that will not mean that they follow their own municipal law because that is the law which they are bound to apply ; it will mean that in the absence of exact definition contained in the laws of war the municipal definition is likely to be the best available guide to the rule that natural justice requires them to apply."(4)

No lawyer of the Anglo-Saxon countries would have any proviso to make to Professor Brierly's view set out above. It must be added, however, that the continental practice is to require that an accused war criminal shall be shown either to have committed a breach of the municipal law of

(1) The *Jaluit Atoll Case*, held before a United States Military Commission in the Marshall Islands, 7th–13th December, 1945 ; see Volume I, p. 80. For other examples of the introduction of municipal law concepts into war crimes proceedings, see pp. 75 and 76–77 of the present Volume and pp. 60, 68–69 and 79–80 of Volume III.

(2) *British Yearbook of International Law*, 1944, p. 2.

(3) Professor Gutteridge prefers this as the interpretation of the words "general principles of law recognized by civilized nations" rather than the requirement that a principle should "exist in identical form in every system of civilised law" ; *op cit*, pp. 4–5.

(4) *The Norseman*, May–June 1944, p. 169.

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CASE No. 9

THE ZYKLON B CASE

TRIAL OF BRUNO TESCH AND TWO OTHERS

BRITISH MILITARY COURT, HAMBURG,
1ST–8TH MARCH, 1946

Complicity of German industrialists in the murder of interned allied civilians by means of poison gas.

Bruno Tesch was owner of a firm which arranged for the supply of poison gas intended for the extermination of vermin, and among the customers of the firm were the S.S. Karl Weinbacher was Tesch's Procurist or second-in-command. Joachim Drosihn was the firm's first gassing technician. These three were accused of having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be used. The Defence claimed that the accused did not know of the use to which the gas was to be put; for Drosihn it was also pleaded that the supply of gas was beyond his control. Tesch and Weinbacher were condemned to death. Drosihn was acquitted.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court consisted of Brigadier R. B. L. Persse, as President, and, as members, Lt. Col. Sir Geoffrey Palmer, Bart., Coldstream Gds., and Major S. M. Johnstone, Royal Tank Regt.

Capt. H. S. Marshall was Waiting Member.

C. L. Stirling, Esq., C.B.E., Barrister-at-Law, Deputy Judge Advocate General, was Judge Advocate.

Major G. I. D. Draper, Irish Guards, Judge Advocate General's Branch, HQ. B.A.O.R., was Prosecutor.

Three German Counsel appeared on behalf of the accused. Dr. O. Zippel, Dr. C. Stumme and Dr. A. Stegemann defended Tesch, Weinbacher and Drosihn respectively.

2. THE CHARGE

The accused, Bruno Tesch, Joachim Drosihn and Karl Weinbacher, were charged with a war crime in that they "at Hamburg, Germany, between 1st January, 1941, and 31st March, 1945, in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used." The accused pleaded not guilty.

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document which all the staff could read. If Sehm had found any other document, it must have been purely by accident ; and no such accident had happened to Weinbacher. In connection with the large supplies of gas which were sent to Auschwitz, Counsel pointed out that Weinbacher had stated on oath that he had never had a summary of supplies to a single customer because this was left to the accountants. In any case, it had been shown that the quantity of Zyklon B needed for the killing of human beings was much smaller than that required for the killing of insects. The quantities of Zyklon B needed for killing half a million or even a million human beings stood in such small proportion to the quantities needed for the killing of insects that it would not have been noticed at all. Therefore, there had been no need for Weinbacher to have grown suspicious, since, claimed Counsel, he knew that Auschwitz was one of the biggest camps and a sort of transit camp. Counsel did not think, therefore, that it was correct to assume that the large quantity of Zyklon going to Auschwitz was any indication of the fact that human beings were being killed there. Supplies for Neuengamme were much lower than those for Auschwitz.

Dr. Stumme did not deal with the law involved, except for stating that Weinbacher, although a procurist, was still only an employee like Sehm and Miss Biagini, against whom no action was being taken, despite the knowledge which they were said to have had.

(iii) *Counsel for Drosihn*

Dr. Stegemann, in his closing address, confined his remarks to what concerned his client exclusively, while claiming the benefit of everything favourable to him which had already been said by the other Counsel. Every witness who was asked had said that the accused had had nothing whatever to do with the firm's business activities. He could not, therefore, for instance, have known of the size of the consignments to Auschwitz. His relatively small salary showed his subordinate position. He was a zoologist, and first technical gassing master to the firm, and spent more than half the year in travelling. When both Tesch and Weinbacher were away, Mr. Zaun had had the power of attorney, not Drosihn.

Both Dr. Tesch and Dr. Drosihn had said that the latter had never instructed S.S. men in the use of Zyklon B, and not even Sehm claimed that he knew anything about the alleged travel report. Drosihn had been away from the office for irregular periods, and was in no position to read Dr. Tesch's travel reports, which were in any case of no interest to him. Counsel denied that there had been general knowledge in Germany before the end of of the war about the gassing of Jews ; his client could not therefore have acquired such knowledge from rumours.

8. THE PROSECUTOR'S CLOSING ADDRESS

In his closing address, the prosecuting Counsel said that the possibility that some firm other than Tesch and Stabenow could have supplied Zyklon B to Auschwitz could be ruled out, as the latter had the monopoly in that area. The essential question was whether the accused knew of the purpose to which their gas was being put. Counsel admitted that the S.S. were under no restrictions as to the use they made of the gas, and that the direct knowledge which was available to Tesch as to that use was of the scantiest,

due to the fear and secrecy in which the S.S. worked. He relied for his case on the evidence of Sehm, Miss Biagini and Miss Uenzelmann.

Counsel said that it was unbelievable that Dr. Tesch did not know that anything wrong went on in the concentration camps. Dr. Drosihn had said without hesitation that he saw things there which were not worthy of human dignity, and that he had said so to Tesch. It was also unbelievable that Dr. Tesch had no knowledge of the amounts of gas being supplied to the S.S. and to Auschwitz in particular, by a firm which was wholly his property. In 1942 and 1943 Auschwitz had been the firm's second largest customer. Dr. Tesch had no reason to believe that Auschwitz was a transit camp, and moreover he was too efficient a man to be duped by the S.S. Counsel completed his case against Tesch by casting doubt on his veracity by showing how contradictions existed between his statements and those of other witnesses on certain details unrelated to the main issue.

Dealing very shortly with Weinbacher's position, Counsel contended that all that Tesch knew must, from the nature of the inner organisation of the business, have also been known by Weinbacher. For 200 days in the year he was in sole control of the firm, with access to all the books, able to read the travel reports, indeed compelled to read the travel reports if he was to carry on the business properly during the periods when his principal was away.

Prosecuting Counsel claimed that Drosihn must to some extent have shared the confidence of Tesch and Weinbacher, even although his activities were confined to the technical side of the firm as opposed to the sales and bookkeeping side.

He concluded that, by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder.

9. THE SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate, in summing up the evidence before the Court, pointed out that the latter must be sure of three facts, first, that Allied nationals had been gassed by means of Zyklon B ; secondly, that this gas had been supplied by Tesch and Stabenow ; and thirdly, that the accused knew that the gas was to be used for the purpose of killing human beings. On points of law he did not think that the Court needed any direction.

After summarising the evidence of the Prosecution witnesses, the Judge Advocate said : " To my mind, although it is entirely a question for you, the real strength of the Prosecution in this case rests rather upon the general proposition that, when you realise what kind of a man Dr. Tesch was, it inevitably follows that he must have known every little thing about his business. The Prosecution ask you to say that the accused and his second-in-command Weinbacher, both competent business men, were sensitive about admitting that they knew at the relevant time of the size of the deliveries of poison gas to Auschwitz. The Prosecution then ask : " Why is it that these competent business men are so sensitive about these particular deliveries ? Is it because they themselves knew that such large deliveries could not possibly be going there for the purpose of delousing clothing or for the purpose of disinfecting buildings ? "

In Weinbacher's case, there was no direct evidence, either by way of conversation or of anything that he had written among the documents of the firm produced during the trial, which formed any kind of evidence specifically imputing knowledge to Weinbacher as to how Zyklon B was being used at Auschwitz. " But the Prosecution," said the Judge Advocate, " ask you to say that, in his case as in Tesch's case, the real strength of their case is not the individual direct evidence, but the general atmosphere and conditions of the firm itself." The Judge Advocate asked the Court whether or not it was probable that Weinbacher would constantly watch the figures relating to a less profitable activity of the firm, particularly since he received a commission on profits as well as his salary.

The Judge Advocate emphasised Drosihn's subordinate position in the firm, and asked whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was being put could make him guilty.

10. THE VERDICT

Tesch and Weinbacher were found guilty.
Drosihn was acquitted.

11. THE SENTENCE

Counsel for Tesch, pleading in mitigation of sentence, said that if Tesch did know the use to which the gas was being put, and had consented to it, this happened only under enormous pressure from the S.S. Furthermore, had Tesch not co-operated, the S.S. would certainly have achieved their aims by other means. Tesch was merely an accessory before the fact, and even so, an unimportant one.

Counsel for Weinbacher pleaded that the Court should consider the latter's wife and three children ; that he as a business employee might have thought that the ultimate use of the gas was Tesch's responsibility ; and that if he had refused to supply Zyklon B the S.S. would immediately have handed him over to the Gestapo.

Nevertheless, subject to confirmation, the two were sentenced to death by hanging.

The sentences were confirmed and carried into effect.

B. NOTES ON THE CASE

1. A QUESTION OF JURISDICTION : THE NATIONALITY OF THE VICTIMS

The Prosecutor specified a number of Allied countries from which, he claimed, many of the persons gassed had originated. Wilhelm Bahr told how he himself had gassed two hundred Russians. Perry Broad mentioned Jews from Belgium, Holland, France, Czechoslovakia and Poland, among those gassed at Auschwitz. The Judge Advocate, in his summing up, stated that " among those unfortunate creatures undoubtedly there were many Allied nationals."

It was not alleged that British citizens were among the victims.

B. JUDGMENT[1]

INTRODUCTION

On 18 November 1947,[2] an indictment against the above-named defendants was filed with the Secretary General of the United States Military Tribunals at Nuernberg. Generally stated, said indictment, consisting of eight counts, charged the defendants with having committed crimes against peace, war crimes, crimes against humanity, and with having participated in a common plan and conspiracy to commit crimes against peace, all as defined in Control Council Law No. 10, duly enacted by the Allied Control Council on 20 December 1945.

Several, but not all, of the defendants are charged under each of the counts of the indictment. The applicable provisions of Control Council Law No. 10 will hereinafter be referred to and set forth as they relate to each count of the indictment when such counts are reached for discussion and decision.

The indictment was served upon all of the defendants in the German language, more than 30 days before arraignment of the defendants thereunder. On 19 December 1947 the case was assigned to this Tribunal for trial by the Supervisory Committee of Presiding Judges of the United States Military Tribunals in Germany, in conformity with Article V of Military Government Ordinance No. 7, as amended, this Tribunal theretofore having been duly established and constituted, pursuant to said Ordinance No. 7, which ordinance was promulgated by the United States Military Governor of the United States Occupation Zone of Germany on 18 October 1946. The arraignment of the defendants took place on 20 December 1947, at which time all defendants pleaded "Not Guilty" to the charges in the indictment.

Throughout the trial of this case, all of the defendants were represented by German counsel of their own choice. One defendant requested that he also be allowed to retain American counsel to represent him. The request was granted.

The presentation of evidence in the case was commenced on 7 January 1948. Final arguments before the Tribunal were concluded on 18 November 1948. The transcript record of the case consists of 28,085 pages. In addition thereto, the prosecution and

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[1] The judgment was read in open Court on 11–13 April 1949 and is recorded in the mimeographed transcript, pages 28086–28803. Just before the reading of the judgment, Presiding Judge Christianson said "The Tribunal will file the original of such judgment with the Secretary General, and the original copy as filed shall constitute the official judgment record of this case." (Tr. p. 28086.) The judgment as reproduced herein is taken from the record copy filed with the Secretary General.

[2] The indictment was signed by the United States Chief of Counsel for War Crimes on 15 November 1947, but it was not filed until 18 November 1947.

theless, when we appreciate the realities of the situation and from what is disclosed, not only by testimony of representatives of the Vatican but from contemporaneous, official documents regarding the actual policy and the action taken by the defendants of the Foreign Office, we are convinced that at the time they did the best, perhaps the most, they could to prevent the persecution of the Church, its priests, and its communicants. It is quite true that in one or more cases Woermann suggested that the concordats were no longer practicable in view of the political situation, but he did not recommend that they be abrogated, but that such action be postponed. His recommendation evidently was approved, and the concordats remained in effect, although without question other agencies of the Nazi government paid little or no attention to their terms. That this is the fact is shown by numerous documents offered on behalf of the defendant von Weizsaecker and the affidavit of Father Gehrmann who, from 1925 to 1945, was secretary of the Apostolic Nuncio in Berlin. This is also shown by the Woermann memorandum of 22 November 1939 and his memorandum of 21 April 1942 which ended with the words (*Woermann 149, Woermann Ex. 90*):

> "For these reasons I consider it necessary that all such measures directed against the Church be suspended or discontinued until the end of the war."

See also the memorandum of du Moulin of 9 March 1939; that of von Weizsaecker of 16 August 1941; the memorandum of Woermann and Haidlen of 24 May 1939 and 4 March 1940; the Haidlen and von Weizsaecker memoranda of 10 December 1940, 17 January 1941, and 5 February 1941; the Haidlen memoranda of 11 February and 6 March 1941; and the Hoffmann memorandum with Woermann's note of 16 September 1942.

It is clear that the Foreign Office defendants were not engaged in a program of persecution, but whenever and wherever possible they sought to modify, gain as many exceptions as they could, and mitigate those which could not be changed or modified.

We must not forget that guilt is a personal matter; that men are to be judged not by theoretical, but by practical standards; that we are here to define a standard of conduct of responsibility, not only for Germans as the vanquished in war, not only with regard to past and present events, but those which in the future can be reasonably and properly applied to men and officials of every state and nation, those of the victors as well as those of the vanquished. Any other approach would make a mockery of international law and would result in wrongs quite as serious and fatal as those which were sought to be remedied.

a fund placed at Himmler's personal disposal. There is no evidence, however, that matters relating to the resettlement program were ever discussed or acted upon in the meetings of this circle, or that it was in any way a policy-making body. Nor is there any evidence that Rasche knew that any part of the fund to which the bank made contributions was intended to be or was ever used by Himmler for any unlawful purposes.

His participation in the loans made by the Dresdner Bank to various SS enterprises which employed slave labor and to those engaged in the resettlement program presents a more difficult problem.

The defendant is a banker and businessman of long experience and is possessed of a keen and active mind. Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did.

The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary.

The defendant Rasche should be and is found not guilty under count five.

RITTER

The defendant Ritter, now in his 66th year, entered the Foreign Office in 1922 after a career as a civil servant in various

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COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU DROIT D'ASILE

(COLOMBIE / PÉROU)

ARRÊT DU 20 NOVEMBRE 1950

1950

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

ASYLUM CASE

(COLOMBIA / PERU)

JUDGMENT OF NOVEMBER 20th, 1950

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This provision has been interpreted by that Government in the sense that the usages, conventions and laws of Colombia relating to the qualification of the offence can be invoked against Peru. This interpretation, which would mean that the extent of the obligation of one of the signatory States would depend upon any modifications which might occur in the law of another, cannot be accepted. The provision must be regarded as a limitation of the extent to which asylum shall be respected. What the provision says in effect is that the State of refuge shall not exercise asylum to a larger extent than is warranted by its own usages, conventions or laws and that the asylum granted must be respected by the territorial State only where such asylum would be permitted according to the usages, conventions or laws of the State of refuge. Nothing therefore can be deduced from this provision in so far as qualification is concerned.

The Colombian Government has further referred to the Montevideo Convention on Political Asylum of 1933. It was in fact this Convention which was invoked in the note of January 14th, 1949, from the Colombian Ambassador to the Peruvian Minister for Foreign Affairs. It is argued that, by Article 2 of that Convention, the Havana Convention of 1928 is interpreted in the sense that the qualification of a political offence appertains to the State granting asylum. Articles 6 and 7 of the Montevideo Convention provide that it shall be ratified and will enter into force as and when the ratifications are deposited. The Montevideo Convention has not been ratified by Peru, and cannot be invoked against that State. The fact that it was considered necessary to incorporate in that Convention an article accepting the right of unilateral qualification, seems to indicate that this solution was regarded as a new rule not recognized by the Havana Convention. Moreover, the preamble of the Montevideo Convention states in its Spanish, French and Portuguese texts that it modifies the Havana Convention. It cannot therefore be considered as representing merely an interpretation of that Convention.

The Colombian Government has finally invoked "American international law in general". In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to

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international custom "as evidence of a general practice accepted as law".

In support of its contention concerning the existence of such a custom, the Colombian Government has referred to a large number of extradition treaties which, as already explained, can have no bearing on the question now under consideration. It has cited conventions and agreements which do not contain any provision concerning the alleged rule of unilateral and definitive qualification such as the Montevideo Convention of 1889 on international penal law, the Bolivarian Agreement of 1911 and the Havana Convention of 1928. It has invoked conventions which have not been ratified by Peru, such as the Montevideo Conventions of 1933 and 1939. The Convention of 1933 has, in fact, been ratified by not more than eleven States and the Convention of 1939 by two States only.

It is particularly the Montevideo Convention of 1933 which Counsel for the Colombian Government has also relied on in this connexion. It is contended that this Convention has merely codified principles which were already recognized by Latin-American custom, and that it is valid against Peru as a proof of customary law. The limited number of States which have ratified this Convention reveals the weakness of this argument, and furthermore, it is invalidated by the preamble which states that this Convention modifies the Havana Convention.

Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or—if in some cases it was in fact invoked—that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far

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20 JUILLET 2012

ARRÊT

QUESTIONS CONCERNANT L'OBLIGATION DE POURSUIVRE OU D'EXTRADER

(BELGIQUE c. SÉNÉGAL)

QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE

(BELGIUM *v.* SENEGAL)

20 JULY 2012

JUDGMENT

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"'torture' for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention". However, when the Committee considered Mr. Habré's situation, the question of the temporal scope of the obligations contained in the Convention was not raised, nor did the Committee itself address that question (*Guengueng et al.* v. *Senegal* (Communication No. 181/2001, decision of 17 May 2006, UN doc. CAT/C/36/D/181/2001)).

102. The Court concludes that Senegal's obligation to prosecute pursuant to Article 7, paragraph 1, of the Convention does not apply to acts alleged to have been committed before the Convention entered into force for Senegal on 26 June 1987. The Court would recall, however, that the complaints against Mr. Habré include a number of serious offences allegedly committed after that date (see paragraphs 17, 19-21 and 32 above). Consequently, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. Although Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987, nothing in that instrument prevents it from doing so.

103. The Court now comes to the second aspect of the question put by a Member of the Court, namely, what was the effect of the date of entry into force of the Convention, for Belgium, on the scope of the obligation to prosecute. Belgium contends that Senegal was still bound by the obligation to prosecute Mr. Habré after Belgium had itself become party to the Convention, and that it was therefore entitled to invoke before the Court breaches of the Convention occurring after 25 July 1999. Senegal disputes Belgium's right to engage its responsibility for acts alleged to have occurred prior to that date. It considers that the obligation provided for in Article 7, paragraph 1, belongs to "the category of divisible *erga omnes* obligations", in that only the injured State could call for its breach to be sanctioned. Senegal accordingly concludes that Belgium was not entitled to rely on the status of injured State in respect of acts prior to 25 July 1999 and could not seek retroactive application of the Convention.

104. The Court considers that Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal's compliance with its obligation under Article 7, paragraph 1. In the present case, the Court notes that Belgium invokes Senegal's responsibility for the latter's conduct starting in the year 2000, when a complaint was filed against Mr. Habré in Senegal (see paragraph 17 above).

105. The Court notes that the previous findings are also valid for the temporal application of Article 6, paragraph 2, of the Convention.

3. Implementation of the obligation laid down in Article 7, paragraph 1

106. Belgium, while recognizing that the time frame for implementation of the obligation to prosecute depends on the circumstances of each case, and in particular on the evidence gathered, considers that the State in whose territory the suspect is present cannot indefinitely delay performing the obligation incumbent upon it to submit the matter to its competent authorities for

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INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA *v.* SERBIA AND MONTENEGRO)

JUDGMENT OF 26 FEBRUARY 2007

2007

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À L'APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

ARRÊT DU 26 FÉVRIER 2007

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404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under

the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.

*

408. The Respondent has emphasized that in the final judgments of the Chambers of the ICTY relating to genocide in Srebrenica, none of its leaders have been found to have been implicated. The Applicant does not challenge that reading, but makes the point that that issue has not been before the ICTY for decision. The Court observes that the ICTY has indeed not up to the present been directly concerned in final judgments with the question whether those leaders might bear responsibility in that respect. The Court notes the fact that the report of the United Nations Secretary-General does not establish any direct involvement by President Milošević with the massacre. The Court has already recorded the contacts between Milošević and the United Nations on 10 and 11 July (paragraph 285). On 14 July, as recorded in the Secretary-General's Report,

> "the European Union negotiator, Mr. Bildt, travelled to Belgrade to meet with President Milošević. The meeting took place at Dobanovci, the hunting lodge outside Belgrade, where Mr. Bildt had met President Milošević and General Mladić one week earlier. According to Mr. Bildt's public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war. He also insisted that the Netherlands soldiers be allowed to leave at will. Mr. Bildt added that the international community would not tolerate an attack on Goražde, and that a 'green light' would have to be secured for free and unimpeded access to the enclaves. He also demanded that the road between Kiseljak and Sarajevo ('Route Swan') be opened to all non-military transport. President Milošević apparently acceded to the various demands, but also claimed that he did not have control over the matter. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.
>
> A few hours into the meeting, General Mladić arrived at Dobanovci. Mr. Bildt noted that General Mladić readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Milošević's intervention, it appeared that an agreement in principle had been reached. It was decided that

The response of the Applicant was to quote an earlier passage which refers to reports which "suggest" that VJ troops and possibly elements of the Serbian State Security Department may have been engaged in the battle in Srebrenica — as indeed the second sentence of the passage quoted by the Respondent indicates. It is a cautious passage, and significantly gives no indication of any involvement by the Respondent in the post-conflict atrocities which are the subject of genocide-related convictions. Counsel for the Respondent also quoted from the evidence of the Deputy Commander of Dutchbat, given in the *Milošević* trial, in which the accused put to the officer the point quoted earlier from the Epilogue to the Netherlands report. The officer responded:

> "At least for me, I did not have any evidence that it was launched in co-operation with Belgrade. And again, I read all kinds of reports and opinions and papers where all kinds of scenarios were analysed, and so forth. Again, I do not have any proof that the action, being the attack on the enclave, was launched in co-operation with Belgrade."

The other evidence on which the Applicant relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale. It mainly consists of the evidence given at the *Milošević* trial by Lord Owen and General Wesley Clark and also Lord Owen's publications. It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.

* *

(5) Conclusion as to Responsibility for Events at Srebrenica under Article III, Paragraph (a)*, of the Genocide Convention*

413. In the light of the information available to it, the Court finds, as indicated above, that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent (see paragraph 395 above). It finds also that it has not been established that those massacres were committed on the instructions or under the direction of organs of the respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which, as indicated in paragraph 297 above, constituted the crime of genocide, were perpetrated.

The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent *(dolus specialis)* characterizing the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis. All indications are to the contrary: that the

decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

As for the killings committed by the "Scorpions" paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY (see, in particular, the Trial Chamber's decision of 12 April 2006 in the *Stanišić and Simatović* case, IT-03-69), it has not been proved that they took place either on the instructions or under the control of organs of the FRY.

414. Finally, the Court observes that none of the situations, other than those referred to in Articles 4 and 8 of the ILC's Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent's disposal by another State (Art. 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9); finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).

415. The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.

* * *

VIII. The Question of Responsibility, in Respect of Srebrenica, for Acts Enumerated in Article III, Paragraphs *(b)* to *(e)*, of the Genocide Convention

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent's possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to

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421. Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent *(dolus specialis)* which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent *(dolus specialis)* of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken; the Court has found (paragraph 295 above) that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established

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INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA *v.* UNITED STATES OF AMERICA)

MERITS

JUDGMENT OF 27 JUNE 1986

1986

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI

(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

FOND

ARRÊT DU 27 JUIN 1986

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observe humanitarian standards and no reference to the concept of military necessity". In support of this, Nicaragua has catalogued numerous incidents, attributed to "CIA-trained mercenaries" or "mercenary forces", of kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity. The declaration of Commander Carrión annexed to the Memorial lists the first such incident in December 1981, and continues up to the end of 1984. Two of the witnesses called by Nicaragua (Father Loison and Mr. Glennon) gave oral evidence as to events of this kind. By way of examples of evidence to provide "direct proof of the tactics adopted by the *contras* under United States guidance and control", the Memorial of Nicaragua offers a statement, reported in the press, by the ex-FDN leader Mr. Edgar Chamorro, repeated in the latter's affidavit, of assassinations in Nicaraguan villages ; the alleged existence of a classified Defence Intelligence Agency report of July 1982, reported in the *New York Times* on 21 October 1984, disclosing that the *contras* were carrying out assassinations ; and the preparation by the CIA in 1983 of a manual of psychological warfare. At the hearings, reliance was also placed on the affidavit of Mr. Chamorro.

114. In this respect, the Court notes that according to Nicaragua, the *contras* are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command. In the view of Nicaragua, "*stricto sensu,* the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States." If such a finding of the imputability of the acts of the *contras* to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the *contras* to commit them.

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras,* the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United

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States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras*. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the *contras* may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the *contras* were in fact committed by them. At the same time, the question whether the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras* is relevant to an assessment of the lawfulness of the action of the United States. In this respect, the material facts are primarily those connected with the issue in 1983 of a manual of psychological operations.

117. Nicaragua has in fact produced in evidence before the Court two publications which it claims were prepared by the CIA and supplied to the *contras* in 1983. The first of these, in Spanish, is entitled *"Operaciones sicológicas en guerra de guerrillas"* (Psychological Operations in Guerrilla Warfare), by "Tayacán" ; the certified copy supplied to the Court carries no publisher's name or date. In its Preface, the publication is described as

> "a manual for the training of guerrillas in psychological operations, and its application to the concrete case of the Christian and democratic crusade being waged in Nicaragua by the Freedom Commandos".

The second is entitled the *Freedom Fighter's Manual*, with the subtitle "Practical guide to liberating Nicaragua from oppression and misery by paralyzing the military-industrial complex of the traitorous marxist state without having to use special tools and with minimal risk for the combatant". The text is printed in English and Spanish, and illustrated with simple drawings : it consists of guidance for elementary sabotage techniques. The only indications available to the Court of its authorship are reports in the *New York Times*, quoting a United States Congressman and

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INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NORTH SEA CONTINENTAL SHELF CASES

(FEDERAL REPUBLIC OF GERMANY/DENMARK;
FEDERAL REPUBLIC OF GERMANY/NETHERLANDS)

JUDGMENT OF 20 FEBRUARY 1969

1969

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRES DU PLATEAU CONTINENTAL DE LA MER DU NORD

(RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/DANEMARK;
RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/PAYS-BAS)

ARRÊT DU 20 FÉVRIER 1969

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their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the *Lotus* case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case (*P.C.I.J., Series A, No. 10*, 1927, at p. 28):

> "Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . ., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, . . . there are other circumstances calculated to show that the contrary is true."

Applying this dictum to the present case, the position is simply that in certain cases—not a great number—the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt

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INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING RIGHT OF PASSAGE OVER INDIAN TERRITORY

(PORTUGAL *v.* INDIA)

MERITS

JUDGMENT OF 12 APRIL 1960

1960

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU DROIT DE PASSAGE SUR TERRITOIRE INDIEN

(PORTUGAL c. INDE)

FOND

ARRÊT DU 12 AVRIL 1960

2250

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for the purpose of collecting revenue and in pursuit of that purpose exercised such authority as had been delegated to them by the Marathas cannot, in the view of the Court, be equated to a right of passage for the exercise of sovereignty.

* * *

It is clear from a study of the material placed before the Court that the situation underwent a change with the advent of the British as sovereign of that part of the country in place of the Marathas. The British found the Portuguese in occupation of the villages and exercising full and exclusive administrative authority over them. They accepted the situation as they found it and left the Portuguese in occupation of, and in exercise of exclusive authority over, the villages. The Portuguese held themselves out as sovereign over the villages. The British did not, as successors of the Marathas, themselves claim sovereignty, nor did they accord express recognition of Portuguese sovereignty, over them. The exclusive authority of the Portuguese over the villages was never brought in question. Thus Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently tacitly recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory.

For the purpose of determining whether Portugal has established the right of passage claimed by it, the Court must have regard to what happened during the British and post-British periods. During these periods, there had developed between the Portuguese and the territorial sovereign with regard to passage to the enclaves a practice upon which Portugal relies for the purpose of establishing the right of passage claimed by it.

With regard to Portugal's claim of a right of passage as formulated by it on the basis of local custom, it is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.

As already stated, Portugal claims a right of passage to the extent necessary for the exercise of its sovereignty over the enclaves, without any immunity and subject to the regulation and control of India. In the course of the written and oral proceedings, the existence of the right was discussed with reference to the different categories making up the right, namely private persons, civil officials, goods in general, armed forces, armed police, and arms and

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E100/6

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

ឯកសារដើម
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សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before: **Judge NIL Nonn, President**
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Date: **12 September 2011**
Original language(s): **Khmer/English/French**
Classification: **PUBLIC**

DECISION ON THE APPLICABILITY OF JOINT CRIMINAL ENTERPRISE

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Accused
NUON Chea
IENG Sary
IENG Thirith
KHIEU Samphan

Civil Party Lead Co-Lawyers
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Diana ELLIS
SA Sovan
Jaques VERGÈS

1. INTRODUCTION

1. At the Initial Hearing in Case 002, the Trial Chamber heard oral argument in relation to all matters that it considered to be preliminary objections within the scope of Internal Rule 89. The Chamber also indicated that early clarification of a number of other legal issues raised by the parties may nonetheless assist in the fair and expeditious conduct of the trial.[1]

2. On 17 June 2011, the Office of the Co-Prosecutors filed a motion requesting the Trial Chamber to consider JCE III (the so-called extended form of joint criminal enterprise ("JCE")) as an alternative mode of liability in Case 002.[2] The Civil Party Lead Co-Lawyers filed a brief in support of the Co-Prosecutors Motion.[3] All Defence teams have opposed this motion, on grounds of its admissibility and merits.[4] The Co-Prosecutors filed a reply on 11 August 2011.[5]

3. The Chamber is additionally seised of a motion by the IENG Sary Defence of 24 February 2011 requesting that portions of the Closing Order be struck out due to defects.[6] The Co-Prosecutors responded to this motion on 16 March 2011.[7] The Chamber in this decision rules also on this motion insofar as it pertains to the applicability of JCE.[8]

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1 T., 27 June 2011, pp. 12-118; T., 28 June 2011, pp. 14-115; T., 29 June 2011, pp. 3-113.

2 Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, E100, 17 June 2011 ("Co-Prosecutor's Motion").

3 Brief in Support of the Co-Prosecutors' Request for the Trial Chamber to Consider Joint Criminal Enterprise III as an Alternative Mode of Liability, E100/4, 22 July 2011.

4 Defence Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, E100/1, 22 July 2011 ("IENG Thirith Response"); Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, E100/5, 22 July 2011 ("NUON Chea Response"); *Réponse à la demande des co-procureurs relative à la troisième catègorie d'entreprise criminelle commune*, E100/3, 22 July 2011 ("KHIEU Samphan Response"); IENG Sary's Response to the Co-Prosecutor's Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability and Request for an Oral Hearing, E100/2, 22 July 2011 ("IENG Sary Response").

5 Co-Prosecutors' Consolidated Reply to Defence Responses to Co-Prosecutor's Requests to Recharacterise Charges in the Indictment and to Exclude the Nexus Requirement for an Armed Conflict to Prove Crimes Against Humanity, E95/6, 11 August 2011, paras. 93-97.

6 "IENG Sary's Motion to Strike Portions of the Closing Order due to Defects", E58, 24 February 2011, paras. 3-6 ("IENG Sary Motion to Strike"). In their preliminary objections, the Accused IENG Sary, KHIEU Samphan and IENG Thirith made related submissions (Summary of IENG Sary's Rule 89 Preliminary Objections, E51/4, 25 February 2011, para. 24(d), Preliminary Objections Concerning Jurisdiction, E46, 14 February 2011, para. 18 ("KHIEU Samphan Preliminary Objections") and IENG Thirith Defence's Preliminary Objections, E44, 14 February 2011, paras. 33-38 ("IENG Thirith Preliminary Objections") (collectively, "the Defence Motions"). The Co-Prosecutors and Civil Parties responded to all Defence Preliminary Objections on 21 March 2011 and 7 March 2011, respectively (Civil Parties' Joint Response to Defence Rule 89 Preliminary Objections, E51/5/4, 7 March 2011, paras. 42-51 and Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, E51/5/3/1, 21 March 2011, paras. 22-26).

7 "Co-Prosecutor's Response to IENG Sary's Motion to Strike Portions of the Closing Order due to Defects", E58/1, 16 March 2011, paras. 1-7, 18-19 ("Co-Prosecutor's Response to IENG Sary Motion to Strike").

8 *See further* Trial Chamber Response to various Motions following Trial Management Meeting, E74,

2. PROCEDURAL HISTORY

4. On 8 December 2009, the Co-Investigating Judges issued an order holding JCE to be applicable in all of its forms before the ECCC.[9] On 18 and 22 January 2010, three Defence teams appealed this order to the Pre-Trial Chamber.[10] On 19 February 2010, the Co-Prosecutors filed a joint response to the Defence Motions, addressing the applicability of JCE in all of its forms, including JCE III.[11]

5. On 20 May 2010, the Pre-Trial Chamber rejected the Co-Prosecutors' reasoning in part, ruling that JCE III did not form part of customary international law between 1975 and 1979, but upholding the applicability of JCE I and II.[12] The Closing Order in Case 002 consequently did not include JCE III as a form of responsibility against any of the Accused but did allege responsibility in relation to all Accused pursuant to JCE I and II.[13]

6. The Co-Prosecutors did not appeal the exclusion of JCE III from the Closing Order pursuant to Internal Rules 67(5) and 74. In its motion before this Chamber, the Co-Prosecutors ask the Trial Chamber instead to re-characterize the facts in the Indictment in the verdict, where appropriate, as crimes committed pursuant to JCE III (rather than JCE I or II).[14]

7. The IENG Sary Defence challenge the inclusion of JCE in the Closing Order, in particular, its identification of the elements required for participation in a common criminal plan, and its treatment of the specific intent requirement for genocide.[15]

April 2011 ("[t]he Chamber is seized of various Motions concerning alleged deficiencies in the Indictment or in the Investigation, [... including requests that] parts of the Indictment should be struck out [....]. It is clear from the Rules that the Chamber is bound by the scope of the Indictment. [....] Should any ambiguity in the Indictment arise at trial, the Chamber will, on a case-by-case basis state its interpretation of the scope of the Indictment and will consider itself bound by this interpretation").

[9] Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, D97/13, Office of Co-Investigating Judges, 8 December 2009.

[10] *Appel contre l'ordonnance sur l'application devant les CETC de la responsabilité dite <<Entreprise criminelle commune>>*, D97/16/1, 18 January 2010; IENG Thirith Defence Appeal Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise of 8 December 2009, D/97/15/1, 18 January 2010; IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, D97/14/5, 22 January 2010.

[11] Co-Prosecutors' Joint Response to IENG Sary, IENG Thirith and KHIEU Samphan's Appeals on Joint Criminal Enterprise, 19 February 2010, D97/16/5.

[12] Decision on the Appeals Against the Co-Investigative Judges Order On Joint Criminal Enterprise, Pre-Trial Chamber, D97/15/9, 20 May 2010, paras. 69, 77, 88 ("PTC JCE Decision").

[13] Closing Order, D427, 15 September 2010 (as amended by the Pre-Trial Chamber's Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, D427/3/15, 15 February 2011 and Decision on IENG Sary's Appeal Against the Closing Order, D427/1/30, 11 April 2011)("Amended Closing Order").

[14] Co-Prosecutor's Motion, para. 1.

[15] IENG Sary Motion to Strike, paras. 20-28.

3. SUBMISSIONS

3.1. The Defence Motions

8. The IENG Sary Defence submits that the Closing Order failed to apply the correct *mens rea* concerning IENG Sary's participation in a common criminal plan.[16] The Closing Order alleges he participated in a non-criminal common plan that merely resulted in the commission of crimes. Such an allegation, if proven, does not support a *prima facie* case of JCE I. In addition, he submits that JCE as applied to the crime of genocide requires proof of a specific intent (*i.e.* intent to destroy, in whole or in part, a national, ethnical, racial or religious group).[17] As the Closing Order simply alleges the members of the JCE were aware of the perpetrators' genocidal intent but not that IENG Sary shared this genocidal intent, all reference to genocide must consequently be stricken from it.[18]

9. Although conceding that JCE I was unambiguously part of Cambodian law between 1975 and 1979, the IENG Thirith Defence submits that JCE II is ambiguous and uncertain and therefore inapplicable before the ECCC.[19]

10. The Co-Prosecutors submit IENG Sary misconstrues the Closing Order and that the facts included in the Closing Order support an inference that IENG Sary shared the intent to perpetrate crimes through a joint criminal enterprise.[20] They submit that JCE in all its forms was considered a criminal mode of liability within customary international law at the time relevant to Case 002.[21]

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16 IENG Sary Motion to Strike, para. 20.
17 IENG Sary Motion to Strike, paras. 21-24.
18 IENG Sary Motion to Strike, paras. 26-28..
19 IENG Thirith Preliminary Objections, paras. 36-37 (noting that the 1956 Cambodian Penal Code included co-perpetration and complicity, which nonetheless 'largely coincide with joint criminal enterprise in its basic and second forms'); *see also* KHIEU Samphan Preliminary Objections, para. 18 (adopting IENG Sary's earlier submissions before the Pre-Trial Chamber by reference).
20 Co-Prosecutors' Response to IENG Sary's Motion to Strike, paras. 32-36.
21 Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, E51/5/3/1, 21 March 2011, paras. 23-26 (incorporating by reference prior submissions).

3.2. The Co-Prosecutor's Motion

3.2.1. Admissibility

11. All Defence teams contend that the Co-Prosecutor's Motion is inadmissible because it constitutes a jurisdictional challenge pursuant to Rule 89 and the deadline for the filing of preliminary objections has long since passed.[22]

12. The Co-Prosecutors argue that their motion is instead admissible pursuant to Rule 98(2).[23] This Rule permits the Trial Chamber to change the legal characterization of a crime as set out in the Indictment. They consider re-characterization to be consistent with the fair trial rights of the Accused because the Accused have been appraised of the Co-Prosecutors' intent to seek re-characterisation, and as the applicability of JCE III was extensively litigated at the pre-trial stage.[24] The Co-Prosecutors also note that the Trial Chamber granted a similar motion in Case 001.[25]

3.2.2. Merits

13. In their motion, the Co-Prosecutors urge the Trial Chamber to adopt the approach taken by the ICTY Appeals Chamber in *Prosecutor v. Tadić* concerning the applicability of JCE III.[26] In this regard, the Co-Prosecutors place particular reliance on two cases cited by the *Tadić* Appeal Judgement: the *Essen Lynching Case* from the British Military Court for the Trial of War Criminals, and the *Borkum Island Case* from the American Military Tribunal at Dachau.[27] They also argue, in the alternative, that JCE III constitutes a general principle of law and is applicable on this basis.[28]

14. Three Defence teams counter that the authorities relied upon by the *Tadić* Appeal Judgement do not support the existence of JCE III as a form of responsibility in customary

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[22] IENG Thirith Response, paras. 3, 7-10; NUON Chea Response, para. 3; KHIEU Samphan Response, para. 26; IENG Sary Response, para. 4; *see also* IENG Sary's Request for an Expedited Decision as to Whether the OCP May Raise Requests for Re-characterization at this Stage in the Proceedings, E103, 24 June 2011.
[23] Co-Prosecutor's Motion, para. 8.
[24] Co-Prosecutor's Motion, paras. 9-11.
[25] Co-Prosecutor's Motion, para. 8 *citing* 001/18-07-2007-ECCC/TC, Judgement, E188, 26 July 2010 ("*Duch* Judgement"), paras. 496, 516.
[26] Co-Prosecutors' Motion, paras. 20-21; *Prosecutor v. Tadić*, Judgement, ICTY Appeals Chamber (Case No. IT-94-1-A), 15 July 1999 ("*Tadić* Appeal Judgement").
[27] Co-Prosecutor's Motion, paras. 24-28.
[28] Co-Prosecutor's Motion, paras. 29-30.

international law between 1975-1979.[29] Two Defence teams also argue that JCE III is not a general principle of law.[30] The IENG Sary Defence further notes that the *Tadić* Appeal Judgement itself stated that domestic sources could not be relied on as irrefutable evidence that JCE III constituted a general principle of law.[31]

4. DELIBERATIONS

4.1. Introduction

15. Joint criminal enterprise was first set out by the ICTY Appeals Chamber in the *Tadić* Appeal Judgement in 1999. The ICTY Appeals Chamber has held that participation in a joint criminal enterprise constitutes a mode of liability in the form of commission.[32] Both the ECCC Pre-Trial and Trial Chambers have similarly found participation in a joint criminal enterprise to amount to commission within the scope of Article 29 (new) of the ECCC law.[33] The three categories of JCE articulated in the *Tadić* Appeal Judgement comprise:

- The basic category or JCE I, involving cases where all participants act pursuant to a common purpose and share the same criminal intent[34];
- The systemic category or JCE II, referring to instances of systemic ill-treatment in organized institutions, such as concentration camps[35]; and
- The extended form or JCE III, entailing liability of the members of the group for acts that occur as a natural and foreseeable consequence of carrying out the common purpose of the group.[36] To be found liable under this extended form of JCE, it must be shown than an Accused intended to participate in and further criminal activity of a group, and to contribute to its joint criminal enterprise. It must also be shown that it was foreseeable that a crime outside the scope of this agreement might be perpetrated by one or other members of the group and that the Accused willingly took the risk that this would occur.[37]

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[29] IENG Thirith Response, Para. 19; NUON Chea Response, para. 8; IENG Sary Response, paras. 9-17. The KHIEU Samphan Defence relies exclusively on its arguments regarding the inadmissibility of the Co-Prosecutor's Motion.
[30] IENG Thirith Response, para. 20; IENG Sary Response, paras. 19-21.
[31] IENG Sary Response, para 19.
[32] *Tadić* Appeal Judgement, para. 190.
[33] PTC JCE Decision, para. 49; *Duch* Judgement, para. 511.
[34] *Tadić* Appeal Judgement, paras. 196-201.
[35] *Tadić* Appeal Judgement, paras. 202-203.
[36] *Tadić* Appeal Judgement, para. 204.
[37] *Tadić* Appeal Judgement, para. 228.

4.2. Required specificity of the Indictment in relation to Joint Criminal Enterprise

4.2.1. Applicable law

16. The Chamber notes that where crimes of specific intent are concerned, proof is required that the Accused possessed not only the intent to commit the underlying crime but also the special intent required by these offences.[38] In order to convict for genocide committed as part of a JCE, it follows that proof is required that the Accused possessed the intent to destroy in whole or in part a protected group.[39] Proof of genocidal intent may, however, be established on the basis of circumstantial evidence where it is the only reasonable conclusion in the circumstances of a case.[40]

17. The Trial Chamber further notes that joint criminal enterprise is a form of responsibility and not a crime in itself. In this regard, it is sufficient to show that the Accused participated in some way in the JCE, and that this participation either amounts to or involves the commission of a crime.[41] The case law of other international tribunals has consistently found that the common plan forming part of the joint criminal enterprise need not be criminal in nature so long as crimes are contemplated as a means of bringing the common plan to fruition.[42] On appeal before the Special Court for Sierra Leone ("SCSL") in *Brima et. al.,* the Defence argued that the indictment was defective because the common plan alleged by the Prosecution was not a crime under international law.[43] Noting several cases from the ICTY and the Rome Statute, the SCSL Appeals Chamber held that the common plan, design or purpose of a joint criminal enterprise must either have as its objective a crime or contemplate crimes as the means of achieving its objective.[44] It concluded that "[a]lthough the objective of gaining and exercising political power and control over the territory of Sierra Leone may not

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[38] *Prosecutor v. Simba,* ICTR Trial Chamber (Case No. ICTR-01-76-T), 13 December 2005 ("*Simba* Trial Judgement"), para. 388; *Prosecutor v. Munyakazi,* ICTR Trial Chamber (Case No. ICTR-97-36A-T) 5 July 2010, ("*Munyakazi* Trial Judgement"), para. 439; *Prosecutor v. Kvočka et. al.,* Judgement, ICTY Trial Chamber (Case No. IT-98-30/1-T), 2 November 2001, para. 288; *Prosecutor v. Kvočka et. al.,* Judgement, ICTY Appeals Chamber (Case No. IT-98-30/1-A), 28 February 2005 ("*Kvočka* Appeal Judgement"), paras. 240-45; *Prosecutor v. Krnojelac,* Judgement, ICTY Appeals Chamber (Case No. IT-97-25-A), 17 September 2003, para. 111.

[39] *Simba* Trial Judgement, paras. 415-419; *Munyakazi* Trial Judgement, paras. 500-501.

[40] *Simba* Trial Judgement, paras. 415-419; *Munyakazi* Trial Judgement, paras. 500-501.

[41] *Tadic* Appeal Judgement, para. 227; *Kvočka* Appeal Judgement, para. 46; *Prosecutor v.Krnojelac,* Judgement, ICTY Appeals Chamber (IT-97-25-A), 17 September 2003, para. 31. *See also, Prosecutor v. Ntakirutimana,* Judgement, ICTR Appeals Chamber (Cases Nos. ICTR-96-10-A and ICTR-96-17-A), December 13, 2004, para. 466.

[42] *Prosecutor v. Brima et. al.,* Judgement, SCSL Appeals Chamber (Case No. SCSL-04-16-A), 22 February 2008, *("Brima* Appeal Judgement"), para.80;

[43] *Brima* Appeal Judgement, para. 71; *Kvočka* Appeal Judgement, para. 46.

[44] *Brima* Appeal Judgement, paras. 77-80.

be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute."[45] The ICTY Appeals Chamber in *Kvočka* similarly noted that the foundation of the Prosecution case regarding joint criminal enterprise was the alleged common purpose of "the creation of a Serbian State within the former Yugoslavia."[46] Therefore, the common plan, design or purpose of a joint criminal enterprise must either have as its objective a crime or contemplate crimes as the means of achieving its objective. The common plan itself need not be criminal. .

4.2.2. Treatment of common purpose and mens rea for JCE in the Closing Order

18. In relation to the nature of the common plan alleged in Case 002, the Closing Order states:

> The common purpose of the CPK leaders was to implement rapid socialist revolution by (*sic*) in Cambodia through a "great leap forward" and to defend the Party against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and /or involved the commission of crimes within the jurisdiction of the ECCC.[47]

19. Although the plain language of this paragraph asserts that the purpose of the common plan was not entirely criminal, it clarifies that its implementation involved the commission of crimes within the jurisdiction of the ECCC. Further, the subsequent paragraph of the Closing Order indicates a number of criminal activities that "resulted in" or "were committed by members and non-members of the JCE."[48] This language makes it clear that the plan involved the commission of criminal acts by members of the JCE. The language accords with the above jurisprudence and does not support an inference that IENG Sary is accused of commission solely by participation in a non-criminal common plan.

20. Concerning the Accused's alleged genocidal *mens rea* as a participant in the JCE, the Amended Closing Order states:

> With regard to the policies targeting Chams and Vietnamese, the plan to eliminate these groups may not have existed until April 1977 for the Vietnamese and from 1977 for the Cham. From that moment, the members of the JCE knew that the implementation of the common purpose expanded to include the commission of genocide of these protected groups. Acceptance of

[45] *Brima* Appeal Judgement, para. 84.
[46] *Kvočka* Appeal Judgement, para. 46 (finding that the Prosecution gave clear and consistent notice that it intended to rely on the theory of joint criminal enterprise and dismissing the ground of appeal before it).
[47] Amended Closing Order, para. 1524.
[48] Amended Closing Order, para. 1525.

> this greater range of criminal means, coupled with persistence in implementation, amounted to an intention of the JCE members to pursue the common purpose through genocide.[49]

21. Further, paragraphs 1532 to 1541 of the Amended Closing Order set forth the alleged conduct of the Accused and their participation in a joint criminal enterprise. This conduct, if proven, may lead to the conclusion that the Accused possessed the special intent necessary to prove genocide.[50] The Trial Chamber concludes that paragraph 1527 when read with the Amended Closing Order as a whole, does not apply the incorrect *mens rea* to the crime of genocide as committed as part of a joint criminal enterprise.

4.3. Applicability of JCE I and II

22. The *Duch* Judgement found that the notion of commission through participation in a joint criminal enterprise falls within the scope of Article 29 (new) of the ECCC law.[51] It further held that the systemic form of joint criminal enterprise, along with the basic form from which it derives (*i.e.* JCE I and II), were a part of customary international law between 1975 and 1979.[52] The applicability of JCE I and II before the ECCC has been further endorsed by the Pre-Trial Chamber as comprising recognized forms of responsibility in customary international law at the time relevant for Case 002.[53] The Trial Chamber accordingly finds that the applicability of JCE I and II before the ECCC constitutes settled law within the ECCC jurisprudence.

4.4. Applicability of JCE III

4.4.1. Admissibility of Co-Prosecutor's Motion

23. The Chamber notes that the Co-Prosecutors' theory of the case relies primarily on JCE I. The Co-Prosecutors state in their motion that the first form of joint criminal enterprise (JCE I) best reflects the nature of the liability of the Accused in Case 002.[54] They seek to add JCE

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[49] Amended Closing Order, para. 1527.
[50] *See Simba* Trial Judgement, paras. 415-419 and *Munyakazi* Trial Judgement, paras. 500-501 (finding that where genocidal *mens rea* is established inferentially, this inference must be the only reasonable conclusion based on the evidence at trial).
[51] *Duch* Judgement, para. 511.
[52] *Duch* Judgement, paras. 511-.3. The *Duch* Judgement did not rule on the applicability of JCE III, which was not applicable in that case.
[53] PTC JCE Decision, paras. 54-73 (noting amongst other authorities the London Charter, Control Council Law No. 10, international cases and other authoritative pronouncements).
[54] Co-Prosecutor's Motion, para. 2.

III only in the event that their primary theory proves inapplicable to certain facts.[55] They argue that there is a possibility – even if only remote – that a very limited number of criminal events alleged in the Closing Order may not have been within the scope of the common criminal plan as originally conceived.[56] In this case, they request the Trial Chamber to retain the discretion to criminalize this conduct pursuant to JCE III in the verdict, if appropriate.[57]

24. The Trial Chamber has previously held that legal re-characterization is permissible before the ECCC pursuant to Rule 98(2).[58] The Trial Chamber in the *Duch* Judgement noted that the Accused in that case was on notice that the issue of JCE was before the Chamber and that it intended to rule on the issue in the verdict. It therefore held that application of this mode of responsibility did not breach the fair trial rights of the Accused.[59]

25. The Chamber finds that it may at any time change the legal characterisation of facts contained in the Amended Closing Order to accord with any other applicable form of criminal responsibility up to and including in the verdict. This is subject only to the overriding requirements of a fair trial.[60] Although, unlike in Case 001, the Co-Prosecutors did not notify the parties and the Judges at the Initial Hearing that it would ask the Trial Chamber to consider JCE III in this case, the Co-Prosecutor's Motion has nonetheless raised the issue before the commencement of the trial on the substance.[61] There is accordingly no unfairness to the Accused in considering the Co-Prosecutor's Motion at this time. The Chamber finds that the Prosecutor's request for re-characterisation does not breach the Accused's right to be adequately informed of the nature of the charges against him or any other fair trial principle. The Trial Chamber accordingly rejects IENG Sary's later request to determine this issue solely on grounds of admissibility.[62]

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55 Co-Prosecutor's Motion, para. 3.
56 Co-Prosecutor's Motion, para. 2.
57 Co-Prosecutor's Motion, para. 3.
58 *Duch* Judgement, para. 496.
59 *Duch* Judgement, para. 503.
60 In the specific ECCC context, this requires the Chamber to remain within the confines of the facts as included in the Closing Order (*see* Internal Rule 98(2): "The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.")
61 *Duch* Judgement, para. 489, fn. 862; *see also* Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case, E73/2, 17 September 2009, paras. 7-13 (contesting the admissibility of the request because the Pre-Trial Chamber excluded JCE from the Amended Closing Order, and as JCE had not been pleaded with sufficient specificity by the Co-Prosecutors).
62 *See* IENG Sary's Request for an Expedited Decision as to Whether the OCP May Raise Requests for Re-characterization at this Stage in the Proceedings, E103, 24 June 2011.

4.4.2. Merits of Co-Prosecutor's Motion

26. The Trial Chamber notes, at the outset, that the applicability of JCE III has been extensively litigated before the ECCC. This issue has also already undergone appellate scrutiny before the Pre-Trial Chamber in Case 002. Although the Trial Chamber is not a review or appellate body from decisions of the Pre-Trial Chamber, it is now confronted with a motion substantially similar to that previously before the Pre-Trial Chamber. For reasons of judicial economy, the Trial Chamber will not issue lengthy decisions in circumstances where it can find no cogent reasons to depart from the Pre-Trial Chamber's analysis and where it concurs in the result.

4.4.2.1. The Pre-Trial Chamber Decision

27. The Pre-Trial Chamber's JCE Decision extensively reviewed pre-1975 legal instruments, including the Nuremberg Charter and Control Council Law No. 10. It concurred with the findings of the Trial Chamber in the *Duch* Judgement that JCE I and JCE II were recognized forms of responsibility in customary international law during the period relevant to Case 002.[63] However, it held that these international instruments do not specifically recognize JCE III.[64] It also examined the post-World War II cases cited by the *Tadić* Appeal Judgement, including *Borkum Island* and *Essen Lynching*, to determine whether customary international law included JCE III as a form of responsibility at the relevant time.[65] It concluded that the cases decided pursuant to Control Council Law No. 10 did not support an inference that these convictions were based on JCE III.[66] It further found that several national authorities cited in support of the application of JCE III also provided insufficient evidence of consistent state practice or *opinio juris* at the time relevant to Case 002.[67]

28. Finally, the Pre-Trial Chamber considered whether JCE III could be upheld as a form of responsibility as a 'general principle of law recognized by civilized nations.'[68] The Pre-

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63 PTC JCE Decision, paras. 69, 72.
64 PTC JCE Decision, para. 78.
65 PTC JCE Decision, paras. 79-82.
66 PTC JCE Decision, para. 80.
67 PTC JCE Decision, para. 82.
68 PTC JCE Decision, para. 84. "General principles of law recognized by civilized nations" are a source of international law distinct from customary and conventional law (*see* Statute of the International Court of Justice, Article 38(1)(c)). It is unclear in both the case law and the scholarly literature as to whether this principle may independently provide the source of a principle of international law of general application, or whether it is instead merely supplementary proof that this principle has been accepted as a norm of customary international law; *see e.g.* Malcolm Shaw, *International Law* (Cambridge 2003) pp. 93-99 ("There are various opinions as to what the general principles of law concept is intended to refer. .... [M]ost writers are prepared to accept that the

Trial Chamber noted the conclusion in the *Tadić* Appeal Judgement that common purpose liability was not adopted by most domestic legal systems.[69] Ultimately however, the Pre-Trial Chamber did not rule on whether JCE III amounted to a general principle of law, on grounds that any such a principle would not have been sufficiently foreseeable and accessible to the Accused in Case 002, because there was no basis for JCE III liability within Cambodian domestic law.[70]

29. For the reasons outlined below, the Trial Chamber agrees in substance with the Pre-Trial Chamber's analysis of the above post-WWII cases. Further, the Trial Chamber has undertaken its own analysis of the extent to which JCE III is recognized by various national legal systems. It has concluded that JCE III cannot be considered to have been a general principle of law between 1975 and 1979.

4.4.2.2. World War II era cases cited in the Tadić Appeal Judgement

4.4.2.2.1. Borkum Island and Essen Lynching

30. In the *Borkum Island* case, the charging instrument accused several German nationals of having wrongfully encouraged, aided, abetted and participated in the assault and killing of seven American airmen.[71] The Americans had crash-landed on Borkum Island and a German military commander ordered that the Americans be marched by a guard unit through the town and not protected against any attack by civilians. The Americans were beaten by several members of the public and, according to one account, one was shot by an off-duty German soldier. All seven Americans were ultimately killed.[72] Fifteen Accused were tried for the deaths, including two civilians, five officers, and the members of the guard detail.[73] Fourteen of the fifteen Accused were convicted and received sentences ranging from two years to the death penalty.[74] However, the basis for these convictions cannot be ascertained because no reasoned judgement was produced. Also unclear from the verdict is the extent to which any defendant was found criminally responsible for an act not directly perpetrated by him.

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general principles do constitute a separate source of law but of fairly limited scope, and this is reflected in the decisions of the Permanent Court of International Justice and the International Court of Justice.")

69 *See* PTC JCE Decision, para. 85, *citing Tadić* Appeal Judgement, paras. 225-226.

70 PTC JCE Decision, para. 87.

71 *See United States v. Haesiker*, Case No. 12-489-1, 16 October 1947, Review Judgement (based on the same facts as *United States of America v. Goebell, et. al.* 6 February-21 March 1946) ("*Borkum Island* case").

72 *Borkum Island* case, at 191.

73 *Borkum Island* case, at 191.

74 *Borkum Island* case, at 191.

Although the basis for conviction in this case could have been JCE III, the Chamber finds that it might equally have been some other form of responsibility.

31. Similarly, the record of the judgement in the *Essen Lynching* case exists only as a summary provided by the UN War Crimes Commission.[75] The legal basis for its conviction is also unclear. In fact, the decision summary makes several references to incitement, instigation, and ordering, lending support to the conclusion that the convictions may have been based on other modes of liability.[76] The Chamber therefore finds that the inference drawn by the *Tadić* Appeal Judgement that this conviction was based on JCE III is not the only possible one based on the surviving record.

4.4.2.3. Other World War II era cases

32. The Trial Chamber has additionally considered other relevant decisions, cited in a recent decision of the Special Tribunal for Lebanon issued subsequent to the Pre-Trial Chamber's JCE Decision.[77] The Trial Chamber has reviewed these additional World War II era cases, but considers that they also do not support a conclusion as to the existence of JCE III in general international law between 1975 and 1979.

33. Although the Interlocutory Decision of the Special Tribunal for Lebanon found JCE III to be applicable, it distinguished the Pre-Trial Chamber's JCE Decision in view of the relevance to the Special Tribunal for Lebanon of jurisprudence dating from the early 1990s.[78] The Interlocutory Decision of the Special Tribunal for Lebanon, however, also cites a number of additional post-World War II era cases, which it claims support the earlier existence of JCE III within general international law.[79]

34. Two of these cases, *U.S. v. Ulrich and Merkle* and *U.S. v. Wuelfert*, originate from the Dachau Military Tribunal.[80] These cases involved private businessmen who owned factories

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[75] *Trial of Erich Heyer and Six Others*, British Military Court of the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, UNWCC, Vol. 1 (1949) ("*Essen Lynching* case").

[76] *Essen Lynching* case, at pp. 89-90.

[77] Case No. STL-11-01/1, Interlocutory Decision on the Applicable law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon, 16 February 2011 ("Interlocutory Decision of the Special Tribunal for Lebanon").

[78] Interlocutory Decision of the Special Tribunal for Lebanon, para. 239, fn.360.

[79] Interlocutory Decision of the Special Tribunal for Lebanon, para. 239, fn.360.

[80] *United States* v *Hans Ulrich and Merkle*, Case No. 000-50-2-17, Deputy Judge Advocate's Office, 7708 War Crimes Group - European Command, Review and Recommendations, 12 June 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, available at: http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d19.pdf ("*Ulrich and Merkle* case"); *United Stales* v *Hans Wuelfert el al*, Case No. 000-50-2-72, Deputy Judge Advocate's Office, 7708 War Crimes Group - European Command, Review and Recommendations, 19 September 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, available at: http://dev.jewishvirtuallibrary.org/items/7110.html ("*Wuelfert* case").

near the Dachau concentration camp and employed prisoners at their factories for slave labour. They were held responsible for the mistreatment of the prisoners at the Dachau camp and at the factories, including killings, beatings, torture and starvation. Again, the Interlocutory Decision of the Special Tribunal for Lebanon cites review judgements which do not provide the legal reasoning behind the affirmed convictions. The review judgement in *U.S. v. Ulrich* merely concludes that "[b]oth of the Accused were shown to have participated in the mass atrocity and the Court was warranted by the evidence adduced … in concluding … that they not only participated to a substantial degree, but the nature and extent of their participation was such as to warrant the sentence imposed."[81] These cases appear to support JCE I or JCE II because the Accused were part of the concentration camp apparatus and personally participated in the mistreatment of prisoners. These crimes do not necessarily support guilt based upon JCE III; *i.e.*, responsibility for crimes which were outside the scope of the common plan but which were nonetheless the natural and foreseeable consequence of it.

35. Accordingly, the Trial Chamber does not consider these additional authorities to support its conclusion that JCE III had emerged as a principle of customary international law by the time relevant to Case 002.

4.4.2.4. JCE III as a 'general principle of law'

36. Finally, the Co-Prosecutors cite several national criminal codes to show that JCE III constituted a 'general principle of law recognized by civilized nations' from 1975 until 1979.[82] As the Pre-Trial Chamber did not expressly rule on the issue of whether JCE III constituted a 'general principle of law', the Chamber has additionally considered these arguments.

37. The ICTY Appeals Chamber in the *Tadić* Appeal Judgement found that "reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems."[83] However it also emphasised that "national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common

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81 *Ulrich and Merkle* case, Section 5 ("comments").
82 Co-Prosecutor's Motion, para. 29 (*citing* criminal codes of the Philippines, France and Italy).
83 *Tadić* Appeal Judgement, para. 225.

purpose."[84] The Trial Chamber's own survey of several national legal systems, including the United Kingdom,[85] United States,[86] Germany,[87] the Soviet Union,[88] the Netherlands,[89] France,[90] and Cambodia[91] has also shown considerable divergence of approach between various national jurisdictions. It therefore confirms the assessment of the ICTY Appeals Chamber that state practice in this area lacks sufficient uniformity to be considered a general principle of law.

38. The Trial Chamber consequently finds that the Co-Prosecutors have failed to establish that JCE III formed part of customary international law between 1975 and 1979. It therefore

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[84] *Tadić* Appeal Judgement, para. 225.

[85] The joint enterprise doctrine applied by English courts as of 1975 provided liability only for crimes, which were 'authorized' by the joint enterprise. This form of liability resembles JCE I rather than JCE III (*see e.g. Anderson and Morris* (1966) 2 QB 110; *see also* A. Ashworth, Principles of Criminal Law (Oxford, 1999), p. 448).

[86] In the United States, a type of common purpose liability exists under the label of conspiracy (*see e.g. Pinkerton v. United States*, 328 U.S. 640 (1946)). However, conspiracy is a distinct offence, consummated upon entering into the agreement to commit the offence, and not a form of responsibility.

[87] One form of intent within the German criminal code is referred to as *dolus eventualis* (*see* P. Cramer and G. Heine, in A. Schoenke, H. Schroeder *et al.*, Strafgesetzbuch Kommentar (27th ed., Munich: C.H. Beck, 2006), at 277). However, the German High Court has refused to infer intent in the form of *dolus eventualis* in cases where crimes committed by the co-perpetrator were outside of the agreed plan (*see e.g.* Reichsgericht RGSt 44, 321; a judgment of 2 February 1911, where the common plan was to inflict bodily harm but where one perpetrator instead killed the victim).

[88] Soviet law applicable in 1975 provided that the commission of an offence with a prior agreement is an aggravating factor at sentencing (Article 17.1, Ugolovnii Kodeks RSFSR (The Criminal Code of Russian Soviet Republic), adopted on 27 October 1960). The person creating and directing a group is only liable for the offences committed by members of the group if that was part of the agreement and he intended these crimes to be committed. The modern Russian Criminal Code has further elaborated on that provision, providing that the participants of the agreement are not liable for the so-called 'excess of the perpetrator' when the principal commits crimes not intended by other members: *see* Articles 30(2), 35(7), 36 Ugolovnii Kodeks Rossiskoi Federacii (The Criminal Code of Russian Federation), adopted by the State Duma on 24 May 1996 and by the Federation Council on 5 June 5 1996.

[89] Co-perpetration in Dutch law prior to 1981 resembled JCE I type liability in that it requires shared intent in collaboration (*see* Dutch Supreme Court Ruling dated 17 November 1981, NJ 1983, 84/197 *cited in* van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law, TMC Asser Press, 2003, p. 75).

[90] *Co-action* and *complicité* (which encompasses, *inter alia,* aiding and abetting and instigation) are two modes of criminal liability foreseen in the French Penal Code. *Co-action* implies direct participation in the commission of the crimes together with one or more co-perpetrators (*see* Article 121-7). Both *co-action* and *complicité* imply the existence of a common or shared intent to commit or facilitate a crime. Neither concept reflects JCE III liability as defined in the *Tadić* Appeal judgment as they both exclude liability of co-perpetrators or accomplices for crimes outside the scope of the common or shared intent. In addition, the French legal concept of *association de malfaiteurs* is defined as "a criminal association consist[ing] of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more crimes [...]". This differs from JCE III as *association de malfaiteurs* is not a mode of liability, but is a crime in itself. In 1992, genocide, crimes against humanity, and war crimes were criminalized in the French Penal Code, including a specific form of *association de malfaiteurs* with regard to any of the same; *see* Law No. 92-684, 22 July 1992, JORF No. 169, 23 July 1992, p. 9875.

[91] Cambodia law retains in the 1956 Cambodian Penal Code the same forms of responsibility as are present in French law, including *co-action* and *complicité* (see Articles 82-87). It also criminalizes *association de malfaiteurs* (*see* Article 290). As in French Law, a specific form of *association de malfaiteurs* with regard to genocide, crimes against humanity and, war crimes were recently criminalized in Cambodian law (*see* Articles 185, 190 and 196 of the Cambodian Penal Code of 2009). However, none of these forms of responsibility or crimes (in the case of *association de malfaiteurs*) supports the application of JCE III liability (*see* footnote 94).

denies the Co-Prosecutors' request that the Chamber re-characterize, if appropriate, the crimes alleged in the Closing Order to include JCE III in the verdict.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

REJECTS the Defence Motions insofar as they allege that joint criminal enterprise was improperly included in the Closing Order in Case 002;

DECLARES the Co-Prosecutors' Motion admissible pursuant to Rule 98;

REAFFIRMS the applicability of JCE I and II (the so-called basic and systematic forms of joint criminal enterprise) to Case 002 and consequently rejects the Defence Motions insofar as they allege that these forms of JCE did not constitute recognized forms of criminal participation within general international law between 1975 and 1979;

FINDS that JCE III (the so-called extended form of joint criminal enterprise) did not form part of customary international law and was not a general principle of law at the time relevant to Case 002; and

DENIES in consequence the request of the Co-Prosecutors to re-characterise in the verdict, if appropriate, the crimes alleged in the Closing Order to include JCE III.

Phnom Penh, 12 September 2011
For the President of the Trial Chamber

Nil Nonn

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ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

លេខ/No: D97/15/9

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

ឯកសារច្បាប់ចំលងត្រឹមត្រូវតាមច្បាប់ដើម
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កាលបរិច្ឆេទនៃការបញ្ជាក់ (Date of certification):
20 / 05 / 2010
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Uch Arun

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° **002/19-09-2007-ECCC/OCIJ (PTC38)**

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge PEN Pichsaly

Date: **20 May 2010**

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PUBLIC

DECISION ON THE APPEALS AGAINST THE CO-INVESTIGATIVE JUDGES ORDER ON JOINT CRIMINAL ENTERPRISE (JCE)

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Co-Investigating Judges
Judge YOU Bunleng
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(iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way;

(iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.[114]

44. The Pre-Trial Chamber is not convinced by IENG Sary's argument that the OCIJ should have applied a stricter test than the one applied at the international level and required that JCE liability be established in Cambodian law because the ECCC "is a domestic court".[115] It finds that the above test, which was referred to by the OCIJ,[116] is the correct one.

45. The Pre-Trial Chamber considers that some ICTY decisions seem to imply that if a form of responsibility existed in customary international law at the relevant time, foreseeability and accessibility can be presumed.[117] However, the Pre-Trial Chamber considers it safer to ascertain not only whether JCE existed under customary international law at the relevant time, thus being punishable under international criminal law, but also whether it was sufficiently accessible and foreseeable to the Charged Persons. As to the requirement of foreseeability, a charged person must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, reliance can be placed on a law which is based on custom.[118] Contrary to what some of the Appellants assert, the question of whether JCE is a form of responsibility recognized

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[114] *Ojdanić* JCE Appeal Decision, para. 21. *Accord Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber I, 17 January 2005 ("*Blagojević and Jokić* Trial Judgement"), para. 695, n.2145; Prosecutor v. *Stakić*, IT-97-24-T, Judgement, Trial Chamber II, 31 July 2003 ("*Stakić* Trial Judgement"), para. 431.

[115] Ieng Sary Appeal, para. 2a).

[116] Impugned Order, para. 19.

[117] *See* McGill Amicus Brief, para. 13 & n.6, referring to *Prosecutor v. Martić*, IT-95-11-A, Judgement--Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, 8 October 2008. *See also Ojdanić* Co-Perpetration Decision, para. 15, according to which, "as long as it is clear that the form of responsibility in question existed in customary international law at the time of the commission of the substantive crime, a conviction pursuant to that form of responsibility necessarily complies with *nullum crimen sine lege*; as a consequence, pre-conditions (iii) and (iv) are absorbed into the analysis of whether pre-condition (ii) exists, referring to *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16 July 2003, para. 44.

[118] *See Ojdanić* JCE Appeal Decision, paras 37-39.

in domestic law may be relevant when determining whether it was foreseeable to the Charged Person that his/her alleged conduct may entail criminal responsibility. However, it is not necessary that JCE also be punishable in domestic law in addition to being a recognized form of liability under customary international law for it to apply before the ECCC.[119]

46. The Pre-Trial Chamber will now turn to several errors alleged by the Ieng Sary Appeal and the Khieu Samphan Appeal which, in the Appellants' views, would bar the application of JCE at the ECCC irrespective of whether it was a form of liability recognized in customary international before or during the period of 1975-1979.

47. As to the allegation that the OCIJ erred when, citing the Pre-Trial Chamber in Case 001,[120] it found that "the application of international customary law before the ECCC is a corollary from the finding that ECCC holds indicia of an international court applying international law",[121] the Pre-Trial Chamber considers this immaterial to the issue of whether the ECCC can apply JCE. The OCIJ indeed referred both to the "international aspects of the ECCC, and [to the fact that] the jurisprudence relied upon in articulating JCE pre-dated the events under investigation at the ECCC [to conclude] that there is a basis under international law for applying JCE before the ECCC".[122] However, whether the ECCC "holds indicia of an international court applying international law", "[f]or all practical and legal purposes, [...] is, and operates as, an independent entity within the Cambodian court structure [...]" as found by the Pre-Trial Chamber in Case 001,[123] is "a separately constituted, independent and internationalised court" as found by the Trial Chamber in the same case,[124] or rather is a domestic, Cambodian court as alleged by the Appellant does

[119] *See also* paras 43, 44 infra.
[120] Ieng Sary Appeal, para. 7, referring to Impugned Order, para. 21 quoting *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/PTC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 3 December 2007 ("Decision on Appeal against Duch Detention Order"), para. 20.
[121] Impugned Order, para. 21.
[122] Impugned Order, para. 21.
[123] Ieng Sary Appeal, para. 7; Decision on Appeal Against Duch Detention Order, para. 19.
[124] Case of Kaing Guek Eav alias "Duch"001/18-07-2007-ECCC/TC, Decision on Request for Release, 15 June 2009, E39/5 , para 10

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2010/59
Judgment No.:	UNDT/2010/170
Date:	24 September 2010
Original:	English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

TURNER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
None

> Secretariat. For the purpose of these Regulations, the expressions 'United Nations Secretariat', "staff members" or "staff" shall refer to all the staff members of the Secretariat, within the meaning of Article 97[3] of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1[4], of the Charter. The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary".

28. It is clear that the Charter requires that staff members be "appointed" by the Secretary-General (or those to whom this power has been delegated). The hallmark of a staff relationship is "appointment", and this is done through a letter of appointment pursuant to staff regulation 4.1. The Staff Regulations apply to all staff members of the Secretariat, within the meaning of Article 97 of the Charter, whose employment relationship and contractual link with the Organization are through a letter of appointment issued pursuant to regulations promulgated by the General Assembly. Such letter is signed either by the Secretary-General or by an official in the name of the Secretary-General.

29. Upon appointment, staff members become international civil servants pursuant to Regulation 1.1. As a consequence, their responsibilities as staff members are not national but exclusively international. Staff members have to subscribe to the following written declaration witnessed by the Secretary-General or his or her authorized representative:

> "I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization".

[3] The Secretariat shall comprise a Secretary General and such staff as the Organisation may require.
[4] The staff shall be appointed by the Secretary-General under Regulations established by the General Assembly.

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CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF A.B. v. SLOVAKIA

(Application no. 41784/98)

JUDGMENT

STRASBOURG

4 March 2003

FINAL

04/06/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

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53. The applicant further submitted that, as a result, she had been placed at a disadvantage *vis-à-vis* the defendant whose representative had the possibility of consulting the case-file and submitting the arguments orally to the Regional Court. She concluded that her rights under Article 6 § 1 of the Convention had not been respected.

2. The Court's assessment

(a) The relevant principles

54. The key principle governing the application of Article 6 is fairness. The right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 § 1 of the Convention restrictively (see, *mutatis mutandis*, *Moreira de Azevedo v. Portugal,* judgment of 23 October 1990, Series A no. 189, § 66).

55. The principle of equality of arms – one of the elements of the broader concept of fair trial – requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* his or her opponent (see *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p. 19, § 33; *Ankerl v. Switzerland*, judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, pp. 1567-68, § 38). In this context, importance is to be attached to, *inter alia*, the appearance of the fair administration of justice. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures (see *P., C. and S. v. the United Kingdom*, no. 56547/00, § 91, 16 July 2002).

56. Finally, from the Convention standpoint, a hearing may be held "unfair" and in breach of Article 6 even in the absence of proof of actual prejudice (see *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, § 35).

(b) Application of the above principles to the instant case

57. The Court notes that at the relevant time Article 250f of the Code of Civil Procedure permitted the courts to decide in similar cases without a prior oral hearing, in particular when there was no doubt that the administrative authority had established the facts correctly and the point at issue was a question of law. However, such was apparently not the case in the proceedings under consideration as the Regional Court scheduled a hearing and considered it appropriate to hear the parties prior to deciding on the case.

58. In her submissions to the Bratislava City Court and to the Bratislava Regional Court, which took over the case from the former, the applicant requested that a lawyer be appointed to represent her. On 23 January 1997

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CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF MOREIRA DE AZEVEDO v. PORTUGAL

(Application no. 11296/84)

JUDGMENT

STRASBOURG

23 October 1990

2275

whether such proceedings would have led to a decision being given more rapidly, because in any event they constituted a remedy too indirect to be taken into consideration (see, mutatis mutandis, the Deweer judgment of 27 February 1980, Series A no. 35, pp. 17 and 18, paras. 29 in fine and 31).

The objection must therefore be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

62. Before making any ruling on the alleged violation of Article 6 para. 1 (art. 6-1), the Court has to decide whether that provision is applicable.

A. Applicability of Article 6 para. 1 (art. 6-1)

63. According to the Government, there is no sign in the contested proceedings of any "contestation" (dispute) concerning the applicant's "civil rights and obligations". Mr Moreira de Azevedo had never claimed compensation for the damage sustained inasmuch as the status of assistente was not equivalent to the submission of such a claim. Only an express application lodged at the same time as the indictment, or within the time-limit in which the indictment could be drawn up, would have constituted objective evidence of an intention to claim compensation.

64. Mr Moreira de Azevedo argued, on the other hand, and he referred to the case-law of the Supreme Court (see paragraph 54 above), that a statement expressing a wish to intervene as assistente in itself incorporated an implied claim for financial reparation. In support of this view he cited his request that the decision as to the amount of damages be deferred until the subsequent enforcement proceedings (see paragraph 46 above).

65. The Commission took the view that the applicant had never asserted his civil rights by filing a formal claim for compensation in the criminal proceedings, as was required under Article 32 of the Code of Criminal Procedure. It considered that the guarantees secured under Article 6 para. 1 (art. 6-1) of the Convention did not apply to situations in which, following a conviction, the court awarded a sum of money, of its own motion; it therefore concluded that Article 6 para. 1 (art. 6-1) was not applicable.

66. In the Court's opinion, the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 para. 1 (art. 6-1) of the Convention restrictively.

Conformity with the spirit of the Convention requires that the word "contestation" should not be construed too technically and that it should be given a substantive rather than a formal meaning. Besides, it has no counterpart in the English text of Article 6 para. 1 (art. 6-1) ("in the determination of his civil rights and obligations"; cf. Article 49 (art. 49): "dispute" - see, mutatis mutandis, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 20, para. 45).

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CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF CABLE AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 24436/94, 24582/94, 24583/94, 24584/94, 24895/94, 25937/94, 25939/94, 25940/94, 25941/94, 26271/95, 26525/95, 27341/95, 27342/95, 27346/95, 27357/95, 27389/95, 27409/95, 27760/95, 27762/95, 27772/95, 28009/95, 28790/95, 30236/96, 30239/96, 30276/96, 30277/96, 30460/96, 30461/96, 30462/96, 31399/96, 31400/96, 31434/96, 31899/96, 32024/96 and 32944/96)

JUDGMENT

STRASBOURG

18 February 1999

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PARTLY DISSENTING OPINION OF JUDGE ZUPANČIČ

I voted with the majority on all points except the question of just satisfaction. I find the statement that it is "impossible [for the Court] to speculate as to the outcome of the court-martial proceedings" (paragraph 26 of the judgment) wholly unsatisfactory, the more so since the Court's own case-law, going back to the Colozza v. Italy case, judgment of 12 February 1985, does not offer any substantive explanation for this doctrine.

The question turns on the interpretation of Article 41 of the Convention, that is to say on the meaning of the words "... if the internal law of the High Contracting Party concerned allows only partial reparation to be made..." In these cases the domestic law of the respondent State ought to provide for a retrial.

It cannot be logically maintained that a conviction and sentence in a criminal case are legitimate if the criminal procedure in question violates the essential precepts of a fair trial, due process and so on. The legitimacy of a substantive judgment depends on the legitimacy of the procedure by which it was arrived at. To hold otherwise – that is, to separate the procedure entirely from its substantive outcome (conviction and sentence) – would reduce the meaning and import of the procedure to an ancillary status. This would mean, as it used to mean in the purely inquisitorial procedure, considering the procedure a mere "adjective" to the "substantive" importance of the case.

That, however, is no longer a tenable position. If it were, a fair trial would not be as central to the meaning of Article 6 of the Convention as it is, neither would the exclusionary rule figure as an essential procedural sanction in most national jurisdictions as well as in some international instruments such as the United Nations Convention against Torture (Article 15).

To say in the instant cases that it is "impossible to speculate as to the [substantive] outcome" of the case, in other words to say that the Court does not know what would have happened if the precepts of a fair trial had in fact been respected, is itself a speculation. It is a speculation that the case would have been decided identically – that the defendant would have been convicted – even if the trial had in fact been fair.

The Court is therefore faced with a dilemma. It is forced to speculate whether it accepts the final substantive outcome of the case or not.

The words in Article 41 "... if the internal law of the High Contracting Party concerned allows only partial reparation to be made..." ought, therefore, to be implemented so as to require the respondent State to permit retrial of the cases.

Some of the Contracting States' jurisdictions do in fact have appropriate provisions in their codes of criminal procedure. Those provisions afford a legal basis for convicted persons in situations similar to those of the

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applicants in the instant case to request retrials. Such convicted persons thus acquire standing to lodge a special appeal where the European Court of Human Rights has held that the national criminal proceedings in which they were convicted did not satisfy a particular procedural requirement of the Convention. Only in such circumstances, I think, is the purpose of Article 41 fully achieved.

In situations such as the ones we are faced with here, however – in which no special post-conviction remedy is provided in the national legislation – the Court ought to take a less defeatist approach. Our judgment should at least imply that the national legislation ought to provide for retrial of cases in which the proceedings have been found not to comply with essential procedural requirements. That, I think, is the purpose of the Article 41 words referring to the reparation allowed by internal law.

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CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF EDWARDS v. THE UNITED KINGDOM

(Application no. 13071/87)

JUDGMENT

STRASBOURG

16 December 1992

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recognise her assailant, had failed to identify the applicant from a police photograph album (see paragraph 12 above) and (2) the existence of fingerprints which had been found at the scene of the crime (see paragraph 11 above). If his counsel had been aware of these facts he would have been able to attack the credibility of police testimony. Bearing in mind that this was the main evidence against him there existed a possibility that one more juror might have been persuaded that he was innocent which would have led to his acquittal (see paragraphs 6 and 18 above). As a result, the defence was denied an adequate opportunity to examine the police witnesses and was not on an equal footing with the prosecution as required by paragraph 3 (d) of Article 6 (art. 6-3-d).

In the applicant's view the proceedings before the Court of Appeal did not remedy the defects at the trial since it neither heard the police witnesses nor called for the production of the report of the independent police investigation (the Carmichael report) which had not been disclosed to his legal advisers (see paragraph 9 above). In consequence, he had two incomplete hearings before two separate courts.

31. The Government maintained that, in determining whether there had been unfairness, the proceedings must be considered as a whole including those before the Court of Appeal. The applicant who had been provided with all the relevant information concerning the undisclosed facts had every opportunity, through his lawyer, to submit to the Court of Appeal that his conviction should be quashed. Moreover that court had examined his conviction in the light of the new evidence thoroughly and conscientiously but had concluded that it should be upheld. It was not open to the European Court to substitute its judgment on the facts for that of the Court of Appeal. Finally the Government contended that Article 6 para. 3 (d) (art. 6-3-d) was not relevant to the issue of the non-disclosure of evidence to the defence which fell more appropriately to be considered under paragraph 1 of Article 6 (art. 6-1).

32. The Commission was of the view that paragraph 3 (d) (art. 6-3-d) was relevant to the applicant's complaint but concluded that, having regard to the proceedings as a whole, there had been no breach of Article 6 para. 1 read in conjunction with this provision (art. 6-1, art. 6-3-d).

33. The Court recalls that the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1) (see, as the most recent authority, the T. v. Italy judgment of 12 October 1992, Series A no. 245-C, p. 41, para. 25). In the circumstances of the case it finds it unnecessary to examine the relevance of paragraph 3 (d) (art. 6-3-d) to the case since the applicant's allegations, in any event, amount to a complaint that the proceedings have been unfair. It will therefore confine its examination to this point.

34. In so doing, the Court must consider the proceedings as a whole including the decision of the appellate court (see, amongst other authorities,

the Helmers v. Sweden judgment of 29 October 1991, Series A no. 212, p. 15, para. 31). Moreover it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, inter alia, the Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

35. The applicant's conviction was based mainly on police evidence, which he contested, that he had confessed to the offences. It subsequently came to light that certain facts (see paragraphs 11 and 12 above) had not been disclosed by the police to the defence which would have enabled it to attack the credibility and veracity of police testimony.

36. The Court considers that it is a requirement of fairness under paragraph 1 of Article 6 (art. 6-1), indeed one which is recognised under English law, that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings.

However, when this was discovered, the Secretary of State, following an independent police investigation, referred the case to the Court of Appeal which examined the transcript of the trial including the applicant's alleged confession and considered in detail the impact of the new information on the conviction (see paragraphs 11-14 above).

37. In the proceedings before the Court of Appeal the applicant was represented by senior and junior counsel who had every opportunity to seek to persuade the court that the conviction should not stand in view of the evidence of non-disclosure. Admittedly the police officers who had given evidence at the trial were not heard by the Court of Appeal. It was, none the less, open to counsel for the applicant to make an application to the Court - which they chose not to do - that the police officers be called as witnesses (see paragraph 15 above).

38. In the course of the hearing before the European Court the applicant claimed, for the first time, that without the disclosure of the Carmichael report to the applicant or to the Court of Appeal the proceedings, considered as a whole, could not be fair (see paragraph 9 above). However it is not disputed that he could have applied to the Court of Appeal for the production of this report but did not do so. It is no answer to the failure to make such an application that the Crown might have resisted by claiming public interest immunity since such a claim would have been for the court to determine (see paragraph 21 above).

39. Having regard to the above, the Court concludes that the defects of the original trial were remedied by the subsequent procedure before the Court of Appeal (see, in this respect, the Adolf v. Austria judgment of 26 March 1982, Series A no. 49, pp. 17-18, paras. 38-41 and, mutatis mutandis,

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CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF KOSTOVSKI v. THE NETHERLANDS

(Application no. 11454/85)

JUDGMENT

STRASBOURG

20 November 1989

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...

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

..."

The Commission arrived at the conclusion, which was contested by the Government, that there had been a breach of paragraph 1, taken together with paragraph 3 (d), of Article 6 (art. 6-1, art. 6-3-d).

38. The source of the applicant's allegation was the use as evidence, by the Utrecht District Court and the Amsterdam Court of Appeal, of reports of statements by two anonymous persons. The latter had been heard by the police and, in one case, also by the examining magistrate but were not themselves heard at either of the trials (see paragraphs 11, 13, 15, 16, 18 and 19 above).

39. It has to be recalled at the outset that the admissibility of evidence is primarily a matter for regulation by national law (see the Schenk judgment of 12 July 1988, Series A no. 140, p. 29, § 46). Again, as a general rule it is for the national courts to assess the evidence before them (see the Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, p. 31, § 68).

In the light of these principles the Court sees its task in the present case as being not to express a view as to whether the statements in question were correctly admitted and assessed but rather to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (ibid.).

This being the basic issue, and also because the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1) (see, inter alia, the same judgment, p. 31, § 67), the Court will consider the applicant's complaints from the angle of paragraphs 3 (d) and 1 taken together (art. 6-3-d, art. 6-1).

40. The Court notes that only one of the authors of the statements - namely the person whose statements were read out at the trial - was, under Netherlands law, regarded as a "witness" (see paragraph 18 above). However, in view of the autonomous interpretation to be given to this term (see the Bönisch judgment of 6 May 1985, Series A no. 92, p. 15, §§ 31-32), both authors should be so regarded for the purposes of Article 6 § 3 (d) (art. 6-3-d) of the Convention, since the statements of both of them, whether read out at the trial or not, were in fact before the court and were taken into account by it.

41. In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument (see the above-mentioned Barberà, Messegué and Jabardo judgment, Series A no. 146, p. 34, § 78). This does not mean, however, that in order to be used as

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evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1) provided the rights of the defence have been respected.

As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings (see, mutatis mutandis, the Unterpertinger judgment of 24 November 1986, Series A no. 110, pp. 14-15, § 31).

42. Yet such an opportunity was not afforded to the applicant in the present case, although there could be no doubt that he desired to challenge and question the anonymous persons involved. Not only were the latter not heard at the trials but also their declarations were taken, whether by the police or the examining magistrate, in the absence of Mr Kostovski and his counsel (see paragraphs 11, 13, 15 and 16 above). Accordingly, at no stage could they be questioned directly by him or on his behalf.

It is true that the defence was able, before both the Utrecht District Court and the Amsterdam Court of Appeal, to question one of the police officers and both of the examining magistrates who had taken the declarations (see paragraphs 17 and 19 above). It was also able, but as regards only one of the anonymous persons, to submit written questions to him/her indirectly through the examining magistrate (see paragraph 16 above). However, the nature and scope of the questions it could put in either of these ways were considerably restricted by reason of the decision that the anonymity of the authors of the statements should be preserved (see paragraphs 16, 17 and 19 above).

The latter feature of the case compounded the difficulties facing the applicant. If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.

43. Furthermore, each of the trial courts was precluded by the absence of the said anonymous persons from observing their demeanour under questioning and thus forming its own impression of their reliability. The courts admittedly heard evidence on the latter point (see paragraphs 17 and 19 above) and no doubt - as is required by Netherlands law (see paragraph 32 above) - they observed caution in evaluating the statements in question, but this can scarcely be regarded as a proper substitute for direct observation.

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CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF KRASNIKI v. THE CZECH REPUBLIC

(Application no. 51277/99)

JUDGMENT

STRASBOURG

28 February 2006

FINAL

28/05/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

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B. The Court's assessment

75. The Court reiterates that Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the domestic courts to decide whether it is necessary or advisable to hear a witness (see *S.N. v. Sweden*, no. 34209/96, § 44, ECHR 2002-V, with further references to *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89). Furthermore, evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49).

76. The Court has stated in *Doorson v. the Netherlands* (cited above, p. 470, § 69) and *Van Mechelen and Others v. the Netherlands* (judgment of 23 April 1997, *Reports* 1997-III, p. 711, § 52) that the use of statements made by anonymous witnesses to found a conviction is not in all circumstances incompatible with the Convention. However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with unusual difficulties. Accordingly, the Court has recognised that in such cases Article 6 § 1, taken together with Article 6 § 3 (d), require that the handicaps under which the defence operates should be sufficiently counterbalanced by the procedures followed by the judicial authorities. With this in mind, an applicant should not be prevented from testing the anonymous witness's reliability (see also *Kostowski v. the Netherlands*, judgment of 20 November 1989, Series A no. 166, p. 20, § 42). In addition, no conviction should be based either solely or to a decisive extent on anonymous statements (see *Van Mechelen and Others*, cited above, p. 712, §§ 54-55).

77. In paragraph 76 of its *Doorson* judgment, the Court further held that evidence obtained from witnesses under conditions in which the rights of the defence could not be secured to the extent normally required by the Convention should be treated with extreme care.

78. The Court has also had regard to its rulings, in a series of cases concerning reliance on witness testimony which was not adduced before the trial court, that Article 6 § 3 (d) of the Convention only required the possibility of cross-examining such witnesses in situations where this testimony played a main or decisive role in securing the conviction (see *Delta v. France*, judgment of 19 December 1990, Series A no. 191-A, § 37; *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, § 28; *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, §§ 22-24; *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, § 44).

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CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF PRETTO AND OTHERS v. ITALY

(Application no. 7984/77)

JUDGMENT

STRASBOURG

8 December 1983

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In the case of Pretto and others,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 48 of the Rules of Court* and composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. R. RYSSDAL,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 March and on 25 October 1983,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in an application (no. 7984/77) against the Italian Republic lodged with the Commission in 1977 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Italian citizens, namely Mr. Rodolfo Pretto, his wife Cesira Possia, his son Palmerino Pretto, his daughter-in-law Rita Zordan and his grandsons Andrea and Rodolfo Pretto.

2. The Commission's request was lodged with the registry of the Court on 17 May 1982, within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47). It referred to Articles 44 and 48 (art. 44, art.

* Note by the registry: In the version of the Rules applicable when proceedings were instituted. A revised version of the Rules entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

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48) and to the declaration whereby the Italian Republic recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The request sought a decision from the Court as to the existence of violations of Article 6 § 1 (art. 6-1).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 § 3 (b) of the Rules of Court). On 28 May 1982, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. J. Cremona, Mrs. D. Bindschedler-Robert, Mr. F. Matscher, Mr. R. Macdonald and Mr. R. Bernhardt (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 § 5), ascertained, through the Registrar, the views of the Agent of the Government of the Italian Republic ("the Government") and the Delegates of the Commission regarding the procedure to be followed. On 9 June, he decided that the Agent should have until 30 September 1982 to file a memorial and that the Delegates should be entitled to reply in writing within two months from the date of the transmission of the Government's memorial to them by the Registrar.

5. On 29 June 1982, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

6. By telex received on 4 October 1982, the Government informed the Registrar that they had decided not to file a memorial but to refer to the arguments previously set out in their observations to the Commission. On 9 November 1982, the Registrar, acting on the President's instructions, requested the Commission to produce a copy of those observations; its Secretary supplied this copy on 15 November.

7. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President directed on 1 December 1982 that the oral proceedings should open on 22 March 1983.

8. The hearings were held in public at the Human Rights Building, Strasbourg, on the said day. Immediately before they opened, the Court had held a preparatory meeting; it had authorised the Agent of the Government to use the Italian language (Rule 27 § 2).

There appeared before the Court:

- for the Government:

Mr. A. SQUILLANTE, Section President
at the Consiglio di Stato, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs, *Agent*,

Mr. V. LIBRANDO, Judge
at the Court of Cassation, Ministry of Justice, *Counsel*;

- for the Commission:

Mr. S. TRECHSEL,

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Mr. A. WEITZEL, *Delegates.*

The Court heard addresses by Mr. Squillante for the Government and by Mr. Trechsel and Mr. Weitzel for the Commission, as well as their replies to its questions. However, the Agent of the Government was not in a position to supply on the spot one of the items of information requested (see paragraph 13 below); he was also unable to do so subsequently, as he informed the Registrar by letters of 29 April and 15 July 1983.

AS TO THE FACTS

9. Mr. Rodolfo Pretto, an Italian citizen, for more than forty years farmed, with the help of members of his family, land at Villaganzerla Castegnero (Vicenza) of which he was the tenant.

In 1971, the owner entered into a preliminary contract with a certain Mr. S. for the sale of the property at a price of 27 million Lire. In accordance with section 8 of the Agricultural Land Development Act (Act no. 590 of 26 May 1965 - "Disposizioni per lo sviluppo della proprietà coltivatrice"), he informed Mr. Pretto of the conclusion of this contract.

Mr. Pretto gave notice of his intention to exercise the right of pre-emption ("diritto di prelazione") conferred on him by the same Act. Nevertheless, by deed dated 9 June 1971, the owner sold the land to the brother-in-law of Mr. S. for the price that had been agreed with the latter.

10. On 24 September 1971, Mr. Pretto brought an action before the Vicenza Regional Court seeking the re-sale of the land to him by the new owner (azione di riscatto). He complained of the failure to respect his right of pre-emption and alleged that the price indicated in the contract was fictitious: according to the Agricultural Inspector's valuation, the land was in fact only worth about 12 million Lire. The applicant stated that he was willing to offer the new owner the price actually paid or, alternatively, the price shown in the sale contract or, in the further alternative, such price as the Regional Court might determine.

The defendant pleaded that the action was inadmissible since Mr. Pretto had not made an unconditional offer of the price mentioned in the contract. He also claimed that the plaintiff could in any event no longer avail himself of his right of pre-emption as he had not paid the said amount within the three-month period laid down by section 8 of Act no. 590.

11. The Regional Court gave judgment on 21 March 1973. It held that Mr. Pretto was entitled to have the land re-sold to him at the price specified in the contract, such price to be paid not later than one month and twenty-one days from the date on which the judgment became final.

12. On 7 July 1973, the new owner appealed to the Venice Court of Appeal which, after postponing the hearings three times at the request of

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both parties, reversed the Regional Court's decision by a judgment of 8 October 1974, which was deposited in the Court of Appeal's registry on 12 December. The Venice Court found that although Mr. Pretto's action had been admissible, he was estopped from availing himself of his right to obtain a re-sale since he had not paid the price stated in the sale contract within three months of the commencement of the proceedings at first instance. It held that this time-limit had to apply, by analogy with the rules on the exercise of the right of pre-emption (section 8 of Act no. 590).

13. On 12 February 1975, Mr. Pretto appealed on points of law to the Court of Cassation. The respondent lodged a cross-appeal (ricorso incidentale) on 26 March 1975 and the applicant filed a reply thereto (controricorso al ricorso incidentale) on 3 May 1975.

On a date which it has not been possible to trace (see paragraph 8 in fine above), the President of the 3rd Civil Chamber of the Court of Cassation directed that the hearings be held on 18 February 1976. The applicants claimed that previously Mr. Pretto had twice asked for the case to be dealt with, but that for reasons beyond their control they were unable to prove this.

On 12 February, Mr. Pretto filed a supplementary memorial; under Article 378 of the Code of Civil Procedure, he was permitted to do so up to the fifth day before the hearings.

On 18 February, the 3rd Civil Chamber postponed the hearings: as section 8 of Act no. 590 had given rise to conflicting judicial decisions, it considered it preferable to await the ruling of the plenary Court of Cassation on other appeals bearing on the same point.

The plenary Court was to have sat on the following day, but in fact did not give judgment until 10 June 1976. On 19 October, the 3rd Civil Chamber applied that decision and dismissed Mr. Pretto's appeal; it confirmed the Venice Court of Appeal's interpretation of section 8 of Act no. 590. The full text of the judgment was made public by being deposited in the Court of Cassation's registry on 5 February 1977. Article 133 of the Code of Civil Procedure, which save for some rare exceptions applies to all civil court judgments, whether rendered at first instance, on appeal or on cassation, in fact provides (translation from the Italian):

> "The judgment (sentenza) shall be made public by being deposited in the registry of the court which delivered it. The Registrar shall record at the bottom of the judgment that it has been deposited, adding the date and his signature; within the next five days, he shall advise the parties (parti che si sono costituite) of the deposit by means of a written notice which shall contain the operative provisions of the judgment."

Under Article 120 of Royal Decree no. 1368 of 18 December 1941 (rules on the application of the Code of Civil Procedure and transitional provisions), the deposit has to be effected within thirty days of the examination of the case.

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14. On 24 June 1977, the judgment was served on Mr. Pretto by the respondent and thereupon became enforceable.

15. Anyone can consult or obtain copies of the judgments of the Court of Cassation on application to its registry. If judgments contain features that are novel from the point of view of interpretation of the law, they may be published.

PROCEEDINGS BEFORE THE COMMISSION

16. In their application lodged with the Commission on 27 July 1977 (no. 7984/77), Mr. Pretto and the other members of his family relied on Article 6 § 1 (art. 6-1) of the Convention and made the following complaints:

(a) In the present case the 3rd Civil Chamber of the Court of Cassation had not constituted an independent and impartial tribunal since it had followed an opinion expressed by the plenary Court of Cassation in a judgment which was in the process of being published; moreover, the very existence of the plenary Court was contrary to this provision of the Convention.

(b) The said Chamber had violated the rights of the defence by basing its decision on a judgment which had not yet been published and could not have been known to the applicant's lawyer.

(c) The principle of equality of arms had been infringed, since the public prosecutor's office attached to the Court of Cassation had assisted that Court in its private deliberations (Article 380 of the Code of Civil Procedure, as in force at the time).

(d) The Court of Appeal had violated the right to a fair trial by denying Mr. Pretto the right to seek a judicial determination of the exact price he had to pay in order to exercise validly his right to obtain a re-sale.

(e) By not pronouncing their judgments publicly, the Court of Appeal and the Court of Cassation had failed to satisfy a further requirement of Article 6 § 1 (art. 6-1).

(f) Finally, the length of the proceedings had exceeded a "reasonable time".

17. On 11 July 1979, the Commission declared the application admissible as regards the final complaint and also part of the penultimate complaint (proceedings before the Court of Cassation only). It declared the remainder of the application inadmissible; in particular, in so far as Mr. Pretto complained of the lack of public pronouncement of the Venice Court of Appeal's judgment, it found that he had failed to exhaust domestic remedies.

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In its report of 14 December 1981 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion:

- by eight votes to seven, that the length of the proceedings in question had not exceeded a "reasonable time";

- by twelve votes to three, that there had also been no breach of Article 6 § 1 (art. 6-1) as regards the requirement that judgment be pronounced publicly.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

18. At the hearings on 22 March 1983, the Government requested the Court "to conclude that Italy has not violated Article 6 § 1 (art. 6-1) of the Convention in the present case".

AS TO THE LAW

19. The applicants complained of the fact that the judgment of 19 October 1976 by the Court of Cassation had not been pronounced publicly (see paragraph 13 above); they further objected to the length of the proceedings. They relied on Article 6 § 1 (art. 6-1) of the Convention, which reads:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by [a] ... tribunal ... . Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The Government contended, on the contrary, that the absence of public pronouncement of the judgment did not contravene the Convention and that the "reasonable time" had not been exceeded. The majority of the Commission was of the same opinion, whereas three of its members agreed with the applicants on the first point and seven on the second.

I. ABSENCE OF PUBLIC PRONOUNCEMENT

20. With regard to the first of the two breaches alleged, the cassation proceedings alone are in issue: the applicants raised no objection as to absence of public pronouncement in relation to the Vicenza Regional Court's judgment and their complaint that the Venice Court of Appeal's

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judgment was not pronounced publicly was declared inadmissible by the Commission on the ground of failure to exhaust domestic remedies (see paragraphs 16 and 17 above).

21. The public character of proceedings before the judicial bodies referred to in Article 6 § 1 (art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1 (art. 6-1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, p. 18, § 36, and also the Lawless judgment of 14 November 1960, Series A no. 1, p. 13).

22. Whilst the member States of the Council of Europe all subscribe to this principle of publicity, their legislative systems and judicial practice reveal some diversity as to its scope and manner of implementation, as regards both the holding of hearings and the "pronouncement" of judgments. The formal aspect of the matter is, however, of secondary importance as compared with the purpose underlying the publicity required by Article 6 § 1 (art. 6-1). The prominent place held in a democratic society by the right to a fair trial impels the Court, for the purposes of the review which it has to undertake in this area, to examine the realities of the procedure in question (see notably, mutatis mutandis, the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, § 30).

23. The applicability of Article 6 (art. 6) to the present facts was not disputed and, moreover, is to be inferred from the established case-law of the Court (see notably the Delcourt judgment of 17 January 1970, Series A no. 11, pp. 13-15, §§ 24-26, and the Pakelli judgment of 25 April 1983, Series A no. 64, p. 14, § 29). The manner of application of this text depends, however, on the particular circumstances of the case (ibid.).

24. In accordance with Article 133 of the Code of Civil Procedure, the judgment adopted on 19 October 1976 by the Court of Cassation was simply deposited in the court registry, with written notification of the operative provisions being given to the parties, but not pronounced in open court (see paragraph 13 above). It therefore has to be determined whether, as the applicants and a minority of the Commission contended, this state of affairs violated the Convention.

25. The terms used in the second sentence of Article 6 § 1 (art. 6-1) - "judgment shall be pronounced publicly", "le jugement sera rendu publiquement" - might suggest that a reading out aloud of the judgment is required. Admittedly the French text employs the participle "rendu" (given), whereas the corresponding word in the English version is "pronounced" (prononcé), but this slight difference is not sufficient to dispel the impression left by the language of the provision in question: in French,

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"rendu publiquement" - as opposed to "rendu public" (made public) - can very well be regarded as the equivalent of "prononcé publiquement".

At first sight, Article 6 § 1 (art. 6-1) of the European Convention would thus appear to be stricter in this respect than Article 14 § 1 of the 1966 International Covenant on Civil and Political Rights, which provides that the judgment "shall be made public", "sera public".

26. However, many member States of the Council of Europe have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts, and especially of their courts of cassation, for example deposit in a registry accessible to the public. The authors of the Convention cannot have overlooked that fact, even if concern to take it into account is not so easily identifiable in their working documents as in the travaux préparatoires of the 1966 Covenant (see, for instance, document A/4299 of 3 December 1959, pp. 12, 15 and 19, §§ 38 (b), 53 and 63 (c) in fine).

The Court therefore does not feel bound to adopt a literal interpretation. It considers that in each case the form of publicity to be given to the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1 (art. 6-1).

27. In order to determine whether the manner in which the Court of Cassation delivered its judgment of 19 October 1976 met the requirements of Article 6 § 1 (art. 6-1), account must be taken of the entirety of the proceedings conducted in the Italian legal order and of the Court of Cassation's role therein.

That role was confined to reviewing in law the decision of the Venice Court of Appeal. The Court of Cassation could not itself determine the suit, but only, on this occasion, dismiss the applicant's appeal or, alternatively, quash the previous judgment and refer the case back to the trial court. After holding public hearings, the Court of Cassation adopted the former course. The Venice Court of Appeal's judgment thus became final; its consequences for Mr. Pretto were in no way changed.

The latter judgment, for its part, had been made public by being deposited on 12 December 1974 in the court registry. The applicant alleged that in this respect also there had been a violation of the Convention, but the Commission declared the complaint inadmissible on the ground of failure to exhaust domestic remedies. The Court therefore does not have jurisdiction to decide whether, in the case of the Venice Court, such a deposit is in conformity with the requirements of Article 6 (art. 6). An affirmative reply to this question would also be valid for the Court of Cassation's judgment, whereas the same could not be said of a possible negative reply: on the contrary, even in the latter eventuality, the deposit of the judgment in the registry of the Court of Cassation would satisfy the requirements of Article

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6 (art. 6), having regard to the differences between the respective roles of the two courts.

Furthermore, the Court of Cassation took its decision after holding public hearings and, although the judgment dismissing the appeal on points of law was not delivered in open court, anyone may consult or obtain a copy of it on application to the court registry (see paragraph 15 above).

In the opinion of the Court, the object pursued by Article 6 § 1 (art. 6-1) in this context - namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial - is, at any rate as regards cassation proceedings, no less achieved by a deposit in the court registry, making the full text of the judgment available to everyone, than by a reading in open court of a decision dismissing an appeal or quashing a previous judgment, such reading sometimes being limited to the operative provisions.

28. The absence of public pronouncement of the Court of Cassation's judgment therefore did not contravene the Convention in the present case.

II. COMPLIANCE WITH THE REASONABLE-TIME REQUIREMENT

29. The applicants also complained of the length of the proceedings instituted by Mr. Rodolfo Pretto before the Italian courts.

The Government contended on the other hand that the "reasonable time" referred to in Article 6 § 1 (art. 6-1) had not been exceeded. The Commission agreed in substance with this contention.

1. Length of the proceedings

30. The relevant period did not begin to run as from the institution of proceedings before the Vicenza Regional Court on 24 September 1971 (see paragraph 10 above), but only as from 1 August 1973, when the recognition by Italy of the right of individual petition took effect. However, in assessing the reasonableness of the time that elapsed after 31 July 1973, account must be taken of the then state of proceedings (see the Foti and others judgment of 10 December 1982, Series A no. 56, p. 18, § 53).

The closing date, for its part, was 5 February 1977, the day when the judgment of 19 October 1976 was deposited in the registry of the Court of Cassation (see paragraph 13 above).

To sum up, the period to be taken into consideration runs from 1 August 1973 until 5 February 1977, that is three years, six months and five days.

2. Reasonableness of the length of the proceedings

31. The reasonableness of the length of proceedings has to be assessed in each instance according to the particular circumstances and having regard to the criteria enunciated in the Court's case-law (see, as the most recent

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authority, the Zimmermann and Steiner judgment of 13 July 1983, Series no. 66, p. 11, § 24).

(a) Complexity of the case

32. The Commission and the Government both considered that the facts were undisputed but that they raised a rather complex problem of legal interpretation.

The Court is of the same view: what was involved was the application of a relatively recent statute which did not contain any specific provisions on the legal point in issue, namely whether the conditions to be satisfied in order to exercise the right of pre-emption also applied to the right to obtain a re-sale; in addition, the decided authorities - still scarce at that time - disclosed contradictory approaches. It was thus reasonable that, with a view to eliminating this divergence of approach and to ensuring certainty of the law, the 3rd Civil Chamber of the Court of Cassation should have deferred its decision until judgment was given by the plenary Court, even though there was a possibility that this would lead to a prolongation of the proceedings (see paragraph 13 above).

(b) Conduct of Mr. Pretto

33. The Commission referred to its case-law to the effect that the exercise of the right to a hearing within a reasonable time is subject, in civil cases, to diligence being shown by the party concerned. In its opinion, there was no evidence that the applicant had failed to act with due diligence.

The Government disagreed. They pointed out that during the appeal proceedings the parties' lawyers, including Mr. Pretto's, had on three occasions requested that the hearings be postponed; that they had always lodged the various documents in the case just when the prescribed time-limits were on the point of expiring; that Mr. Pretto, for example, had filed a supplementary memorial barely six days before the hearings due to be held on 18 February 1976 (see paragraph 13 above); and finally that under Italian law the institution and conduct of civil litigation are matters left to the initiative of the parties, without any intervention on the part of the court.

34. Before the Commission, the applicants claimed that Mr. Rodolfo Pretto had twice asked for the appeals on points of law to be dealt with (see paragraph 13 above), but that for reasons beyond their control they were unable to prove this.

The Court sees no cause to doubt their statement, which was not contested by the Government. It also notes that Mr. Pretto was entitled to make full use of the time-limits available under Italian law and that he was never out of time.

Although no blame can be attached to him, the applicant was nevertheless responsible to a certain degree for the prolongation of the proceedings (see the Eckle judgment of 15 July 1982, Series A no. 51, p. 36,

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§ 82). In this respect, he cannot level any reproach against the respondent State.

(c) Conduct of the judicial authorities

35. The manner in which the judicial authorities conducted the case is to be assessed by reference to five successive stages:

(a) from 1 August 1973 (entry into effect of Italy's recognition of the right of individual petition) to 12 December 1974 (deposit of the Venice Court of Appeal's judgment in its registry);

(b) from 12 February 1975 (filing of Mr. Pretto's appeal on points of law) to 3 May 1975 (lodging of his reply to the respondent's cross-appeal);

(c) from 3 May 1975 to 18 February 1976 (hearing devoted to an examination of the appeals, and decision by the 3rd Civil Chamber to defer judgment);

(d) from 18 February to 19 October 1976 (adoption of the judgment);

(e) from 19 October 1976 to 5 February 1977 (deposit of the judgment in the Court of Cassation's registry).

The period from 12 December 1974 to 12 February 1975 does not fall to be taken into account since it corresponds to the time-limit available to the parties for appealing on points of law.

36. The majority of the Commission considered that the different phases in the proceedings had been characterised by delays which could probably have been avoided, but that the overall duration could not be regarded as incompatible with Article 6 § 1 (art. 6-1). For the minority, on the other hand, the intervals between the adoption of the Venice Court of Appeal's and the Court of Cassation's judgments and their deposit in the court registry (8 October 1974 - 12 December 1974, 19 October 1976 - 5 February 1977) and between the lodging of the applicant's reply to the cross-appeal and the first hearing (3 May 1975 - 18 February 1976) were not consonant with the "reasonable time" requirement.

According to the Government, the length of the proceedings had not been shown to be inordinate and was in any event the result of the complexity of the case, the conduct of the parties, the procedural complications at the cassation stage (filing of a cross-appeal and of a reply thereto, see paragraph 13 above) and the expediency, as far as the 3rd Civil Chamber was concerned, of deferring judgment until the plenary Court of Cassation had given its ruling on a similar case. The Government added that account should not be taken of the time-limits available to the parties for lodging cross-appeals and replies thereto, that is to say the period from 12 February to 3 May 1975.

37. The Court is of the same view as the Government on the last point. As regards the four other phases (see paragraph 35 above), it does not find their duration to be unreasonable. Admittedly, the hearings before the Court of Cassation could have taken place earlier: although it is not known exactly

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when their date was fixed (see paragraph 13 above), it can be assumed that the case was ready for hearing as from 3 May 1975, once the appeals and the reply had been filed. In addition, and even according to Italian law (Article 120 of the Royal Decree of 18 December 1941, see paragraph 13 above), there should not have been so long an interval between the adoption of the Venice Court of Appeal's and the Court of Cassation's judgments and their deposit in the court registry (8 October - 12 December 1974 and 19 October 1976 - 5 February 1977, respectively). Nevertheless, although these various delays could probably have been avoided, they are not sufficiently serious to warrant the conclusion that the total duration of the proceedings was excessive. The permissible limit was therefore not overstepped.

FOR THESE REASONS, THE COURT

1. Holds unanimously that the absence of public pronouncement of the Court of Cassation's judgment did not contravene Article 6 § 1 (art. 6-1);

2. Holds by fourteen votes to one that there has also been no breach of Article 6 § 1 (art. 6-1) as regards compliance with the "reasonable time" requirement.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this eighth day of December, one thousand nine hundred and eighty-three.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

The following separate opinions are annexed to the present judgment, in accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 50 § 2 of the Rules of Court :

- concurring opinion of Mr. Ganshof van der Meersch;

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- dissenting opinion of Mr. Pinheiro Farinha.

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M.-A. E.

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CONCURRING OPINION OF MR. GANSHOF VAN DER MEERSCH

(Translation)

I am of the opinion, like my distinguished colleagues, that the absence of public pronouncement of the Italian Court of Cassation's judgment did not contravene Article 6 § 1 (art. 6-1) of the Convention in the present case; however, I cannot agree with one of the reasons on which our Court has based its decision.

I regret that paragraph 27 of the judgment refers, in order to justify the absence of violation, to the fact that the role of the Court of Cassation "was confined to reviewing in law the decision of the Venice Court of Appeal".

Apparently this is not just an obiter dictum, and this impression is reinforced by the fact that in paragraph 26 the Court also cites in support of its decision the example, to be found in several member States of the Council of Europe, of the procedure consisting of the deposit of the judgment in a registry accessible to the public, such procedure being utilised "especially [in] their courts of cassation".

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DISSENTING OPINION OF MR. PINHEIRO FARINHA

(Translation)

1. To my great regret I am unable to share the conclusion of the majority of the Court to the effect that the "reasonable time" referred to in Article 6 § 1 (art. 6-1) of the Convention was not exceeded.

2. Like the majority, I am of the opinion that "the relevant period did not begin to run as from the institution of proceedings before the Vicenza Regional Court on 24 September 1971" - and I emphasise the date -, "but only as from 1 August 1973, when the recognition by Italy of the right of individual petition took effect", and that "in assessing the reasonableness of the time that elapsed after 31 July 1973, account must be taken of the then state of proceedings".

3. I also agree with paragraph 31, where it is stated that "the reasonableness of the length of proceedings has to be assessed in each instance according to the particular circumstances and having regard to the criteria enunciated in the Court's case-law"; this being so, I will now turn to an examination of the specific case.

4. Complexity of the case

The facts were undisputed.

Although the case raised a complex problem of legal interpretation, account must be taken of the fact that the Act which fell to be interpreted (Act no. 590) dated back to 26 May 1965; more than ten years had elapsed between that date and the time when the Court of Cassation was called upon to interpret the Act in the present case. Accordingly, I conclude that the case was not complex, since ten years appear to me to be more than sufficient for an examination of the Act, however complex it may have been.

5. Conduct of Mr. Pretto

I agree with the opinion of the majority to the effect that "Mr. Pretto was entitled to make full use of the time-limits available under Italian law and ... was never out of time".

Mr. Pretto's conduct cannot be criticised; in my view, he was in no way responsible for the prolongation of the proceedings.

6. Conduct of the judicial authorities

It does not seem to me reasonable that the Venice Court of Appeal's judgment, which was adopted on 8 October 1974, should have been deposited in that Court's registry on 12 December: this meant that two months elapsed before it was made public.

Although the case was ready for hearing as from 3 May 1975, the Court of Cassation directed that the hearings be held on 18 February 1976.

On the latter date, the Court of Cassation postponed the hearings in order to await the plenary Court's ruling on appeals on points of law that raised the same issue. The reason for the postponement was not any legal

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obligation to await the plenary Court's decision but the fact that the Civil Chamber of the Court of Cassation considered it proper. The plenary Court did not give judgment until 10 June 1976. There is no justification for this delay; in view of the fact that the case had already been pending for several years, Article 6 § 1 (art. 6-1) of the Convention, to the extent that it secures the right to have proceedings conducted within a reasonable time, required that Mr. Pretto's appeal on points of law be examined immediately.

The appeal was only examined on 19 October 1976 (although the judgment adopted by the plenary Court of Cassation had not yet been made public) and the resulting judgment was made public, by being deposited in the Court of Cassation's registry, on 5 February 1977; there is no justification for this delay either.

7. I conclude that the duration of the proceedings exceeded the "reasonable time". I am therefore of the opinion that there was a violation of Article 6 § 1 (art. 6-1) of the Convention.

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CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF P.S. v. GERMANY

(Application no. 33900/96)

JUDGMENT

STRASBOURG

20 December 2001

FINAL

04/09/2002

This judgment will become final in the circumstances set out in Article 44 § 2.

Mechelen and Others judgment cited above, p. 711, § 49), the Court will consider the applicant's complaints from the angle of paragraphs 3 (d) and 1 taken together.

21. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage (see the Van Mechelen and Others judgment cited above, p. 711, § 51; and the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 21, § 49).

22. In appropriate cases, principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of person are at stake, or interests coming generally within the ambit of Article 8 of the Convention (see the Doorson judgment cited above, p. 470, § 70).

23. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*ibid.*, p. 471, § 72).

24. Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see the van Mechelen and Others judgment cited above, p. 712, § 55; the Doorson judgment cited above, p. 472, § 76; and the Windisch v. Austria judgment of 27 September 1990, Series A no. 186, p. 11, § 31).

Accordingly, the Court has held in a previous case that there was a violation of Article 6 § 1, taken together with Article 6 § 3 (d), noting that "in convicting the applicant in the instant case [of a sexual offence on a minor] the domestic courts relied solely on the statements made in the United States before trial and that the applicant was at no stage in the proceedings confronted with his accusers" (see the A.M. v. Italy judgment, no. 37019/97, 14 December 1999, §§ 26, 28).

25. In the present case, the applicant was convicted of having sexually abused S., an eight-year-old girl.

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CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF SAIDI v. FRANCE

(Application no. 14647/89)

JUDGMENT

STRASBOURG

20 September 1993

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no additional prosecution evidence to corroborate their testimony, such as physical evidence or the results of inquiries or expert reports. In those circumstances, the refusal of the judicial authorities to organise a confrontation between him and the persons in question had deprived him of a fair trial.

42. The Government emphasised the reasons which had led the criminal courts not to hear the witnesses.

They argued that the file had been complete, which meant that confrontations would have served little purpose; the accurate, consistent and concurring character of the testimony obtained first during the police inquiry and then during the judicial investigation gave grounds for considering that the facts were sufficiently established.

Secondly, the nature of the offence and the difficulty of obtaining testimony from drug addicts had made the organisation of confrontations a sensitive matter. In that field the protection of the witnesses took priority and called for exceptional precautions. It was necessary to take account of the psychological fragility of the drug users and their legitimate desire to remain anonymous. The persons concerned were often themselves petty dealers who were dependent on larger suppliers and who feared that they would face reprisals if they co-operated with the judicial authorities.

43. The Court reiterates that the taking of evidence is governed primarily by the rules of domestic law and that it is in principle for the national courts to assess the evidence before them. The Court's task under the Convention is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, as the most recent authority, the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, para. 34).

All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1), provided that the rights of the defence have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings (see, among other authorities, the Isgrò v. Italy judgment of 19 February 1991, Series A no. 194-A, p. 12, para. 34).

44. Like the Commission, the Court notes that in convicting the applicant the two courts which tried him referred to no evidence other than the statements obtained prior to the trial.

The Nice Criminal Court drew attention to the statements or depositions of several drug users or dealers; it concluded that Mr Saïdi had been "formally implicated by some of [his] regular customers ... and by the very people who carried out some of [his] deliveries" (see paragraph 18 above).

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The Aix-en-Provence Court of Appeal stated that it endorsed the grounds relied on at first instance, which were, in its view, relevant. It considered that "the concurring and repeated statements of the people who sold the drugs supplied by [him] ... and those who bought the drugs ... [were] sufficiently convincing to establish the offence of which [he was] accused and also the role which [he had] played in the heroin traffic in Nice" (see paragraph 19 above).

The testimony therefore constituted the sole basis for the applicant's conviction, after having been the only ground for his committal for trial. Yet neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial. The Court is fully aware of the undeniable difficulties of the fight against drug-trafficking - in particular with regard to obtaining and producing evidence - and of the ravages caused to society by the drug problem, but such considerations cannot justify restricting to this extent the rights of the defence of "everyone charged with a criminal offence".

In short, there has been a violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d).

II. APPLICATION OF ARTICLE 50 (art. 50)

45. According to Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. New trial or adoption of administrative measures

46. Mr Saïdi sought in the first place and above all a retrial. He requested that, in the event of the Court's considering it inappropriate to order a new trial, his criminal conviction should be removed from his police record or certain extracts (bulletins) therefrom and that his situation on French territory should be regularised, in particular by according him a right of residence.

Neither the Government nor the Commission submitted observations on this question.

47. The Court notes that the Convention does not give it jurisdiction to direct the French State to open a new trial (see, mutatis mutandis, the Belilos v. Switzerland judgment of 29 April 1988, Series A no. 132, p. 32, para. 76) or to adopt one of the other measures sought by the applicant.

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CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF STANFORD v. THE UNITED KINGDOM

(Application no. 16757/90)

JUDGMENT

STRASBOURG

23 February 1994

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decision by counsel with which the applicant could be taken to have agreed. Nothing therefore occurred during the course of the trial which would have put the judge on notice of this problem.

24. The Court must consider the proceedings as a whole including the decisions of the appellate courts. Its task is to ascertain whether the proceedings in their entirety, as well as the way in which evidence was taken, were fair (see, inter alia, the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, para. 34).

25. It recalls that it is not in dispute between those appearing before the Court that the applicant had difficulties in hearing some of the evidence given during the trial.

26. Nor is it in dispute that Article 6 (art. 6), read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, inter alia, not only his right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 (art. 6-3-c, art. 6-3-d, art. 6-3-e), - "to defend himself in person", "to examine or have examined witnesses", and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court" (see, inter alia, the Colozza v. Italy judgment of 12 February 1985, Series A no. 89, p. 14, para. 27, and the Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 33, para. 78).

27. In the present case neither the applicant nor the legal representatives sought to bring his hearing difficulties to the attention of the trial judge at any stage throughout the six-day hearing. It is true that the applicant mentioned these problems to a prison officer and subsequently to his lawyers (see paragraphs 11 and 12 above). However, the officer was neither a court official nor an officer of the court. Moreover, counsel, who had lengthy experience in handling criminal cases, chose for tactical reasons to remain silent about the difficulties (see paragraphs 11 and 13 above) and there was nothing to indicate that, as subsequently claimed, the applicant disagreed with this decision.

28. The State cannot normally be held responsible for the actions or decisions of an accused's lawyer. It follows from the independence of the legal profession that the conduct of the defence is essentially a matter between the defendant and his representatives. The Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention (see, as the most recent authority, mutatis mutandis, the Imbrioscia v. Switzerland judgment of 24 November 1993, Series A no. 275, p. 14, para. 41).

This was not, however, the position in the present case (see paragraph 27 above).

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CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF TAXQUET v. BELGIUM

(Application no. 926/05)

JUDGMENT

STRASBOURG

13 January 2009

Referred to the Grand Chamber

05/06/2009

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

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D. Effective remedy

82. Relying on Article 6 § 1 and Article 13 of the Convention, the applicant complained that an appeal against the Assize Court's judgment lay only to the Court of Cassation, which did not determine cases on their merits.

83. The Court observes that the Articles relied on do not guarantee any right of appeal and that, moreover, Belgium is not a party to Protocol No. 7. In addition, the Court has held on a number of occasions that the fact that the review conducted by a supreme court is restricted to questions of law is not in breach of Article 6 § 1 (see, *mutatis mutandis*, *Loewenguth v. France* (dec.), no. 53183/99, ECHR 2000-VI; *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, ECHR 2000-I; *Deperrois v. France* (dec.), no. 48203/99, 22 June 2000; and *Ramos Ruiz v. Spain* (dec.), no. 65892/01, 19 February 2002).

84. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

E. Difference in treatment

85. Relying on Article 6 § 1 and Article 14 of the Convention, the applicant submitted that the difference in the treatment of a defendant in the Assize Court as compared with a defendant in an ordinary criminal court, in terms of the possibilities of appealing, had no objective and reasonable justification, seeing that defendants in the Assize Court were in a more complex legal position, being accused of more serious offences.

86. According to the Court's settled case-law, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.

87. The Court notes that the applicant's complaint under Article 14 concerns the organisation and conduct of proceedings in the Assize Court and the court's composition. It observes that in the present case the difference in treatment relates not to different groups of people but to the type of offence and its seriousness under the law (see, *mutatis mutandis*, *Budak and Others v. Turkey* (dec.), no. 57345/00, 7 September 2004). The Court does not consider that such a practice constitutes a form of discrimination contrary to the Convention. This part of the application must therefore be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

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CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF VAN MECHELEN AND OTHERS
v. THE NETHERLANDS

(Applications nos. 21363/93, 21364/93, 21427/93 and 22056/93)

JUDGMENT

STRASBOURG

23 April 1997

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B. The Court's assessment

1. Applicable principles

49. As the requirements of Article 6 para. 3 (art. 6-3) are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 para. 1 (art. 6-1), the Court will examine the complaints under Article 6 paras. 1 and 3 (d) taken together (art. 6-1+6-3-d) (see, among many other authorities, the above-mentioned Doorson judgment, pp. 469-70, para. 66).

50. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, the above-mentioned Doorson judgment, p. 470, para. 67).

51. In addition, all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 21, para. 49).

52. As the Court had occasion to state in its Doorson judgment (ibid., p. 470, para. 69), the use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention.

53. In that same judgment the Court noted the following:

> "It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention (art. 8). Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify." (see the above-mentioned Doorson judgment, p. 470, para. 70)

54. However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court has recognised that in such cases Article 6 para. 1 taken together with Article 6 para. 3 (d) of the

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UNITED NATIONS

CCPR

International Covenant on Civil and Political Rights

Distr.

GENERAL

CCPR/C/54/D/482/1991
24 July 1995

Original: ENGLISH

Communication No. 482/1991 : Jamaica. 24/07/1995. CCPR/C/54/D/482/1991. (Jurisprudence)

Convention Abbreviation: CCPR

Human Rights Committee

Fifty-fourth session

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4,

of the Optional Protocol to the International Covenant

on Civil and Political Rights

- Fifty-fourth session -

Communications Nos. 464/1991 & 482/1991

Submitted by: Garfield Peart and Andrew Peart

[represented by counsel]

Victims: The authors

State party: Jamaica

Date of communications: 17 July 1991 and 12 November 1991

(initial submissions)

Date of decisions on admissibility: 17 March 1994 and 19 March 1993

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Furthermore, counsel points out that in reply to the complaint made by the author about his treatment in prison, the Commissioner of Police acknowledged receipt of the complaints and advised him that the matter was being referred to the Commissioner of Correctional Services for appropriate action. On 27 June 1994, counsel sent a further letter to the Commissioner of Corrections, but no response has been received to date.

10.2 Counsel maintains that there was a material discrepancy between the original statement of Walsh and his evidence in court of which the defence was not advised and that the failure to produce the original statement resulted in a miscarriage of justice.

Issues and proceedings before the Committee:

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee has noted the State party's argument that the claim with regard to the treatment suffered by Garfield Peart in prison is inadmissible because of failure to exhaust domestic remedies. The Committee has also noted that the author had complained to the acting Superintendent, and that his counsel had made a complaint to the Commissioner of Police and was subsequently informed that the complaint was referred to the Commissioner of Correctional Services for appropriate action. In the circumstances, the Committee considers that the author and his counsel have shown due diligence in the pursuit of domestic remedies and that there is no reason to review the Committee's decision on admissibility.

11.3 With regard to the authors' claim that the unavailability of the expert witness from the Meteorological Office constitutes a violation of article 14 of the Covenant, the Committee notes that it appears from the trial transcript that the defence had contacted the witness but had not secured his presence in court, and that, following a brief adjournment, the judge then ordered the Registrar to issue a subpoena for the witness and adjourned the trial. When the trial was resumed and the witness did not appear, counsel informed the judge that he would go ahead without the witness. In the circumstances, the Committee finds that the State party cannot be held accountable for the failure of the defence expert witness to appear.

11.4 With regard to the evidence given by the main witness for the prosecution, the Committee notes that it appears from the trial transcript that, during cross-examination by the defence, the witness admitted that he had made a written statement to the police on the night of the incident. Counsel then requested a copy of this statement, which the prosecution refused to give; the trial judge subsequently held that defence counsel had failed to put forward any reason why a copy of the statement should be provided. The trial proceeded without a copy of the statement being made available to the defence.

11.5 From the copy of the statement, which came into counsel's possession only after the Court of Appeal had rejected the appeal and after the initial petition for special leave to appeal to the Judicial Committee of the Privy Council had been submitted, it appears that the witness named another man as the one who shot the deceased, that he implicated Andrew Peart as having had a gun in his hand, and that he did not mention Garfield Peart's participation or presence during the killing. The Committee notes that the evidence of the only eye-witness produced at the trial was of primary importance in the absence of any corroborating evidence. The Committee considers that the failure to make the police statement of the witness available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants. The Committee finds therefore that the facts before it disclose a violation of article 14, paragraph 3(e), of the Covenant.

11.6 With regard to the authors' allegations about maltreatment on death row, the Committee notes that the State party has indicated that it would investigate the allegations, but that the results of the investigations have not been transmitted to the Committee. Due weight must therefore be given to the authors' allegations, to the

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High Court of Australia

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Giorgianni v R [1985] HCA 29; (1985) 156 CLR 473 (18 April 1985)

HIGH COURT OF AUSTRALIA

GUISEPPE **GIORGIANNI** v. THE QUEEN [1985] HCA 29; (1985) 156 CLR 473

Criminal Law

High Court of Australia
Gibbs C.J.(1), Mason(2), Wilson(3), Deane(3) and Dawson(3) JJ.

CATCHWORDS

Criminal Law - Parties - Culpable driving causing death - Whether person aiding, abetting, counselling or procuring person to drive dangerously guilty of substantive offence - Knowledge of essential facts constituting offence - Wilful blindness - Whether negligence or recklessness sufficient - Crimes Act 1900 (N.S.W.), ss. 52A, 351.

HEARING

1984, December 5; 1985, April 18. 18:4:1985
APPLICATION for special leave to appeal from the Supreme Court of New South Wales.

DECISION

GIBBS C.J. This is an application for special leave to appeal from a decision of the Supreme Court of New South Wales constituted as the Court of Criminal Appeal dismissing the applicant's appeal from his conviction on five charges of culpable driving causing death and one charge of culpable driving causing grievous bodily harm. The charges arose out of an incident that occurred on 18 May 1979 when a truck heavily laden with coal got out of control while descending a steep incline at Mount Ousley and collided with other vehicles, causing the deaths of five persons and serious injury to another. The truck was driven by one Renshaw, an employee of the applicant **Giorgianni**. The brakes of the coal truck failed as it was making the descent and as it continued down the road at an increasing speed one Fraser, the driver of a Volvo truck, deliberately placed his vehicle in its path in an attempt to stop its progress. The two vehicles collided, but the effect of the collision was to damage the steering of the coal truck, which then careered quite out of control into other cars, some of whose passengers were killed or injured. The applicant was charged under s.52A of the Crimes Act 1900 (N.S.W.), as amended ("the Crimes Act"). The Crown case was that the brakes of the coal truck were dangerously defective and that Renshaw, by driving it in that condition, was driving in a manner dangerous to the public. It was not suggested that the applicant was present when Renshaw drove the truck; what was contended on behalf of the Crown was that the applicant procured Renshaw to drive the truck in its defective condition. The applicant was charged by virtue of s.351 of

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the Crimes Act, which provides as follows:

"Any person who aids, abets, counsels, or procures, the commission of any misdemeanour, whether the same is a misdemeanour at Common Law or by any statute, may be indicted, convicted, and punished as a principal offender."

2. There was evidence from which it appears that the last occasion on which the applicant had inspected the truck before the accident was during the weekend of 5-6 May 1979 when, together with Renshaw and one Fitzpatrick, he did some work on the vehicle. According to the evidence of Fitzpatrick and the applicant's statement to the jury, the condition of the brakes then appeared satisfactory, but it was open to the jury to infer, from police evidence which detailed the many defects that were apparent in the brakes after the accident, that a person who had worked on the vehicle a fortnight before would, or at least should, have noticed those defects. Amongst other things, one brake shoe was tied by wire to a U-bolt in an effort to retain it to the brake drum and that brake would have been completely ineffective. The applicant, in his statement, said that he had not noticed the wire. Renshaw gave evidence that after 6 May he drove the truck on about fifty occasions between a coal mine at Appin and the harbour at Port Kembla. He said that it was his practice to notify the applicant when he noticed any fault in the vehicle and that on 18 May he in fact noticed a leaking oil seal and rang the applicant to inform him of it. The evidence does not make it clear what was the applicant's response or what was the significance of that incident. Renshaw said that he did not notice anything wrong with the brakes until he was travelling on the fatal journey on 18 May.

3. The learned trial judge in the course of his summing up described as follows the nature of the contentions put on behalf of the Crown:

> "The Crown alleges - it must prove beyond reasonable doubt - that the brakes were defective, that the defective brakes constituted a danger to the public on the Mount Ousley road on a Friday afternoon, that the impact ... was caused while driving in a manner dangerous to the public with defective brakes, that the accused knew or ought to have known of the defect by the exercise of his reasonable care and diligence, that the accused knew or ought to have known by the exercise of reasonable care and diligence of the danger thereby to the public, and that the accused either ignored it or knowingly took such negligent measures to cope with it to make his conduct in employing the driver so to drive driving in a manner dangerous to the public."

Later he said that "it is further put that ⇦ **Giorgianni** ⇨ either had knowledge or imputed knowledge of those circumstances ...". Towards the end of his summing up, after he had dealt with the facts, he directed the jury on this aspect of the matter as follows:

> "Of course, in this case the manner of driving the vehicle dangerous to the public involved the vehicle being driven in circumstances fully laden down the mountain with a defective braking system, which the prosecution has to establish he had knowledge of or imputed knowledge that could be

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> ascertained with the exercise of reasonable care and diligence ...".

After hearing some submissions from counsel in the absence of the jury, the learned trial judge gave the jury a further direction. He said that the statement "that the accused knew or ought to have known with the exercise of reasonable care and diligence that the truck on 18th May, 1979, had defective brakes, that the driving of it in that condition would constitute driving it in a manner dangerous to the public" should be qualified. He said that "a mere failure to make an inquiry which would yield knowledge of an essential fact is not in itself sufficient, for to act negligently does not make a person an aider or abetter". He concluded by saying (and repeating) that the prosecution must show that the applicant "knew when he procured the use of the vehicle by Renshaw on 18th May the brakes were defective and could fail and could constitute driving in a manner dangerous to the public or he acted recklessly not caring whether these facts existed or not".

4. In these circumstances two questions of principle arise for our decision. The first is whether a person who has aided, abetted, counselled or procured another person to drive in a manner dangerous to the public may, if death or grievous bodily harm has been occasioned, be properly convicted of an offence against s.52A of the Crimes Act. That question must in my opinion be answered in the affirmative. It is true that the application of provisions such as those of s.351 of the Crimes Act "may be excluded by the nature of the substantive offence or the general tenor or policy of the provisions by which it is created": Mallan v. Lee [1949] HCA 48; (1949) 80 CLR 198, at p 216. There is however nothing in the nature of the offence created by s.52A, or in the provisions of that section, which reveals any intention to exclude the ordinary rules governing the liability of a secondary party, as a person who has aided, abetted, counselled or procured the commission of a crime is now called. The section, so far as it is relevant, provides as follows:

> "(1) Where the death of, or grievous bodily harm to, any person is occasioned through -
>
> ...
>
> (d) the impact of a motor vehicle with any vehicle or other object in, on or near which that person was at the time of the impact,
>
> and the motor vehicle was at the time of the impact ... being driven by another person -
>
> (e) under the influence of intoxicating liquor or a drug; or
>
> (f) at a speed or in a manner dangerous to the public,
>
> the person who was so driving the motor vehicle shall be guilty of the misdemeanour of culpable driving.
>
> ...
>
> (3) It shall be a defence to any charge under this section that the death or the grievous bodily harm occasioned, as the case may be, was not in any way

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> attributable to the fact that the person charged was under the influence of intoxicating liquor or of a drug or, as the case may be, to the speed at which or the manner in which the vehicle was driven."

There is no reason why a person who counsels or procures another to drive a vehicle, knowing that the person persuaded to drive the vehicle is drunk, or that the vehicle is so defective as to be dangerous, should not be liable, in accordance with the ordinary principles embodied in s.351 of the Crimes Act, if the vehicle is involved in a collision causing death. This view is supported by Reg. v. Robert Millar Ltd. (1970) 2 QB 54, where it was held that an employer who instructed an employee to drive a vehicle, knowing it to be in a dangerously defective condition, was guilty of the offence of dangerous driving causing death. That decision is consistent with other authorities. It has been held that the owner of a car who, travelling as a passenger, allowed the driver to drive at a speed which he knew to be dangerous could properly be convicted of the offence of driving at a speed dangerous to the public (Du Cros v. Lambourne (1907) 1 KB 40) and that the supervisor of a learner driver may be convicted of aiding and abetting the learner driver in the commission of the offence of driving without due care and attention (Rubie v. Faulkner (1940) 1 KB 571) or of the offence of driving with alcohol in his blood exceeding the prescribed limit (Carter v. Richardson (1974) RTR 314; mentioned (1975) C.L.J. 182). Counsel for the applicant sought to find an indication of a contrary intention in sub-s.(1) of s.52A, which states that "the person who was so driving the motor vehicle shall be guilty of the misdemeanour", and in sub-s.(3), which refers to "the fact that the person charged was under the influence of intoxicating liquor or of a drug". However, those forms of words do not indicate that it is only the actual perpetrator of the offence who may be charged under the section. Many statutory provisions which create misdemeanours refer only to the person who directly engages in the forbidden conduct, yet the ordinary rule which makes any person who aided, abetted, counselled or procured the commission of the misdemeanour liable to be convicted and punished as a principal offender nevertheless applies. When a person is charged as a secondary party with an offence against s.52A(1)(f), the prosecution has to prove that the accused aided, abetted, counselled or procured another person to drive the vehicle at a speed or in a manner dangerous to the public, but not that he aided, abetted, counselled or procured the driver to occasion the death or grievous bodily harm which must have been occasioned if the offence was committed. There can be no doubt in the present case that the applicant was rightly convicted if the evidence was such that a reasonable jury could have been satisfied that he had counselled or procured his employee to drive a truck which he knew to be dangerously defective. The questions whether the intervention of Fraser and the collision with his Volvo truck meant that thereafter the coal truck was not "being driven" by Renshaw, or that the deaths and grievous bodily harm were not occasioned by dangerous driving, were matters of fact for the jury.

5. The second question that arises is whether a person may be convicted of an offence against s.52A of the Crimes Act, on the footing that he aided, abetted, counselled or procured the commission of that offence, if it is not proved that he knew all the circumstances which made what was done an offence. In other words, is it necessary to prove that the person sought to be made liable as a secondary party had knowledge of all essential facts, or is it enough to prove that he should have had knowledge of those facts or that he acted recklessly not caring whether those facts existed or not?

6. Section 52A prescribes an objective standard and, speaking generally, the reference to a motor vehicle being driven "at a speed or in a manner dangerous to the public" refers to the actual behaviour of the driver and does not require any given state of mind as an essential element of the offence: R v. Coventry [1938] HCA 31; (1938) 59 CLR 633, at pp 637-638. That does not mean that a person can aid, abet, counsel or procure the commission of an offence of strict liability without having an intention to do so formed in the light of knowledge of the facts. The very words used in s.351, and the synonyms which express their meanings - e.g. help, encourage, advise, persuade, induce, bring about by effort - indicate that a particular state of mind is essential before a person can become liable as a secondary party for the commission of an offence, even if the offence is one of

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strict liability. In United States v. Peoni (1938) 100 F 2d. 401, at p 402, Judge Learned Hand referred to various statutory and common law definitions of "accessories", by which he meant secondary parties, and, in a passage cited by Bright J. in Lenzi v. Miller (1965) SASR 1, at p 15, went on to say:

> "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used - even the most colourless 'abet' - carry an implication of purposive attitude towards it."

In other words, the person charged as a secondary party should in some way be "linked in purpose with the person actually committing the crime ...": R v. Russell [1933] VicLawRp 7; (1933) VLR 59, at p 67, per Cussen ACJ.

7. Section 351 of the Crimes Act is based on s.8 of the Accessories and Abettors Act, 1861 (U.K.), which, it has often been said, was only declaratory of the common law on the subject: Du Cros v. Lambourne, at p 44; Reg. v. Maxwell (1978) 1 WLR 1350, at p 1359; (1978) 3 All ER 1140, at p 1148. Although it was said, in Attorney-General's Reference (No. 1 of 1975) [1975] EWCA Crim 1; (1975) Q.B. 773, at p.779, that there is a difference between the four words (aids, abets, counsels, procures) used in the section, and that each word must be given its ordinary meaning, it is apparent that the ordinary meanings of some at least of those words overlap and that sometimes the words are used in particular combinations or as a phrase which is to be considered as a whole: In re Charles Smith (1858) 3 H & N 227, at pp 237-238 [1858] EngR 533; (157 ER 455, at p 459); A-G v. Able (1983) 3 WLR 845, at p 855; (1984) 1 All ER 277, at p 285. When used in relation to felonies, the words "aid and abet" described the action of a person who was present at the commission of the offence and took some part therein (who was called a principal in the second degree as well as an "aider and abettor"), whereas "counsel and procure" described an accessory before the fact who was not present at the commission of the offence: cf. Ferguson v. Weaving (1951) 1 KB 814, at pp 818-819. The usage was not always uniform or discriminating. The distinction between principals in the first and second degree and between principals and accessories now generally has no legal importance: see Johns (T.S.) v. The Queen [1980] HCA 3; (1980) 143 CLR 108, at p 117 and ss.345-347 of the Crimes Act. No similar distinction was drawn in the case of misdemeanours, and at common law, in cases of misdemeanour, anyone who, in the case of a felony, would have been a principal in the second degree, or an accessory, was a principal offender and was treated as if he had taken the same part as the active perpetrator of the facts constituting the offence: Gould & Co. v. Houghton (1921) 1 KB 509, at p 516. The reason for mentioning those matters, which are now largely of historical interest, is that statements in the authorities regarding the mental state necessary to constitute a person an accessory before the fact in the case of a felony will apply equally to a person who has counselled or procured the commission of a misdemeanour. Further it will be found that statements which refer to the knowledge and intention necessary to make a person an aider and abettor will often be equally applicable to a person who has counselled or procured the commission of the offence.

8. Russell on Crime 12th ed. (1964), p.151, states that "the bare minimum" which is necessary to constitute a person an accessory before the fact is that his conduct should indicate "(a) that he knew that the particular deed was contemplated, and (b) that he approved of or assented to it, and (c) that his attitude in respect of it in fact encouraged the principal offender to perform the deed". The passage is cited with approval in A-G v. Able, at p 855; p 285 of All ER There is a strong body of

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authority which supports the view that knowledge of the facts is necessary before a person can be made liable as a secondary party for the commission of an offence. In Johnson v. Youden (1950) 1 KB 544, Lord Goddard C.J. stated the position in relation to aiders and abettors as follows, at p.546:

> "Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence."

This statement has been frequently cited with approval, and not only in relation to the case of aiders and abettors. In Reg. v. Churchill (1967) 2 AC 224, at p 236, it was held that the law is the same for conspiracy. In Reg. v. Bainbridge (1960) 1 QB 129, the case of an accessory before the fact, Lord Parker C.J. said, at p 134, that "there must be not merely suspicion but knowledge that a crime of the type in question was intended ...". (We are not concerned in the present case with the question whether knowledge of an intention to commit the type of offence is enough.) In Reg. v. Maxwell, at p 1357; p 1146 of All ER, Lord Hailsham of St. Marylebone was content to adopt the passages which I have cited from Johnson v. Youden and Reg. v. Bainbridge as sufficiently answering the question what degree of knowledge is required before an accused can be found guilty of aiding, abetting, counselling or procuring. In Reg. v. Robert Millar Ltd., a case similar to the present, it was said, at p 72, that "if a driver is sent out by his employer to drive a heavy vehicle on a trip extending over some hundreds of miles carrying heavy loads with a dangerously defective front offside tyre, by an employer who knows that the tyre is dangerous, and there is a serious risk of harm resulting to other road-users, then if that tyre does burst and thereby causes an accident killing somebody the employer is guilty of counselling and procuring death by dangerous driving ...". Numerous other cases, including, in Australia, Blackmore v. Linton [1961] VicRp 63; (1961) VR 374, at p 377 and Wilson v. Dobra (1955) 57 WALR 95, at p 97 (a case under the Criminal Code of Western Australia), accept that the general principle is that a person can be convicted as a secondary party only if he had knowledge of the essential circumstances. Further, as has already been indicated, the person charged must have intended to help, encourage or induce the principal offender to bring about the forbidden result. In other words, both knowledge of the circumstances and intention to aid, abet, counsel or procure are necessary to render a person liable as a secondary party: cf. National Coal Board v. Gamble (1959) 1 QB 11, at p 20.

9. However, some cases suggest that some qualifications should be admitted to the general principle that a person cannot be found guilty of having aided, abetted, counselled or procured an offence unless he had actual knowledge of all the essential matters which made the act done a crime. One qualification that must be accepted is that wilful blindness, the deliberate shutting of one's eyes to what is going on, is equivalent to knowledge. In R. v. Antonelli and Barberi (1905) 70 JP 4, where A was indicted for publishing a criminal libel, and B, who had sold copies of the pamphlet containing the libel, was charged with aiding and abetting him, Phillimore J., in summing up to the jury, said, at p.6:

> "If you think he knew what was in the document, or deliberately shut his eyes to what was in it, then you must find him guilty of aiding and abetting."

Lord Devlin has said that a person who has shut his eyes to an obvious means of knowledge may be described as having "knowledge of the second degree": see Roper v. Taylor's Central Garages (Exeter), Limited (1951) 2 TLR 284, at p 288. The relevant principle was recently explained by this Court in Reg. v. Crabbe (26 March 1985, unreported):

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> "When a person deliberately refrains from making inquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring."

10. In Davies, Turner & Co. Ltd. v. Brodie (1954) 1 WLR 1364, at p 1367; cf. (1954) 3 All ER 283, at p 286, Lord Goddard C.J., after repeating what he had said in Johnson v. Youden, continued:

> "If a person shuts his eyes to the obvious or refrains from making any inquiry where a reasonably sensible man would make inquiry, I think the court can find that he was aiding and abetting, certainly if he shuts his eyes to the obvious."

With all respect this dictum was too wide, as indeed Lord Goddard himself may have recognized by the concluding words of the sentence quoted; those words are omitted from the report in the All England series, but the word "perhaps" is inserted. As Lord Devlin pointed out in Roper v. Taylor's Central Garages (Exeter), Limited, at p 289:

> "There is a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make."

The failure to make such inquiries as a reasonable person would have made is not equivalent to knowledge; it is not enough to render a person liable as a secondary party that he ought to have known all the facts and would have done so if he had acted with reasonable care and diligence. That is so even when the offence is one of strict liability, so that the actual perpetrator may be convicted in the absence of knowledge.

11. That this is so is shown by Callow v. Tillstone (1900) 83 LT 411. In that case a butcher was convicted of exposing unsound meat for sale. He had relied on a certificate given by a veterinary surgeon that the meat was sound and healthy. The veterinary surgeon had been guilty of negligence in examining the carcase and giving the certificate. It was held that the fact that he had been negligent, and that the negligence had caused the exposure of the unsound meat for sale, was not sufficient to justify his conviction for aiding and abetting the exposing of the unsound meat for sale. (Perhaps he should more properly have been charged with counselling or procuring the commission of the offence, but the decision did not turn on that point.) Similarly, in Bowker v. Woodroffe. Bowker v. Premier Drug Co. (1928) 1 KB 217, a wholesale firm was charged with aiding and abetting a retailer in committing the offence of selling to the prejudice of the purchaser an article of food not of the nature, substance and quality demanded. Although the retailer was convicted the wholesaler was held entitled to be acquitted, for a number of reasons, one of which was that there was no evidence to show that the wholesaler knew at any material time that the article sold was not what it purported to be: see at p.229.

12. One case which is out of line with these authorities, and which has unfortunately had some influence on two Australian cases, is Carter v. Mace (1949) 2 All ER 714. In that case the appellant, who carried on the business of a transport clearing house, arranged with the owner of a lorry to transport certain goods but did not inquire whether the owner of the lorry was licensed to carry those

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goods. The appellant was convicted of aiding and abetting the lorry driver in the commission of the offence, notwithstanding that he did not know that the lorry driver did not have the necessary licence and did not deliberately refrain from making inquiries for fear that he might learn the truth. The judgment of the Divisional Court suggests that the appellant was under a duty to see that the contracts that he made were carried out in a legal manner. If the case was correctly decided, it might provide authority for the view that a person can be found guilty of aiding, abetting, counselling or procuring if he failed to make reasonable inquiries. However, in Davies, Turner & Co. Ltd. v. Brodie it was said (at p 1367; p 286 of All ER) that Carter v. Mace was decided on its own particular facts, and in a later case, Smith v. Jenner (1968) Crim.LR 99, the opposite conclusion was reached on rather similar facts. There a driving instructor supervised the driving of a learner whose provisional licence had expired, although he was not aware of that fact. The instructor was convicted of aiding and abetting the learner to drive a car without a licence. A Divisional Court which allowed his appeal held that aiding and abetting involved knowledge of the facts. Carter v. Mace cannot be regarded as an authority for the proposition that a person may be liable as a secondary party simply because he fails to make such inquiries as a reasonable man would have made.

13. It is necessary to refer to two other lines of cases, which may cause confusion unless it is recognized that they are not concerned with the liability of persons who have aided, abetted, counselled or procured the commission of a crime. First, there are cases in which the court has considered the effect of statutes which make it an offence to permit a particular state of things, e.g. to permit any person not being the holder of a licence to drive a motor vehicle, or to permit a person to use a vehicle which is uninsured. It has been held that knowledge is not an ingredient of such offences, although honest and reasonable mistake of fact will exculpate the accused: see, e.g., Proudman v. Dayman [1941] HCA 28; (1941) 67 CLR 536; cf. Bateman v. Evans (1964) 108 Sol Jo 522. A second class of case is that in which the statute in question casts an absolute duty upon a principal who is accordingly made responsible for the acts of his servants. Quality Dairies (York) Ltd. v. Pedley (1952) 1 KB 275 is such a case. Decisions that fall within either of those classes have no bearing on the present question. Cases such as Provincial Motor Cab Company, Limited v. Dunning (1909) 2 KB 599 and Gough v. Rees (1929) 142 LT 424, in which the accused, although not made vicariously responsible by statute, was held liable for aiding, abetting, counselling or procuring an offence committed by his servant on the ground that the servant was under his control and he failed to take precautions to prevent the commission of the offence, can only be explained on the basis that the accused knew what would happen if the precautions were not taken: see Lord Hewart C.J. in Gough v. Rees, at p 426. The true principle was applied in Ferguson v. Weaving, where the employees of a licensee, who had the conduct and maintenance of a room in the licensee's premises, allowed customers to consume liquor there after hours. It was held that the licensee, who was unaware of what was happening, could not be convicted of counselling and procuring the offence committed by the customers; the knowledge of the employees could not be imputed to the licensee: see at p.821.

14. In Lenzi v. Miller the Full Court of the Supreme Court of South Australia held that on a charge of having aided, abetted, counselled and procured the commission of an offence, namely the driving of a motor vehicle on a road without there being in force a policy of insurance in relation to the vehicle, it was not necessary for the prosecution to prove that the accused, on whose instructions or with whose permission the vehicle was driven, knew that the vehicle was uninsured. It was said, at p.12, that authorities such as Carter v. Mace and Quality Dairies (York) Ltd. v. Pedley show an Act may be couched in such terms as to imply a duty to foresee and prevent the act or thing that is the offence and that in such circumstances any party, who could and should prevent the act or thing, but omits to do so, is a party to and participates in the offence. The reliance on those authorities was misplaced; Carter v. Mace lays down no acceptable principle and Quality Dairies (York) Ltd. v. Pedley does not deal with the position of aiders, abettors, counsellors and procurers. In Lenzi v. Miller at first instance Chamberlain J., at p 7, said that the cases "support the proposition that the accessory depends on terms of the statute creating the original offence, and that none of them supports the appellant's claim that in order to convict an accessory of an absolute offence it is necessary to prove the case as if mens rea were a necessary element". This passage was cited with

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approval by Walters A.J. in Kurucz v. Mayne (1966) SASR 82. However it is erroneous. Both those decisions may be supported on their facts, but not for all the reasons given by the court.

15. In Reg. v. Glennan (1970) 91 WN(NSW) 609 the Court of Appeal of New South Wales discussed the question whether a conviction for aiding, abetting, counselling and procuring the commission of an offence of driving with more than the prescribed quantity of alcohol present in the blood could be sustained when it had been found that the accused did not and could not know the concentration of alcohol in the driver's blood. It was rightly held that the accused could be convicted of aiding and abetting, because it was established that the accused was aware of all the circumstances that gave rise to the driver's offence, and in particular how much alcohol the driver had consumed. The judgment however contains some observations which with all respect cannot be supported. Their Honours said at p.614:

> "It may, therefore, be concluded that, in the case of statutory offences in which intention is not a necessary element, the law does not require actual knowledge on the part of the aider and abettor of all the essential facts of the offence. The element of knowledge or intention required of an aider and abettor might perhaps be more accurately expressed by saying that it must be shown that he either knew or suspected the existence of facts which would constitute the commission of the offence or, perhaps, that he acted recklessly, not caring whether the facts existed or not. Mere failure to make an inquiry which, if made, would yield knowledge of an essential fact, is not in itself enough to constitute knowledge of the fact, for it is accepted that to act negligently does not make a person an aider and abettor (Callow v. Tillstone; Bowker v. Premier Drug Co.). But the circumstances of a given case may be such as to reveal not merely a failure to make an inquiry, but a failure to make an inquiry which is of such a kind as to suggest that the defendant has deliberately abstained from acquiring knowledge because he suspected the existence of a fact which would have been ascertained on inquiry, or that the defendant has acted recklessly in the sense that he did not care whether the facts existed or not (Carter v. Mace; cf. Davies, Turner & Co. Ltd. v. Brodie)."

Suspicion of the existence of facts, although relevant when the accused has deliberately shut his eyes, does not by itself amount to or take the place of knowledge for present purposes. Further it is not correct to say that a person may be convicted of aiding, abetting, counselling or procuring the commission of an offence simply because he has acted recklessly. Dr Edwards, in Mens Rea in Statutory Offences (1955), pp.196-205, asserts that a person who deliberately closes his eyes to what is going on connives at it and that there is a close analogy between connivance and recklessness. However connivance, or wilful blindness, is only relevant to the liability of a secondary party to an offence because it virtually amounts to knowledge. Recklessness, in the sense of not caring whether the facts exist or not, would be relevant only if it too was virtually equivalent to knowledge, in other words only if it amounted to wilful blindness.

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16. It is true that there are some remarks in the judgments of the members of the Divisional Court in Carter v. Richardson, at pp 317, 318, which suggest that it is enough that an aider and abettor was reckless as to whether the principal offender had consumed an excessive amount of alcohol before driving a motor vehicle. However the ratio of that case was expressed in the following words, at p.318:

> "The justices were right if they took the view that it was sufficient if the defendant was aware that the principal offender had consumed excessive alcohol even though the precise amount had not been determined."

It can never be right to direct a jury that recklessness is enough to constitute a person an aider, abettor, counsellor or procurer. Indeed in many, if not most, cases it will be unnecessary to introduce the subject of wilful blindness into a summing up and it would only be confusing to direct a jury on that subject if the facts of the case did not require it.

17. My view of the law may be summed up very shortly. No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Wilful blindness, in the sense that I have described, is treated as equivalent to knowledge but neither negligence nor recklessness is sufficient.

18. It follows that the summing up in the present case was materially defective and that the conviction cannot stand. Since there was evidence on which the jury could have found that the applicant did counsel or procure the commission of the offence, the proper course for this Court is to order a new trial. However, the tragic circumstances of the incident, and the public reaction to it, should not obscure the fact that the case against the applicant is not a particularly strong one. It will be a matter for the Executive to consider whether, having regard to that fact, and to the fact that the applicant has already been tried twice, the applicant should be put on his trial for a third time.

19. I would grant the application for special leave to appeal, allow the appeal and order a new trial.

MASON J. This is an application for special leave to appeal from a judgment of the Court of Criminal Appeal of New South Wales dismissing an appeal by the applicant against his conviction on six charges of culpable driving before Torrington D.C.J. and a jury in the District Court at Sydney. The charges consisted of five charges of driving in a manner dangerous to the public causing death and one charge of driving in a manner dangerous to the public causing grievous bodily harm. They related to an incident on 18 May 1979 in which a prime mover and trailer leased by the applicant and driven by his employee, named Renshaw, suffered a brake failure while loaded with over 22 tonnes of coal travelling down a steep gradient along Mount Ousley Road near Port Kembla in New South Wales. The vehicle collided with two other vehicles as a result of which five people were killed and one suffered grievous bodily harm.

2. The offence of culpable driving is created by s.52A of the Crimes Act 1900 (N.S.W.). That section relevantly provides:

> "(1) Where the death of, or grievous bodily harm to, any person is occasioned through -
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> .....
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> (c) impact with a motor vehicle;

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and the motor vehicle was at the time of the impact, or at the time of overturning or leaving the highway, being driven by another person -

(e) under the influence of intoxicating liquor or of a drug; or

(f) at a speed or in a manner dangerous to the public,

the person who was so driving the motor vehicle shall be guilty of the misdemeanour of culpable driving.

.....

(3) It shall be a defence to any charge under this section that the death or the grievous bodily harm occasioned, as the case may be, was not in any way attributable to the fact that the person charged was under the influence of intoxicating liquor or of a drug or, as the case may be, to the speed at which or the manner in which the vehicle was driven."

3. In framing the indictment in conformity with s.52A, the Crown relied on s.351 of the Crimes Act. That section provides:

"Any person who aids, abets, counsels, or procures, the commission of any misdemeanour, whether the same is a misdemeanour at Common Law or by any statute, may be indicted, convicted, and punished as a principal offender."

The case for the Crown was that the applicant had procured the commission of the misdemeanour of culpable driving by Renshaw in that, with knowledge of or reckless indifference to the state of the brakes of the vehicle and to the danger which they constituted to the public, he had employed Renshaw to drive the prime mover and trailer when its brakes were in such a defective state that to drive it loaded with coal on a public road having steep gradients was to drive in a manner dangerous to the public.

4. The evidence established that the brakes of the vehicle were manifestly defective at the time of the collision and that the applicant, a former service station proprietor who was accustomed to carrying out the maintenance of the vehicles he owned or leased, had carried out repairs to the vehicle on 4 and 5 May 1979, some two weeks before the collision. At that time he replaced an oil seal on the prime mover. In the circumstances, it was clearly open to the jury to infer that he was aware of or at least suspected the defective state of the vehicle's brakes on those dates. To some extent their defects were obvious. The brake components on one of the wheels of the trailer, for example, were held together with a piece of wire. There was also evidence that the established practice was for Renshaw to inform the applicant of all mechanical defects and that Renshaw had contacted the applicant earlier on the day of the collision reporting that he had observed oil leaking from one of the wheels

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of the prime mover.

5. Before this Court the principal arguments for the applicant relate first to the applicability of s.52A to a person other than the driver of a motor vehicle and secondly, if the section is applicable, to the sufficiency of recklessness as to the state of the brakes and the danger which they constituted to the public as the mental element required to establish liability.

6. The misdemeanour created by s.52A is capable of being committed by a person who is the driver of a motor vehicle. The section was introduced because of the reluctance of juries to convict motorists of manslaughter in the factual circumstances which it envisages (Attorney-General v. Bindoff (1953) 53 SR(NSW) 489, at p 490). However, it is apparent from the terms of the section that mens rea is not an essential element of the misdemeanour which it creates. In order to support a conviction under s.52A it is sufficient that death or grievous bodily harm to a person was occasioned through the specified means at a time when the defendant was driving under the influence of intoxicating liquor or of a drug or at a speed or in a manner dangerous to the public. It is well settled that the test for determining whether the defendant was driving "in a manner dangerous to the public" is an objective one which takes into account "all matters connected with the management and control of a car by a driver when it is being driven" (R. v. Coventry [1938] HCA 31; (1938) 59 CLR 633, at p 639). Those matters, of course, include the mechanical condition of the motor vehicle (cf. Reg. v. Spurge (1961) 2 QB 205; Reg. v. Robert Millar (Contractors) Ltd. (1970) 2 QB 54). But the language of the section does not exclude the operation of a defence of mistake of fact on reasonable grounds and the defendant will not be liable in a case in which the dangerous manner of driving is due to a mechanical defect if he neither knew nor ought to have known of the existence of that defect (R. v. Coventry, at p 638; Reg. v. Spurge).

7. Clearly, s.52A does not in its terms apply to a person in the position of the applicant who was not the driver of the motor vehicle. Its application to the circumstances of the present case is dependent upon the common law doctrine of secondary participation as it is embodied in s.351.

8. It has been recognized that provisions such as s.351 do not themselves create substantive offences but are declaratory of the common law and procedural in nature (Du Cros v. Lambourne (1907) 1 KB 40; Gould & Co. v. Houghton (1921) 1 KB 509; Ex parte Coorey (1944) 45 SR(NSW) 287, at p 295; Reg. v. Glennan (1970) 91 WN (NSW) 609, at pp 612-613; Lenzi v. Miller (1965) SASR 1, at p 10). In misdemeanour, as distinct from felony, a person who aids, abets, counsels or procures the commission of an offence, and who may for convenience be called a secondary party, is regarded for all purposes of procedure as a principal offender. The reason is that the common law has not seen fit to "descend to distinguish the different shades of guilt in petty misdemeanours" (4 Bl. Comm. 36; cf. Gould & Co. v. Houghton, at p 522). Consequently, a secondary party to a misdemeanour may be convicted on an information or indictment which charges him with having committed the offence as principal (Du Cros v. Lambourne). It is essential to conviction on the basis of secondary participation, however, both (a) that the person charged aids, abets, counsels or procures the commission of the misdemeanour and (b) that the misdemeanour is actually committed (Thornton v. Mitchell (1940) 1 All ER 339; cf. Walsh v. Sainsbury [1925] HCA 28; (1925) 36 CLR 464, at p 477; Cain v. Doyle [1946] HCA 38; (1946) 72 CLR 409, at p 419), though there is no requirement that commission of the misdemeanour result in the conviction of another person (R v. Williams (1932) 32 SR(NSW) 504; O'Sullivan v. Thurmer (1955) SASR 76; Schulz v. Paige (1961) SASR 258).

9. In Mallan v. Lee [1949] HCA 48; (1949) 80 CLR 198, at p 216, Dixon J. observed that "the application of sections dealing with aiding and abetting may be excluded by the nature of the substantive offence or the general tenor or policy of the provisions by which it is created". A similar approach must be taken to apply to the exclusion of the doctrine of secondary participation at common law. It may, therefore, be inapplicable to a person of a class whom the substantive offence is designed to protect (Reg. v. Tyrrell (1894) 1 QB 710; Reg. v. Whitehouse [1977] EWCA Crim 2; (1977) QB 868; cf. United States v. Annunziato [1961] USCA2 408; (1961) 293 F 2d 373, at p 379)

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or in respect of whose participation some lesser punishment is imposed (Ellis v. Guerin (1925) SASR 282; cf. People v. Pangelina (1981) 117 Cal. App. 3d 414, at pp 420-421). It may also be inapplicable where the substantive offence itself involves some element of secondary participation (cf. Jenks v. Turpin (1884) 13 QBD 505, at p 526; Carmichael & Sons (Worcester) Ltd. v. Cottle (1971) RTR 11, at p 14). And in McAteer v. Lester (1962) NZLR 485, a legislative intent to exclude responsibility for secondary participation was found in s.194(1) of the Licensing Act 1908 (N.Z.) which made it an offence for a person to be found on licensed premises at certain times unless he satisfied the Court that he was on the premises for a lawful purpose.

10. It is inherent in the concept of secondary participation, however, that a person may be convicted on the basis of aiding, abetting, counselling or procuring the commission of a statutory offence although the statute creating the offence deals only with the liability of the principal offender. So much was stated by Coke and Hale (3 Co. Inst. 59; 1 P.C. 613, 614, 704). And it has been settled at common law at least since R. v. Potts [1818] EngR 57; (1818) Russ & Ry 353 (168 ER 841). This is also the case even where the offence is of such a nature that the person could not have committed it as a principal offender (cf. R. v. Goldie; Ex parte Picklum [1937] HCA 65; (1937) 59 CLR 254, at pp 263-264; Mallan v. Lee, at pp 210-211; Reg. v. Australian Industrial Court; Ex parte C.L.M. Holdings Pty. Ltd. (1977) 136 CLR 235, at pp 245-246). Morris v. Tolman (1923) 1 KB 166, to the extent to which it is based on the contrary view, should not be followed.

11. Contrary to the argument of counsel for the appellant, the mere description of the offender under s.52A as the driver of the motor vehicle cannot, therefore, be seen as evidencing a legislative intention to exclude the operation of the common law with respect to secondary participation. Nor, in my opinion, can any such intention be otherwise extracted from the nature of the offence or the terms of the section by which it is created. It follows that the applicant, although charged as a matter of procedure with the substantive offence, was liable to conviction on the basis of having aided, abetted, counselled or procured the commission of the misdemeanour of culpable driving by Renshaw.

12. The terms "aid, abet, counsel or procure" require some comment. In England the approach has been taken that those terms, as they occur in s.8 of the Accessories and Abettors Act 1861 (U.K.) (as amended by s.1 of the Criminal Law Act 1967 (U.K.) which abolished the distinction between felony and misdemeanour), should be treated as four separate words and, so far as possible, be given their ordinary meanings: Attorney-General's Reference (No. 1 of 1975) [1975] EWCA Crim 1; (1975) Q.B. 773. This approach has attracted some criticism (see: J.C. Smith, "Aid, Abet, Counsel or Procure" in P.R. Glazebrook (ed.), Reshaping the Criminal Law (1978), pp.120-137). In any case it has no application to the construction of the same terms as they appear in s.351. Once it is acknowledged that those terms are merely declaratory of the common law, it is to the common law concept of secondary participation, and not to the ordinary meaning of the words themselves, that regard must be had.

13. In felony at common law the terms "aid" and "abet" are generally used to refer to the conduct of a principal in the second degree, or one who is present at the commission of the offence by the principal offender, while the terms "counsel" or "procure" are generally used in relation to the conduct of an accessory before the fact, or one who is absent at the time of the commission of the offence (4 Bl. Comm. 34-36; Ferguson v. Weaving (1951) 1 KB 814, at pp 818-819). In substance, however, there appears to be no distinction between a principal in the second degree and an accessory before the fact beyond the question of presence. In misdemeanour, where no attempt has been made to classify the parties to an offence, each of the four terms is employed to refer to the conduct of a secondary participant. But the terms are descriptive of a single concept. In this regard, I would adopt the observation of Cussen A.C.J. in R v. Russell [1933] VicLawRp 7; (1933) VLR 59, at p 67, as being applicable to secondary participation in misdemeanour. Having listed various words, including "aiding" and "abetting" which have been used to refer to the conduct of a principal in the second degree in felony, his Honour observed:

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> "All the words abovementioned are, I think, instances of one general idea, that the person charged as a principal in the second degree is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission."

As R v. Russell itself illustrates, there need not exist any agreement or consensus between the principal in the second degree or secondary participant and the principal offender.

14. In the present case, particular emphasis was placed by the Crown on the conduct of the applicant as having "procured" the misdemeanour of culpable driving by Renshaw. While it may be that in the circumstances of a particular case one term will be more closely descriptive of the conduct of a secondary party than another, it is important that this not be allowed to obscure the substantial overlap of the terms at common law and the general concept which they embody. In approaching the question of whether recklessness as to the state of the brakes is a sufficient mental element to establish liability on the part of the applicant, it is to the mental element required by that general concept that one must look and not to the particular mental state which might be thought to inhere in the word "procure".

15. The application of the doctrine of secondary participation to statutory offences involving no mental element has been considered in a number of cases. In general, the absence of intention as an element of the substantive offence has not been regarded as obviating the necessity for knowledge on the part of the secondary party of the essential facts constituting the offence. The "link in purpose" between the secondary party and the principal offender is not established where a person does something to bring about, or render more likely, the commission of an offence by another in circumstances in which, through ignorance of the facts, it appears to him to be an innocent act.

16. The classic statement of the position is that of Lord Goddard C.J. in Johnson v. Youden (1950) 1 KB 544, at pp 546-547:

> "Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence, because to allow him to say, 'I knew of all those facts but I did not know that an offence was committed,' would be allowing him to set up ignorance of the law as a defence.
>
> The reason why, in our opinion, the justices were right in dismissing the informations against the first two defendants is that they found, and found on good grounds, that they did not know of the matters which in fact constituted the offence;

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> and, as they did not know of those matters, it follows that they cannot be guilty of aiding and abetting the commission of the offence."

This statement has received the endorsement of the House of Lords in Reg. v. Churchill (1967) 2 AC 224, at pp 236-237, and Director of Public Prosecutions for Northern Ireland v. Maxwell (1978) 3 All ER 1140 and has been followed in a number of English cases (Ackroyds Air Travel Ltd. v. Director of Public Prosecutions (1950) 1 All ER 933; Thomas v. Lindop (1950) 1 All ER 966; Ferguson v. Weaving; Smith v. Jenner (1968) Crim LR 99; D. Stanton & Son Ltd. v. Webber (1972) Crim.LR 544). The proposition that a person cannot be convicted of secondary participation at common law unless he knows the facts which must be proved to show that the offence has been committed has also been embraced in Australia (Abley v. Crosaro [1946] VicLawRp 11; (1946) VLR 53; Blackmore v. Linton [1961] VicRp 63; (1961) VR 374, at p 377; Reg. v. Glennan; Dennis v. Pight (1968) 11 FLR 458). The reasoning of the Full Court of South Australia in Lenzi v. Miller, if it proceeds on a different basis, cannot be supported.

17. The application of the proposition to the offence created by s.52A does not require that the applicant be shown to have any knowledge or intention concerning the impact with a motor vehicle or the occasioning of death or grievous bodily injury even though these matters must be proved to establish the offence. The reason is that the actions of both the principal offender and the secondary party under s.52A are complete where the vehicle is driven in a manner dangerous to the public. The circumstance that liability attaches under the section only where that manner of driving carries certain consequences, which are the natural and probable results of such driving, does not relieve the secondary party of culpability merely because he has no knowledge of those consequences.

18. As we have seen, knowledge of all the essential facts giving rise to the dangerous driving is necessary to constitute commission of the offence on the part of the applicant. But it is not necessary that there should be actual knowledge of all the essential facts constituting the offence in order to establish secondary participation. It is enough if the defendant has deliberately shut his eyes to a relevant fact or has deliberately abstained from obtaining knowledge by making an inquiry for fear that he may learn the truth (cf. Reg. v. Crabbe (unreported judgment, delivered 26 March 1985)). On this aspect of the case, notwithstanding my participation in the judgment of the Court of Criminal Appeal in Reg. v. Glennan, I am now in agreement with what the Chief Justice has written, including his comments on the passage in the judgment in Reg. v. Glennan (at p 614). It follows that the summing-up was defective to the extent that it referred to the concept of recklessness.

19. Further arguments for the applicant relate broadly to the manner in which the collision occurred. The evidence established that as the vehicle careered down the steep gradient along Mount Ousley Road following the failure of its brakes, the driver of another truck interposed his vehicle in front of it in an attempt to stop or slow it down. When the vehicle collided with the truck Renshaw lost his ability to steer. It was several seconds after this and some 200 metres further down the road that the vehicle collided with the two other vehicles as a result of which the deaths and injury occurred. In these circumstances, it is argued that there was a novus actus interveniens or alternatively that the vehicle was not being driven, either by Renshaw or in a manner dangerous to the public, at the time of impact with those vehicles.

20. The argument that there was a novus actus interveniens is in substance an argument that the deaths and harm occasioned were not attributable to the manner in which the vehicle was driven within the meaning of s.52A(3). The subsection requires only that the defence establish on the balance of probabilities the absence of any causal connection between the deaths and harm and the manner in which the vehicle was being driven (Reg. v. Windle (1958) 75 WN (NSW) 63). It is a question of fact and degree and one which was properly left to the jury.

21. The question of whether the vehicle was being driven by Renshaw or in a manner dangerous to

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the public at the time of impact is also one of fact and degree. A vehicle which becomes uncontrollable as a consequence of a dangerous manner of driving does not necessarily cease to be driven or to be driven in that manner because the driver is unable to steer it. In McBride v. The Queen [1966] HCA 22; (1965) 115 CLR 44, at p 47, Barwick C.J. said:

> "In some circumstances it may not be enough that the impact is the result of the vehicle having been driven at some earlier point of time in breach of the section. In other circumstances, the interval of time between the driving which is in breach of the section and the impact may be so short that the offending driving can be regarded as persisting to the moment of impact."

It was clearly open to the jury to conclude that the offending driving in this case persisted to the moment of impact.

22. The final argument for the applicant, which attacks the answer given by the trial judge to a question by the foreman of the jury on the issue of causation, is without substance. The foreman of the jury asked the following question:

> "Does a causal connection have to be established between
>
> (a) the driving in a manner dangerous (first section of the charge); and
>
> (b) 'when through impact ... with a certain other vehicle' (another section of the charge)?"

His Honour replied:

> "The position is that the death, or the grievous bodily harm must be occasioned to a person in a motor vehicle through the impact, that is caused by the impact, and the second thing is that impact must occur at a time when the vehicle is being driven in a manner dangerous to the public."

I can see no error in this reply.

23. However, having regard to my agreement with the Chief Justice as to the inadequacy of the instruction given to the jury on the question of knowledge, this being an important question in the law of criminal complicity, I would grant special leave to appeal, allow the appeal, quash the conviction and order a new trial.

WILSON, DEANE and DAWSON JJ. The appellant was convicted upon six counts of culpable driving under s.52A of the Crimes Act 1900 (N.S.W.). The charges arose from a series of collisions between a prime mover and semi-trailer owned or leased by the appellant and a number of motor cars in one of which a family of five persons were killed and in another of which the driver sustained grievous bodily harm. The appellant's motor vehicle was at the time of the accident driven by a man named Renshaw and the appellant, who was not present at the accident, was charged with culpable driving in reliance upon s.351 of the Crimes Act, which provides:

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> "Any person who aids, abets, counsels, or procures, the commission of any misdemeanour, whether the same is a misdemeanour at Common Law or by any statute, may be indicted, convicted, and punished as a principal offender."

The counts contained in the indictment charged the appellant with driving a motor vehicle in a manner dangerous to the public when through impact of the said motor vehicle with a certain other motor vehicle, a death, in the case of five counts, and grievous bodily harm, in the case of the sixth count, was occasioned.

2. Where s.351 is applicable, it permits the indictment to be framed in this way, but it is an undesirable practice because it does not make clear the real nature of the case against the accused. The Crown in this case did not allege that the appellant himself drove the vehicle, but that he aided, abetted, counselled or procured the driving of the vehicle in the circumstances alleged. Upon the assumption that s.351 applied, it was plainly preferable, in order to avoid the possible confusion of the jury, to have added sufficient particulars to indicate how it was that the appellant was charged with the offences alleged against him. See Reg. v. Maxwell (1978) 1 WLR 1350; (1978) 3 All ER 1140.

3. The Crown case against the appellant was that he procured the commission by Renshaw of the offences of culpable driving by sending him on to the road in a vehicle with defective brakes on the date on which the accident happened, which was 18 May 1979.

4. The evidence was clearly sufficient to establish that Renshaw was driving the appellant's prime mover and semi-trailer for him on 18 May 1979 and that on that day the vehicle's brakes were grossly defective. Although causation was no necessary part of the Crown's proof (absence of causation nevertheless providing a defence: s.52A(3)), the evidence also established that it was the failure of the vehicle's brakes which caused the accident in which five persons were killed and one suffered serious injury. There was evidence upon which the jury could find that the appellant knew of the defective condition of the brakes, although it was a real question whether he did in fact have that knowledge.

5. The evidence revealed that the appellant used to own a garage and was a mechanic. He attended to the maintenance of the vehicle and carried out repairs on it. When Renshaw noticed any mechanical defects in the vehicle he told the appellant of them. On the week-end of 5 and 6 May 1979, the appellant, together with Renshaw and another man, did some work on the vehicle, including work on its braking system. At the same time, they replaced an oil seal on the brakes and adjusted them. A week or two before the accident, the appellant and Renshaw changed some of the tyres on the vehicle. On 18 May 1979, the day of the accident, Renshaw telephoned the appellant and told him there was an oil leak from one of the wheels of the prime mover. Upon inspection of the vehicle after the accident, apart from the many less obvious defects, it was apparent that the offside front leading shoe on the trailer had been wired back to the back plate to prevent the shoe from dragging on the inside surface of the brake drum.

6. Section 52A of the Crimes Act, under the heading "Culpable driving", provides:

> "(1) Where the death of, or grievous bodily harm to, any person is occasioned through -
>
> ...
>
> (c) impact with a motor vehicle; or

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...

and the motor vehicle was at the time of the impact, or at the time of overturning or leaving the highway, being driven by another person -

(e) under the influence of intoxicating liquor or of a drug; or

(f) at a speed or in a manner dangerous to the public,

the person who was so driving the motor vehicle shall be guilty of the misdemeanour of culpable driving.

...

(3) It shall be a defence to any charge under this section that the death or the grievous bodily harm occasioned, as the case may be, was not in any way attributable to the fact that the person charged was under the influence of intoxicating liquor or of a drug or, as the case may be, to the speed at which or the manner in which the vehicle was driven."

7. The manner in which a vehicle may be driven includes its mechanical condition and if that condition is defective, it may, by reason of that fact, be driven in a manner dangerous to the public. See R. v. Coventry [1938] HCA 31; (1938) 59 CLR 633, esp. at p 639; Reg. v. Spurge (1961) 2 QB 205; Reg. v. Robert Millar Ltd. (1970) 2 QB 54. The offence created by s.52A does not require the prosecution to prove any state of mind on the part of the driver, although his act of driving must be conscious and voluntary and he may have a defence of mistake of fact on reasonable grounds: R. v. Coventry, at p 638. It is unnecessary to pursue in this case whether the driver must establish such a defence or whether the effect of his raising it is to cast upon the Crown the ultimate burden of disproving it beyond reasonable doubt. It is sufficient to observe that the defence is available. Otherwise the mental state of the driver is irrelevant, for the section imports an objective standard by which his driving is to be judged.

8. No question was, however, raised in this case that the actions of Renshaw were other than conscious and voluntary and no reliance appears to have been placed upon any exculpatory belief which may have been entertained by him. The accident occurred when the brakes failed on the appellant's vehicle and it careered down a steep descent unable to slow down or stop. Seconds before the accident, the vehicle collided with another truck which had been intentionally placed in its path in an effort to avoid the collisions which nevertheless ensued. Renshaw gave evidence that, after colliding with the other truck, the steering mechanism of the appellant's vehicle failed and he lost control of it. Thereafter the vehicle veered on to the wrong side of the road and collided with other vehicles, including those in which the five people died and the sixth was injured. The question was raised whether Renshaw was driving the appellant's vehicle at the time of the impact with the latter vehicles, having regard to the collision with the other truck and his loss of control, but, as Barwick C.J. pointed out in McBride v. The Queen [1966] HCA 22; (1966) 115 CLR 44, at p 47, " ... the interval of time between the driving which is in breach of the section and the impact may be so short that the offending driving can be regarded as persisting to the moment of impact." It was a question

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for the jury and the learned trial judge drew their attention to it in clear terms. There was evidence upon which the jury could find that Renshaw was still driving the appellant's vehicle at the time of the two impacts in question and it is clear that they did so find.

9. It is necessary, therefore, to proceed upon the basis that the offences of culpable driving were committed by Renshaw. It is those offences which the appellant was alleged to have aided, abetted, counselled or procured. To have done so he must have intentionally participated in the principal offences and so must have had knowledge of the essential matters which went to make up the offences of culpable driving on the occasion in question, whether or not he knew that those matters amounted to a crime. See Johnson v. Youden (1950) 1 KB 544, at p 546; Reg. v. Churchill (1967) 2 AC 224. As Viscount Dilhorne put it in Reg. v. Maxwell, at p 1355 of WLR; p 1144 of All ER, " ... it is clear that a person cannot properly be convicted of aiding and abetting in the commission of acts which he does not know may be or are intended." See also Ableyv. Crosaro [1946] VicLawRp 11; (1946) VLR 53; Blackmore v. Linton [1961] VicRp 63; (1961) VR 374; Dennis v. Pight (1968) 11 FLR 458. The requirement of intention on the part of an aider, abettor, counsellor or procurer or, if we may use the term, a secondary participant in a crime, is a requirement at common law and it is a requirement which is not affected by s.351 of the Crimes Act. That section merely restates the common law by providing, in effect, that in proceeding against a secondary participant in a misdemeanour, no distinction is to be drawn between the principal offender and the secondary participant. See Du Cros v. Lambourne (1907) 1 KB 40; Gould & Co. v. Houghton (1921) 1 KB 509; Carter Patersons & Pickfords Carriers, Ld. v. Wessel (1947) KB 849, at p 852; Richards v. McPherson [1943] VicLawRp 7; (1943) VLR 44; Ex parte Coorey (1944) 45 SR (NSW) 287, at p 295. Whilst in the case of felonies, separate offences are committed by principals in the second degree (aiders and abettors) and accessories before the fact (counsellors and procurers), a person who aids, abets, counsels or procures the commission of a misdemeanour may at common law be proceeded against as a principal because " ... it is not worth while to regard inferior criminals through a microscope, or to classify them scientifically, as felons were treated when most felonies were capital offences so far as the principals were concerned." See Gould & Co. v. Houghton, at p 520 per Darling J. It is the common law position which s.351 of the Crimes Act expresses and in so doing it does not exclude a guilty mind as a necessary ingredient of secondary participation in the commission of a misdemeanour.

10. We have mentioned at the outset the requirement of intent on the part of a secondary participant, because, in each count, the principal offence, culpable driving, is, in the sense in which we have explained it, an offence involving strict liability: the prosecution is not required to prove any mental state on the part of the driver. That does not, however, relieve the prosecution of the burden of proving intention on the part of a secondary participant and it is this consideration which we think lies behind a submission that the offence of culpable driving created by s.52A of the Crimes Act is of such a nature as to preclude secondary participation in it with the result that the application of s.351 is excluded. The application of that section may be excluded by necessary implication (see Mallan v. Lee [1949] HCA 48; (1949) 80 CLR 198, at p 216 per Dixon J.; Morris v. Tolman (1923) 1 KB 166; Ellis v. Guerin (1925) SASR 282) and it would be excluded if it appeared that the offence of culpable driving created by the legislature was intended to apply only to the driver of the vehicle involved and not to a secondary participant. The mere absence in the section of any reference to secondary participation does not, however, show any intention to exclude it. See Hale's Pleas of the Crown, vol.1 (1800), p 704; R. v. Potts [1818] EngR 57; (1818) Russ & Ry 353 (168 ER 841).

11. There is no difficulty in the proposition that a person may intentionally aid, abet, counsel or procure the driving of a vehicle in a particular manner or whilst the driver is in a particular state. Thus there may be secondary participation in the offence of driving in a manner dangerous to the public or of driving whilst under the influence of intoxicating liquor or of a drug. Those offences are created by s.4(1) and s.5(2) of the Motor Traffic Act 1909 (N.S.W.). But the offence of culpable driving is something more than those offences. It includes the acts necessary to constitute those offences but requires in addition that the driving should be attended by death or grievous bodily harm occasioned through impact with the vehicle being driven. Although it is clear that a person may

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intend to aid, abet, counsel or procure the driving of a vehicle in a dangerous manner or whilst the driver is under the influence of intoxicating liquor, it is not to be expected, except, perhaps, in rare instances, that in so doing he would intend that there should be an impact occasioning death or grievous bodily harm. So it is said, as we understand the submission, that whilst the driver of the vehicle may be guilty of culpable driving because the offence does not involve any mental state on his part, he cannot be aided, abetted, counselled or procured to commit the offence because that would require on the part of the secondary participant an intention which encompassed the occurrence of death or grievous bodily harm. It may be enough to answer the submission to point to the rare instances - intentionally encouraging a driver to drive in the face of oncoming traffic, for example - where the intent of the secondary participant may be said to extend to an impact occasioning death or grievous bodily harm, but the real answer lies elsewhere.

12. Before the introduction of the offence of culpable driving, motorists who caused death in the course of committing unlawful acts on the roads were charged with manslaughter. Although the manslaughter charged was involuntary manslaughter, juries were nevertheless reluctant to convict and the less grave offence of culpable driving was conceived. See Attorney-General v. Bindoff (1953) 53 SR (NSW) 489, at p 490. As with involuntary manslaughter, culpable driving does not require that the death, if it is a case involving death, should be intended. It is merely a consequence which serves to convert what would otherwise amount to one offence - driving in a manner dangerous to the public, for instance - into another and more serious offence. The same may be said of grievous bodily harm if it is a case of grievous bodily harm. Just as an unintended death may convert a crime such as an assault into involuntary manslaughter, so death or grievous bodily harm may convert a lesser driving offence into culpable driving, even if the death or grievous bodily harm is unintended.

13. At one time there may have been some basis for the proposition that no offence is known to the law of being an accessory before the fact to involuntary manslaughter. See Hale's Pleas of the Crown, vol.1 (1800), p.436. The proposition is based upon the notion that a man cannot counsel or procure what he does not intend and he cannot intend an accidental killing. But in Blackstone's Commentaries (21st ed. 1844) vol.4, pp.36-37, it was said:

> "And it is also settled, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other."

And Bramwell B. in Reg. v. Gaylor (1857) Dears & Bell 288, at p 291 (169 ER 1011, at p 1012) apparently thought that there was only one answer to the question:

> "Suppose a man, for mischief, gives another a strong dose of medicine, not intending any further injury than causing him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, another had counselled him to do it, would not he who counselled be an accessory before the fact?"

See also Reg. v. Taylor (1875) 13 Cox CC 68; Reg. v. Buck and Buck (1960) 44 Cr App R 213.

14. In Reg. v. Creamer (1966) 1 QB 72, at p 82, the Court of Criminal Appeal reviewed the

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authorities and expressed the law to be as follows:

> "A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence such as assault, or, in the present case, abortion. This can no doubt be said to be illogical, since the culpability is the same, but nevertheless, it is an illogicality which runs throughout the whole of our law, both the common law and the statute law. A comparatively recent example is clearly that of dangerous driving and causing death by dangerous driving. Bearing that in mind, it is quite consistent that a man who has counselled and procured such an illegal and dangerous act from which death, unintended, results should be guilty of being accessory before the fact to manslaughter."

15. That seems to us to be an accurate statement of the law and it follows that, although a person cannot aid, abet, counsel or procure the commission of an offence, even a statutory offence involving strict liability, without intent based upon knowledge of the essential facts which constitute the offence, the requisite intent and knowledge do not, in the case of culpable driving, extend to the occurrence of the death or grievous bodily harm which "ensues upon" the unlawful act the commission of which was aided, abetted, counselled or procured. The application of s.351 of the Crimes Act to the offence of culpable driving is not, therefore, excluded by necessary implication. Cf. Reg. v. Robert Millar (Contractors) Ltd.

16. The second main submission made on behalf of the appellant was that the learned trial judge misdirected the jury in charging them that it was sufficient to establish intent on the part of the accused if his vehicle was being driven by Renshaw with defective brakes and the applicant " ... ought to have known of the defect by the exercise of his reasonable care and diligence, that the accused knew or ought to have known by the exercise of reasonable care and diligence of the danger thereby to the public, and that the accused either ignored it or knowingly took such negligent measures to cope with it to make his conduct in employing the driver so to drive in a manner dangerous to the public." Elsewhere in the charge the learned trial judge referred to the possibility of "imputed knowledge" or "presumed knowledge" of the applicant of the defective state of his vehicle's brakes and finally in a re-direction he qualified his former remarks by saying:

> "I qualify that by limiting the words, 'Ought to have known by the exercise of reasonable care and diligence' by saying that a mere failure to make an inquiry which would yield knowledge of an essential fact is not in itself sufficient, for to act negligently does not make a person an aider or abettor. The prosecution for its part must show that he knew on 18 May that the brakes were defective and could constitute the driving of the vehicle to be driving in a manner dangerous to the public ... or on 18 May he acted so recklessly not

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caring whether these facts existed or not."

17. In giving these directions, the trial judge no doubt had in mind the judgment of the New South Wales Court of Criminal Appeal in Reg. v. Glennan (1970) 91 WN (NSW) 609 in which the following passage appears at p 614:

> "It may, therefore, be concluded that, in the case of statutory offences in which intention is not a necessary element, the law does not require actual knowledge on the part of the aider and abettor of all the essential facts of the offence. The element of knowledge or intention required of an aider and abettor might perhaps be more accurately expressed by saying that it must be shown that he either knew or suspected the existence of facts which would constitute the commission of the offence or, perhaps, that he acted recklessly, not caring whether the facts existed or not. Mere failure to make an inquiry which, if made, would yield knowledge of an essential fact, is not in itself enough to constitute knowledge of the fact, for it is accepted that to act negligently does not make a person an aider and abettor ... But the circumstances of a given case may be such as to reveal not merely a failure to make an inquiry, but a failure to make an inquiry which is of such a kind as to suggest that the defendant has deliberately abstained from acquiring knowledge because he suspected the existence of a fact which would have been ascertained on inquiry, or that the defendant has acted recklessly in the sense that he did not care whether the facts existed or not (Carter v. Mace (1949) 2 All ER 714; cf. Davies, Turner & Co. Ltd. v. Brodie (1954) 1 WLR 1364; (1954) 3 All ER 283)."

18. A number of things might be said about that passage. In the first place, there is no basis upon which it can be said that where a statutory offence requires no proof of intent, it is unnecessary in order to establish secondary participation in the commission of that offence to prove actual knowledge of all the essential facts of the offence. Intent is an ingredient of the offence of aiding and abetting or counselling and procuring and knowledge of the essential facts of the principal offence is necessary before there can be intent. It is actual knowledge which is required and the law does not presume knowledge or impute it to an accused person where possession of knowledge is necessary for the formation of a criminal intent. Secondly, although it may be a proper inference from the fact that a person has deliberately abstained from making an inquiry about some matter that he knew of it and, perhaps, that he refrained from inquiry so that he could deny knowledge, it is nevertheless actual knowledge which must be proved and not knowledge which is imputed or presumed.

19. The third question raised by the passage which we have cited from Reg. v. Glennan is whether it is possible to aid, abet, counsel or procure the commission of an offence by acting recklessly. Aiding, abetting, counselling or procuring the commission of an offence requires the intentional

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assistance or encouragement of the doing of those things which go to make up the offence. The necessary intent is absent if the person alleged to be a secondary participant lacks knowledge that the principal offender is doing something or is about to do something which amounts to an offence. We have already referred to Johnson v. Youden and the other cases in which this point is made clearly. The same point was expressed differently but with equal clarity by Lord Goddard C.J. in Thomas v. Lindop (1950) 1 All ER 966, at p 968, where he said:

> "More than once this court has pointed out that it is impossible to convict persons of aiding and abetting the commission of an offence unless they know the facts which must be proved to show that an offence has been committed ... It is, of course, not necessary to show that the person knew that it was an offence, because he cannot plead ignorance of the law, but where anyone is charged with aiding and abetting a person to commit an offence, it must, at least, be shown that he knew what that person was doing. A person who does not know of the acts which another person is doing cannot be charged with aiding and abetting him because he does not know that he is doing acts which amount to an offence."

There are, of course, those cases which hold that the requisite knowledge need not extend to the precise crime which is in fact committed, although some crime must be in contemplation at the time secondary participation is alleged to occur, a general criminal purpose being insufficient. See R. v. Lomas (1913) 9 Cr App R 220; Reg. v. Bullock (1955) 1 WLR 1; (1955) 1 All ER 15; R v. Bainbridge (1960) 1 KB 129; Reg. v. Maxwell. The questions which these cases raise do not arise in this case and it is unnecessary to do more than refer to them.

20. In this case, the Crown contends that the appellant procured the commission of the offences of culpable driving by Renshaw by sending him on to the road in a vehicle with defective brakes. It contends that, even if the appellant had no knowledge of the state of the vehicle's brakes, it was sufficient that he acted recklessly in doing what he did. The precise nature of the recklessness relied upon is not entirely clear and it is understandable that it occasioned the learned trial judge some difficulty in attempting to explain it to the jury. It cannot have been inadvertent carelessness, however gross, for it can hardly be suggested that a person can accidentally become a secondary participant in the commission of a crime. The recklessness contemplated must have involved some foresight on the part of the appellant that the driving of the vehicle on the road would probably (or possibly - it was not made clear which) be dangerous, because of the defective condition of the brakes. In effect, that would mean, if the Crown were correct, that it would have proved a sufficient intent on the part of the appellant in all the circumstances if it established that he knew that the brakes on the vehicle were probably (or possibly) defective.

21. For the purposes of many offences it may be true to say that if an act is done with foresight of its probable consequences, there is sufficient intent in law even if such intent may more properly be described as a form of recklessness. There are, however, offences in which it is not possible to speak of recklessness as constituting a sufficient intent. Attempt is one and conspiracy is another. And we think the offences of aiding and abetting and counselling and procuring are others. Those offences require intentional participation in a crime by lending assistance or encouragement. They do not, of course, require knowledge of the law and it is necessary to distinguish between knowledge of or belief in the existence of facts which constitute a criminal offence and knowledge or belief that those facts are made a criminal offence under the law. The necessary intent is absent if the person alleged to be a secondary participant does not know or believe that what he is assisting or encouraging is

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something which goes to make up the facts which constitute the commission of the relevant criminal offence. He need not recognize the criminal offence as such, but his participation must be intentionally aimed at the commission of the acts which constitute it. It is not sufficient if his knowledge or belief extends only to the possibility or even probability that the acts which he is assisting or encouraging are such, whether he realizes it or not, as to constitute the factual ingredients of a crime. If that were sufficient, a person might be guilty of aiding, abetting, counselling or procuring the commission of an offence which formed no part of his design. Intent is required and it is an intent which must be based upon knowledge or belief of the necessary facts. To the extent that Reg. v. Glennan suggests the contrary, it is not, in our view, in accordance with principle and does not correctly state the law.

22. The authorities relied upon in the passage which we have cited in Reg. v. Glennan do not appear to us to provide adequate support for the propositions which it contains. Carter v. Mace was a case in which the appellant was alleged to have aided and abetted the commission of the statutory offence of failing to comply with the conditions of a licence to carry goods. The principal offence was committed by the owner of a lorry which the appellant, who carried on the business of a transport clearing house, hired to carry goods for him. A Divisional Court held that if the appellant undertook this class of business he was bound to see that contracts were carried out in a legal manner and, having failed to do so, was guilty of aiding and abetting the commission of a statutory offence. The precise basis of the decision is difficult to discern. In Davies, Turner & Co. Ltd. v. Brodie, a Divisional Court was referred to Carter v. Mace and it expressed the view that it was a decision on its own particular facts and laid down no proposition of law. In Davies, Turner & Co. Ltd. v. Brodie, the defendant was charged with aiding and abetting the commission of the offence of using a goods vehicle without the required permit. The defendant had obtained an assurance from the driver of the vehicle that he had the necessary permit. The Court held that because the appellant " ... had no reason to suppose that the facts were present which would constitute an offence ... ", the offence of aiding and abetting was not made out. Lord Goddard C.J., who also presided in Carter v. Mace, said, at p 1367 of WLR; cf. p 286 of All ER:

> "If a person shuts his eyes to the obvious or refrains from making any inquiry where a reasonably sensible man would make inquiry, I think the court can find that he was aiding and abetting, certainly if he shuts his eyes to the obvious."

The fact of exposure to the obvious may warrant the inference of knowledge. The shutting of one's eyes to the obvious is not, however, an alternative to the actual knowledge which is required as the basis of intent to aid, abet, counsel or procure. Lord Goddard appears to have recognized this by concluding his judgment with the words:

> " ... that is the point: you must know the essential matters which constitute the offence."

23. The Court of Criminal Appeal in Reg. v. Glennan also referred in its judgment to Poultry World Ltd. v. Conder (1957) Crim LR 803 and Bateman v. Evans (1964) 108 SJ 522. In the report of Poultry World Ltd. v. Conder, a Divisional Court is said to have decided that a person could not be convicted of aiding and abetting unless he had knowledge of the facts which constitute the offence or unless he deliberately abstained from obtaining such knowledge. In the commentary upon the decision, however, it is made clear that the Court took the view that the offence of aiding and abetting could not be established unless there was proof of knowledge or " ... such negligence as to amount to deliberate shutting of the eyes, i.e. connivance." Connivance can, of course, only be established on the basis of knowledge, whether proved directly or by inference.

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24. In Bateman v. Evans, the defendant was convicted of aiding and abetting the commission of the offence of driving while disqualified. The defendant believed the driver's assurance that he had lodged an appeal against his disqualification and was permitted to drive. On a case stated by justices of a Divisional Court, it was held that the conviction should be quashed upon the basis " ... that A had a bona fide belief that B was entitled to drive, and the case fell within Davies, Turner & Co. Ltd. v. Brodie".

25. The passage which we have cited from Reg. v. Glennan was unnecessary for the decision in that case, which held that a person charged with aiding and abetting the offence of driving with a prescribed percentage of alcohol in the blood did not have to know the percentage in order to know all the facts which gave rise to the commission of the principal offence.

26. It follows that, in our view, the trial judge was wrong in directing the jury that reckless behaviour on the part of the appellant would suffice to establish the intent necessary to constitute him the procurer of the offences of culpable driving. That is sufficient to determine this case and no point is to be served in examining the terms of the direction given. Since there was evidence, not without its weaknesses, from which the jury might have inferred that the appellant knew the facts which went to make up the offence of culpable driving, there was a case to answer. The proper course is, therefore, for this Court to grant special leave, allow the appeal, quash the conviction and order a new trial.

27. However, there are some special features of this case which should, perhaps, be mentioned. These proceedings against the appellant have been pending since May 1979. There have been two trials, two appeals to the Court of Criminal Appeal and an application for special leave to this Court. The appellant is a man of some 58 years of age who, as the Court of Criminal Appeal said, " ... came before the Court as a man of good character who had led a very hard-working and enterprising life in this country." On 17 September 1982, he was sentenced by the trial judge to concurrent periods of imprisonment of five years each on the first five counts and three years on the sixth count. A non-parole period of two years was specified. On 30 May 1984, these sentences were quashed by the Court of Criminal Appeal and concurrent periods of imprisonment of two and a half years on each of the first five counts and two years on the sixth were imposed. The legislation relating to parole having changed in the meantime, the Court of Criminal Appeal specified a non-probation period of one year and three months and made a probation order for the release of the appellant at the expiration of that period. It was not suggested that the appellant was in any way responsible for the delays which have occurred and it is plain that the protracted nature of the proceedings must have subjected him to prolonged strain. No doubt these matters will be given due weight when consideration is given by the Crown to the course which should be taken.

ORDER

Application for special leave to appeal granted.

Appeal allowed.

Order that the judgment of the Court of Criminal Appeal of the Supreme Court of New South Wales be set aside. In lieu thereof order that the appeal to that Court be allowed, that the conviction and sentence be set aside and that a new trial be had.

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COURT OF APPEAL FOR ONTARIO

2004 CanLII 59974 (ON CA)

WEILER, BORINS AND SIMMONS JJ.A.

BETWEEN:

HER MAJESTY THE QUEENRespondent

- and -

RONALD WILLIAM ROACHAppellant

Gregory Lafontaine for the appellant
Christine Tier for the respondent

HEARD: December 8, 2003

On appeal from conviction entered on November 27, 2001, and the sentence imposed on March 27, 2002, by Justice Robert N. Weekes of the Superior Court of Justice, sitting with a jury.

BORINS J.A.:

I

[1] The appellant, Ronald Roach, and Robert Stoangi were tried by a jury presided over by Weekes J. upon an indictment alleging that:

> [B]etween the 1st day of January, in the year 1999 and the 27th day of April, in the year 1999, both dates inclusive, at the Town of Midland, in the Central East Region, and elsewhere in the Province of Ontario and in the United States of America, they did by deceit, falsehood or other fraudulent means, to wit: being parties to an enterprise which by telephone misrepresented to persons that they had won valuable prizes, defraud the public of money, property or other valuable security, of a value exceeding five thousand dollars, contrary to the Criminal Code of Canada.

And further that they:

> [B]etween the 1st day of January, in the year 1999 and the 27th day of April, in the year 1999, both dates inclusive, at the Town of Midland, in the Central East Region, and elsewhere in the Province of Ontario and in the United States of America, they

standard may catch some legitimate undercover crime investigation techniques that involve encouragement of crime, with no intention that the crime counselled actually be carried out. (LaFave and Scott, Substantive Criminal Law at Ch. 6 §6.11, p. 14; Glanville Williams, Textbook of Criminal Law, 1st ed. (London: Steven & Sons, 1978 at p. 386).

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[44] In summary, the mens rea for party liability is contained in s. 21(1)(b) of the Criminal Code that requires that the aid given by the accessory to the principal be "for the purpose of aiding" the principal to commit the crime of which the accessory has been charged. To be convicted as an aider, the defendant must not only assist the principal in the commission of the offence, but must intend to do so, although it is not necessary that the aider know all the details of the crime committed. It is sufficient that the aider was aware of the type of crime to be committed and knew the circumstances necessary to constitute the crime that he or she is accused of aiding. On the basis of Woolworth and McDaid knowledge will include actual knowledge or wilful blindness, but will not include recklessness. This accords with Professor Roach's approach regarding the high level of mens rea required for party liability and with the opinions of the other legal scholars that I have reviewed.

[45] With respect to the crime of aiding Dube to commit fraud, on the application of s. 21(1)(b), the appellant was entitled to a clear instruction in conformity with this analysis. Although the trial judge's instructions on s. 21(1)(b) were generally correct, as I have explained, his failure to instruct the jury on the proof of the appellant's knowledge and intention that he was aiding Dube to commit a crime coupled with his failure to correct the Crown's erroneous position that recklessness satisfies the mens rea of s. 21(1)(b) led the jury to believe that it did. Therefore, the appellant is entitled to a new trial on count one. In addition, because the appellant had provided an innocent explanation for his involvement in the fraudulent telemarketing scheme, and the possibility existed that Dube may have misled him to believe that it was legal, a better W.(D.) instruction more meaningfully situated in the trial judge's instruction would have been preferable. However, this in itself would not have warranted ordering a new trial.

V

[46] As for the instruction on the conspiracy count, I have earlier expressed my concern about the adequacy of this perfunctory instruction. As there is to be a new trial on count one, it is unnecessary to comment extensively on the trial judge's instruction on count two. As I understand the instruction, by telling the jury that it should apply his instruction on count one to count two, the trial judge could have been understood as saying that recklessness would satisfy the mens rea of the substantive offence of conspiracy to commit a criminal act. He made it clear that recklessness would satisfy the mens rea in his answers to the jury's questions that are reproduced in paragraph 25.

[47] In my view, the trial judge erred by leaving to the jury recklessness as a basis for liability for the offence of conspiracy to commit fraud. In R. v. Lessard (1982), 10 C.C.C. (3d) 61 at 86 (Que. C.A.) it was held that the crime of conspiracy cannot be committed by mere recklessness as to the object of the agreement. Lessard was applied in United States

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1974 CarswellOnt 454, 3 O.R. (2d) 629, 18 C.C.C. (2d) 23, 46 D.L.R. (3d) 345, 16 C.P.R. (2d) 272

R. v. F.W. Woolworth Co.

Regina v. F.W. Woolworth Co. Ltd.

Ontario Court of Appeal

Kelly, Dubin and Martin, JJ.A.

Judgment: March 21, 1974

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Counsel: *A. Maloney, Q.C.*, for accused, appellant.

J.A. Isaac, for the Crown, respondent.

Subject: Intellectual Property; Criminal; Property; Corporate and Commercial

Criminal Law --- General principles involving criminal law — Elements of crime — Mens rea — Necessity of intention.

Knowledge — Courts recognizing both actual knowledge and imputed knowledge in criminal law — Imputed knowledge exemplified by accused refraining from making inquiries -- Constructive knowledge occurring where accused having means of knowledge not recognized by criminal law necessary to prove that aider knew he was — Mere constructive knowledge insufficient for liability — Accused acquitted.

Trade and Commerce --- Consumer protection — Misleading advertising — Untrue statements — Strict liability.

Combines Investigation Act, R.S.C. 1970, c. C-23.

Misrepresentation as to ordinary price -- Aiding and abetting with offence of strict liability -- Necessity still to prove mens rea in aider or abetter.

The judgment of the Court was delivered by *Kelly, J.A.*:

1 On the application made on behalf of F.W. Woolworth Co. Limited (Woolworth) pursuant to s. 762 of the *Criminal Code* the summary conviction Court stated a case in the following terms:

> STATED CASE by His Honour Judge R.B. Dnieper, Provincial Court Judge, in the Provincial Court (Criminal Division) Judicial District of York, under the provisions of Section 734 of the Criminal Code of Canada.
>
> I On the 29th day of March, 1971, an Information was laid under oath by Mr. Jules Arvay for that the above-named F.W. Woolworth Co. Limited:

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Between the 3rd day of February, 1971, and the 10th day of February, 1971, at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did for the purpose of promoting the sale of "Ball Point" Pens, named — Auto Magic — make a misleading representation to the public concerning the price at which such articles have been, are, or will be ordinarily sold, contrary to Section 33C (1) of the Combines Investigation Act, R.S.C., 314, and its amendments.

II On the 17th day of May, 1971, the said charge was duly heard before me in the presence of the accused and after hearing the evidence adduced and the submissions made by counsel on behalf of the Crown and the accused, I found the said F.W. Woolworth Co. Limited guilty of the said offence and convicted it thereof, but at the request of counsel for the said F.W. Woolworth Co. Limited, I state the following case for the consideration of this Honourable Court:

It was shown before me and I found as a fact:

1. The accused, F.W. Woolworth Co. Limited, the Appellant herein ("Woolworth") is a corporation carrying on the business of a retail department store at the corner of Yonge Street and Queen Street in the Municipality of Metropolitan Toronto in the Judicial District of York (the "store premises").

2. The said store premises were managed at the material times hereinafter set out by one Peter Fawcett ("Fawcett"), a full-time store manager employed by the accused Woolworth. Fawcett, as store manager, had authority to enter into agreements on behalf of Woolworth with persons for the purpose of allowing such persons to demonstrate, display, and sell or give away wares owned by the said persons in the said store premises.

3. On or about January 15, 1971, Fawcett was approached by one James Healey ("Healey") who requested that Fawcett agree to allow Healey to demonstrate and sell certain pens hereinafter more particularly described in the said store premises. Fawcett on behalf of the accused Woolworth in consideration for Healey's agreement to pay Woolworth thirty per cent of the sales of the said pens agreed to rent Healey a store counter and an area of floor space in front thereof in the said store premises for the purpose of demonstrating and selling the said pens during Woolworth's normal store hours. There was no discussion with respect to Healey being an employee of Woolworth and the parties understood that Healey was in business for himself. There was no discussion of Healey being a representative or agent of the accused Woolworth. The agreement was oral and there was no document or other written evidence of same admitted in evidence.

4. Healey employed one John McPhee ("McPhee") on a day-to-day basis in consideration for twenty-five per cent of the sales of the said pens. McPhee demonstrated and sold the pens to the public in the manner hereinafter more particularly set out.

5. For a period of approximately five weeks in January and February of 1971, including the dates hereinafter referred to, Healey and McPhee were on the said store premises under the terms of the said agreement referred to in paragraph 3 hereof.

6. The property, fixtures, equipment and wares used in connection with the demonstration and sale of the said pens were as follows:

(i) a store counter, floor space and cash register, being part of the said store premises and equipment owned by the accused Woolworth;

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(ii) a display booth which was placed on top of the said store counter and a sign affixed thereto with the wording "free sample" or similar words written on a sign attached thereto, and a small microphone and public address speaker, both of which were brought onto the premises and owned by Healey, and removed by him at the end of the said five week peri- od;

(iii) an inventory of the following types of pens and pen refills:

(a) a pen and pencil set consisting of a ball point pen named — "Auto Magic" ball point pen and a pencil said to be a liquid lead pencil also named — "Auto Magic",

(b) a ball point pen and pen stand with a clip called a "telephone clip-on" pen, and

(c) ball point pen refills.

Healey owned the inventory of "Auto Magic" ball point pen and pencil sets, telephone clip-on pens and ball point pen refills which he brought onto the said store premises at the commencement of the said five week period. Healey purchased further inventory of pens and pen refills in his own name which was ordered from a U.S. supplier, described as Speedy Sales, and picked up by Healey at the Toronto International Airport from time to time to replace pens and pen refills sold out of inventory. Healey removed the remainder of the inventory of pens and pen refills on the termination of the said five week period.

7. Any refunds requested by purchasers from time to time were the responsibility of Healey.

8. On February 4 of 1971 McPhee at the said counter and booth in the said store premises represented to a group of people in the course of a demonstration and sales speech in effect that he represented a large manufacturing company, that the said pen set which he called "Auto Magic" by Packard was made to retail for $7.95, that his company was giving the pens away free to persons who purchased the said telephone clip-on pen which was made to retail at $3.95, but which was being sold for $2.98, and that there were also further bonuses being refills for ball point pens.

9. On February 5 at the said store premises, McPhee made the following representations to a group of people in the course of demonstrating the said Auto Magic ball point pens and making a sales speech said to be for the purpose of launching a brand new product not yet on sale:

Now, remember the name, that's Auto Magic by Packard, the dual pen set, as you see. Designed to retail at $7.95, and

Now, remember the name, that is telephone clip-on pen by Packard. Goes on sale and designed to retail at $3.98.

10. On February 5 at the said store premises, McPhee made the following representations to a group of people in the course of demonstrating the said Auto Magic ball point pens and making a sales speech said to be for the purpose of launching a brand new product not yet on sale:

It's Packard Auto Magic, the dual pen set. The two, designed to retail at $7.95, get one, they're really worth it, and

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Now remember the name. It's telephone clip-on pen by Packard. Designed to retail at $3.98, and

One of our Packard Auto Magic dual pen sets which you see here is $7.95, and

One of our new telephone clip-on pens at the nationally advertised price of $3.98.

11. On completion of each of the said sales speeches, McPhee sold a number of telephone clip-on pens for $2.98 and subsequently delivered to each purchaser one "Auto Magic" ball point pen set, and a number of ball point pen refills which were represented to be as bonuses to the purchasers. No receipts were given to persons making purchases.

12. I found that the aforesaid representations were made for the purpose of promoting the sale of the ball point pens named "Auto Magic".

13. I also found as a fact that McPhee made the following statement as part of his sales speech:

How many of you same people would take this set from me now, absolutely free? Now take it home and show it to your friends and help us to advertise our new product and take along with you one of our new telephone clip-on pens at the nationally advertised price of $3.98. Would you like to raise your hands? Thank you sir, thank you sir, thank you ladies.

14. I found that the aforesaid representations were false representations of the ordinary selling price of the ball point pens named "Auto Magic" since testimony from the several witnesses which I accepted placed the maximum selling price between $2.00 and $6.95 and not $7.95 as was stated by McPhee.

15. The said sales speeches including the representations aforesaid were prepared in writing by Healey. They were not considered or approved by Fawcett. There was no evidence of consideration or approval of the said representations by any other person on behalf of the accused Woolworth.

16. McPhee in his sales speeches represented that he was associated with a large manufacturing company, the Packard Pen Company. At no time during the said sales speeches did McPhee represent that he was an employee, agent, servant or representative of Woolworth or hold himself out as being associated with Woolworth.

17. Fawcett made no express arrangement directly with McPhee permitting him to be on the premises but understood that he was employed by Healey. Fawcett had no knowledge of the terms of the agreement between McPhee and Healey or of what they did with the proceeds gained from sales.

18. Fawcett had no control over the manner in which Healey or McPhee demonstrated and sold the said pens except to terminate their permission to be on the said store premises.

19. I found that the accused Woolworth:

(i) Knew or should have known by informing itself as to what was said by Mr. McPhee;

(ii) was a participant;

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(iii) was a partner with Healey in this venture;

(iv) provided the facilities without charge for the selling of the ball point pens named "Auto Magic";

(v) received a commission from the accused Healey of 30% of the gross sales of the ball point pens named "Auto Magic".

20. Upon convicting the accused Woolworth, I pronounced the following Order pursuant to Section 31(1) of the Combines Investigation Act, R.S.C. 1952, Chapter 314, as amended:

F.W. Woolworth Company is ordered by this Court not to commit the offence of which the company was this day convicted; that is, the company is prohibited from making any materially misleading representation to the public by any means whatsoever for the purpose of promoting the sale of articles which have or will be sold.

The said F.W. Woolworth Co. Limited desires to question the validity of the said conviction on the grounds that it is erroneous in point of law, the questions submitted for the judgment of this Honourable Court being:

QUESTIONS

1. Whether the evidence constituted any evidence upon which the said appellant could be convicted of the said offence.

2. Whether the evidence constituted any evidence of a representation made for the purpose of promoting the sale of "Ball Point Pens named Auto Magic".

3. Whether the evidence constituted any evidence of the ordinary selling price of "Ball Point" Pens named Auto Magic.

4. Whether the Court erred in law in holding that F.W. Woolworth Co. Limited was a participant.

5. Whether the Court erred in law in holding that F.W. Woolworth Co. Limited was a partner with one Healey.

6. Whether the Court erred in law in granting an Order under Section 31(1) of the Combines Investigation Act R.S.C. 1952, Chapter 314.

7. Whether the Court erred in law in refusing to restrict the terms of the said Order to a continuation or repetition of the making of misleading representations to the public concerning the price at which "Ball Point" Pens named Auto Magic have been, are, or will be ordinarily sold for the purpose of promoting the sale of such article.

2 On May 15, 1973, Houlden, J., answered in the affirmative solely the first question propounded and dismissed the appeal [11 C.C.C. (2d) 572, 11 C.P.R. (2d) 229, 21 C.R.N.S. 371]. From that disposition this appeal was taken by Woolworth.

3 The grounds which were advanced in support of the appeal were the following:

1. That the representations made related to the distribution of the ball point pen named "telephone clip-

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on" and not the sale of the pen as charged in the information.

2. That the learned trial Judge misdirected himself with respect to the necessary elements of *mens rea.*

3. That the learned trial Judge erred in law in granting an order under s. 31(1) [am 1953-54 c. 51, s. 750, 1960, c. 45, s. 12] of the *Combines Investigation Act*, R.S.C. 1952, c. 314, and amending Acts (now R.S.C. 1970, c. C-23, s. 30(1)).

4. That the learned trial Judge erred in refusing to restrict the order made under s. 31(1) to the repetition or the continuation of the offence of which Woolworth was convicted.

4 Before this Court it was conceded that Healey and his employee McPhee had violated s. 33C(1) of the Act (as enacted by 1960, c. 45, s. 13 [now s. 36]) and that Fawcett came within the class of employees whose acts were those of his corporate employer in relation to the arrangement made with Healey.

5 I am of the opinion that there was evidence to support the conviction of Healey and McPhee on the charge as particularized in the information.

6 Since the offence is the making of a misleading representation, to fix Woolworth with criminal responsibility for the making of it, the Crown was required to connect Woolworth with the "making" in some manner which would in law constitute Woolworth criminally liable for such representation. This could have been done only:

1. By fixing Woolworth with the vicarious liability for the acts of Healey and McPhee.

2. By establishing that Woolworth was a party to the offence by reason of s. 21 of the *Criminal Code.*

7 Before dealing with the legal responsibility flowing from the facts, some consideration must be given to the findings of the trial Court, particularly to those set out in para. 19 of the stated case:

1. "Woolworth knew, or ought to have known, by informing itself as to what was said by Mr. McPhee."

Devlin, J., in *Roper v. Taylor's Central Garages (Exeter), Ltd.*, [1951] 2 T.L.R. 284, described three degrees of knowledge — first, actual knowledge; second, the situation where the person to whom the knowledge is imputed deliberately refrains from making inquiries, the result of which he might not care to have, and third, constructive knowledge often described by the words "ought to have known" meaning that the person had in effect the means of knowledge. He stated at p. 289:

> There is a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make. If that distinction is kept well in mind I think that justices will have less difficulty than this case appears to show they have had in determining what is the true position. The case of shutting the eyes is actual knowledge in the eyes of the law; the case of merely neglecting to make inquiries is not knowledge at all — it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law.

Since there is no foundation for the conclusion that Fawcett deliberately refrained from making inquiries as to McPhee's conduct in making sales, the finding of the trial Court was one of constructive knowledge which in criminal law is not knowledge at all.

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2. "Woolworth was a participant."

The Act contains for the limited purposes of s. 41 [am. *idem*, s. 18] thereof (now s. 45), a definition of "participant" but this term has no relevancy whatsoever to the determination of Woolworth's guilt; nor, in my view, does the section under which Woolworth was charged impose criminal liability on one who could be styled broadly a "participant" unless it can be held a party within the meaning of s. 21 of the *Criminal Code*.

3. "Woolworth was a partner with Healey in this venture."

The undisputed facts as to the relationship between the appellant and Healey will not support the existence of a partnership. The provision of the facilities was not without charge and even if that had been the case it would not have been determinative of the existence of a partnership. The receipt of a percentage of the gross sales does not of itself create a partnership: *Partnerships Act*, R.S.O. 1960, c. 288, s. 3, para. 2 [now R.S.O. 1970, c. 339]. The inventory was owned by Healey and Woolworth had no proprietary interest in it. There is a complete absence of the carrying on of business in common with a view to profit which is the essential character of a partnership.

8 Accepting, as Woolworth appeared to accept, that the offence created by s. 33 is one of [rep. & sub. *idem*, s. 13] is one of strict liability in order to hold it vicariously liable, there still must be proven such a relationship between the actual maker and defendant that the act of the maker may be imputed to the defend- ant.

9 Examples of such relationship are that of master and servant where the master may be responsible for his servant's acts within the scope of his employment — principal and agent where the principal may be responsible for his agent's acts and that where there has been delegation to another of a sphere of activity within which the acts of the delegate are performed on behalf of the delegator. There existed no such relationship between Woolworth and Healey and McPhee since Healey was conducting his own business and Woolworth had no control over the manner in which Healey and McPhee demonstrated or sold the pens except to terminate their permission to be on the store premises. The appellant and Healey were either lessor and lessee or licensor and licensee; neither relationship would justify imposing vicarious liability on Woolworth for the acts of either Healey or McPhee.

10 It remains to consider whether Woolworth was a party to the offence by virtue of s. 21 of the *Criminal Code* made applicable to the offence created by the Act by s. 27 of the *Interpretation Act*, 1967-68 (Can.), c. 7 (now R.S.C. 1970, c. I-23).

11 As has been stated by Lord Reid in *Sweet v. Parsley*, [1970] A.C. 132, there is a presumption that *mens rea* is an essential element of every offence unless some reason can be found for holding that it is not necessarily so; when Parliament has chosen to create an offence of absolute liability the Courts must carry out its will but only to the extent that Parliament's intention to displace the presumption is clearly stated. In enacting s. 33 Parliament had the option of including in the Act provisions extending culpability for the infraction of the section to those other than the actual perpetrators in which even the Courts would have been called upon to interpret the scope of the words used by Parliament to convey its intention. However, instead of so doing Parliament has chosen to rely upon the extension by s. 21 imported into any offence created by statute. Section 21 reads as follows:

21(1) Every one is a party to an offence who

(a) actually commits it,

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(b) does or omits to do anything for the purpose of aiding any person to commit it, or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

12 It is sought to make Woolworth a party as having done or omitted to do something for the purpose of aiding Healey and McPhee to commit the substantive offence.

13 There are two principal reasons for holding that Woolworth was not a party to the offence charged:

1. Even with respect to offences of strict liability the alleged aider must know that he is aiding. Although it is not necessary that it be proven that he know that the conduct he is aiding constitutes an offence it is necessary that the accused be proven at least to have known the circumstances necessary to constitute the offence he is accused of aiding.

Counsel before Houlden, J., informed him that diligent search had not disclosed any authority in point. He was left to rely upon the following dictum in *R. v. Jacobs et al.*, [1944] K.B. 417 at p. 420, [1944] 1 All E.R. 485 at p. 487:

> We desire, however, to guard ourselves against being supposed to assent to the proposition that a person who aids and abets another in the commission of an offence not involving any mens rea in the principal cannot be convicted in the absence of proof of mens rea on his own part.

This dictum formed no essential part of the decision of the issue before the Court. The Court was dealing with the sufficiency of a direction given to a jury in the trial of charges of conspiracy as to what constituted aiding and abetting. After approving as correct the instructions given by the trial Judge the judgment went on to make, due perhaps to over-caution, a reservation as to what the Court was not deciding. It is sufficient to say that when a Court indicates the exact limits it wishes to be put upon its pronouncements no inference may be drawn as to what would have been its decision on the points it has disclaimed as part of its decision.

Subsequent cases appear to have more relevancy to the point at issue than has the case quoted. In *National Coal Board v. Gamble*, [1959] 1 Q.B. 11, the Board as the operator of a mine, through its employee, a weighmaster, gave to the driver of an independent haulage contractor a delivery ticket which indicated that the vehicle was overweight. The driver of the vehicle, who chose to risk driving as he had loaded, was apprehended and convicted. The Board which had no control over the driver, but whose ticket was necessary for the driver to leave the Board's premises, was charged as an aider and abettor. On the review of the conviction by the Queen's Bench Division, Lord Goddard, C.J., stated at p. 18:

> In *Ackroyds Air Travel, Ltd. v. Director of Public Prosecutions*, [1950] 1 All E.R. 933, 936, I stated the law with regard to aiding and abetting in this way: "...a person could only be convicted ... as an aider and abettor if he knew all the circumstances which constituted the offence. Whether he realized that those circumstances constituted an offence was immaterial. If he knew all the circumstances and those circumstances constituted the offence ... that was enough to convict him of being an aider and abettor." Humphreys J. in the same case said: "...it must be shown that the unlawful act has been committed, and, therefore, that the offence has been committed, and, further, that the person charged as an aider and abettor was aware of the facts sufficiently to enable him to know that

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the act was unlawful."

It may be noted that the judgment of Lord Goddard, C.J., in *Ackroyds Air Travel, Ltd. v. Director of Public Prosecutions*, [1950] 1 All E.R. 933, was delivered in 1950 and refers to an earlier statement to the same effect, in *Carter Patersons & Pickfords Carriers Ltd. v. Wessel*, [1947] 1 K.B. 849, [1947] 2 All E.R. 280.

The statement of Lord Goddard, C.J., above quoted was applied in *John Henshall (Quarries) Ltd. v. Harvey*, [1965] 2 W.L.R. 758.

In *Sweet v. Parsley, supra*, the attention of the Court was directed principally to another point: but there seems to have been no challenge to the Court's assumption that, even in offences of strict liability, to hold one guilty as an aider and abettor, the Crown had the onus of proving knowledge on the part of the alleged aider of the circumstances necessary to constitute the offence which he is alleged to have aided, although it is not required that it be proven the alleged aider knew that those circumstances constituted an offence.

In the light of the foregoing authorities I am of the view that, it not having been shown that Woolworth had knowledge of the facts which constituted the offence, it could not be convicted as an aider by the application of s. 21. I use knowledge in this connection as actual knowledge as defined by Devlin, J., that is, actual knowledge or deliberate ignorance which is the equivalent of actual knowledge.

2. There is another reason why I am of the opinion that the convictions cannot stand. Section 21 requires that an alleged party must do or omit to do something for the purpose of aiding the principal to commit the offence. That purpose must be the purpose of the one sought to be made a party to the offence (*Sweet v. Parsley, supra*) but if what is done incidentally and innocently assists in the commission of an offence that is not enough to involve the alleged party whose purpose was not that of furthering the perpetration of the offence.

If the owner of a car rents or loans it to one he knows contemplates using it for the purpose of committing a robbery, he would thereby render himself liable as a party, or if an owner of a house rents the house knowing it is to be used for recording bets, he similarly would be a party to the offence. But one does not render himself liable by renting or loaning a car for some legitimate business or recreational activity merely because the person to whom it is loaned or rented chooses in the course of his use to transport some stolen goods, or by renting a house for residential purposes to a tenant who surreptitiously uses it to store drugs.

Hence where, as here, the arrangement between Woolworth and the actual offender was for the purpose of merchandising in the normal conduct of which there would be no infraction of s. 33, the departure of Healey and McPhee from the legitimate course of business by making statements constituting an infraction of s. 33 was outside the purpose of the arrangement. There is no evidence that Woolworth's purpose in providing space and facilities in its store was for the purpose of aiding and abetting Healey in the commission of this offence. Woolworth, having no actual knowledge of the illegal conduct or of Healey's intention to commit it, cannot be held to have provided the facilities and premises for the purpose of aiding and abetting in the commission of an offence.

Since it is apparent that I consider there was no evidence upon which the appellant could be convicted of the offence charged, I would answer Q. 1 in the negative and, as I have already indicated, Qq. 2, 3, 4 and 5 in the affirmative.

On this disposition of the appeal it may be considered unnecessary to answer Qq. 6 and 7. However, as a

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further appeal may be taken from the decision of this Court, it is desirable that views of the Court be expressed on all the questions stated.

Even if it be assumed that a proper case had been made out for the making of an order under s. 31(1), the scope of the order, as framed by the trial Court, exceeds the jurisdiction conferred on it by the section. Cases dealing with prohibitory orders have not been restrictive of the power of the Court to make orders in a proper case directed to preventing the continuation or repetition of the offence of which a conviction had been registered: *R. v. St. Lawrence Corp.*, [1969] 2 O.R. 305, 7 C.R.N.S. 265, [1969] 3 C.C.C. 263, 59 C.P.R. 97, 5 D.L.R. (3d) 263 (C.A.). Nonetheless the order to be made must relate to the continuation or repetition of the offence for which the conviction was made. Quite apart from the irrelevancy of prohibiting Woolworth from making any representations for the purpose of promoting a sale of articles which have been sold, I consider that the order herein does not bear a proper relationship in its terms to the terms of the offence charged in the information and it therefore offends as exceeding the authority conferred on the Court by the Act. It is on that account void or is at least unenforceable with respect to representations respecting articles which bear no generic similarity to the articles in respect of which the conviction has been registered. Orders which have been upheld by the Court in the past have been directed to the continuation or repetition, reasonably to be apprehended, of the unlawful conduct in respect of the class of goods which were the subject-matter of the charge. In *R. v. St. Lawrence Corp.* where a considerable period had elapsed between the impugned action and the prosecution, the order was confined to the repetition of the act complained of since continuation of the act which had terminated was at that time not possible. On this account I would answer Q. 7 in the affirmative.

Had Parliament so wished it could have made the prohibitory order a universal and necessary consequence of a conviction of an offence under Part V of the Act. It has not done so — it has made a separate provision in Part IV entitled "Special Remedies" whereby a convicting Court, or under certain circumstances a superior Court of criminal jurisdiction, within three years of a conviction may, but is not required to, make an order prohibiting the continuation or repetition of the offence. Since the making of such an order requires the judicial exercise by the Court of its discretion that discretion must be exercised for the purpose of achieving the purpose for which the section offended was intended to accomplish. The purpose of s. 33 is to prevent the making of misleading representations as to price for the purpose of promoting sales. It appears to me that Parliament has shown a clear intention that, in the usual course, the imposition of one or more of the penalties provided by the *Criminal Code* for the punishment of a person convicted of an offence punishable by summary conviction will be the adequate deterrent. In order to justify the Court in exercising the discretion to impose the special remedy under s. 31(1) a Court should be satisfied that there exist circumstances from which it is reasonably inferable that the purpose of the Act will not be accomplished unless the special remedy of a prohibitory order is invoked in addition to the normal penalty of fine and imprisonment. The evidence before the Court ought to show a deliberate and flagrant disobedience of this section and the likelihood of a continuation or repetition in the absence of prohibition. There has always been a reluctance on the part of Courts or Judges to invoke extraordinary powers unless satisfied that no other adequate remedy exists and that the use of the extraordinary power is necessary under the circumstances. In my opinion, the evidence before the trial Court related to a comparatively minor and isolated occurrence which did not merit or require the invocation of the special remedy of prohibition. For these reasons the answer to Q. 6 is in the affirmative.

14 As I am of the opinion that the evidence before the trial Court did not constitute any evidence upon which Woolworth could be convicted of the offence charged, I would allow the appeal and direct that the verdict be set aside on the ground that it cannot be supported by the evidence, and that the conviction recorded by the trial Court be quashed and a verdict of acquittal entered.

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105. Kann ein Rechtsanwalt, indem er in Ausübung seines Berufes Rat in einer Rechtssache erteilt, sich der Beihülfe zu einer strafbaren Handlung schuldig machen?

St.G.B. § 49.

I. Strafsenat. Urt. v. 17. November 1904 g. B. u. Gen. Rep. 1178/04.

I. Landgericht Köln.

Der Kaufmann A. B. war rechtskräftig wegen Betruges zu einer Gefängnisstrafe verurteilt worden und verbüßte diese ihm auferlegte Strafe. Es wurde ihm gestattet, in Begleitung eines Schutzmannes seine Angehörigen in deren Wohnung zu besuchen. Seine Ehefrau und seine Söhne haben ihm nun bei dem Besuche vorsätzlich, indem sie die Aufmerksamkeit des bewachenden Schutzmannes ablenkten, dazu verholfen, aus der Gewalt des letzteren zu entfliehen. Sie sind wegen vorsätzlicher Beihülfe zur Selbstbefreiung eines Gefangenen verurteilt worden.

Der mitangeklagte Rechtsanwalt M., ihr Rechtsbeistand, um dessen Revision es sich hier allein handelt, ist wegen Beihülfe zu dieser Tat und zugleich — in idealer Konkurrenz — wegen Begünstigung des A. B., um ihn der Bestrafung zu entziehen, verurteilt worden.

Auf seine Revision wurde das Urteil der Strafkammer, soweit es seine Verurteilung ausspricht, aufgehoben und die Sache zur anderweiten Verhandlung und Entscheidung an die Vorinstanz zurückverwiesen aus folgenden

Gründen:

... Was den Angeklagten Rechtsanwalt M. betrifft, so hat die Strafkammer folgendes festgestellt: Bevor der Gefangene A. B. floh und seine Angehörigen, die Mitangeklagten, ihm zur Selbstbefreiung behülflich waren, haben letztere seinen, des M., Rat in seiner Eigenschaft als ihres Rechtsbeistandes verlangt. Der Beschwerdeführer hat zuerst abgeraten, dann aber, als er sah, daß die Flucht doch ins Werk gesetzt werden würde, „hat er als Rechtsbeistand geglaubt, der Ehefrau B. seinen Rat nicht vorenthalten zu sollen". Indem er den § 120 St.G.B.'s übersah, hat er seinen „Rat" dahin erteilt, daß die Mitangeklagten für ihre Hülfeleistung bei der Flucht ihres Ehemannes und Vaters nicht bestraft werden könnten. Dadurch hat

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er sie in ihrem Vorhaben gestärkt. Es wird als erwiesen bezeichnet, daß M. sich auch bewußt war, wie er durch Rat die zur Hülfeleistung bei der Flucht ihres Ehemannes und Vaters bereits entschlossenen Mitangeklagten in ihrem Entschlusse befestigt und bestärkt hat, und daß „sein Wille darauf gerichtet war, nachdem an der Flucht B.'s nichts mehr geändert werden konnte, seinerseits den Mitangeklagten bei der geplanten Hülfeleistung zur Flucht Beihülfe zu leisten, indem er sie über die dabei von ihnen zu vermeidenden Delikte belehrte und ihnen durch Hinweis auf ihre Straflosigkeit Sicherheit einflößte." Indem die Strafkammer darlegt, daß auch der rechtskundige M. durch seinen Irrtum über das Strafgesetz (§ 120 St.G.B.'s) nicht geschützt werde, hat sie ihn für schuldig erachtet, den Mitangeklagten, der Ehefrau und den Söhnen B., zur Begehung der vorsätzlichen Hülfeleistung zur Selbstbefreiung eines Gefangenen durch Rat wissentlich Hülfe gewährt und durch dieselbe Handlung dem A. B. nach Begehung des Vergehens der Unterschlagung wissentlich Beistand geleistet zu haben, um ihn der Bestrafung zu entziehen. Der Angeklagte M. ist aus §§ 120. 49. 257 und 73 St.G.B.'s zu Strafe verurteilt worden.

Der hiergegen von dem Angeklagten eingelegten Revision konnte der Erfolg nicht versagt werden.

Zwar ist dem ersten Richter zuzugeben, daß es nicht zu den Pflichten — oder auch nur Rechten — eines Rechtsanwaltes gehört, durch seinen Rat zur Begehung einer strafbaren Handlung wissentlich Hülfe zu leisten, und daß auch ihn ein Irrtum über das Strafrecht nicht straffrei macht. Andererseits aber ist es selbstverständlich, daß das — nach bestem Wissen abgegebene, richtige oder unrichtige — Rechtsgutachten eines Rechtsanwaltes darüber, ob eine gewisse, von dem das Gutachten Erheischenden geplante Handlung nach den Gesetzen mit Strafe belegt sei oder nicht, an und für sich nicht als Beihülfe im Sinne des § 49 St.G.B.'s angesehen werden darf, auch wenn das Gutachten die Ausführung der Tat zur Folge hat, der Gutachter diesen bevorstehenden Erfolg bereits bei seiner Ratserteilung wußte und die Tat in Wahrheit ein strafbares Delikt ist. Die Beihülfe durch Rat besteht in einer psychischen Einwirkung auf den Täter, allerdings auch, um den bereits zur Tat Entschlossenen in seinem Entschlusse zu befestigen oder zu bestärken.

Vgl. Entsch. des R.G.'s in Strafs. Bd. 27 S. 157.

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Zur „Wissentlichkeit" — gleichbedeutend mit Vorsätzlichkeit — aber ist es nicht ausreichend, daß dem Gehülfen bekannt ist, der Täter wolle die betreffende strafbare Handlung begehen; es ist vielmehr für das subjektive Tatbestandsmerkmal erforderlich, daß der Täter seine Hülfe und insbesondere seinen Rat gewähre, in dem Bewußtsein, es werde durch diese seine Tätigkeit die Ausführung der von dem anderen beabsichtigten Tat gefördert werden, und daß somit auch der Wille des Ratgebenden auf diesen Erfolg gerichtet sei.

Vgl. Entsch. des R.G.'s in Strafs. Bd. 16 S. 25, Bd. 17 S. 377, Bd. 32 S. 353.

Gehört es nun, wie unzweifelhaft ist, zu den Berufshandlungen und Berufspflichten eines Rechtsanwaltes, denjenigen, die seinen Rat erfordern, nach bestem Wissen diesen Rat zu erteilen, so wird man von vornherein und präsumtiv davon ausgehen müssen, daß das Bewußtsein und der Wille des Anwaltes in solchen Fällen lediglich darauf gerichtet ist, pflichtmäßig Rat zu erteilen, insbesondere nicht darauf, auf das, was der Klient infolge der rechtsgutachtlichen Äußerung seines Rechtsbeistandes tut, einzuwirken. Das wird man im allgemeinen auch in dem Falle annehmen müssen, wenn der Anwalt sich sagt oder weiß, daß sein Rat den Klienten zur Vornahme irgendeiner bestimmten Handlung veranlassen wird, insbesondere, daß der gutachtliche Rat den anderen zur Begehung eines Delikts bestimmen, also objektiv zur Ausführung einer strafbaren Handlung Beihülfe leisten wird. Sollte der erste Richter bei Feststellung des Vorsatzes des Angeklagten auch schon in einem derartigen „Bewußtsein" das Tatbestandsmerkmal der Wissentlichkeit im Sinne des § 49 St.G.B.'s erblickt haben, so würde seine Feststellung des subjektiven Tatbestandes auf Rechtsirrtum beruhen. In Fällen der vorliegenden Art wird man besonders streng zu unterscheiden und bei Prüfung der Frage nach der Vorsätzlichkeit den Begriff des „Bewußtseins" und des „Willens" in Anpassung an die konkrete Sachlage mit besonderer Schärfe aufzufassen haben. Will der Anwalt — auf berufsmäßige Gutachten anderer Zweige wird dieselbe Erwägung zutreffen — nichts weiter tun, als seinen berufs- und pflichtmäßigen Rat (d. i. Belehrung) erteilen, ist ihm dabei bekannt, daß sein Gutachten zur Begehung eines Delikts führt, ... hat jedoch sein Wille mit dieser Folge seiner rechtlichen Begutachtung oder Ratserteilung nichts zu schaffen, so kann

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von einer wissentlichen Beihülfe nicht die Rede sein. Geht aber seine Geistes- und Willenstätigkeit nicht nur darauf hin, in der Ratserteilung seinen Beruf zu erfüllen, sondern auch durch die berufsmäßige Ratserteilung die Ausführung einer Straftat zu fördern, dann — und nur dann — liegt Beihülfe im Sinne des Strafgesetzes vor. Nun sagen zwar die Urteilsgründe hier, daß der Wille des Angeklagten darauf gerichtet war, seinerseits zur Flucht Beihülfe zu leisten, diese Feststellung aber wird — wie mangels jeder in einem so subtilen Falle doch unbedingt erforderlichen Angabe von Gründen angenommen werden muß — lediglich auf die unmittelbar vorhergehende Darlegung des Beweises des „Bewußtseins" des Angeklagten von den fraglichen Folgen seiner Ratserteilung gegründet, und somit ist es nicht ausgeschlossen, nach Lage des erwiesenen Sachverhaltes sogar höchstwahrscheinlich, daß die Strafkammer den Begriff des „Bewußtseins" in dem vorstehend gemißbilligten Sinne aufgefaßt hat. Hierfür spricht namentlich auch die Stelle in den Urteilsgründen, wo es wörtlich heißt, der Angeklagte habe als Rechtsbeistand geglaubt, der Ehefrau B. seinen Rat nicht vorenthalten zu sollen. Damit wäre das Tatbestandsmerkmal der „Wissentlichkeit" im Sinne des § 49 St.G.B.s verkannt. Zur anderweiten Feststellung dieses Merkmals mußte hiernach das angefochtene Urteil in dem entsprechenden Umfange aufgehoben werden, wobei noch zu bemerken ist, daß augenscheinlich der Mangel des Urteils auch die Feststellung des subjektiven Tatbestandes des § 257 St.G.B.'s trifft.

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BUNDESGERICHTSHOF

IM NAMEN DES VOLKES

Urteil

4 StR 453/00

vom

8. März 2001

in der Strafsache

gegen

1.

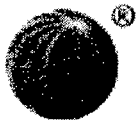
2.

wegen Verdachts der Beihilfe zum Totschlag und zur schweren Körperverletzung

493). Denn unter diesen Voraussetzungen verliert sein Tun stets den "Alltagscharakter"; es ist als "Solidarisierung" mit dem Täter zu deuten (Roxin aaO § 27 Rdnr. 19). Anderenfalls kommt straflose Mitwirkung in Betracht.

3. Diese Grundsätze lassen sich auch auf den hier zu entscheidenden Fall übertragen (vgl. hierzu auch Rogall, Bewältigung von Systemkriminalität, in: 50 Jahre Bundesgerichtshof, Festgabe aus der Wissenschaft Bd. IV, S. 383, 397/398). Ihre Anwendung führt zur Verneinung einer Beihilfestrafbarkeit der Angeklagten:

Die Jahresbefehle 101 bis 20 betrafen nicht ausschließlich strafrechtlich relevantes Verhalten gegenüber sog. "Grenzverletzern", sondern auch legitime Belange der Landesverteidigung der ehemaligen DDR sowie deren Grenzsicherung nach Außen. Die Mitwirkung der beiden Angeklagten bei der Erstellung der Befehle 40 beschränkte sich zudem auf die ihnen zugewiesenen, in keinem Zusammenhang mit der Verminung des Grenzgebietes stehenden militärischen Aufgabenbereiche; sie war damit "berufstypisch" und bezogen auf die den Verfahrensgegenstand bildenden Rechtsgutsverletzungen "neutral". Zwar wußten die Angeklagten, daß die Jahresbefehle auch Anordnungen über die Verlegung, Instandhaltung und Bedienung von Minen enthalten würden. Ihre eigenen Beiträge hatten jedoch jeweils eine eigenständige Bedeutung; sie blieben auch ohne die strafbaren Handlungen der Haupttäter "sinnvoll" (vgl. Roxin aaO § 27 Rdnr. 17) und können hiervon losgelöst rechtlich beurteilt werden (vgl. auch BGHR StGB § 27 Abs. 1 Hilfeleisten 3; BGH StV 2000, 492, 494). Bei der gebotenen bewertenden Betrachtungsweise stellt sich daher das Verhalten dieser Angeklagten bei der Erstellung der Jahresbefehle nur als straflose Mitwirkung dar.



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[1988] 1 HKC 679

MAGISTRACY APPEAL NO 1040 OF 1987

HIGH COURT

DECIDED-DATE-1: 20 JANUARY 1988

DE BASTO J

CATCHWORDS:

Criminal Law and Procedure - Theft - Aiding and abetting - Appellant present when offence committed - Whether mere presence sufficient - Whether intentional encouragement necessary

HEADNOTES:

The appellant and two other defendants were charged with and convicted of theft. The other defendants pleaded guilty. The magistrate found that the appellant was an aider and abettor 'in a form of encouragement in the circumstances'.

Held, allowing the appeal:

(1) It was not enough that the presence of the accused person had, in fact, given encouragement. It must be proved that he intended to give encouragement, that he wilfully encouraged. *R v Clarkson* (1971) 55 Cr App R 445 followed.

(2) The magistrate did not mention that he found that the appellant intentionally gave encouragement to the others by his presence at the scene, thus omitting an important finding, namely, the appellant wilfully encouraged the commission of the crime.

R v Allan (1963) 47 Cr App R 243
R v Clarkson (1971) 55 Cr App R 445
R v Jones and Mirrless (1977) 65 Cr App R 250
R v Leung Tak Yin [1987] 2 HKC 250

This was an appeal against conviction for aiding and abetting the commission of theft. The facts appear sufficiently in

the following judgment.

A Sedgwick QC and Selwyn So (Chan Lau & Wai) for the appellant.
J Shaw (Crown Prosecutor) for the respondent.

JUDGMENTBY: DE BASTO J

DE BASTO J The appellant was charged together with two other accused, D1 and D2 who pleaded guilty, with the offence of theft. He was convicted and placed on probation for a period of 12 months. He now appeals against his conviction

Very briefly, the appellant and the other two accused drove to a dead end road in Homantin at about 1am. They had all spent the evening together. D1 and D2 drove while the appellant drove his own car. D1 parked his car on one side of the road and the appellant on the other side. The appellant testified that he saw D1 and D2 tampering with the light covers of another car and he knew D1 had lost similar covers on his car. [*680] The police arrived and it is not disputed the car light in the appellant's car was on.

Upon being questioned, the appellant denied he knew D1 and D2 -- this was a lie and he said he lied because he did not want the police to think that he was associated with what D1 and D2 were doing.

I was referred to three cases -- *R v Allan & Ors* 1963 47 Cr App R 243, *R v Clarkson & Ors* 1971 55 Cr App R 445 and *R v Jones and Mirrless* 1977 65 Cr App R 250 -- and I referred to the case of *R v Leung Tak-yin* [1987] 2 HKC 250 in which the Court of Appeal approved the main principles set out in *R v Clarkson & Ors* 1971 55 Cr App R 445:

> It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for a jury whether he did so or not.

It is not enough, then, that the presence of the accused person has, in fact, given encouragement. It must be proved that he intended to give encouragement; that he wilfully encouraged.

An accused person is entitled, as of right, to know precisely not only of that he was convicted, but the reasons therefore. The learned magistrate found that the appellant was an aider and abetter 'in a form of encouragement in the circumstances'. With respect, I found what the learned magistrate said at the bottom of p 51 and top of p 52 somewhat confusing. He appeared not to have chosen to say, of his findings of fact, that he found the appellant guilty because he was acting in concert with D1 and D2, for example, as a lookout. He may have had doubts about the appellant being a 'lookout' because when the police arrived at the scene, they found his car light on. A 'lookout' is highly unlikely to advertise his presence. By the same token, an aider and abetter is unlikely to do anything which might draw the attention of the police or of passers-by to the scene where a crime is being committed.

To find a person guilty as an aider and abetter, it is not only necessary to prove that he was present while the offence is committed, that he knew an offence was being committed and that his presence, in fact, gave encouragement to the perpetrators but it must be proved that he intended to give that encouragement, that he *wilfully* encouraged.

The learned magistrate makes no mention that he found that the appellant intentionally gave encouragement to the

others by his presence at the scene.

[*681]

The learned magistrate, having decided to find the appellant guilty not as a principal in the first degree but as an aider and abetter, omitted an important finding -- that the appellant wilfully encouraged the commission of the crime.

For these reasons, I allow the appeal, quash the conviction and set aside the sentence.

11 of 64 DOCUMENTS

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Hong Kong Cases

R V LEUNG TAK YIN

[1987] 2 HKC 250

CRIMINAL APPEAL NO 10 OF 1987

COURT OF APPEAL

DECIDED-DATE-1: 10 MARCH 1987

ROBERTS CJ, YANG AND SILKE JJA

CATCHWORDS:

Criminal Law and Procedure - Indecent assault - Aiding and abetting - Whether mere presence sufficient to make person aider and abettor - Requirement that person wilfully encouraged commission of offence

HEADNOTES:

The complainant owed a substantial sum of money to a group of men which included the second defendant and the appellant. They had rented a room in which the second defendant, the appellant and two other men played mahjong. The second defendant demanded the complainant to take off her clothes when she failed to raise money to repay him for the money owed. The second defendant threatened to beat her if she did not take her clothes off. After she had taken off her clothes, the second defendant indecently assaulted her while the other three were sitting in the room. The judge held that the appellant was also guilty of indecent assault because he shared with the second defendant a common purpose which the indecent assault was designed to further, though he took no part in the indecent assault.

Held, allowing the appeal: Non-interference to prevent a crime was not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for a jury whether he did so or not. It was not enough that the presence of the accused person had given encouragement. It had to be proved that he intended to give encouragement and that he wilfully encouraged. *R v Clarkson* 1971 55 Cr App R 445 followed.

R v Clarkson (1971) 55 Cr App R 445
R v Coney (1882) 8 QBD 534

This was an appeal against conviction and sentence on a charge of indecent assault. The facts appear sufficiently in the

following judgment.

D MacKenzie-Ross (CW Leung & Co) for the appellant.
IG Cross (Crown Prosecutor) for the respondent.

JUDGMENTBY: ROBERTS CJ

ROBERTS CJ This is an application for leave to appeal against conviction and sentence on one charge of indecent assault.

The applicant, who was the first defendant at the trial, was jointly charged with another man with eight different charges, one of false [*251] imprisonment, three of blackmail, three of criminal intimidation and one of indecent assault.

At the conclusion of the Crown case, the judge ruled that there was no case to answer on seven of the eight charges against both defendants.

We observe, in passing, that it was a matter of some surprise to us that he should have reached this conclusion in relation to the second and third charges of blackmail and criminal intimidation, since the principal witness on whom the Crown relied, in relation to those charges was the same witness as the one on whose evidence the judge relied, in order to convict the first defendant on the charge of indecent assault.

It is unnecessary to go into any detail as to the background facts giving rise to these charges, other than to say that the girl who was the subject of the alleged indecent assault, whom I will refer to as the complainant, had been to Macau for the purposes of gambling and had borrowed a substantial sum of money from a group of men there, who expressed themselves willing to lend money on certain conditions to those who wished to continue gambling.

After various incidents, into which it is unnecessary to go, the complainant found herself with the two defendants and other men on 9 September, in the afternoon, on the premises of the Tak Fuk Association in Wanchai, where a room had been rented by the group of men who were there with the complainant.

The evidence in relation to the indecent assault falls within a short compass. I quote the relevant passage of the complainant's evidence:

> At the Tak Fuk Association, I was accompanied by D1, D2, Ah Kan and Ah Chuen. A room was rented and they played mahjong and I stayed there to make further phone calls to my sister.
>
> D1 had burnt my arm with a cigarette butt and caused it to be injured -- about 3 pm. I had made calls to my sister but nothing came of it then D1 burnt my arm.
>
> Then D2 demanded that I should take off all my clothes when I failed to raise money, he lost his temper and demanded me to do that. I refused but he threatened to beat me if I did not obey. At that time D1, Ah Chuan and Ah Kan were present in the room. I took off all my clothes. Then D2 committed an act of indecent assault -- he touched my breasts with his hand -- both hands -- the other three were sitting there.
>
> Ah Kan later told me to put back on my clothes. I was without clothes about five minutes.
>
> I cried and then they asked me to make further phone calls to my elder sister.
>
> I took off my clothes because D2 said if not, he would beat me.
>
> There was a phone in the room.

D1, D2 and Ah Kan made phone calls to their friends asking how much would be paid working as a prostitute.

D1 and D2 said to me if money not paid by 5pm, I would have to work as a prostitute, before and after I took off my clothes.

[*252]

Mr MacKenzie-Ross submitted on behalf of the applicant that the second defendant, although no doubt he and the applicant shared a common purpose to regain the money that they had lent, had gone further on his own than can reasonably be said to have been the common intention of the group.

In his very short reasons for verdict, the judge directs himself on this issue in the following terms:

> I also accept that both D1 and D2 were endeavouring to get the return of a loan from PW1 and that was their common purpose or design. In the course of that common purpose, D2 acted by losing his temper and getting PW1 to remove all her clothes. That in itself was an indecent assault as she was forced to strip in the presence of four men.

I have given much consideration to this point and take the view that since D1 and D2 had a common purpose, which this incident was used to pursue, that D1 is equally guilty as D2 of the indecent assault.

There can, I think, be no criticism, and none was raised by Mr MacKenzie-Ross, of the judge's finding that an order to a woman to undress, accompanied by threats, would amount to an indecent assault in law.

The question, however, is whether the judge has correctly directed himself on the question of common purpose. As we interpret his ruling, it can be summarized as follows.

Firstly, the two defendants had a common purpose, namely, to secure the return of the money which they had lent to the complainant.

Secondly, in the course of that common purpose, the second defendant forced the complainant to remove her clothes.

Thirdly, that constituted an indecent assault by the second defendant.

Fourthly, the first defendant is also guilty of indecent assault because he shared with the second defendant a common purpose which the indecent assault was designed to further, though he took no part in the indecent assault, and there is no evidence that he encouraged it, though he watched it.

In our view, this is an incorrect direction on the law governing aiders and abettors. The authorities state that, before a person may properly be convicted as an aider and abettor, it is not sufficient merely for him to be present while an offence is committed. If he takes no part in it and does not act in concert with those who commit it, it is insufficient merely for him not to try to prevent the offence being committed. We were referred by counsel for the Crown, to *R v Clarkson & Ors* 1971 55 Cr App R 445, in which the main principles are set out. At p 450, Lord Justice Megaw quoted an earlier passage from the case of *R v Coney* 1882 8 QBD 534:

> It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might [*253] reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon

which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for a jury whether he did so or not.

It is not enough, then,that the presence of the accused person has, in fact, given encouragement. It must be proved that he intended to give encouragement;that he wilfully encouraged.

Had the judge directed himself in the manner required by *R v Clarkson* default (1971) 55 Cr App R 445 and various other authorities, he might well have come to the same conclusion which he did. However, for the reasons which we have already given, we are satisfied the judge did misdirect himself and that his approach to the evidence was in error.

We therefore feel obliged to allow the application for leave to appeal against conviction and sentence and to quash both the conviction and sentence, though we do so with some regret because, as we have already commented, had the judge correctly directed himself properly, it might very well be that he would have reached the same conclusion.

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composta dai signori magistrati:
dott. Renato ACQUARONE - Presidente
dott. Luciano DERIU - Consigliere
dott. Ilario MARTELLA - Consigliere
dott. Francesco GRANENDOLA - Consigliere
dott. Giorgio COLLA - Consigliere
riuniti in camera di consiglio, ha pronunciato la seguente

SENTENZA

sul ricorso proposto da:
S. G., n. a F. il GG.MM.AAAA;
R. F., n. a C. il GG.MM.AAAA;
Lo B. C., n. a S. il GG.MM.AAAA;
La G. C., n. a P. il GG.MM.AAAA;
nei confronti della sentenza in data 28 giugno 2001 della Corte d'appello di Palermo;
udita in pubblica udienza la relazione fatta dal Consigliere dott. Giorgio Colla;
udito il Procuratore generale nella persona del sostituto dott. Gianfranco Viglietta, che ha concluso per l'annullamento con rinvio della sentenza impugnata;
udito il difensore avv. Tirinocchi per S. e Lo B..

(Torna su)**FATTO**

RITENUTO IN FATTO

1. - Con la sentenza in epigrafe la Corte d'appello di Palermo ha riformato quella del Tribunale di Agrigento del 1 marzo 2000 con la quale i ricorrenti sopra indicati erano stati condannati alle pene ritenute di giustizia per il reato, commesso in concorso tra loro, di turbata libertà degli incanti, in esso assorbito il reato di abuso di ufficio, con riferimento a una licitazione privata per l'acquisto di un'attrezzatura sanitaria "TAC" per l'ospedale S. Giovanni di Dio di Agrigento: ha, infatti, concesso a tutti gli odierni ricorrenti le attenuanti generiche e, conseguentemente, ha dichiarato il delitto estinto per prescrizione (reato commesso fino all'agosto del 1990).

2. - In sintesi, la Corte ha ravvisato una serie di anomalie e violazioni di legge in relazione allo svolgimento della gara - compiute dal S. quale Presidente del Comitato di gestione della USL n. 11 di Agrigento e di Presidente della Commissione per l'aggiudicazione, dal R., quale Primario del reparto di radiologia, abilitato a partecipare alle operazioni di gara per le valutazioni tecniche, dal Lo B. quale vice Commissario straordinario della USL anzidetta (dal novembre '88 al novembre '89) e dal La G. quale "consulente tecnico qualificato" - allo scopo di far risultare vincitrice la ditta S., come poi concretamente avvenne.

3. - Sottolineava la Corte d'appello, riportandosi integralmente all'analisi svolta dai giudici di primo grado, che tali mezzi fraudolenti erano, in particolare, consistiti: a) nella indicazione nel bando di gara del 1989 (una precedente gara era stata annullata ex officio perché ritenuto non confacente il solo parametro di aggiudicazione del prezzo migliore) di criteri di valutazione diversi rispetto a

quelli concretamente utilizzati, "posto che tale discrasia aveva penalizzato i possibili partecipanti alla gara, qualora fossero stati messi al corrente degli effettivi criteri e parametri di valutazione della gara stessa"; b) nel fatto che i parametri di aggiudicazione della gara proposti dal La G., e recepiti dal Comitato di gestione con delibera 416/1989, non erano conformi a quelli indicati dall'art. 40 della L. regionale 21/1985 e dall'art. 24 lett. b) L. statale n. 584/1977, dichiarati formalmente applicabili dalla stessa amministrazione procedente, delibera alle cui prescrizioni la USL si sarebbe dovuta attenere secondo quanto indicato dallo stesso Comitato provinciale di controllo, in pratica disattendendone le previsioni (in sostanza il citato art. 24 non consentiva che tra i criteri di aggiudicazione fosse previsto quello della "assistenza tecnica", previsto, invece, dall'art. 61, lett. b) della L. regionale 69/1981, legge che, nel caso, non doveva trovare applicazione alla licitazione, secondo quanto rilevato dal predetto Comitato provinciale di controllo).
Tali anomalie erano rese evidenti - secondo la Corte di merito - nelle conclusioni del perito C. che aveva sottolineato come nella semplice fornitura di un apparecchio di altissima tecnologia, le cui componenti fondamentali sono costruite da un numero ristrettissimo di aziende (solo tre ditte al mondo), non si sarebbe dovuto dare eccessivo peso valutativo a parametri diversi da quello del prezzo, evitando di enfatizzarne altri di tipo tecnico-gestionale; tanto che, secondo il perito, una valutazione più aderente al criterio anzidetto avrebbe dovuto condurre all'aggiudicazione alla società G. E. che aveva offerto un prezzo più basso di circa il 32 per cento.
4. - La Corte passava, quindi, ad elencare i singoli atteggiamenti dei correi dai quali si ricavava che le attività sopra richiamate si inserivano in un contesto di comportamenti individuali specifici che giustificavano l'esattezza della tesi dello sviamento della gara dal suo corretto andamento e, quindi, l'accoglimento dell'impostazione accusatoria.
5. - Osservava che: "In particolare, i comportamenti addebitati al S. concernono la pretestuosità delle giustificazione addotta per rinviare la gara alla seduta del 9.12.87, l'immotivata nomina del Prof. La G. quale consulente tecnico qualificato, nonostante il diverso suggerimento dell'Ufficio di Direzione di nominare il collega di pari grado dell'Università di Verona, nonché la ricezione del criterio di aggiudicazione suggerito dal prof. La G., nonostante la consapevolezza dell'erroneità dei criteri adottati. Con riferimento al Lo B., vengono in considerazione l'evidente falsità e pretestuosità delle giustificazioni addotte al commissario straordinario P. per giustificare le lungaggini della procedura, nonché l'avere emanato la delibera n. 189/89 (la cui attribuibilità al suddetto imputato, per le ragioni suesposte, non può essere revocata in dubbio), con cui la Usl, pur dichiarando di adeguarsi ai rilievi mossi dalla CPC, in realtà riproponeva gli stessi criteri censurati dal predetto organo di controllo, non rispondenti alla normativa vigente in materia. Quanto al La G. ed al R., è evidente che le anomalie evidenziate nell'iter procedimentale della gara in questione appaiono imputabili anche alla loro condotta ed ai loro interventi, estrinsecatisi nella nota del primo (rectius: del secondo) del 19.5.87, sopra indicata, e, per entrambi, nella complessiva attività dagli stessi svolta nell'ambito della Commissione tecnica relativa alla valutazione delle offerte. Appaiono infatti evidenti l'atipicità e l'irregolarità dei comportamenti degli imputati anzidetti nello svolgimento della gara, che lungi dall'essere rispondenti ai criteri di imparzialità e trasparenza cui deve essere informata l'attività della P.A., hanno certamente determinato uno sviamento della gara dal suo corretto andamento, impedendo che la stessa avesse un esito lineare e corretto, in che si sostanzia il reato di turbativa d'asta ascritto ai medesimi.
6. - Rilevava ancora che non poteva dubitarsi del concorso nelle condotte a ognuno ascritte, precisando che per la realizzazione del paradigma dell'art. 110 c.p. non è necessario il previo concerto, essendo sufficiente, al contrario, un individuale apporto materiale o psichico al realizzarsi dell'evento voluto da ciascuno dei singoli partecipi.
7. - Avverso la predetta sentenza ricorrono per cassazione tutti gli imputati chiedendone l'annullamento per il riconoscimento di una formula ampiamente liberatoria.
8. - In particolare il S. deduce, con unico motivo, la violazione degli artt. 110 e 353 c.p. e il difetto, l'illogicità, l'incompletezza e la contraddittorietà della motivazione al riguardo. Precisa che l'ultimo atto da lui compiuto risaliva all'ottobre 1988, epoca dalla quale aveva, lasciato l'incarico ricoperto

nella USL. La gara di cui si contestava la turbativa era quella indetta nel 1989. L'ultimo atto da lui firmato era la delibera dell'agosto 1988 con cui si decideva il passaggio da una gara col sistema della licitazione con le modalità del prezzo più vantaggioso a quella con le modalità dell'offerta economicamente più vantaggiosa. Il bando per questa seconda gara era stato firmato nel 1989 dal Commissario straordinario. Non è dunque spiegato come sia ravvisabile il concorso.

9. - Il Lo B. formula due censure. La prima è rubricata come "Violazione art. 606 lett. D ed E CPP (omessa motivazione sulla richiesta di una prova decisiva". Sostiene che egli si limitò a firmare il bando e le lettere di invito. Non aveva firmato la deliberazione commissariale con la quale era stata indetta la gara del 1989. Il P., Commissario straordinario, sentito come teste, aveva affermato di aver delegato l'intera materia a lui, ma si sarebbe dovuta disporre nel giudizio di merito (ma la richiesta non era stata accolta) l'acquisizione di tale ultima deliberazione, perché dalla copia in atti la delibera non risultava sottoscritta da alcuno. Ciò rendeva impossibile ipotizzare un concorso nel delitto contestato. Con un secondo motivo lamenta la "Violazione dell'art. 606 lett. E e B CPP in relazione agli artt. 110 e 353 c.p. (erronea applicazione delle norme sul concorso di persone nel reato - motivazione illogica - motivazione incompleta e contraddittoria)" e ribadisce la mancanza di prova del concorso. Egli non aveva mai avuto contatti con chicchessia, tanto meno con i partecipanti alla gara. Non si comprendeva come mai avrebbe potuto favorire qualcuno.

10. Il La G. a sua volta deduce il vizio di mancanza e manifesta illogicità della motivazione, in quanto i Giudici di appello si erano limitati a fare riferimento agli argomenti del Giudice di primo grado senza dare risposta ai motivi di appello. Sottolinea che la pubblica amministrazione aveva ampio potere di modificare le modalità della gara originariamente indetta, ritenute inadatte. Era quindi normale che si nominassero consulenti tecnici per la valutazione della offerta più vantaggiosa, metodologia utilizzata per la seconda gara. Gli stessi giudici di primo grado avevano riconosciuto la legittimità di tale comportamento, la correttezza della indizione della nuova gara secondo i criteri di cui alla lett. b) dell'art. 24 L. n. 584/1977 e la esattezza della tesi della pubblicazione di criteri diversi nel bando rispetto a quelli stabiliti e concretamente utilizzati per mero errore materiale di scritturazione da parte della persona addetta. Correttamente erano stati, quindi, utilizzati i parametri stabiliti. Inoltre i criteri. adottati (sei) restringevano e non dilatavano i poteri della Commissione rispetto ai criteri (tre) riportati nel bando. E ancora, il perito C. aveva affermato che sia con gli uni che con gli altri avrebbe vinto la S.. Del tutto neutra poi si rilevava la circostanza che anche presso l'ospedale di Palermo dove operava esisteva un'apparecchiatura TAC di marca S.. Inoltre il Tribunale aveva affermato che l'apparecchiatura TAC della S. era la migliore. Né poteva rilevare che il prezzo di aggiudicazione corrispondesse più o meno alla somma stanziata. La sentenza di primo grado non aveva poi dato alcuna dimostrazione dei rapporti tra lui e il rappresentante della S. che era stato assolto. Infine nessuna prova era stata fornita sul concorso di persone nel reato.

11. - Il R., infine, deduce la nullità della sentenza per mancanza e vizi della motivazione. La doglianza si incentra sul mancato esame dei motivi di gravame da parte della Corte d'appello, che si era limitata a riportarsi alle argomentazioni della sentenza di primo grado. In specie si duole del fatto che erano stati ritenuti indizi a suo carico: a) la lettera del 19 maggio 1987 al Capo ripartizione provveditorato della USL e al Direttore sanitario dell'ospedale, con la quale, premessa la sua scarsa esperienza, suggeriva la possibilità di nominare esperti in apparecchiature TAC, indicati nominativamente (L. e La G.) (nota che fu ignorata, tanto che si procedette con l'originaria licitazione privata: nella seduta della Commissione del 9 dicembre 1987 si rinviò l'espletamento della gara da parte dei Presidente S. per l'assenza del ricorrente); b) la sua partecipazione alla riunione del 24 maggio 1998 (di cui al verbale n. 2): furono il La G. e il L., esperti appositamente nominati dalla USL, a proporre la possibilità di modificare il sistema di gara da effettuarsi con il metodo dell'offerta economicamente più vantaggiosa (suggerimento, ad avviso della difesa, del tutto legittimo; c) la sua attività valutativa svolta in sede di Commissione tecnica ed estrinsecatasi in varie deliberazioni: essa fu, invero, a suo avviso, del tutto legittima, perché svolta in base ai documenti consegnati alla Commissione, in forza dei quali fu redatta la definitiva relazione tecnica

(non potendo comunque imputarsi alla Commissione tecnica le discrasie del bando e la valutazione dell'opportunità di annullare la precedente gara e di procedere ad altra con diverso metodo di aggiudicazione, operazione quest'ultima ritenuta perfettamente legittima dagli stessi Giudici di merito), che giudicava economicamente più vantaggiosa l'offerta della S., a poco o nulla rilevando che il perito C., sulla base di criteri matematici da lui stesso "creati", avesse concluso che ben avrebbe potuto essere dichiarata vincitrice la G. E..

DIRITTO

CONSIDERATO IN DIRITTO

1. Osserva la Corte che - da un esame di quelli che appaiono motivi comuni, con sfumature diverse, di tutti i ricorrenti - le impugnazioni devono trovare accoglimento anche alla luce delle conclusioni del Procuratore generale che ha chiesto l'annullamento con rinvio della sentenza, per mancanza e per illogicità della motivazione, e perché si accerti, quindi, se le anomalie della gara evidenziate nella sentenza della Corte d'appello di merito possano avere rilievo ai fini della configurabilità del reato di turbata libertà degli incanti.

2. - Occorre, peraltro, prima ricordare che, nel caso, la prescrizione è stata dichiarata a seguito della concessione delle attenuanti generiche a tutti gli imputati. Orbene, conformemente a un orientamento di questa Corte che si ritiene di condividere (Cass., sez. II, 12 gennaio 2001, dep. 13 febbraio 2001, n. 6064, Mazzei), in ipotesi siffatte non può operare il principio più volte ribadito dalla giurisprudenza di legittimità secondo cui, in presenza di una causa di estinzione del reato, non è consentito al giudice di legittimità pronunciare l'annullamento con rinvio essendo impossibile la prosecuzione del processo penale a meno che non balzi all'evidenza ictu oculi la prova dell'innocenza (art. 129, secondo comma, c.p.p.). Tale principio, infatti, si fonda sull'esigenza di assicurare (allorquando il giudice abbia accertato la sussistenza dei presupposti per concludere il processo penale con un proscioglimento non di merito deve emettere l'immediata pronuncia in tal senso, a meno che non risulti la prova della evidenza dell'innocenza) la prevalenza di un postulato di ordine generale di economia processuale sul diritto dell'imputato di ottenere una pronuncia di non punibilità nel merito quando ancora non sia accertata la sua penale responsabilità. Ma se il giudice di merito per applicare la causa di non punibilità è costretto ad affermare previamente la responsabilità dell'imputato o a concedere dopo le attenuanti generiche, i presupposti logici del sistema delineato dall'art. 129 c.p.p. vengono a mancare. Il sacrificio dell'interesse dell'imputato di vedere accertata la sua innocenza per il prevalere del principio di economia processuale non si giustifica più. E se - come è evidenziato nella motivazione della sentenza ora citata - è ammissibile che in presenza di una causa estintiva applicabile de plano il giudice la dichiari immediatamente, accertando solo che non vi sia l'evidenza dell'innocenza dell'imputato, non è altrettanto ammissibile che quando la causa di estinzione passi attraverso un'affermazione di responsabilità dell'imputato non vi sia nel sistema un rimedio adeguato contro i vizi di quella sentenza; il principio di economia processuale deve in questa ipotesi venire meno anche nel giudizio di legittimità.

3. - Passando ora a esaminare i motivi di ordine generale comuni ad alcuni ricorrenti va osservato quanto segue.

3.1. - le perplessità di fondo che sorgono dalla lettura della sentenza impugnata (e di quella di primo grado) derivano dal fatto (il motivo è sviluppato nei ricorsi Lo B. e La G.) che l'ipotesi accusatoria partiva da un nitido presupposto: gli odierni ricorrenti erano sottoposti a giudizio per aver turbato la gara in collusione con il rappresentante legale della S., P. V., che invece è stato assolto in primo grado per non aver commesso il fatto, perché non ha svolto alcuna attività di turbativa della gara né avrebbe potuto svolgerla, dato che non aveva alcun potere decisionale in merito alla partecipazione o meno alla licitazione e alla determinazione della offerta (pag. 30 sent. di primo grado). La tesi della collusione con la S. cade, dunque, completamente, in quanto neppure si ipotizza, nelle sentenze di merito, che, dal lato della impresa aggiudicataria abbia agito qualcun altro, sia pure rimasto ignoto. Viene così totalmente a mancare la prova della esistenza di un accordo fraudolento con la ditta ora nominata a favorire la vincitrice della gara con l'accordo di questa.

3.2. - Lo sforzo dei giudici di merito a questo punto si sarebbe dovuto fondamentalmente rivolgere a dimostrare, per tener ferma l'ipotesi di reato di cui alla lettera a) del capo di imputazione, che quelle che sono individuate come anomalie dello svolgimento della gara (che come si vedrà fra breve possono trovare e trovano una spiegazione a volte ambigua, ma spesso nel senso di disvelare comportamenti del tutto innocui o giustificabili dei ricorrenti) costituivano comunque "altri mezzi fraudolenti" - spiegandone la finalizzazione -capaci di turbare la gara (posto che deve escludersi che la turbativa potesse nella specie essersi realizzata con le altre modalità previste dall'art. 354 c.p.p., cioè con la "violenza", la "minaccia", i "doni" o le "promesse").
3.3. - Non solo. La decisione impugnata non offre una motivazione logica sull'applicazione della norma dell'art. 110 c.p. (il motivo è approfondito nei ricorsi S., Lo B. e La G.), perché non spiega convenientemente in qual modo persone con i compiti più diversi ed intervenute in tempi differenti nel lunghissimo iter delle procedure necessarie ai fini della aggiudicazione abbiano in concorso tra loro agito per uno scopo comune, necessariamente fraudolento. La Corte di merito afferma che non occorre provare il previo concerto per dimostrare il concorso di persone. Nessun dubbio su tale affermazione. Ma il concorso di persone nel reato implica, tra i suoi requisiti di applicazione, che ciascuno dei concorrenti agisca per una finalità unitaria con la consapevolezza del ruolo svolto da ognuno dei partecipanti e la volontà di agire in comune. E se taluno decida di subentrare a progetto criminoso già iniziato, occorre una più attenta motivazione sul dolo di partecipazione, occorrendo la dimostrazione che il subentrante conosca quanto già sia stato realizzato dai singoli compartecipi, quanto ciascuno debba ancora da realizzare e quali siano i propri specifici compiti. Considerazioni analoghe valgono per chi, come S., sia cessato da ogni carica sin da prima della indizione delle seconda licitazione. Su tali elementi manca nella sentenza impugnata una qualsiasi analisi e l'affermazione che i quattro odierni ricorrenti abbiano agito in concorso appare davvero tautologica.
4. - Sui residui motivi di ordine generale comuni ad alcuni ricorrenti occorre ancora svolgere le seguenti osservazioni.
4.1. - La sentenza impugnata riscontra tre anomalie del procedimento di gara addebitate a tutti i ricorrenti. La prima è individuata nella indicazione, nel bando di gara del 1989 (come si è già ricordato, una precedente gara era stata annullata perché ritenuto non confacente il solo parametro dei prezzo migliore), di criteri di valutazione diversi rispetto a quelli concretamente utilizzati. Ma la stessa sentenza, subito dopo, afferma che ciò fu "probabilmente" dovuto a un errore materiale. Su questi argomenti si incentrano le doglianze di La G. e R.. Le doglianze sono fondate. La sola precisazione della Corte secondo cui la pubblicazione sarebbe dovuta "probabilmente" a un errore, azzera il valore probatorio che a tale elemento la sentenza vorrebbe attribuire al fine di dimostrare la frode (per di più in concorso) dei ricorrenti, senza che occorra spendere molte parole sul punto. L'argomentazione secondo cui la Commissione (e i rappresentanti della USL) avrebbero dovuto far ripubblicare il bando di concorso con i criteri esatti è priva di spessore, perché tale addebito aggiuntivo presuppone ed implica un dolo successivo, diverso da quello originariamente contestato. In sintesi, l' "anomalia" di che trattasi è stata posta a base del procedimento di inferenza per indurne la prova del reato e del concorso senza alcuna spiegazione sulla conclusione cui si è giunti o, in altri termini, applicando in modo erroneo le regole di esperienza che avrebbero condotto alla soluzione opposta a quella della malafede.
4.2. - Queste ultime considerazioni si attagliano pienamente anche alla seconda pretesa "anomalia" con particolare riguardo ai requisiti del reato di cui all'art. 353 c.p. Sè è contestato ai ricorrenti di aver aggiunto -un criterio di aggiudicazione non previsto dalla legge (quello della "assistenza tecnica"). Anche su tale punto della motivazione si incentrano in particolare le doglianze di La G. e di R.. Le censure sono fondate. La previsione di un criterio ulteriore potrebbe, al più, dar luogo a una violazione di legge (sempre che si ritenga che i criteri stabiliti dall'art. 40 della L. regionale 21/1985 e dall'art. 24 lett. b) L. statale n. 584/1977 siano tassativi) ma non consente di desumere tout court - la frode necessaria per il reato contestato di turbata libertà degli incanti. L'illogicità del ragionamento posto a base della conclusione cui perviene la Corte d'appello e l'erronea applicazione delle regole di esperienza risultano palesi ove si consideri che la frode si sarebbe potuta intravedere

nel caso si fossero eliminati criteri da inserire necessariamente nel bando, di modo che ne risultassero ampliati i poteri discrezionali della Commissione; ma l'aggiunta di un criterio restringeva sicuramente, in modo ulteriore, detti poteri e occorreva quindi una particolare motivazione su tale aspetto, e non utilizzare sic et sempliciter (argomento per pervenire alla certezza dell'esistenza del requisito necessario per la configurabilità del reato di cui si discute.

4.3. - Del tutto inconferente appare, poi, l'inserimento tra gli argomenti generali a sostegno della responsabilità dei ricorrenti la questione della "perizia C.". Il tecnico si limita ad affermare che sarebbe stato più opportuno adottare il solo criterio del prezzo migliore. L'osservazione non è concludente, posto che la Commissione aveva deciso di adottare criteri diversi. Tale censura è svolta da R. e in modo più sfumato da La G. ed appare anch'essa fondata.

5. - Per quanto riguarda i residui profili della vicenda processuale e dei rimanenti mezzi proposti dai vari ricorrenti, la motivazione della sentenza impugnata si presta a censura sotto altri due importanti aspetti.

5.1. - Essa non spiega per quali ragioni si giunga a inferire dai restanti comportamenti contestati ai diversi ricorrenti (annullamento di una prima gara bandita con la previsione del criterio di aggiudicazione del solo prezzo migliore, senza la garanzia del vaglio da parte di una Commissione tecnica; indizione di una seconda gara con la previsione di un più articolato numero di criteri e la nomina di una Commissione di tre tecnici) la messa in atto di mezzi fraudolenti tali da turbare la licitazione (e quindi da giustificare l'applicazione della norma dell'art. 353 c.p.), e non piuttosto un ripensamento capace di salvaguardare al meglio, in via di autotutela, l'interesse della pubblica amministrazione di acquisire un macchinario e una serie di prestazioni accessorie connesse alla sua gestione in modo da conseguire il migliore risultato possibile in termini di economicità (in senso lato) e di buona amministrazione (v. i ricorsi Lo B., La G. e R.). Laddove, ancora una volta, le regole di esperienza avrebbero condotto a preferire la seconda conclusione: nel senso che l'adozione di garanzie più pregnanti avrebbe dovuto condurre proprio a escludere la frode.

5.2. - La sentenza, inoltre, non dà conto del fatto se sia stata effettivamente svolta un'indagine sul problema dell'interpello del cattedratico dell'università di Verona di cui alla nota 19 gennaio 1988 dell'Ufficio di Direzione della USL e sull'eventuale rifiuto da parte di costui prima della nomina dei La G. quale tecnico della Commissione. La sentenza affronta questo argomento solo per porre in evidenza un mendacio che il Lo B. ha reso al Commissario straordinario della USL che lo invitava ad accelerare i tempi della licitazione. Il mendacio, tuttavia, non riguarda l'effettivo interpello o meno del docente di Verona, ma tendeva a giustificare (in modo smentito dagli atti) le lungaggini della procedura derivanti dal dover sostituire "un docente del nord ... che aveva declinato l'incarico".

6. - Per tutte le suesposte ragioni la sentenza impugnata va annullata con rinvio ad altra sezione della Corte d'appello di Palermo per nuovo esame suoi profili analizzati.

P.Q.M.

P.Q.M.

Annulla la sentenza impugnata e rinvia ad altra sezione della Corte d'appello di Palermo per nuovo esame.

Così deciso in Roma, il 21 gennaio 2003.

DEPOSITATA IN CANCELLERIA IL 12 GIU. 2003.

CORRELAZIONI

Legislazione **correlata:**

Codice Penale art. 110

Codice Penale art. 353

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Gillick (A.P.) (Respondent)

v.

West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security (Appellants)

(England)

JUDGMENT

Die Jovis 17° Octobris 1985

Upon Report from the Appellate Committee to whom was referred the Cause Gillick against West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security, That the Committee had heard Counsel on Monday the 24th, Tuesday the 25th, Wednesday the 26th and Thursday the 27th days of June, and Monday the 1st, Tuesday the 2nd, Wednesday the 3rd and Thursday the 4th days of July last, upon the Petition and Appeal of the Department of Health and Social Security of Alexander Fleming House, Elephant and Castle, London, SE1, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 20th day of December 1984, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioners might have such

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other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as also upon the Case of Victoria Gillick lodged in answer to the said Appeal, and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the Appeal be Allowed, and the Declaration made in the said Order of Her Majesty's Court of Appeal of the 20th day of December 1984 against the Respondent Department of Health and Social Security complained of in the said Appeal be, and the same is hereby, **Set Aside:** And it is further Ordered, That the Costs of the Respondent be taxed in accordance with Schedule 2 to the Legal Aid Act 1974; And it is also further Ordered, That the Cause be, and the same is hereby, remitted back to the Queen's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this Judgment.

Cler: Parliamentor:

HOUSE OF LORDS

GILLICK
(RESPONDENT)

WEST NORFOLK AND WISBECH AREA HEALTH AUTHORITY
AND THE DEPARTMENT OF HEALTH AND SOCIAL SECURITY

(APPELLANTS) (ENGLAND)

Lord Fraser of Tullybelton
Lord Scarman
Lord Bridge of Harwich
Lord Brandon of Oakbrook
Lord Templeman

LORD FRASER OF TULLYBELTON

My Lords,

The main question in this appeal is whether a doctor can lawfully prescribe contraception for a girl under 16 years of age,

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without the consent of her parents. The second appellant, the Department of Health and Social Security ("the D.H.S.S.") maintains that a doctor can do so. The respondent, Mrs. Gillick, maintains that he cannot. The first appellant, West Norfolk and Wisbech Area Health Authority, was not represented when the appeal reached this House, but in the Court of Appeal they were represented by the same counsel as the D.H.S.S.

In December 1980, the D.H.S.S. issued guidance on family planning services for young people, which was a revised version of earlier guidance on the same subject, and which stated, or implied, that, at least in certain cases which were described as "exceptional," a doctor could lawfully prescribe contraception for a girl under 16 without her parents' consent. Mrs. Gillick, who is the mother of five daughters under the age of 16, objected to the guidance and she instituted the proceedings which have led to this appeal, and in which she claims a declaration against both appellants that the advice given in the guidance was unlawful. She also claims a further declaration against the first appellant alone, but it is of less general importance than the declaration to which I have already referred, and I defer consideration of it until later in this speech.

It will be convenient to dispose at once of some preliminary matters. In the first place, Mrs. Gillick's husband is not a party to the present proceedings, but we were informed that he is in full agreement with Mrs. Gillick's contention, and I proceed on that basis. Secondly, there is no suggestion that Mrs. Gillick's relationship with her daughters is other than normal and happy, nor is it suggested that there is any present likelihood of any of the daughters seeking contraceptive advice or treatment without the consent of their mother.

Thirdly, I must mention a procedural matter. The declaration which is claimed against the D.H.S.S., to the effect that the advice given in the guidance was unlawful, amounts to an assertion that the Secretary of State for Health and Social Security has acted illegally, in the sense of ultra vires. The

remedy claimed is in the field of public law and, since the decision of your Lordships' House in the case of O'Reilly v. Mackman [1983] 2 A.C. 237, it is one which should normally be claimed in an application for judicial review. But the writ and statement of claim in this action were issued on 5 August 1982, three months before the decision in O'Reilly, which was on 25 November 1982. Accordingly, Mr. Laws, who appeared for the D.H.S.S., merely mentioned the procedural point but he did not submit that the procedure was out of order. I have had the benefit of reading in draft the speech prepared by my noble and learned friend Lord Scarman and I agree with him that, for the reasons explained by him, Mrs. Gillick was fully entitled to proceed in the case by ordinary action.

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The advice, the lawfulness of which is in dispute, is a revised version of part of a comprehensive Memorandum of Guidance on the family planning service which had been issued to health authorities in May 1974 under cover of a circular (H.S.C. (I.S.) 32) from the D.H.S.S. The Memorandum of Guidance was divided into a number of sections, one of which was section G which was headed "The Young." The revised section G, which contains the disputed advice, is as follows:

> "Clinic sessions should be available for people of all ages, but it may be helpful to make separate, less formal arrangements for young people. The staff should be experienced in dealing with young people and their problems.
>
> "There is widespread concern about counselling and treatment for children under 16. Special care is needed not to undermine parental responsibility and family stability. The Department would therefore hope that in any case where a doctor or other professional worker is approached by a person under the age of 16 for advice in these matters, the doctor, or other professional, will always seek to persuade the child to involve the parent or guardian (or other person in loco parentis) at the earliest stage of consultation, and will proceed from the assumption that it would be most unusual to provide advice about contraception without parental consent.
>
> "It is, however, widely accepted that consultations between doctors and patients are confidential; and the Department recognises the importance which doctors and patients attach to this principle. It is a principle which applies also to the other professions concerned. To abandon this principle for children under 16 might cause some not to seek professional advice at all. They could then be exposed to the immediate risks of pregnancy and of sexually-transmitted diseases, as well as other long-term physical, psychological and emotional consequences which are equally a threat to stable family life. This would apply particularly to young people whose parents are, for example, unconcerned, entirely unresponsive, or grossly disturbed. Some of these young people are away from their parents and in the care of local authorities or voluntary organisations standing in loco parentis.

> "The Department realises that in such exceptional cases the nature of any counselling must be a matter for

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the doctor or other professional worker concerned and that the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor."

That advice emphasised, more strongly than section G in its original form had done, that the cases in which a doctor could properly advise a girl under 16 years of age about contraception without parental consent would be most unusual. If the advice had been contained in a legal document there might well have been room for argument as to its exact effect, but, in my view, it is perfectly clear that it would convey to any doctor or other person who read it that the decision whether or not to prescribe contraception for a girl under 16 was in the last resort a matter for the clinical judgment of a doctor, even if the girl's parents had not been informed that she had consulted the doctor, and even if they had expressed disapproval of contraception being prescribed for her. Mrs. Gillick objected to the guidance, in its amended form, and after some correspondence with the area health authority, she wrote to the acting area administrator on 3 March 1981 a letter which included this paragraph:

> "I formally FORBID any medical staff employed by Norfolk A.H.A. to give any contraceptive or abortion advice or treatment whatsoever to my four daughters whilst they are under 16 years without my consent."

Mrs. Gillick's youngest (fifth) daughter has been born since that letter was sent. The acting administrator replied on 9 March 1981 acknowledging the letter and stating that the A.M.A. held to the view "that treatment prescribed by a doctor is a matter for that doctor's clinical judgment, taking into account all the factors of the case."

On 5 August 1982 Mrs. Gillick began these proceedings against the area health authority and the D.H.S.S., in which she seeks the following declarations (as amended before the Master):

> "(i) A declaration against the [Area Health Authority] and the [D.H.S.S.] on a true construction of the said notice and in the events which have happened, including and in particular the publication and the circulation of the said notice, the said notice has no authority in law and gives advice which is unlawful and wrong, and which adversely affects or which may adversely affect the welfare of the plaintiff's said children, and/or the rights of the plaintiff as parent and custodian of the said children, and/or the ability of the plaintiff properly and effectively to discharge her duties as such parent and custodian;
>
> "(ii) A declaration against the [Area Health Authority] that no doctor or other professional person employed by

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> the [Area Health Authority] either in the Family Planning Service or otherwise may give any contraceptive and/or abortion advice and/or treatment to any child of the plaintiff below the age of 16 without the prior knowledge and consent of the said child's parent or guardian."

Woolf J. [1984] Q.B. 581 refused to grant the declarations sought by Mrs. Gillick and dismissed the action. The Court of Appeal (Eveleigh, Fox and Parker L.JJ.) [1985] 2 W.L.R. 413 allowed the appeal and granted the declarations. Against that decision the D.H.S.S. now appeals.

The central issue in the appeal is whether a doctor can ever, in any circumstances, lawfully give contraceptive advice or treatment to a girl under the age of 16 without her parents' consent. The effect of the Court of Appeal's judgment is to answer that question in the negative. The answer is subject certainly to one exception, in the case of an order by a competent court; this exception was recognised by Parker LJ. in the Court of Appeal, [1985] 2 W.L.R. 413, 420H, and it is accepted in Mrs. Gillick's printed case. But it is of theoretical rather than practical importance, because it would inevitably involve disclosing to the parents the doctor's advice to the girl, and thus would destroy its confidentiality, and also because the delay and expense of obtaining a court order makes frequent use of such procedure impracticable. There must, I think, be a second exception for cases in which the parents, or the sole surviving parent, have deliberately abandoned their parental responsibilities; in such cases it would, in my opinion, be wrong to allow them to emerge from the shadows solely in order to veto contraceptive advice or treatment for their daughter. But these exceptions do not touch the principle which is at issue in the appeal.

The guidance is addressed to regional health authorities and other authorities concerned in administering the National Health Service ("N.H.S."), and the appeal therefore only directly concerns doctors and other persons working in the N.H.S. I shall refer throughout to doctors, to include bevitatis causa other professional persons working in the N.H.S.

The first statutory provision for contraceptive advice and treatment in the N.H.S. was made by section 1 of the National Health Service (Family Planning) Act 1967. That section empowered local health authorities in England and Wales, with the approval of the Minister of Health, to make arrangements for giving advice on contraception, for medical examination of persons seeking such advice and for the supply of contraceptive substances and appliances. There appears to have been no similar provision

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applying to Scotland. The Act of 1967 was repealed by the National Health Service Reorganisation Act 1973 which, by section 4, replaced the power of local health authorities to provide such advice and treatment with a duty on the Secretary of State to do so. A similar duty was placed on the Secretary of State for Scotland by section 8 of the National Health Service (Scotland) Act 1972. The 1973 provision for England and Wales has now been superseded by the National Health Service Act 1977 which by section 5(I)(b) imposes a duty on the Secretary of State:

> "to arrange, to such extent as he considers necessary to meet all reasonable requirements in England and Wales, for the giving of advice on contraception, the medical examination of persons seeking advice on contraception, the treatment of such persons and the supply of contraceptive substances and appliances."

These, and other, provisions show that Parliament regarded "advice" and "treatment" on contraception and the supply of appliances for contraception as essentially medical matters. So they are, but they may also raise moral and social questions on which many people feel deeply, and in that respect they differ from ordinary medical advice and treatment. None of the provisions to which I have referred placed any limit on the age (or the sex) of the persons to whom such advice or treatment might be supplied.

Three strands of argument are raised by the appeal. These are:

1. Whether a girl under the age of 16 has the legal capacity to give valid consent to contraceptive advice and treatment including medical examination.

2. Whether giving such advice and treatment to a girl under 16 without her parents' consent infringes the parents' rights.

3. Whether a doctor who gives such advice or treatment to a girl under 16 without her parents' consent incurs criminal liability.

I shall consider these strands in order.

1. The legal capacity of a girl under 16 to consent to contraceptive advice, examination and treatment.

There are some indications in statutory provisions to which

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we were referred that a girl under 16 years of age in England and Wales does not have the capacity to give valid consent to contraceptive advice and treatment. If she does not have the capacity, then any physical examination or touching of her body without her parents' consent would be an assault by the examiner. One of those provisions is section 8 of the Family Law Reform Act 1969 which is in the following terms:

> "(1) The consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian.
>
> 2. In this section 'surgical, medical or dental treatment' includes . . .
>
> 3. Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted."

The contention on behalf of Mrs. Gillick was that subsection (1) of section 8 shows that, apart from the subsection, the consent of a minor to such treatment would not be effective. But I do not accept that contention because subsection (3) leaves open the

question whether consent by a minor under the age of 16 would have been effective if the section had not been enacted. That question is not answered by the section, and subsection (1) is, in my opinion, merely for the avoidance of doubt.

Another statutory provision which was referred to in this connection is the National Health Service (General Medical and Pharmaceutical Services) Regulations 1974 (S.I. 1974 No. 160) as amended by the National Health Service (General Medical and Pharmaceutical Services) Amendment Regulations 1975 (S.I. 1975 No. 719). These regulations prescribe the mechanism by which the relationship of doctor and patient under the National Health Service is created. Contraceptive services, along with maternity medical services, are treated as somewhat apart from other medical services in respect that only a doctor who specially offers to provide contraceptive or maternity medical services is obliged to provide them. See the definition of "medical card" and "treatment" in regulation 2(1), regulations 6(I)(a) and 14(2)(a) and Schedule 1 paragraph 13. But nothing turns on this fact. Two

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points in those regulations have a bearing on the present question although, in my opinion, only an indirect bearing. The first is that by regulation 14 any "woman" may apply to a doctor to be accepted by him for the provision of contraceptive services. The word "woman" is not defined so as to exclude a girl under 16 or under any other age. But regulation 32 provides as follows:

> "An application to a doctor for inclusion on his list . . . may be made, either -
>
> > (a) on behalf of any person under 16 years of age, by the mother, or in her absence, the father, or in the absence of both parents the guardian or other adult person who has the care of the child; or
> >
> > (b) on behalf of any other person who is incapable of making such an application by a relative or other adult person who has the care of such person; or . . ." (Emphasis added).

The words in paragraph (b) which I have emphasised are said, by counsel for Mrs. Gillick, to imply that a person under 16 years of age is incapable of applying to a doctor for services and therefore give some support to the argument on behalf of Mrs. Gillick. But I do not regard the implication as a strong one because the provision is merely that an application "may" be made by the mother or other parent or guardian and it applies to the doctor's list for the provision of all ordinary medical services as well as to his list for the provision of contraception services. I do not believe that a person aged 15, who may be living away from home, is incapable of applying on his own behalf for inclusion in the list of a doctor for medical services of an ordinary kind not connected with contraception.

Another provision, in a different branch of medicine, which is said to carry a similar implication is contained in the Mental Health Act 1983 section 131 which provides for informal admission of patients to mental hospitals. It provides by subsection (2) that:

> "In the case of a minor who has attained the age of 16 years and is capable of expressing his own wishes, any such arrangements as are mentioned in subsection (1) above [for informal admission] may be made, carried out and determined notwithstanding any right of custody or control vested by law in his parent or guardian."

That provision has only a remote bearing on the present

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question because there is no doubt that a minor under the age of 16 is in the custody of his or her parents. The question is whether such custody necessarily involves the right to veto contraceptive advice or treatment being given to the girl.

Reference was also made to the Education Act 1944 section 48 which deals with medical inspection and treatment of pupils at state school. Subsection (3) of section 48 which imposes on the Secretary of State a duty to provide for medical and dental inspection of pupils was repealed and superseded by the National Health Service Reorganisation Act 1973 section 3 and Schedule 5. The Act of 1973 in turn was replaced by the National Health Service Act 1977 section 5(l)(a). Subsection (4) of Section 48 of the Education Act 1944 which has not been repealed imposes a duty on the Secretary of State to arrange for encouraging pupils to take advantage of any medical treatment provided under Section 43 but it includes a proviso in the following terms:

> "Provided that if the parent of any pupil gives to the authority notice that he objects to the pupil availing himself of any medical treatment provided under this section, the pupil shall not be encouraged ... so to do."

I do not regard that provision as throwing light on the present question. It does not prohibit a child under the stipulated age from availing himself of medical treatment or an education authority from providing it for him. If the child, without encouragement from the education authority, "wishes to avail himself of medical treatment" the section imposes no obstacle in his way. Accordingly, in my opinion, the proviso gives no support to the contention from Mrs. Gillick, but on the contrary points in the opposite direction.

The statutory provisions to which I have referred do not differentiate so far as the capacity of a minor under 16 is concerned between contraceptive advice and treatment and other forms of medical advice and treatment. It would, therefore, appear that, if the inference which Mrs. Gillick's advisers seek to draw from the provisions is justified, a minor under the age of 16 has no capacity to authorise any kind of medical advice or treatment or examination of his own body. That seems to me so surprising that I cannot accept it in the absence of clear provisions to that effect. It seems to me verging on the absurd to suggest that a girl or a boy aged 15 could not effectively consent, for example, to have a medical examination of some trivial injury to his body or even to have a broken arm set. Of course the consent of the parents should normally be asked, but they may not be immediately available. Provided the patient, whether a boy or a girl, is capable of understanding what is proposed, and of expressing his or her own wishes, I see no good reason for holding that he or she lacks the capacity to express

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them validly and effectively and to authorise the medical man to make the examination or give the treatment which he advises. After all, a minor under the age of 16 can, within certain limits, enter into a contract. He or she can also sue and be sued, and can give evidence on oath. Moreover, a girl under 16 can give sufficiently effective consent to sexual intercourse to lead to the legal result that the man involved does not commit the crime of rape - see Reg. v. Howard [1966] 1 W.L.R. 13, 15 when Lord Parker C.3. said:

> "... in the case of a girl under 16 the prosecution, in order to prove rape, must prove either that she physically resisted, or if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist. . . There are many girls under 16 who know full well what it is all about and can properly consent."

Accordingly, I am not disposed to hold now, for the first time, that a girl aged less than 16 lacks the power to give valid consent to contraceptive advice or treatment, merely on account of her age.

Out of respect for the comprehensive and fully researched argument submitted by Mr. Laws for the D.H.S.S. I should notice briefly two old Acts to which he referred, but which do not appear to me to be helpful. One of these is the Abduction Act 1557 (4 and 5 Ph. & M. c.3) for punishing "such as shall take away maidens that be inheritors, being within the age of 16 years, or that marry them, without consent of their parents." That Act was evidently passed for the protection of property rather than for protection of the virtue of maidens. It was repealed by the Offences Against the Person Act 1823 (9 Geo. 4, c.31). We were referred to section 20 of the Act of 1823, but that section was concerned only with punishing abduction of any unmarried girl under the age of 16 and appears to me to have little or no bearing on the present problem.

On this part of the case accordingly I conclude that there is no statutory provision which compels me to hold that a girl under the age of 16 lacks the legal capacity to consent to contraceptive advice, examination and treatment provided that she has sufficient understanding and intelligence to know what they involve. I can deal with the case law more conveniently in what follows.

2. The parents' rights and duties in respect of medical treatment of their child. "

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The amended guidance expressly states that the doctor will proceed from the assumption that it would be "most unusual" to provide advice about contraception without parental consent. It also refers to certain cases where difficulties might arise if the doctor refused to promise that his advice would remain confidential and it concludes that the department realises that "in such exceptional cases" the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor. Mrs. Gillick's contention that the guidance adversely affects her rights and duties as a parent must, therefore, involve the assertion of an absolute right to be informed of and to veto such advice or

treatment being given to her daughters even in the "most unusual" cases which might arise (subject, no doubt, to the qualifications applying to the case of court order or to abandonment of parents' duties).

It was, I think, accepted both by Mrs. Gillick and by the D.H.S.S., and in any event I hold, that parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family. If necessary, this proposition can be supported by reference to Blackstone Commentaries, 17th ed. (1830), vol. 1, p. 452, where he wrote "The power of parents over their children is derived from . . . their duty." The proposition is also consistent with the provisions of the Guardianship of Minors Act 1971 section 1 as follows:

> "Where in any proceedings before any court . . . -
>
> (a) the custody or upbringing of a minor; or ... is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

From the parents' right and duty of custody flows their right and duty of control of the child, but the fact that custody is its origin throws but little light on the question of the legal extent of control at any particular age. Counsel for Mrs. Gillick

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placed some reliance on the Children Act 1975. Section 85(1) provides that in that Act the expression "the parental rights and duties" means "all the rights and duties which by law the mother and father have in relation to a legitimate child and his property," but the subsection does not define the extent of the rights and duties which by law the mother and father have. Section 86 of the Act provides:

> "In this Act, unless the context otherwise requires, 'legal custody' means, as respects a child, so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent)."

In the Court of Appeal Parker L.J. attached much importance to that section especially to the words in brackets. He considered that the right relating to the place and manner in which the child's time is spent included the right, as he put it, "completely to control the child" subject of course always to the intervention of the court. The learned Lord Justice went on thus at [1985] 2 W.L.R. 413, 423A:

> "Indeed there must, it seems to me, be such a right from birth to a fixed age unless whenever, short of majority, a question arises it must be determined, in relation to a particular child and a particular matter, whether he or she

> is of sufficient understanding to make a responsible and reasonable decision. This alternative appears to me singularly unattractive and impracticable, particularly in the context of medical treatment."

My Lords, I have, with the utmost respect reached a different conclusion from that of the learned Lord Justice. It is, in my view, contrary to the ordinary experience of mankind, at least in Western Europe in the present century, to say that a child or a young person remains in fact under the complete control of his parents until he attains the definite age of majority, now 18 in the United Kingdom, and that on attaining that age he suddenly acquires independence. In practice most wise parents relax their control gradually as the child develops and encourage him or her to become increasingly independent. Moreover, the degree of parental control actually exercised over a particular child does in practice vary considerably according to his understanding and intelligence and it would, in my opinion, be unrealistic for the courts not to recognise these facts. Social customs change, and the law ought to, and does in fact, have regard to such changes when they are of major importance. An example of such recognition is to be found in the view recently expressed in your

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Lordships' House by my noble and learned friend Lord Brandon of Oakbrook, with which the other noble and learned Lords who were present agreed, in Reg. v. D [1984] 1 A.C. 778, 806 D. Dealing with the question of whether the consent of a child to being taken away by a stranger would be a good defence to a charge of kidnapping, my noble and learned friend said:

> "In the case of a very young child, it would not have the understanding or the intelligence to give its consent, so that absence of consent would be a necessary inference from its age. In the case of an older child, however, it must, I think be a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent; if, but only if, the jury considers that a child has these qualities, it must then go on to consider whether it has been proved that the child did not give its consent. While the matter will always be for the jury alone to decide, I should not expect a jury to find at all frequently that a child under 14 had sufficient understanding and intelligence to give its consent."

That expression of opinion seems to me entirely contradictory of the view expressed by Cockburn C.J. in Reg. v. Howes (1860) 1 E. & E. 332, 336-337:

> "We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival at the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The legislature has given us a guide, which we may safely follow, in pointing out 16 as the age up to which the father's right to custody of his female child

> is to continue; and short of which such a child has no discretion to consent to leaving him."

The question for decision in that case was different from that in the present, but the view that the child's intellectual ability is irrelevant cannot, in my opinion, now be accepted. It is a question of fact for the judge (or jury) to decide whether a particular child can give effective consent to contraceptive treatment.

In times gone by the father had almost absolute authority over his children until they attained majority. A rather remarkable example of such authority being upheld by the court

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was the case of In re Agar-Ellis (1883) 24 Ch.D. 317 which was much relied on by the Court of Appeal. The father in that case restricted the communication which his daughter aged 17 was allowed to have with her mother, against whose moral character nothing was alleged, to an extent that would be universally-condemned today as quite unreasonable. The case has been much criticised in recent years and, in my opinion, with good reason. In Hewer v. Bryant [1970] 1 Q.B. 357,369 Lord Denning M.R. said:

> "I would get rid of the rule in In re Agar-Ellis and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off with a shilling. If a daughter had an illegitimate child, he would turn her out of the house. His power only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in conformity with the recent Report of the Committee on the Age of Majority [Cmnd. 3342, 1967], that the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."

I respectfully agree with every word of that and especially with the description of the father's authority as a dwindling right. In J. v. C. [1970] A.C. 668 Lord Guest and Lord MacDermott referred to the decision in Agar-Ellis as an example of the almost absolute power asserted by the father over his children before the Judicature Act 1873 and plainly thought such an assertion was out of place at the present time - see Lord MacDermott at pp. 703-704. In Reg. v. D. [1984] A.C. 778 Lord Brandon of Oakbrook cited Agar-Ellis as an example of the older view of a father's authority which his Lordship and the other members of the House rejected. In my opinion, the view of absolute paternal authority continuing until a child attains majority which was applied in Agar-Ellis is so out of line with present day views that it should no longer be treated as having any authority. I regard it as a historical curiosity. As Fox L.J. pointed out in the Court of Appeal [1985] 2 W.L.R. 413, 439D, the Agar-Ellis cases (1878) 10 Ch.D. 49; 24 Ch.D. 317 seemed to have been regarded as somewhat extreme even in their own day, as they were quickly followed by the Guardianship of Infants Act 1886 (49 & 50 Vict. c.27) which, by section 5, provided that the court may:

> "upon the application of the mother of any infant [whether over 16 or not] make such order as it may think fit

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> regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, . . ." (Emphasis added).

Once the rule of the parents' absolute authority over minor children is abandoned, the solution to the problem in this appeal can no longer be found by referring to rigid parental rights at any particular age. The solution depends upon a judgment of what is best for the welfare of the particular child. Nobody. doubts, certainly I do not doubt, that in the overwhelming majority of cases the best judges of a child's welfare are his or her parents. Nor do I doubt that any important medical treatment of a child under 16 would normally only be carried out with the parents' approval. That is why it would and should be "most unusual" for a doctor to advise a child without the knowledge and consent of the parents on contraceptive matters. But, as I have already pointed out, Mrs. Gillick has to go further if she is to obtain the first declaration that she seeks. She has to justify the absolute right of veto in a parent. But there may be circumstances in which a doctor is a better judge of the medical advice and treatment which will conduce to a girl's welfare than her parents. It is notorious that children of both sexes are often reluctant to confide in their parents about sexual matters, and the D.H.S.S. guidance under consideration shows that to abandon the principle of confidentiality for contraceptive advice to girls under 16 might cause some of them not to seek professional advice at all, with the consequence of exposing them to "the immediate risks of pregnancy and of sexually-transmitted diseases." No doubt the risk could be avoided if the patient were to abstain from sexual intercourse, and one of the doctor's responsibilities will be to decide whether a particular patient can reasonably be expected to act upon advice to abstain. We were told that in a significant number of cases such abstinence could not reasonably be expected. An example is the case of In re P (A Minor) (1981) 80 L.G.R. 301 in which Butler-Sloss J. ordered that a girl aged 15 who had been pregnant for the second time and who was in the care of a local authority should be fitted with a contraceptive appliance because, as the learned judge is reported to have said at p. 312:

> "I assume that it is impossible for this local authority to monitor her sexual activities, and, therefore, contraception appears to be the only alternative."

There may well be other cases where the doctor feels that because the girl is under the influence of her sexual partner or for some other reason there is no- realistic prospect of her abstaining from intercourse. If that is right it points strongly to the desirability of the doctor being entitled in some cases, in the girl's best interest, to give her contraceptive advice and treatment if necessary without the consent or even the knowledge of her parents. The only practicable course is, in my opinion, to entrust

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the doctor with a discretion to act in accordance with his view of what is best in the interests of the girl who is his patient. He should, of course, always seek to persuade her to tell her parents that she is seeking contraceptive advice, and the nature of the advice that she receives. At least he should seek to persuade her

to agree to the doctor's informing the parents. But there may well be cases, and I think there will be some cases, where the girl refuses either to tell the parents herself or to permit the doctor to do so and in such cases, the doctor will, in my opinion, be justified in proceeding without the parents' consent or even knowledge provided he is satisfied on the following matters:

1. that the girl (although under 16 years of age) will understand his advice;

2. that he cannot persuade her to inform her parents or to allow him to inform the parents that she is seeking contraceptive advice;

3. that she is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment;

(4) that unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer;

(5) that her best interests require him to give her contraceptive advice, treatment or both without the parental consent.

That result ought not to be regarded as a licence for doctors to disregard the wishes of parents on this matter whenever they find it convenient to do so. Any doctor who behaves in such a way would, in my opinion, be failing to discharge his professional responsibilities, and I would expect him to be disciplined by his own professional body accordingly. The medical profession have in modern times come to be entrusted with very wide discretionary powers going beyond the strict limits of clinical judgment and, in my opinion, there is nothing strange about entrusting them with this further responsibility which they alone are in a position to discharge satisfactorily.

3. Is a doctor who gives contraceptive advice or treatment to a girl under 16 without her parents' consent likely to incur criminal liability?

The submission was made to Woolf J. on behalf of Mrs.

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Gillick that a doctor who provided contraceptive advice and treatment to a girl under 16 without her parents' authority would be committing an offence under section 28 of the Sexual Offences Act 1956 by aiding and abetting the commission of unlawful sexual intercourse. When the case reached the Court of Appeal counsel on both sides conceded that whether a doctor who followed the guidelines would be committing an offence or not would depend on the circumstances. It would depend upon the doctor's intentions; this appeal is concerned with doctors who honestly intend to act in the best interests of the girl, and I think it is unlikely that a doctor who gives contraceptive advice or treatment with that intention would commit an offence under section 28. It must be remembered that a girl under 16 who has sexual intercourse does not thereby commit an offence herself, although her partner does - see the Sexual Offences Act 1956 sections 5 and 6. In any event, even if the doctor would be committing an offence, the fact that

he had acted with the parents' consent would not exculpate him as Woolf 3. pointed out [1984] Q.B. 581, 595G. Accordingly, I regard this contention as irrelevant to the question that we have to answer in this appeal. Parker L.J. in the Court of Appeal dealt at some length with the provisions of criminal law intended to protect girls under the age of 16 from being seduced, and perhaps also to protect them from their own weakness. The learned Lord Justice at [1985] 2 W.L.R. 413, 435B expressed his conclusion on this part of the case as follows:

> "It appears to me that it is wholly incongruous, when the act of intercourse is criminal, when permitting it to take place on one's premises is criminal and when, if the girl were under 13, failing to report an act of intercourse to the police would up to 1967 have been criminal, that either the . department [or] the area health authority should provide facilities which would enable girls under 16 the more readily to commit such acts. It seems to me equally incongruous to assert that doctors have the right to accept the young, down, apparently to any age, as patients, and to provide them with contraceptive advice and treatment without reference to their parents and even against their known wishes."

My Lords, the first of those two sentences is directed to the question, which is not in issue in this appeal, of whether contraceptive facilities should be available at ail under the National Health Service for girls under 16. I have already explained my reasons for thinking that the legislation does not limit the duty of providing such facilities to women of 16 or more. The second sentence, which does bear directly on the

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question in the appeal, does not appear to me to follow necessarily from the first and with respect I cannot agree with it. If the doctor complies with the first of the conditions which I have specified, that is to say if he satisfies himself that the girl can understand his advice there will be no question of his giving contraceptive advice to very young girls.

For those reasons I do not consider that the guidance interferes with the parents' rights.

The Second Declaration

The second declaration is directed only against the area health authority. Its practical importance would be minimal because doctors are not "employed" by the area health authority in the family planning service and, if they were, the declaration could easily be avoided by the girl going to a doctor in a different area. The Court of Appeal made the declaration sought, and the authority has not appealed against its decision. I am, therefore, of opinion that we should not reverse the decision of the Court of Appeal on this part of the case. But it is clearly inconsistent with the views I have expressed on the first declaration, and I agree with Lord Scarman that it should be overruled.

I would allow the appeal against the first declaration granted by the Court of Appeal, and I would overrule the second declaration as being erroneous.

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LORD SCARMAN

My Lords,

I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Fraser of Tullybelton. Agreeing with it, I shall endeavour in delivering my opinion to avoid repetition. The importance of the case is, however, such that I believe it necessary, even at the cost of some repetition, to deliver my opinion in my own words. The case is the beginning, not the conclusion, of a legal development in a field glimpsed by one or two judges in recent times (notably Butler-Sloss 3. In re P (A Minor) (1981) 80 L.G.R. 301) but not yet fully explored. Mrs. Gillick, even though she may lose the appeal, has performed a notable public service in directing judicial attention to the problems arising from the interaction of parental right and a doctor's duty in a field of medicine unknown to our fathers but of immense consequence to our society. The contraceptive pill has introduced a new independence, and offers

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new options, for women: but has it in the process undermined parental right and duty? In my judgment, the answer is "no", even though parental right may not be as extensive or as long lasting as she believes it to be.

Victoria Gillick, mother of five daughters under the age of 16, challenges the lawfulness of a memorandum of guidance issued by the Department of Health and Social Security which she says encourages and in certain circumstances recommends health authorities, doctors, and others concerned in operating the department's family planning services to provide contraceptive advice and treatment to girls under the age of 16 without the knowledge or consent of a parent. Mrs. Gillick is a wife and mother living in a united family with her husband and their children. The husband supports the action being taken, as they both see it, to protect their daughters. No further need be said of their family situation in deciding this appeal.

Mrs. Gillick began her proceedings by the issue of a writ against two defendants, the health authority for the area in which she lives and the department. She claims in an ordinary civil action declaratory relief against both defendants that the guidance is unlawful, and against the area health authority alone a declaration that no doctor or other person in its employ may give contraception or abortion advice to Mrs. Gillick's children under the age of 16 without her prior knowledge and consent. The area health authority has taken no part in the litigation, but the department has fought the case strenuously. The appeal to the House is that of the department: the health authority has not appealed and is not represented.

The written case submitted on Mrs. Gillick's behalf to the House formulates three propositions of law, any one of which, if made good, would suffice to entitle her to relief. They are as follows:

> "(i) parental rights should be protected from any invasion or interference neither authorised by a competent court nor expressly authorised by statute: [the parental rights case]

> "(ii) the provision of contraceptive treatment to girls under the age of 16 either constitutes criminal conduct in itself or is so closely analogous thereto as to be contrary to public policy: [the criminal law case]
>
> "(iii) a girl below the age of 16 is not capable in law of giving a valid consent to medical treatment and in

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> the particular context of this case to contraceptive or abortion treatment." [the age of consent point].

Before, however, considering these propositions, it is necessary to clear out of the way certain procedural questions, which, though not urged upon our attention, do call for a brief consideration.

Procedure

Three procedural questions have emerged in the course of the litigation. First, Mr. Simon Brown, who before his elevation to the bench had the conduct of the case as counsel for the department, raised at the trial the question as to the propriety of the civil court granting a declaration in a case which involved the criminal law. The judge saw no reason why he should be inhibited on this ground from dealing with the issues in the action; and I agree with him. It was not contended that the issue of the guidance was itself a crime: the case against the department was simply that the guidance, if followed, would result in unlawful acts and that the department by issuing it was exercising a statutory discretion in a wholly unreasonable way; i.e. the classical "Wednesbury" case for judicial review: Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223.

The second question is as to the propriety of proceeding in this case by ordinary civil action. Should not Mrs. Gillick have proceeded by way of judicial review under R.S.C. Ord. 53? No point was taken at trial or in the Court of Appeal against Mrs. Gillick that she should have proceeded not by issuing a writ, but by applying for judicial review. Woolf J. did, however, mention the matter only to hold that there was a relevant precedent for proceeding by writ in this House's decision in Royal College of Nursing of the United Kingdom v. Department of Health and Social Security [1981] A.C. 800. "

The point having been brought to the attention of the House I think it desirable to consider it if only because of the later decision of the House in O'Reilly v. Mackman [1983] 2 A.C. 237, where Lord Diplock, with whose opinion their other Lordships agreed, laid down a rule in these terms at p. 285D:

> "Now that those disadvantages [i.e. those previously associated with prerogative order procedure] to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule [emphasis supplied] be contrary to public policy, and as such an abuse of the process of the court, to

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> permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."

If there be in the present case an abuse of the process of the court, the House cannot overlook it, even if the parties are prepared to do so, and even though the writ in this case was issued before the decision of the House in O'Reilly's case [1983] 2 A.C. 237.

Mrs. Gillick's action is essentially to protect what she alleges to be her rights as a parent under private law. Although she is proceeding against two public authorities and invokes the criminal law and public policy in support of her case, she claims as a parent whose right of custody and guardianship in respect of her children under the age of 16 is (she says) threatened by the guidance given by the department to area health authorities, doctors, and others concerned in the provision by the department of a family health service. This is a very different case from O'Reilly [1983] 2 A.C. 237 where it could not be contended that there was any infringement or threat of infringment of any right derived from private law. For the appellants in O'Reilly's case were convicted prisoners faced with forfeiture of remission, and they were held to have not a right to remission of their prison sentences but merely "a legitimate expectation" which could, if the necessary facts were established, entitle them "to a remedy in public law." They had, therefore, no private right in the matter, and could rely only on the "public law" doctrine of legitimate expectation.

It is unnecessary to embark upon an analysis of the newly fledged distinction in English law between public and private law, for I do not see Mrs. Gillick's claim as falling under the embargo imposed by O'Reilly's case [1983] 2 A.C. 237. If I should be wrong in this view, I would nevertheless think that the private law content of her claim was so great as to make her case an exception to the general rule. Lord Diplock at p. 285F recognised that the general rule which he was laying down admitted of exceptions including cases:

> "where the invalidity of [the public authority's] decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure

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by writ or originating summons."

Both these exceptions can be said to apply in the present case. Like Lord Diplock, I think that procedural problems in the field of public law must be left to be decided on a case to case basis. Mrs. Gillick was, in my opinion, fully entitled to proceed by ordinary action, even though she could also have proceeded by way of judicial review.

The third and final procedural question is a mere technicality: as such, it creates - no lawyer would be surprised - more trouble than the other two. If the House should allow the department's appeal against the guidance declaration what is to be

done about the other declaration granted exclusively against the area health authority? As a matter of common sense, if Mrs. Gillick fails to establish that the department's guidance is unlawful she cannot upon the evidence in this case establish her entitlement to the other declaration against the health authority. The Court of Appeal treated the second declaration as consequential upon the guidance declaration, which upon the evidence they were plainly, right to do. But there is a difficulty in allowing an appeal where there is no appellant and no appeal. Fortunately in this case there is no issue between the parties as to costs. If the department succeeds, it does not ask for costs against Mrs. Gillick here or below: and the area health authority has incurred no costs. Two courses are open to the House: one would be to ignore the technicalities, allow the appeal (if that be the view of the House), and set aside both declarations: the other, which is strictly correct, would be to allow the department's appeal and to declare that the reasoning was also applicable to the Court of Appeal's decision in favour of the health authority which must, therefore, be held to be overruled. If the second course should be taken, the only order to be made by the House would be to allow the department's appeal and set aside the "guidance" declaration. I favour the second course.

The Department's Guidance

In 1974 the department assumed statutory responsibility for the provision of family planning services on a national basis. This involved a reorganisation which included a transfer of services from the agencies previously concerned to area health authorities. In the course of the reorganisation which took some two years to complete the department issued guidance as to the duties and responsibilities of doctors and others concerned with the provision of such services. It was empowered so to do by its assumption, pursuant to statute, of responsibility for the provision of such

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services. In May 1974 the department circulated a memorandum of guidance HN(80)46: it included a section (section G.) as to the provision of services to young people. The text of section G. aroused some public concern, and in December 1980 a revised section G. was issued to replace the earlier text. It is this revision which lies at the heart of the case, being the subject of Mrs. Gillick's challenge. I set it out in full:

"REVISED SECTION G - THE YOUNG

"Clinic sessions should be available for people of all ages, but it may be helpful to make separate, less formal arrangements for young people. The staff should be experienced in dealing with young people and their problems.

"There is widespread concern about counselling and treatment for children under 16. Special care is needed not to undermine parental responsibility and family stability. The Department would therefore hope that in any case where a doctor or other professional worker is approached by a person under the age of 16 for advice in these matters, the doctor, or other professional, will always seek to persuade the child to involve the parent or guardian (or other person in loco parentis) at the earliest stage of consultation, and will proceed from the assumption that it

would be most unusual to provide advice about contraception without parental consent.

"It is, however, widely accepted that consultations between doctors and patients are confidential; and the Department recognises the importance which doctors and patients attach to this principle. It is a principle which applies also to the other professions concerned. To abandon this principle for children under 16 might cause some not to seek professional advice at all. They could then be exposed to the immediate risks of pregnancy and of sexually-transmitted diseases, as well as other long-term physical, psychological and emotional consequences which are equally a threat to stable family life. This would apply particularly to young people whose parents are, for example, unconcerned, entirely unresponsive, or grossly disturbed. Some of these young people are away from their parents and in the care of local authorities or voluntary organisations standing in loco parentis.

"The Department realises that in such exceptional cases the nature of any counselling must be a matter for the doctor or other professional worker concerned and that the decision

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whether or not to prescribe contraception must be for the clinical judgment of a doctor."

The first question in the appeal is simply: what is the true meaning of this text? Does it, or does it not, permit doctors concerned in the provision of a statutory service to prescribe contraceptive treatment for a girl under 16 without the knowledge and consent of her parents? And, if it does, in what circumstances?

There can be no doubt that it does permit doctors to prescribe in certain circumstances contraception for girls under 16 without the knowledge and consent of a parent or guardian. (In this opinion I shall use the term "parent" to include "guardian"). The text is not, however, clear as to the circumstances (variously described as "unusual" and "exceptional") which justify a doctor in so doing. The House must be careful not to construe the guidance as though it was a statute or even to analyse it in the way appropriate to a judgment. The question to be asked is: what would a doctor understand to be the guidance offered to him, if he should be faced with a girl under 16 seeking contraceptive treatment without the knowledge or consent of her parents?

He would know that it was his duty to seek to persuade the girl to let him bring into consultation her parents (or one of them). If she refused, he (or the counsellor to whom the girl had gone) must ask himself whether the case was one of those exceptional cases in which the guidance permitted a doctor to prescribe contraception without the knowledge or consent of a parent (provided always that in the exercise of his clinical judgment he thought this course to be in the true interest of his patient). In my judgment the guidance clearly implies that in exceptional cases the parental right to make decisions as to the care of their children, which derives from their right of custody, can lawfully be overridden, and that in such cases the doctor may without parental consultation or consent prescribe contraceptive treatment in the exercise of his clinical judgment. And the

guidance reminds the doctor that in such cases he owes the duty of confidentiality to his patient, by which is meant that the doctor would be in breach of his duty to her if he did communicate with her parents.

The guidance leaves two areas of the doctor's responsibility in some obscurity. Though it provides illustrations of exceptional cases, it offers no definition. And it gives no clue as to what is meant by "clinical judgment" other than that it must at least include the professional judgment of a doctor as to what is the

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medically appropriate advice or treatment to be offered to his patient. .

This lack of definition does not, in my judgment, assist Mrs. Gillick. If, contrary to her submission, the law recognises that exceptional cases can arise in which it is lawful for a doctor to prescribe contraceptive treatment for a girl under 16 without the knowledge and consent of a parent, the guidance would be within the law notwithstanding its lack of precision, unless its vagueness created so obscure a darkness that it could reasonably be understood by a doctor as authorising him to prescribe without the parent's consent whenever he should think fit.

I do not find upon a fair reading of the guidance anything to obscure or confuse its basic message that a doctor is only in exceptional circumstances to prescribe contraception for a young person under the age of 16 without the knowledge and consent of a parent. No reasonable person could read it as meaning that the doctor's discretion could ordinarily override parental right. Illustrations are given in the text of exceptional cases in which the doctor may take the "most unusual" course of not consulting the parent. Only in exceptional cases does the guidance contemplate him exercising his clinical judgment without the parent's knowledge and consent. Lastly, there really can be no compulsion in law upon a government department to spell out to a doctor what is meant by "clinical judgment."

The Question in the Appeal

It is only if the guidance permits or encourages unlawful conduct in the provision of contraceptive services that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way.

The question, therefore, for the House is - can a doctor in any circumstances lawfully prescribe contraception for a girl under 16 without the knowledge and consent of a parent?

Before discussing the question, I put out of the way the two exceptions which I understand both parties to the appeal accept? namely the order of a competent court, and emergency. Nobody disputes the existence of the court exception, nor does the other situation call for more than a brief mention.

If, as is clear in the light of section 5 of the National Health Service Act 1977 (re-enacting earlier legislation) and section 41 of the National Health Service (Scotland) Act 1978, contraceptive medical treatment is recognised as a legitimate and

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beneficial treatment in cases in which it is medically indicated, it must be an available option for the doctor in an emergency where treatment is urgently needed and the consent of the patient or his parent cannot be obtained either in time or at all. And the case of a teenage girl abandoned by her parents and not yet received into the care of a local authority or placed under the protection of a responsible adult in loco parentis can be seen to be a true emergency. Both Mrs. Gillick, as I understand her case, and the department accept these exceptions to the general rule that a parent must be consulted and give consent and I say no more than that it would be unthinkable for the law not to recognise them.

Parental Right and the Age of Consent

Mrs. Gillick relies on both the statute law and the case law to establish her proposition that parental consent is in all other circumstances necessary. The only statutory provision directly in point is section 8 of the Family Law Reform Act 1969. Subsection (1) of the section provides that the consent of a minor who has attained the age of 16 to any surgical, mental, or dental treatment which in the absence of consent would constitute a trespass to his person shall be as effective as if he were of full age and that the consent of his parent or guardian need not be obtained. Subsection (3) of the section provides that:

> "Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted."

I cannot accept the submission made on Mrs. Gillick's behalf that subsection (1) necessarily implies that prior to its enactment the consent of a minor to medical treatment could not be effective in law. Subsection (3) leaves open the question whether the consent of a minor under 16 could be an effective consent. Like my noble and learned friend, Lord Fraser of Tullybelton, I read the section as clarifying the law without conveying any indication as to what the law was before it was enacted. So far as minors under 16 are concerned, the law today is as it was before the enactment of the section.

Nor do I find in the provisions of the statute law to which Parker L.J. refers in his judgment in the Court of Appeal [1985] 2 W.L.R. 413 any encouragement, let alone any compelling reason, for holding that Parliament has accepted that a child under 16 cannot consent to medical treatment. I respectfully agree with the reasoning and conclusion of my noble and learned friend, Lord Fraser of Tullybelton, on this point.

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The law has, therefore, to be found by a search in the judge-made law for the true principle. The legal difficulty is that in our search we find ourselves in a field of medical practice where parental right and a doctor's duty may point us in different directions. This is not surprising. Three features have emerged in today's society which were not known to our predecessors:- (1) contraception as a subject for medical advice and treatment; (2) the increasing independence of young people; and (3) the changed status of women. In times past contraception was rarely a matter for the doctor: but with the development of the contraceptive pill

for women it has become part and parcel of every-day medical practice, as is made clear by the Department's Handbook of Contraceptive Practice (1984 revision), particularly para. 1.2. Family planning services are now available under statutory powers to all without any express limitation as to age or marital status. Young people, once they have attained the age of 16, are capable of consenting to contraceptive treatment, since it is medical treatment: and, however extensive be parental right in the care and upbringing of children, it cannot prevail so as to nullify the 16-year's old capacity to consent which is now conferred by statute. Furthermore, women have obtained by the availability of the pill a choice of life-style with a degree of independence and of opportunity undreamed of until this generation and greater, I would add, than any law of equal opportunity could by itself effect.

The law ignores these developments at its peril. The House's task, therefore, as the supreme court in a legal system largely based on rules of law evolved over the years by the judicial process is to search the overfull and cluttered shelves of the law reports for a principle, or set of principles recognised by the judges over the years but stripped of the detail which, however appropriate in their day, would, if applied today, lay the judges open to a justified criticism for failing to keep the law abreast of the society in which they live and work.

It is, of course, a judicial common place to proclaim the adaptability and flexibility of the judge-made common law. But this is more frequently proclaimed than acted upon. The mark of the great judge from Coke through Mansfield to our day has been the capacity and the will to search out principle, to discard the detail appropriate (perhaps) to earlier times, and to apply principle in such a way as to satisfy the needs of their own time. If judge-made law is to survive as a living and relevant body of law, we must make the effort, however inadequately, to follow the lead

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of the great masters of the judicial art,

In this appeal, therefore, there is much in the earlier case law which the House must discard - almost everything I would say but its principle. For example, the horrendous Agar-Ellis decisions 10 Ch.D. 49; 24 Ch.D. 317 of the late 19th century asserting the power of the father over his child were rightly remaindered to the history books by the Court of Appeal in Hewer v. Bryant [1970] 1 Q.B. 357, an important case to which I shall return later. Yet the decisions of earlier generations may well afford clues to the true principle of the law: e.g. Reg. v. Howes (1860) 3 E. & E. 332, 336, which I also later quote. It is the duty of this House to look at, through, and past the decisions of earlier generations so that it may identify the principle which lies behind them. Even Lord Eldon, (no legal revolutionary), once remarked, when invited to study precedent, (the strength of which he never under-rated):

> "All law ought to stand upon principle; and unless decision has removed out of the way all argument and all principle, so as to make it impossible to apply them to the case before you, you must find out what is the principle upon which it must be decided." 1 Bligh 486 quoted by Lord Campbell, Lives of the Lord Chancellors, 4th ed. (1857), vol. 10, chap. 213, p. 244.

Approaching the earlier law in this way, one finds plenty of indications as to the principles governing the law's approach to parental right and the child's right to make his or her own decision. Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child - custody, care, and control of the person and guardianship of the property of the child. But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child. The principle has been subjected to certain age limits set by statute for certain purposes: and in some cases the courts have declared an age of discretion at which a child acquires before the age of majority the right to make his (or her) own decision. But these limitations in no way undermine the principle of the law, and should not be allowed to obscure it.

Let me make good, quite shortly, the proposition of principle.

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First, the guardianship legislation. Section 5 of the Guardianship of Infants Act 1886 began the process which is now complete of establishing the equal rights of mother and father. In doing so the legislation, which is currently embodied in section 1 of the Guardianship of Minors Act 1971, took over from the Chancery courts a rule which they had long followed (it was certainly applied by Lord Eldon, during his quarter of a century as Lord Chancellor, as Parker L.3. in this case, quoting Heilbron 3. at [1985] 2 W.L.R. 413, 424, reminds us) that when a court has before it a question as to the care and upbringing of a child it must treat the welfare of the child as the paramount consideration in determining the order to be made. There is here a principle which limits and governs the exercise of parental rights of custody, care, and control. It is a principle perfectly consistent with the law's recognition of the parent as the natural guardian of the child; but it is also a warning that parental right must be exercised in accordance with the welfare principle and can be challenged, even overridden, if it be not.

Secondly, there is the common law's understanding of the nature of parental right. We are not concerned in this appeal to catalogue all that is contained in what Sachs L.J. has felicitously described as the "bundle of rights" (Hewer v. Bryant, [1970] Q.B. 357, 373) which together constitute the rights of custody, care, and control. It is abundantly plain that the law recognises that there is a right and a duty of parents to determine whether or not to seek medical advice in respect of their child, and, having received advice, to give or withhold consent to medical treatment. The question in the appeal is as to the extent, and duration of the right and the circumstances in which outside the two admitted exceptions to which I have earlier referred it can be overridden by the exercise of medical judgment.

As Parker and Fox L.JJ. noted in the Court of Appeal, the modern statute law recognises the existence of parental right: e.g. sections 85 and 86 Children Act 1975 and sections 2. 3, and 4

Child Care Act 1980. It is derived from parental duty. A most illuminating discussion of parental right is to be found in Blackstone's Commentaries, 17th ed. (1830), vol. 1 chapters 16 and 17. He analyses the duty of the parent as the "maintenance . . . protection, and . . . education" of the child: p. 446. He declares that the power of parents over their children is derived from their duty and exists "to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it:" op.cit. p. 452. In chapter 17 he discusses the relation of guardian and ward. It is, he points out, a

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relation "derived out of [the relation of parent and child]: the guardian being only a temporary parent, that is, for so long a time as the ward is an infant, or under age": op.cit. chap. 17, p. 460. A little later in the same chapter he again emphasises that the power and reciprocal duty of a guardian and ward are the same, pro tempore, as that of a father and child and adds that the guardian, when the ward comes of age, (as also the father who becomes guardian "at common law" if an estate be left to his child) must account to the child for all that he has transacted on his behalf: pp. 462-463. He then embarks upon a discussion of the different ages at which for different purposes a child comes of sufficient age to make his own decision; and he cites examples, viz. a boy might at 12 years old take the oath of allegiance; at 14 he might consent to marriage or choose his guardian "and, if his discretion be actually proved, may make his testament of his personal estate;" at 17 he could be an executor - all these rights and responsibilities being capable of his acquiring before reaching the age of majority at 21: op.cit. p. 463.

The two chapters provide a valuable insight into the principle and flexibility of the common law. The principle is that parental right or power of control of the person and property of his child exists primarily to enable the parent to discharge his duty of maintenance, protection, and education until he reaches such an age as to be able to look after himself and make his own decisions. Blackstone does suggest that there was a further justification for parental right, viz. as a recompense for the faithful discharge of parental duty: but the right of the father to the exclusion of the mother and the reward element as one of the reasons for the existence of the right have been swept away by the Guardianship of Minors legislation to which I have already referred. He also accepts that by statute and by case law varying ages of discretion have been fixed for various purposes. But it is clear that this was done to achieve certainty where it was considered necessary and in no way limits the principle that parental right endures only so long as it is needed for the protection of the child.

Although statute has intervened in respect of a child's capacity to consent to medical treatment from the age of 16 onwards, neither statute nor the case law has ruled on the extent and duration of parental right in respect of children under the age of 16. More specifically, there is no rule yet applied to contraceptive treatment, which has special problems of its own and is a late-comer in medical practice. It is open, therefore, to the House to formulate a rule. The Court of Appeal favoured a fixed age limit of 16, basing themselves on a view of the statute law which I do not share and upon their view of the effect of the older case law which for the reasons already given I cannot

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accept. They sought to justify the limit by the public interest in the law being certain. Certainty is always an advantage in the law, and in some branches of the law it is a necessity. But it brings with it an inflexibility and a rigidity which in some branches of the law can obstruct justice, impede the law's development, and stamp upon the law the mark of obsolescence where what is needed is the capacity for development. The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose upon the process of "growing up" fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change. If certainty be thought desirable, it is better that the rigid demarcations necessary to achieve it should be laid down by legislation after a full consideration of all the relevant factors than by the courts confined as they are by the forensic process to the evidence adduced by the parties and to whatever may properly fall within the judicial notice of judges. Unless and until Parliament should think fit to intervene, the courts should establish a principle flexible enough to enable justice to be achieved by its application to the particular circumstances proved by the evidence placed before them.

The underlying principle of the law was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. Lord Denning M.R. captured the spirit and principle of the law when he said in Hewer v. Bryant [1970] 1 Q.B. 357, 369:

> "I would get rid of the rule in In re Agar-Ellis, 24 Ch.D. 317 and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off with a shilling. If a daughter had an illegitimate child, he would turn her out of the house. His power only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in conformity with the recent Report of the Committee on the Age of Majority [Cmnd. 3342, 1967], that the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling

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right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."

But his is by no means a solitary voice. It is consistent with the opinion expressed by the House in J. v. C. [1970] A.C. 668 where their Lordships clearly recognised as out of place the assertion in the Agar-Ellis cases 10 Ch.D. 49; 24 Ch.D. 317 of a father's power bordering on "patria potestas." It is consistent with the view of Lord Parker C.J. in Reg. v. Howard [1966] 1 W.L.R. 13, 14 where he ruled that in the case of a prosecution charging

rape of a girl under 16 the Crown must prove either lack of her consent or that she was not in a position to decide whether to consent or resist and added the comment that "there are many girls who know full well what it is all about and can properly consent." And it is consistent with the views of the House in the recent criminal case where a father was accused of kidnapping his own child, Reg. v. D. [1984] A.C. 778, a case to which I shall return.

For the reasons which I have endeavoured to develop the case law of the 19th and earlier centuries is no guide to the application of the law in the conditions of today. The Agar-Ellis cases 10 Ch.D. 49; 24 Ch.D. 317 (the power of the father) cannot live with the modern statute law. The habeas corpus "age of discretion" cases are also no guide as to the limits which should be accepted today in marking out the bounds of parental right, of a child's capacity to make his or her own decision, and of a doctor's duty to his patient. Nevertheless the "age of discretion" cases are helpful in that they do reveal the judges as accepting that a minor can in law achieve an age of discretion before coming of full age. The "age of discretion" cases are cases in which a parent or guardian (usually the father) has applied for habeas corpus to secure the return of his child who has left home without his consent. The courts would refuse an order if the child had attained the age of discretion, which came to be regarded as 14 for boys and 16 for girls, and did not wish to return. The principle underlying them was plainly that an order would be refused if the child had sufficient intelligence and understanding to make up his own mind. A passage from the judgment of Cockburn C.J. in Reg. v. Howes (1860) 3 E. & E. 332, which Parker L.J. quoted in the Court of Appeal, illustrates their reasoning and shows how a fixed age was used as a working rule to establish an age at which the requisite "discretion" could be held to be achieved by the child. The Chief Justice said at pp. 336-337:

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> "Now the cases which have been decided on this subject shew that, although a father is entitled to the custody of his children till they attain the age of 21, this court will not grant a habeas corpus to hand a child which is below that age over to its father, provided that it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests. The whole question is, what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The legislature has given us a guide, which we may safely follow, in pointing out 16 as the age up to which the father's right to the custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him"

The principle is clear: and a fixed age of discretion was accepted by the courts by analogy from the Abduction Acts (the first being the Act of 1557 4 & 5 Ph. & M. c.8). While it is unrealistic today to treat a 16th century Act as a safe guide in the matter of a girl's discretion, and while no modern judge would dismiss the intelligence of a teenage girl as "intellectual precocity," we can agree with Cockburn C.J. as to the principle of the law - the attainment by a child of an age of sufficient discretion to enable him or her to exercise a wise choice in his or her own interests.

The modern law governing parental right and a child's capacity to make his own decisions was considered in Reg. v. D; [1984] A.C. 778. The House must, in my view, be understood as having in that case accepted that, save where statute otherwise provides, a minor's capacity to make his or her own decision depends upon the minor having sufficient understanding and intelligence to make the decision and is not to be determined by reference to any judicially fixed age limit. The House was faced with a submission that a father, even if he had taken his child away by force or fraud, could not be guilty of a criminal offence of any kind. Lord Brandon of Oakbrook, with whom their other Lordships agreed, commented at pp. 804-805 that this might well have been the view of the legislature and the courts in the 19th century, but had this to say about parental right and a child's capacity in our time to give or withhold a valid consent:

> "This is because in those times both the generally accepted conventions of society, and the courts by which such conventions were buttressed and enforced, regarded a father as having absolute and paramount authority, as against all the world, over any children of his who were still under the

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> age of majority (then 21), except for a married daughter. The nature of this view of a father's rights appears clearly from various reported cases, including, as a typical example, In re Agar-Ellis (1883) 24 Ch.D. 317. The common law, however, while generally immutable in its principles, unless different principles are laid down by statute, is not immutable in the way in which it adapts, develops and applies those principles in a radically changing world and against the background of radically changed social conventions and conditions."

and later, at p. 806 -

> "I see no good reason why, in relation to the kidnapping of a child, it should not in all cases be the absence of the child's consent which is material, whatever its age may be. In the case of a very young child, it would not have the understanding or the intelligence to give its consent, so that absence of consent would be a necessary inference from its age. In the case of an older child, however, it must, I think be a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent; if, but only if, the jury considers that a child has these qualities, it must then go on to consider whether it has been proved that the child did not give its consent. While the matter will always be for the jury alone to decide, I should not expect a jury to find at all frequently that a child under 14 had sufficient understanding and intelligence to give its consent."

In the light of the foregoing I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates

if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law. Until the child achieves the capacity to consent, the parental right to make the decision continues save only in exceptional circumstances. Emergency, parental neglect, abandonment of the child, or inability to find the parent are examples of exceptional situations justifying the 'doctor proceeding to treat the child without parental knowledge and consent: but there will arise, no doubt, other exceptional situations in which it will be reasonable for the doctor to proceed without the parent's consent.

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When applying these conclusions to contraceptive advice and treatment it has to be borne in mind that there is much that has to be understood by a girl under the age of 16 if she is to have legal capacity to consent to such treatment. It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved. There are moral and family questions, especially her relationship with her parents; long-term problems associated with the emotional impact of pregnancy and its termination; and there are the risks to health of sexual intercourse at her age, risks which contraception may diminish but cannot eliminate. It follows that a doctor will have to satisfy himself that she is able to appraise these factors before he can safely proceed upon the basis that she has at law capacity to consent to contraceptive treatment. And it further follows that ordinarily the proper course will be for him, as the guidance lays down, first to seek to persuade the girl to bring her parents into consultation, and if she refuses, not to prescribe contraceptive treatment unless he is satisfied that her circumstances are such that he ought to proceed without parental knowledge and consent.

Like Woolf J., I find illuminating and helpful the judgment of Addy J. of the Ontario High Court in Johnston v. Wellesley Hospital (1970) 17 D.L.R. (3d) 139, a passage from which he quotes in his judgment in this case, [1984] Q.B. 581, 597. The key passage bears repetition!

> "But, regardless of modern trend, I can find nothing in any of the old reported cases, except where infants of tender age or young children were involved, where the courts have found that a person under 21 years, of age was legally incapable of consenting to medical treatment. If a person under 21 years were unable to consent to medical treatment, he would also be incapable of consenting to other types of bodily interference. A proposition purporting to establish that any bodily interference acquiesced in by a youth of 20 years would nevertheless constitute an assault would be absurd. If such were the case, sexual intercourse with a girl under 21 years would constitute rape. Until the minimum age of consent to sexual acts was fixed at 14 years by a statute, the courts often held that infants were capable of consenting at a considerably earlier age than 14 years.

"I feel that the law on this point is well expressed in the volume on Medical Negligence (1957), by Lord Nathan,

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> p. 176: 'It is suggested that the most satisfactory solution of the problem is to rule that an infant who is capable of appreciating fully the nature and consequences of a particular operation or of particular treatment can give an effective consent thereto, and in such cases the consent of the guardian is unnecessary; but that where the infant is without that capacity, any apparent consent by him or her will be a nullity, the sole right to consent being vested in the guardian.'"

I am, therefore, satisfied that the Department's guidance can be followed without involving the doctor in any infringement of parental right. Unless, therefore, to prescribe contraceptive treatment for a girl under the age of 16 is either a criminal offence or so close to one that to prescribe such treatment is contrary to public policy, the department's appeal must succeed.

The Criminal Law Case

If this case should be made good, the discussion of parental right is, of course, an irrelevance. If it be criminal or contrary to public policy to prescribe contraception for a girl under the age of 16 on the ground that sexual intercourse with her is unlawful and a crime on the part of her male partner, the fact that her parent knew and consented would not make it any less so. I confess that I find the submission based upon criminality or public policy surprising. So far as criminality is concerned, I am happy to rest on the judgment of Woolf J. whose approach to the problem I believe to be correct. Clearly a doctor who gives a girl contraceptive advice or treatment not because in his clinical judgment the treatment is medically indicated for the maintenance or restoration of her health but with the intention of facilitating her having unlawful sexual intercourse may well be guilty of a criminal offence. It would depend, as my noble and learned friend, Lord Fraser of Tullybelton observes, upon the doctor's intention - a conclusion hardly to be wondered at in the field of the criminal law. The department's guidance avoids the trap of declaring that the decision to prescribe the treatment is wholly a matter of the doctor's discretion. He may prescribe only if she has the capacity to consent or if exceptional circumstances exist which justify him in exercising his clinical judgment without parental consent. The adjective "clinical" emphasises that it must be a medical judgment based upon what he honestly believes to be necessary for the physical, mental, and emotional health of his patient. The bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse*

The public policy point fails for the same reason. It cannot be said that there .is anything necessarily contrary to public policy in medical contraceptive treatment if it be medically indicated as

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in the interest of the patient's health: for the provision of such treatment is recognised as legitimate by Parliament: section 5 National Health Service Act 1977. If it should be prescribed for a girl under 16 the fact that it may eliminate a health risk in the event of the girl having unlawful sexual intercourse is an

irrelevance unless the doctor intends to encourage her to have that intercourse. If the prescription is the bona fide exercise of his clinical judgment as to what is best for his patient's health, he has nothing to fear from the criminal law or from any public policy based on the criminality of a man having sexual intercourse with her.

It can be said by way of criticism of this view of the law that it will result in uncertainty and leave the law in the hands of the doctors. The uncertainty is the price which has to be paid to keep the law in line with social experience, which is that many girls are fully able to make sensible decisions about many matters before they reach the age of 16. I accept that great responsibilities will lie on the medical profession. It is, however, a learned and highly trained profession regulated by statute and governed by a strict ethical code which is vigorously enforced. Abuse of the power to prescribe contraceptive treatment for girls under the age of 16 would render a doctor liable to severe professional penalty. The truth may well be that the rights of parents and children in this sensitive area are better protected by the professional standards of the medical profession than by 'a priori' legal lines of division between capacity and lack of capacity to consent since any such general dividing line is sure to produce in some cases injustice, hardship, and injury to health.

For these reasons I would allow the Department's appeal, and set aside the declaration that the guidance is unlawful. I would add that, since the second declaration granted by the Court of Appeal, which concerns only the area health authority, was based on the same reasoning as the first, it must be held to have been wrongly granted. The Court of Appeal's decision to grant it should be, in my opinion, overruled as erroneous in law.

LORD BRIDGE OF HARWICH

My Lords,

The prelude to the proceedings from which this appeal arises was an exchange of correspondence between the present

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respondent, Mrs. Victoria Gillick, and her local area health authority in which she sought, but failed to obtain, an assurance that in no circumstances would any of her daughters when under 16 be offered contraceptive advice or treatment. Mrs. Gillick now has her declaration against the health authority, from which they do not appeal. I should suppose that in such a family as Mrs. Gillick's the possibility of any of her daughters under 16 seeking to use contraceptives secretly was in any event so remote as to make the issue in the proceedings against the health authority purely academic. But what prompted the correspondence was a "Memorandum of Guidance" (to which I will refer simply as "the Memorandum") on the subject of contraceptive advice and treatment for children under 16 issued to all health authorities by the present appellants, the Department of Health and Social Security ("D.H.S.S."). The terms of the Memorandum are set out in full in the speeches of my noble and learned friends Lord Fraser of Tullybelton and Lord Scarman. The Memorandum has

been declared by the Court of Appeal to be contrary to law and it is that declaration that gives rise to the only live issue in this appeal. It is against the ethos expressed in the Memorandum that Mrs. Gillick's crusade, as my noble and learned friend Lord Templeman aptly calls it, is primarily directed.

Throughout the hearing of the argument in the appeal and in subsequent reflection on the questions to which it gives rise I have felt doubt and difficulty as to the basis of the jurisdiction which Mrs. Gillick invokes in her claim to a declaration against the D.H.S.S. If the claim is well founded, it must surely lie in the field of public rather than private law. Mrs. Gillick has no private right which she is in a position to assert against the D.H.S.S. But the point which troubles me has nothing to do with the purely procedural technicality that the proceedings were commenced by writ rather than by application for judicial review. I agree that no objection has been, nor could now be, raised on that ground. My difficulty is more fundamental. I ask myself what is the nature of the action or decision taken by the D.H.S.S. in the exercise of a power conferred upon it which entitles a court of law to intervene and declare that it has stepped beyond the proper limits of its power. I frame the question in that way because I believe that hitherto, certainly in general terms, the court's supervisory jurisdiction over the conduct of administrative authorities has been confined to ensuring that their actions or decisions were taken within the scope of the power which they purported to exercise or conversely to providing a remedy for an authority's failure to act or to decide in circumstances where some appropriate statutory action or decision was called for.

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Now it is true that the Secretary of State for Health and Social Security under section 5(I)(b) of the National Health Service Act 1977 has a general responsibility for the provision within the National Health Service of what may be described shortly as family planning services. But only in a very loose sense could the issue of the Memorandum be considered as part of the discharge of that responsibility. The Memorandum itself has no statutory force whatever. It is not and does not purport to be issued in the exercise of any statutory power or in the performance of any statutory function. It is purely advisory in character and practitioners in the National Health Service are, as a matter of law, in no way bound by it.

In the light of these considerations I cannot, with all respect, agree that the Memorandum is open to review on "Wednesbury" principles on the ground that it involves an unreasonable exercise of a statutory discretion. Such a review must always begin by examining the nature of the statutory power which the administrative authority whose action is called in question has purported to exercise, and asking, in the light of that examination, what were, and what were not, relevant considerations for the authority to take into account in deciding to exercise that power. It is only against such a specific statutory background that the question whether the authority has acted unreasonably, in the Wednesbury sense, can properly be asked and answered. Here there is no specific statutory background by reference to which the appropriate Wednesbury questions could be formulated.

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The issue by a department of government with administrative responsibility in a particular field of non-statutory guidance to subordinate authorities operating in the same field is a familiar feature of modern administration. The innumerable circulars issued over the years by successive departments responsible in the field of town and country planning spring to mind as presenting a familiar example. The question whether the advice tendered in such non-statutory guidance is good or bad, reasonable or unreasonable, cannot, as a general rule, be subject to any form of judicial review. But the question arises whether there' is any exception to that general rule.

Your Lordships have been referred to the House's decision in Royal College of Nursing v. Department of Health and Social Security [1981] A.C. 800. The background to that case was exceptional, as only becomes fully clear when one reads the judgment of Woolf 3. at first instance, reported at [1981] 1 All

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E.R. 545. The Royal College of Nursing ("R.C.N.") and the D.H.S.S. had received conflicting legal advice as to whether or not it was lawful, on the true construction of certain provisions of the Abortion Act 1967, for nurses to perform particular functions in the course of a novel medical procedure for the termination of pregnancy, when acting on the orders and under the general supervision of a registered medical practitioner but not necessarily in his presence. The R.C.N. had issued a memorandum and a later circular to its members to the effect that it was not lawful. The D.H.S.S. had issued a circular advising that it was lawful. The desirability of an authoritative resolution of this dispute on a pure question of law was obvious in the interests both of the nursing profession and of the public. The proceedings took the form of a claim by the R.C.N. against the D.H.S.S. for a suitable declaration and the D.H.S.S. in due course counterclaimed a declaration to the opposite effect. As Woolf J. pointed out, neither side took any point as to the jurisdiction of the court to grant a declaration. Woolf J. himself felt it necessary to raise and examine certain questions as to the locus standi of the R.C.N. to bring the proceedings and as to the propriety of their form. He answered these questions in a favourable sense to enable him to decide the disputed question of law on its merits. No technical question bearing on jurisdiction attracted any mention in the Court of Appeal or in this House. In the litigation the original conflict between the parties was reflected in a conflict of judicial opinion. On a count of judicial heads a majority of 5 to 4 favoured the R.C.N. But by a majority of 3 to 2 in your Lordships' House the D.H.S.S.. carried the day and obtained the declaration they sought.

Against this background it would have been surprising indeed if the courts had declined jurisdiction. But I think it must be recognised that the decision (whether or not it was so intended) does effect a significant extension of the court's power of judicial review. We must now say that if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration. Such an extended jurisdiction is no doubt a salutary and indeed a necessary one in certain circumstances, as the Royal College of Nursing case [1981]

A.C. 800 itself well illustrates. But the occasions of a departmental non-statutory publication raising, as in that case, a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare. In cases where any proposition of law implicit in a departmental advisory document is interwoven with

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questions of social and ethical controversy, the court should, in my opinion, exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority or preferring answers to hypothetical questions of law which do not strictly arise for decision.

My Lords, the Memorandum, in expressing the view that in exceptional and unusual cases it may be proper for a doctor to offer contraceptive advice and treatment to a girl under 16 without the knowledge or consent of her parent, guardian or other person in loco parentis, implies that the law does not prohibit the doctor from so acting. The exceptional and unusual cases contemplated are clearly not confined to cases of children abandoned by their parents and not yet taken into care by a local authority or to cases of "emergency", whatever meaning one may give to that word in this context. I am content to assume, without deciding, that Mrs. Gillick, in view of her dispute with the health authority, has sufficient locus standi to contest the issue of the lawfulness of the Memorandum. To succeed in her action against the D.H.S.S. she must at least establish that, leaving aside cases of abandoned children or emergencies, the law does absolutely prohibit the prescription of contraception for a girl under 16 without parental consent or an order of the court.

The most direct support for that proposition is to be found in the opinion of my noble and learned friend Lord Brandon of Oakbrook that to prescribe contraception for a girl under 16, with or without parental consent, is either to aid and abet the offence which will be committed by the man with whom she has intercourse, or at least so far to facilitate his criminal conduct as to be contrary to public policy. I appreciate the logical cogency of my noble and learned friend's reasoning, but I cannot agree with his conclusion. With reference to the possible criminal complicity of the doctor I am content gratefully to adopt the relevant passage from the judgment of Woolf J., [1984] 1 Q.B. 581, 593B - 595G, with which I fully agree. On the issue of public policy, it seems to me that the policy consideration underlying the criminal sanction imposed by statute upon men who have intercourse with girls under 16 is the protection of young girls from the untoward consequences of intercourse. Foremost among these must surely be the risk of pregnancy leading either to abortion or the birth of a child to an immature and irresponsible mother. In circumstances where it is apparent that the criminal sanction will not or is unlikely to, afford the necessary protection it cannot, in my opinion, be contrary to public policy to prescribe contraception as the only effective means of avoiding a wholly undesirable pregnancy. On the facts presented to Butler-Sloss J. in the case of In re P. (A Minor) (1981) 80 L.G.R. 301, I think, if I may respectfully say so, that she took an eminently sensible and entirely proper course.

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The alternative and more extensively argued ground on which Mrs. Gillick challenges the lawfulness of the Memorandum depends on the two closely related propositions:

1. that no girl under 16 can have the capacity in law to give a valid consent to submit to contraceptive treatment;

2. that the prescription of such treatment without parental consent is an unlawful invasion of parental rights.

Both these propositions are comprehensively examined in the speeches of my noble and learned friends Lord Fraser of Tullybelton and Lord Scarman. I fully agree with the reasons expressed by both my noble and learned friends for reaching the conclusion that neither proposition is well founded in law.

Accordingly I would allow the appeal of the D.H.S.S. to the extent of setting aside the declaration made by the Court of Appeal that the Memorandum was contrary to law.

LORD BRANDON OF OAKBROOK

My Lords,

In this case your Lordships are concerned with the legal aspect of three activities relating to the sexual conduct of girls who are under the age of 16. The first activity is the giving to such girls by professional persons other than doctors (e.g. social workers) of advice about contraception. The second activity is the physical examination of such girls by doctors with a view to their using one or other form of contraception. The third activity is the prescribing for such girls of contraceptive treatment, especially that form which is commonly called "the pill."

The question with regard to these three activities which has been raised in the two courts below, and again in your Lordships' House, is whether such activities can be lawfully carried on without the prior knowledge and consent of the parents of any girl of the age concerned.

In my opinion the formulation of the question for decision in

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this way involves the rolling up in one composite question of two quite separate and distinct points of law. The first point of law is whether the three activities to which I have referred can be carried on lawfully in any circumstances whatever. If, on the one hand, the right answer to this first point of law is "no", then no second point of law arises for decision. If, on the other hand, the answer to the first question is "yes", then a second point of law arises, namely, whether the three activities referred to can only be lawfully carried on with the prior knowledge and consent of the parents of the girl concerned.

The first point of law appears to me to be one of public policy, the answer to which is to be gathered from an examination

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of the statutory provisions which Parliament has enacted from time to time in relation to men having sexual intercourse with girls either under the age of 13 or between the ages of 13 to 16.

It is, I think, sufficient to begin with the Criminal Law Amendment Act 1885 (48 & 49 Viet. C. 69) and then to go on to the Sexual Offences Act 1956, by which the former Act was repealed and largely replaced.

Part I of the Act of 1885, which contained sections 2-12, had the cross-heading "Protection of Women and Girls." Sections 4 and 5 provided, so far as material:

> "4. Any person who –
>
> unlawfully and carnally knows any girl under the age of 13 years shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour. . . .
>
> 6. Any person who –
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> 6. unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of 13 years and under the age of 16 years; ...
>
> shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. . . ."

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In Reg. v. Tyrrell [1894] 1 Q.B. 710 it was held by the Court of Crown Cases Reserved that it was not a criminal offence for a girl between the ages of 13 and 16 to aid and abet a man in committing, or to incite him to commit, the misdemeanour of having carnal knowledge of her contrary to section 5 of the Criminal Law Amendment Act 1885 set out above. The ground of this decision was that the Act of 1885 had been passed for the purpose of protecting women and girls against themselves: see the judgment of Lord Coleridge C.J. at p. 712.

The Sexual Offences Act 1956 represents the latest pronouncement of Parliament on these matters. Sections 5 and 6 provide, so far as material!

> "5. It is a felony for a man to have unlawful sexual intercourse with a girl under the age of 13.
>
> 6. - (i) It is an offence . . . for a man to have unlawful sexual intercourse with a girl not under the age of 13 but under the age of 16."

Further, by section 37 and the Second Schedule, the maximum punishment for an offence under section 5 is imprisonment for life, and that for an offence under section 6 imprisonment for two years. Since the passing of the Act of 1956 the distinction

between felonies and misdemeanours has been abolished. For the purposes of this case, however, nothing turns on this change of terminology.

My Lords, the inescapable inference from the statutory provisions of the Acts of 1885 and 1956 to which I have referred is that Parliament has for the past century regarded, and still regards today, sexual intercourse between a man and a girl under 16 as a serious criminal offence so far as the man who has such intercourse is concerned. So far as the girl is concerned, she does not commit any criminal offence, even if she aids, abets or incites the having of such intercourse. The reason for. this, as explained earlier, is that the relevant statutory provisions have been enacted by Parliament for the purpose of protecting the girl from herself. The having of such intercourse is, however, unlawful, and the circumstance that the man is guilty of a criminal offence, while the girl is not, cannot alter that situation.

On the footing that the having of sexual intercourse by a man with a girl under 16 is an unlawful act, it follows necessarily that for any person to promote, encourage or facilitate the

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commission of such an act may itself be a criminal offence, and must, in any event, be contrary to public policy. Nor can it make any difference that the person who promotes, encourages or facilitates the commission of such an act is a parent or a doctor or a social worker.

The question then arises whether the three activities to which I referred earlier should properly be regarded as, directly or indirectly, promoting, encouraging or facilitating the having, contrary to public policy, of sexual intercourse between a man and a girl under 16. In my opinion there can be only one answer to this question, namely, that to give such a girl advice about contraception, to examine her with a view to her using one or more forms of protection, and finally to prescribe contraceptive treatment for her, necessarily involves promoting, encouraging or facilitating the having of sexual intercourse, contrary to public policy, by that girl with a man.

The inhibitions against the having of sexual intercourse between a man and a girl under 16 are primarily two-fold. So far as the man is concerned there is the inhibition of the criminal law as contained in sections 5 and 6 of the Act of 1956. So far as both are concerned there is the inhibition arising from the risk of an unwanted pregnancy. To give the girl contraceptive treatment, following appropriate advice and examination, is to remove largely the second of these two inhibitions. Such removal must involve promoting, encouraging or facilitating the having of sexual intercourse between the girl and the man.

It has been argued that some girls under 16 will have sexual intercourse with a man whether contraceptive treatment is made available to them or not, and that the provision of such treatment does not, therefore, promote, encourage or facilitate the having of such intercourse. In my opinion this argument should be rejected for two quite separate reasons. The first reason is that the mere fact that a girl under 16 seeks contraceptive advice and treatment, whether of her own accord or at the suggestion of others, itself indicates that she, and probably also the man with

whom she is having, **or** contemplating having, sexual intercourse, are conscious of the inhibition arising from the risk of an unwanted pregnancy. They are conscious of it and are more likely to indulge their desires if it can be removed. The second reason is that, if all a girl under 16 needs to do in order to obtain contraceptive treatment is to threaten that she will go ahead with, or continue, unlawful sexual intercourse with a man unless she is given such treatment, a situation tantamount to blackmail will arise which no legal system ought to tolerate. The only answer which the law should give to such a threat is "wait till you are

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16."

The D.H.S.S. has contended that section 5(1) of the National Health Service Act 1977 imposes on it a statutory duty to carry out, in relation to girls under 16 as well as to older girls or women, the three activities to which I referred earlier. That provision reads:

> "5. - (1) It is the Secretary of State's duty - . . .
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> > (b) to arrange, to such extent as he considers necessary to meet all reasonable requirements in England and Wales, for the giving of advice on contraception, the medical examination of persons seeking advice on contraception, the treatment of such persons and the supply of contraceptive substances and appliances."

This provision does not define the "persons" who are the subject-matter of it, nor is there any definition of that expression anywhere else in the Act. In these circumstances it seems to me that a court, in interpreting the provision, must do so in a way which conforms with considerations of public policy rather than in a way which conflicts with them. For the reasons which I have given earlier, I am of the opinion that, in the case of girls under 16, the giving of advice about contraception, medical examination with a view to the use of one or other form of contraception, and the prescribing of contraceptive treatment, are all contrary to public policy. It follows that I would interpret the expression "persons" in section 5(1)(b) above as not including girls under 16. Alternatively I would say that the expression "all reasonable retirements", which occurs earlier in the provision, cannot be interpreted as including the requirements of a girl under 16 which, if satisfied, will promote, encourage or facilitate unlawful acts of sexual intercourse between a man and her.

My Lords, reference was made in the course of the argument before you to a decision of Butler-Sloss J. in In re P (A Minor) 80 L.G.R. 301. In that case the learned judge, in wardship proceedings, ordered that a girl of 15, who had been pregnant for the second time and was in the care of a local authority, should be fitted with a contraceptive appliance because it appeared that it was impossible for the local authority, in whose care she was, to control her sexual conduct. It was contended that this decision was authority for the proposition that, in wardship proceedings at any rate, an order could lawfully be made for the supply and fitting of a contraceptive appliance to a girl under 16.

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I do not know what arguments were or were not addressed to Butler-Sloss J. in that case, and it is, in any event, unnecessary for your Lordships to decide in these proceedings the limits of the powers of a court exercising wardship jurisdiction. As at present advised, however, I am of opinion, with great respect to Butler-Sloss 3., that the order which she made was not one which she could lawfully make.

My Lords, great play was made in the argument before you of the disastrous consequences for a girl under 16 of becoming pregnant as a result of her willingly having unlawful sexual intercourse with a man. I am fully conscious of these considerations, but I do not consider that, if the views which I have so far expressed are right in law, those considerations can alter the position.

It is sometimes said that the age of consent for girls is presently 16. This is, however, an inaccurate way of putting the matter, since, if a man has sexual intercourse with a girl under 16 without her consent, the crime which he thereby commits is that of rape. The right way to put the matter is that 16 is the age of a girl below which a man cannot lawfully have sexual intercourse with her. It was open to Parliament in 1956, when the Sexual Offences Act of that year was passed, and it has remained open to Parliament throughout the 29 years which have since elapsed, to pass legislation providing for some lower age than 16, if it thought fit to do so. Parliament has not thought fit to do so, and I do not consider that it would be right for your Lordships' House, by-holding that girls under 16 can lawfully be provided with contraceptive facilities, to undermine or circumvent the criminal law which Parliament has enacted. The criminal law and the civil law should, as it seems to me, march hand in hand on all issues, including that raised in this case, and to allow inconsistency or contradiction between them would, in my view, serve only to discredit the rule of law as a whole.

Since I am of opinion that the first question which I posed earlier, namely, whether the provision of contraceptive facilities to girls under 16 was lawful in any circumstances at all, should be answered in the negative, the second question which I posed relating to the need for prior parental knowledge and consent, does not arise. This is because, on the view which I take of the law, making contraception available to girls under 16" is unlawful, whether their parents know of and consent to it or not.

My Lords, it remains for me to indicate what order I Consider that the House should make on this appeal. With regard to the first declaration made by the Court of Appeal, I would uphold it, albeit on grounds wider than those on which it was founded in that court. With regard to the second declaration, there is no appeal against it and I would uphold it also, although,

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for the reasons which I have given, I regard the four lines which follow the words "the age of 16" as surplusage.

In the result, I would dismiss the appeal of the D.H.S.S. with costs.

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LORD TEMPLEMAN

My Lords,

This appeal involves consideration of the independence of a teenager, the powers of a parent and the duties of a doctor. The question is, who has the right to decide whether an unmarried girl under the age of 16 may practise contraception?

An unmarried girl under the age of 16 does not, in my opinion, possess the power in law to decide for herself to practise contraception. Section 6 of the Sexual Offences Act 1956 makes it an offence for a man to have unlawful sexual intercourse with a girl under the age of 16. Consent by the girl does not afford a defence to the man or constitute an offence by the girl. Parliament has thus indicated that an unmarried girl under the age of 16 is not sufficiently mature to be allowed to decide for herself that she will take part in sexual intercourse. Such a girl cannot therefore be regarded as sufficiently mature to be allowed to decide for herself that she will practise contraception for the purpose of frequent or regular or casual sexual intercourse. Section 6 of the Sexual Offences Act 1956 does not, however, in my view, prevent parent and doctor from deciding that contraceptive facilities shall be made available to an unmarried girl under the age of 16 whose sexual activities are recognised to be uncontrolled and uncontrollable. Section 6 is designed to protect the girl from sexual intercourse. But if the girl cannot be deterred then contraceptive facilities may be provided, not for the purpose of aiding and abetting an offence under Section 6 but for the purpose of avoiding the consequences, principally pregnancy, which the girl may suffer from illegal sexual intercourse where sexual intercourse cannot be prevented. In general, where parent and doctor agree that any form of treatment, including contraceptive treatment, is in the best interests of the girl, there is, in my opinion, no legal bar to that treatment.

Difficulties arise when parent and doctor differ. The parent, claiming the right to decide what is in the best interests of a girl in the custody of that parent may forbid the -provision of contraceptive facilities. A doctor, claiming the right to decide

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what is in the best interests of a patient, may wish to override the parent's objections. A conflict which is express may be resolved by the court which may accept the view of either parent or doctor or modify the views of both of them as to what is in the best interests of the girl. The present appeal is concerned with a conflict which is known to the doctor but is concealed from the parent and from the court. The girl, aware that the parent will forbid contraception, requests the doctor to provide and the doctor agrees to provide contraceptive facilities and to keep the parent in ignorance.

A parent is the natural and legal guardian of an infant under the age of 18 and is responsible for the upbringing of an infant who is in the custody of that parent. The practical exercise of parental powers varies from control and supervision to guidance and advice depending on the discipline enforced by the parent and the age and temperament of the infant. Parental power must be exercised in the best interests of the infant and the court may intervene in the interests of the infant at the

behest of the parent or at the behest of a third party. The court may enforce parental right, control the misuse of parental power or uphold independent views asserted by the infant. The court will be guided by the principle that the welfare of the infant is paramount. But subject to the discretion of the court to differ from the views of the parent, the court will, in my opinion, uphold the right of the parent having custody of the infant to decide on behalf of the infant all matters which the infant is not competent to decide. The prudent parent will pay attention to the wishes of the infant and will normally accept them as the infant approaches adulthood. The parent is not bound by the infant's wishes, but an infant approaching adulthood may be able to flout the wishes of the parent with ease.

A doctor tenders advice and offers treatment which the doctor considers to be in the best interests of the patient. A patient is free to reject the advice and refuse the treatment; Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] 2 W.L.R. 480, 508. Where the patient is an infant, the medical profession accept that a parent having custody and being responsible for the infant is entitled on behalf of the infant to consent to or reject treatment if the parent considers that the best interests of the infant so require. Where doctor and parent disagree, the court can decide and is not slow to act. I accept that if there is no time to obtain a decision from the court, a doctor may safely carry out treatment in an emergency if the doctor believes the treatment to be vital to the survival or health of an infant and notwithstanding the opposition of a parent or the impossibility of alerting the parent

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before the treatment is carried out. In such a case the doctor must have the courage of his convictions that the treatment is necessary and urgent in the interests of the patient and the court will, if necessary, approve after the event treatment which the court would have authorised in advance, even if the treatment proves to be unsuccessful.

I accept also that a doctor may lawfully carry out some forms of treatment with the consent of an infant patient and against the opposition of a parent based on religious or any other grounds. The effect of the consent of the infant depends on the nature of the treatment and the age and understanding of the infant. For example, a doctor with the consent of an intelligent boy or girl of 15 could in my opinion safely remove tonsils or a troublesome appendix. But any decision on the part of a girl to practise sex and contraception requires not only knowledge of the facts of life and of the dangers of pregnancy and disease but also an understanding of the emotional and other consequences to her family, her male partner and to herself. I doubt whether a girl under the age of 16 is capable of a balanced judgment to embark on frequent, regular or casual sexual intercourse fortified by the illusion that medical science can protect her in mind and body and ignoring the danger of leaping from childhood to adulthood without the difficult formative transitional experiences of adolescence. There are many things which a girl under 16 needs to practise but sex is not one of them. Parliament could declare this view to be out of date. But in my opinion the statutory provisions discussed in the speech of noble and learned friend Lord Fraser of Tullybelton, and the provisions of section 6 of the Sexual Offences Act 1956 indicate that as the law now stands an unmarried girl

under 16 is not competent to decide to practise sex and contraception.

In the present case it is submitted that a doctor may lawfully make a decision on behalf of the girl and in so doing may overrule or ignore the parent who has custody of the girl. It is submitted that a doctor may at the request of a girl under 16 provide contraceptive facilities against the known or assumed wishes of the parent and on terms that the parent shall be kept in ignorance of the treatment. The justification is advanced that if the girl's request is not met, the girl may persist in sexual intercourse and run the risk of pregnancy. It is not in the interests of a girl under 16 to become pregnant and therefore the doctor may, in her interests, confidentially provide contraceptive facilities unless the doctor can persuade the girl to abstain from sexual intercourse or can persuade her to ensure that precautions are taken by the male participant. The doctor is not bound to provide contraceptive facilities but, it is said, is entitled to do so

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in the best interests of the girl. The girl must be assured that the doctor will be pledged to secrecy otherwise the girl may .not seek advice or treatment but will run all the risks of disease and pregnancy involved in sexual activities without adequate knowledge or mature consideration and preparation. The D.H.S.S.

memorandum instructs a doctor to seek to persuade the girl to involve the parent but concludes that "the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor."

There are several objections to this approach. The first objection is that a doctor, acting without the views of the parent, cannot form a "clinical" or any other reliable judgment that the best interests of the girl require the provision of contraceptive facilities. The doctor at the family planning clinic only knows that which the girl chooses to tell him. The family doctor may know some of the circumstances of some of the families who form his registered patients but his information may be incomplete or misleading. The doctor who provides contraceptive facilities without the knowledge of the parent deprives the parent of the opportunity to protect the girl from sexual intercourse by persuading and helping her to avoid sexual intercourse or by the exercise of parental power which may prevent sexual intercourse. The parent might be able to bring pressure on a male participant to desist from the commission of the offence of sexual intercourse with a girl under 16. The parent might be able and willing to exercise parental power by removing the family or the girl to a different neighbourhood and environment and away from the danger of sexual intercourse.

The second objection is that a parent will sooner or later find out the truth, probably sooner, and may do so in circumstances which bring about a complete rupture of good relations between members of the family and between the family and the doctor. It is inevitable that when the parent discovers that the girl is practising sexual intercourse, the girl will in self justification and in an attempt to reassure the parent reveal that she is relying on contraceptive facilities provided by the doctor in order to avoid pregnancy. The girl and the doctor will be the loser by this revelation.

The third and main objection advanced on behalf of the respondent parent, Mrs. Gillick, in this appeal is that the secret provision of contraceptive facilities for a girl under 16 will, it is said, encourage participation by the girl in sexual intercourse and this practice offends basic principles of morality and religion which

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ought not to be sabotaged in stealth by kind permission of the National Health Service. The interests of a girl under 16 require her to be protected against sexual intercourse. Such a girl is not sufficiently mature to be allowed to decide to flout the accepted rules of society. The pornographic press and the lascivious film may falsely pretend that sexual intercourse is a form of entertainment available to females on request and to males on demand but the regular frequent or casual practice of sexual intercourse by a girl or a boy under the age of 16 cannot be beneficial to anybody and may cause harm to character and personality. Before a girl under 16 is supplied with contraceptive facilities, the parent who knows most about the girl and ought to have the most influence with the girl is entitled to exercise parental rights of control, supervision, guidance and advice in order that the girl may, if possible, avoid sexual intercourse until she is older. Contraception should only be considered if and when the combined efforts of parent and doctor fail to prevent the girl from participating in sexual intercourse and there remains only the possibility of protecting the girl against pregnancy resulting from sexual intercourse.

These arguments have provoked great controversy which is not legal in character. Some doctors approve and some doctors disapprove of the idea that a doctor may decide to provide contraception for a girl under 16 without the knowledge of the parent. Some parents agree and some parents disagree with the proposition that the decision must depend on the judgment of the doctor. Those who favour doctor power assert that the failure to provide confidential contraceptive treatment will lead to an increase in pregnancies amongst girls under 16. As a general proposition, this assertion is not supported by evidence in this case, is not susceptible to proof and in my opinion is of doubtful validity. Availability of confidential contraceptive treatment may increase the demand for such treatment. Contraceptive treatment for females usually requires daily discipline in order to be effective and girls under 16 frequently lack that discipline. The total number of pregnancies amongst girls of under 16 may, therefore, be increased and not decreased by the availability of contraceptive treatment. But there is no doubt that an individual girl who is denied the opportunity of confidential contraceptive treatment may invite or succumb to sexual intercourse and thereby become pregnant. Those who favour parental power assert that the availability of confidential contraceptive treatment will increase sexual activity by girls under 16. This argument is also not supported by evidence in the present case, and is not susceptible to proof. But it is clear that contraception removes or gives an illusion of removing the possibility of pregnancy and therefore removes restraint on sexual intercourse. Some girls would come under pressure if contraceptive facilities were known to be available and some girls under 16 are susceptible to male domination.

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Parliament could decide whether it is better to have more contraception with the possibility of fewer pregnancies and less

disease or whether it is better to have less contraception with the possibility of reduced sexual activity by girls under 16. Parliament could ensure that the doctor prevailed over the parent by reducing the age of consent or by expressly authorising a doctor to provide contraceptive facilities for any girl without informing the parent, provided the doctor considered that his actions were for the benefit of the girl. Parliament could, on the other hand, ensure that the parent prevailed over the doctor by forbidding contraceptive treatment for a girl under 16 save by or on the recommendation of the girl's general medical practitioner and with the consent of the parent who has registered the girl as a patient of that general practitioner. Some girls, it is said, might pretend to be over 16 but a doctor in doubt could always require confirmation from the girl's registered medical practitioner.

This appeal falls to be determined by the existing law. No authority has been cited which prevents an infant from seeking medical or any other advice or which forbids a doctor to advise an infant who has not been tendered by the parent as a patient. No authority compels a doctor to disclose to a parent, otherwise than in the course of litigation, any information obtained as a result of a conversation between the doctor and the infant. On the other hand, in my opinion, confidentiality owed to an infant is not breached by disclosure to a parent responsible for that infant if the doctor considers that such disclosure is necessary in the interests of the infant. A doctor who gave a pledge to a girl under 16 that he would not disclose the fact or content of a conversation would no doubt honour that pledge, but the doctor ought to hesitate before committing himself. A doctor who gave an unconditional pledge of confidentiality to a girl under 16 would, for example, be in a difficult position if the girl then disclosed information which made the doctor suspect that she was being introduced to sexual intercourse by a man who was also introducing her to drugs.

Although a doctor is entitled to give confidential advice to an infant, the law will, in my opinion, uphold the right of a parent to make a decision which the infant is not competent to make. The decision to authorise and accept medical examination and treatment for contraception is a decision which a girl under 16 is not competent to make. In my opinion a doctor may not lawfully provide a girl under 16 with contraceptive facilities without the approval of the parent responsible for the girl save pursuant to a

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court order, or in the case of emergency or in exceptional cases where the parent has abandoned or forfeited by abuse the right to be consulted. Parental rights cannot be insisted upon by a parent who is not responsible for the custody and upbringing of a infant or where the parent has abandoned or abused parental rights. And a doctor is not obliged to give effect to parental rights in an emergency.

A girl under 16 is usually living with a parent and is usually attending school. It is sufficient for the doctor to obtain the consent of the parent or guardian with whom the girl is living. It seems to me to be contrary to law and offensive to professional standards that a doctor should provide contraceptive facilities against the known or presumed wishes of such a parent and that the doctor should conspire with the girl to keep the parent in ignorance of the fact that the girl intends to participate in

frequent, regular or casual sexual intercourse in the belief that the only bar to sexual intercourse is the risk of pregnancy and in complacent reliance on the doctor's contraceptive facilities to obviate that risk.

But parental rights may have been abandoned. If the doctor discovers, for example, that the girl is not living with a parent but has been allowed to live in an environment in which the danger of sexual intercourse is pressing, the doctor may lawfully provide facilities for contraception until the parent has been alerted to the danger and has been afforded the opportunity to reassert parental rights and to protect the girl by means other than contraception. The court will uphold the doctor's actions if the doctor reasonably believes that parental rights have, for the time being at any rate, been abandoned.

Parental rights may have been abused. The dangers of sexual intercourse may emanate from the girl's home. The doctor would be entitled to provide the girl with contraceptive facilities but would then be bound to consider whether the local welfare authorities should be alerted to the possibility that the girl is in need of care and protection. Again, the doctor may be satisfied that the parent is a brute and that the girl has been driven to seek solace outside the family. The doctor might decide that it was necessary to provide contraceptive facilities for the girl without informing the parent but the doctor would be bound to consider the possible consequences if the parent, known to be brutal, discovered the truth.

The doctor may also be faced with circumstances which could properly be described as a medical emergency. The doctor

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may decide that the girl is unable to control her sexual appetite or is acting under an influence which cannot be counteracted immediately. The doctor would be entitled to provide contraceptive facilities as a temporary measure but would, in my opinion, be bound to inform the parent. A subsequent decision to continue contraceptive treatment would be open to the doctor and the parent acting jointly; in default of agreement between them, the welfare authority or the court could be asked to intervene.

There may be other exceptional circumstances and emergencies which would impel the doctor to provide contraceptive facilities without the prior consent of the parent but in most cases the doctor would be bound to inform the parent as soon as possible in order that the parent might have the opportunity of exercising parental rights in such manner as to deter or prevent the girl from indulging in sexual intercourse.

The position seems to me to be as follows. A doctor is not entitled to decide whether a girl under the age of 16 shall be provided with contraceptive facilities if a parent who is in charge of the girl is ready and willing to make that decision in exercise of parental rights. The doctor is entitled in exceptional circumstances and in emergencies to make provision, normally temporary provision, for contraception but in most cases would be bound to inform the parent of the treatment. The court would not hold the doctor liable for providing contraceptive facilities if the doctor had reasonable grounds for believing that the parent had abandoned or abused parental rights or that there was no

parent immediately available for consultation or that there was no parent who was responsible for the girl. But exceptional circumstances and emergencies cannot be expanded into a general discretion for the doctor to provide contraceptive facilities without the knowledge of the parent because of the possibility that a girl to whom contraceptive facilities are not available may irresponsibly court the risk of pregnancy. Such a discretion would enable any girl to obtain contraception on request by threatening to sleep with a man.

In the present state of the law the D.H.S.S. memorandum appears to me to be defective. The principal defect lies. in the assertion that "the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor." In my opinion a decision by a doctor to provide contraceptive facilities for an unmarried girl of 16 against the known or presumed wishes of a parent who has custody of the girl and without the knowledge, of the parent would constitute an unlawful interference with the rights of the parent, subject to the

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intervention of the court, to make that decision on behalf of the girl and an unlawful interference with the right of the parent to influence the conduct of the girl by the exercise of parental powers of control, guidance and advice.

There are two further defects. The memorandum asserts "that consultations between doctors and patients are confidential" without making any distinction between adult patients and infant patients. The memorandum also suggests that doctors should consider providing contraceptive facilities without the knowledge of the parent where "parents are, for example, unconcerned, entirely unresponsive or grossly disturbed." Of course a doctor must protect a girl against a parent who is grossly disturbed although the doctor must also consider the possible consequences if such a parent discovers that the daughter has been practising sexual intercourse with the ostensible approval of the doctor manifested by the secret supply of contraceptives. And if it is plain that the parent is "unconcerned" in the sense that parental control has been abandoned, then the provision of contraceptive facilities without the prior knowledge of the parent would be lawful. But any girl who is anxious to practise sexual intercourse may plausibly represent that the parent is "entirely unresponsive." On behalf of Mrs. Gillick it was urged with some force that the practical effect of the memorandum couched in this opaque language was to enable an inexperienced doctor in a family planning clinic, exuding sympathy and veiled in ignorance of the girl's personality and history, to provide contraceptives as if they were sweets withheld from a deprived child by an unfeeling parent; and that any parent who was concerned with the girl's immortal soul or with moral or religious principles might be said to be "entirely unresponsive" to a proposal that an unmarried girl under the age of 16 should be provided with contraceptives. As the memorandum now stands, a "clinical judgment" by the doctor may amount to no more than a belief that a parent will not consent to contraception and a fear that the girl may practise sex without contraception.

These defects in the memorandum constitute in my opinion a mistake of law on the part of the D.H.S.S. The memorandum assumes and asserts that the doctor is entitled by himself to decide whether an unmarried girl under the age of 16 shall be

provided with contraceptive facilities and that the doctor is entitled to conceal that decision from the parent. In my opinion the decision cannot lawfully be made without the consent of the parent in charge of the girl unless the parent has abandoned or abused parental powers or is not available. If the memorandum is defective by reason of a mistake of law and if, in consequence, a doctor making a decision in reliance on the views, expressed in the

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memorandum may unlawfully interfere with the rights of a parent and make and act upon a decision which the doctor is in law not entitled to make, then in my opinion, the D.H.S.S. which is responsible for the memorandum is amenable to the remedies of judicial review. It matters not whether the memorandum constitutes an order or guidance or advice or a mere expression of views directed to the medical profession or directed to doctors who are engaged in the National Health Service. The issue is not whether the D.H.S.S. are exercising a statutory discretion in a reasonable way but whether by mistake of law the D.H.S.S., a public authority, purports by the memorandum to authorise or approve an unlawful interference with parental rights. In this respect I gratefully acknowledge and accept the observations of my noble and learned friend, Lord Bridge of Harwich, and his warning against the involvement of the courts in areas of social and ethical controversy or hypothetical questions. Nevertheless the questions raised by this appeal must now be answered and, differing from a majority of your Lordships, I consider that Mrs. Gillick has succeeded in her crusade and is entitled in judicial review proceedings to a declaration that the memorandum is unlawful insofar as it purports to authorise or approve of the provision of contraceptive facilities for an unmarried girl under the age of 16 without the knowledge of a parent who holds custody of the girl and has not abandoned or abused the parental right to decide whether such facilities shall be provided. The danger that other parents or individuals may exploit judicial review proceedings by referring social problems to the courts or by seeking general pronouncements of law based on hypothetical facts can be averted by the exercise of the judicial, discretion to refuse leave to prosecute judicial review proceedings. In the present case the proceedings are not in form judicial review proceedings but at this stage the technicality can be ignored because the legal issues raised in these proceedings cannot be allowed to remain unanswered. I would therefore grant the relief I have indicated in substitution for the declarations made by the Court of Appeal and I would order Mrs. Gillick's costs to be paid by the D.H.S.S.

My Lords, in this appeal social issues are entangled with legal issues. In my view the law is consistent with social policy in forbidding the provision of contraceptive facilities for young girls who are under the' care and protection of a parent without the involvement of the parent. But social issues need not finally be determined and are not best determined by lawyers or by doctors.

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In re Evans (Assisted Person)

JUDGMENT

Die Jovis 22° Julii 1982

Upon Report from the Appellate Committee to whom was referred the Cause In re Evans (Assisted Person), That the Committee had heard Counsel as well on Monday the 21st as on Tuesday the 22nd days of June last upon the Petition and Appeal of Philip Alan Myers formerly Chief Constable North Wales Police of Glan-y-Don Colwyn Bay in the County of Clwyd praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 21st day of December 1981 so far as therein stated to be appealed against might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order so far as aforesaid might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as also upon the Case of Michael John Evans lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal (Civil Division) of the 21st day of

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December 1981 in part complained of in the said Appeal be, and the same is hereby, **Affirmed** with the Variation that in lieu of the Declaration therein it be Declared that the Appellant acted unlawfully and in breach of his duty under Regulation 16 of the Police Regulations 1971 in threatening to dispense with the Respondent's services unless he resigned from the North Wales Police and in thus causing him to resign and that it be further Declared that, by reason of his unlawfully induced resignation, the Respondent has thereby become entitled to the same rights and remedies, not including re-instatement, as he would have had if the Appellant had unlawfully dispensed with his services under Regulation 16(1) of the Police Regulations 1971; And it is further Ordered, That the said Petition and Appeal be, and the same is hereby, dismissed this House: And it is further Ordered, That the Appellant do pay or cause to be paid to the said Respondent the Costs incurred by him in respect of the said Appeal, the amount thereof to be certified by the Clerk of the Parliaments if not agreed between the parties: And it is also further Ordered, That the Respondent's Costs in this House be taxed in accordance with the provisions of schedule 2 to the Legal Aid Act 1974.

Cler: Parliamentor

HOUSE OF LORDS

IN RE EVANS (A.P.)

Lord Chancellor
Lord Fraser of Tullybelton
Lord Roskill
Lord Bridge of Harwich
Lord Brightman

Lord Hailsham of St. Marylebone

My Lords,

The analysis of the facts and argument contained in the speech of my noble and learned friend, Lord Brightman, which I have read in draft, relieve me of much of the labour in this case, and enable me to reduce the few observations I wish to make to reasonably concise proportions. I desire, however, to say at the outset that I agree with every word which is about to fall from my noble and learned friend as to the treatment to which this young respondent has been subjected by the appellant. Like my noble and learned friend, I do not doubt the appellant's good faith, but in the result, partly as the result of muddle, partly as the result of a false view of the law, and partly as the result of a disregard of the elementary principles of natural justice, I regard the treatment meted out to this young man as little short of outrageous.

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Briefly, the proceedings originated in an application by the respondent for judicial review under R.S.C. Or. 53 of a decision by the appellant (then Chief Constable of the Police Force of North Wales) whereby in November 1978 he had given the respondent, at that time a probationary constable, the option of resignation from office or dismissal on a month's notice under Regulation 16 of the relevant Regulations. In the event, the respondent had chosen resignation, but had sought relief under R.S.C. Or. 53 on the basis that he had been treated unfairly and in a manner contrary to natural justice.

The first observation I wish to make is by way of criticism of some remarks of the learned Master of the Rolls which seem to me capable of an erroneous construction of the purpose of the remedy by way of judicial review under R.S.C. Or. 53. This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.

Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. There are passages in the judgment of the learned Master of the Rolls (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts *carte blanche* to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on the merits. I am not sure whether the Master of the Rolls really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in

the present case, the reasoning of the subordinate authority with a view to substituting its own opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court.

In the instant case I have no doubt that the respondent was not treated fairly by the appellant. In the first place by his own affidavit the appellant establishes that he asked himself the wrong question, and, once this has been established, for the purposes of judicial review, that by itself is surely enough to vitiate an impugned decision which is not otherwise self-evidently justified. The relevant Regulation enjoined the appellant to consider whether the

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respondent was " fitted physically or mentally to perform the duties of his " office " or was likely to " become an efficient or well-conducted constable " before dispensing with his services. In his affidavit the appellant claimed that this Regulation " gives me an absolute discretion to dispense with a " probationer's services ". In my opinion the discretion, although wide, is not absolute. The Chief Constable should have directed his mind to the criteria laid down in the Regulation in accordance with the appropriate principles of natural justice. He did not do so, and I think it only too likely that it was precisely the belief that his discretion was absolute which led to the cavalier treatment to which, in the event, the respondent was subjected.

To this treatment I now come. Once it is established as was conceded here, that the office held by the appellant was of the third class enumerated by Lord Reid in *Ridge* v. *Baldwin* [1964] A.C. 40 at p.66, it becomes clear, quoting Lord Reid *(ibid),* that there is " an unbroken line of authority to the effect " that an officer cannot lawfully be dismissed without first telling him what is " alleged against him and hearing his defence or explanation ". I regard this rule as fundamental in cases of this kind when deprivation of office is in question. I agree with the appellant's affidavit that " a formal hearing " may well be unnecessary if by that is meant an oral hearing in every case held before the Chief Constable himself. But this does not dispense a Chief Constable from observing the rule laid down by Lord Reid. It may well be also that part or all of the enquiry on the facts may be delegated to a subordinate official, as was done here by the appellant to the Deputy Chief Constable, though, where this is done, the ultimate decision must not be delegated, and in my view, common prudence should dictate that the report by the delegated officer, in this case the Deputy Chief Constable, or at least its substance, should be shown to the officer the subject of review and an opportunity afforded him to comment on it before the final decision is taken by the Chief Constable himself. This was not done here. Moreover, where there has been delegation, the delegated enquiry itself must be conducted in accordance with Lord Reid's rule, and, where it is not, the ultimate decision, even if not delegated, will almost certainly be vitiated.

Apart from his self misdirection on the scope of his discretion, in the present case the appellant clearly admitted in his affidavit that he had taken into account matters concerning the domestic life of the respondent, some of which, if properly put to the respondent, might perhaps, after his explanation had been given and heard, have influenced the decision as to whether the respondent was likely to become an efficient or well-conducted constable. But some of the allegations were plainly erroneous and none, whether erroneous or otherwise, was ever put to the respondent at all in connexion with the relevant enquiry, whether at the delegated hearing or otherwise. Moreover, it was conceded by the appellant's counsel that, at the time of the extremely brief interview at which the decision was made by the appellant, the appellant had already made up his mind to dispense with the respondent's services on the basis of the report made to him by the Deputy Chief Constable, and the respondent was given no chance to say anything by way of denial of the facts alleged in the report or in mitigation of them.

As an example of the extreme danger of proceeding in this way, it must be observed, that, as one of the two clinching matters which seem to have influenced him, the appellant says in his affidavit: " Further, it became known

" (sic) to Senior Officers that the applicant and his wife had lived a ' hippy '

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" type lifestyle at Tyddyn Mynyddig Farm, Bangor ". This had never been put to the respondent at all, and had the appellant or his deputy to whom he delegated the enquiry taken the trouble to ask the respondent about it, he would have discovered at once that this allegedly clinching allegation was palpably untrue, and simply the result of a mistaken address. It was, in short, an utterly incorrect statement relied upon precisely owing to the failure of natural justice of which complaint is made.

There is room for greater controversy regarding the other matter supposedly clinching. There was a finding by the deputy who conducted the enquiry that the respondent had " deliberately flouted " the conditions of tenancy at his council house by keeping dogs in excess of the number permitted by the council and that this exhibited an attitude to authority improper in a member of the police force. This matter had indeed been put to the respondent in some form, but there is a conflict of evidence relating to the interview, of which only the respondent's version is on oath. Without seeking to resolve this conflict, I am of the opinion that natural justice required that it should have been put precisely to the respondent that exact compliance with the conditions of tenancy within the extended time permitted by the council, which at the time of the interview had not yet expired, would probably be a condition of his continuance in office as a probationary constable. It is clear that this was not done and it is fair to the respondent to say that he deposed on oath that, had it been put in this way, " I would have disposed of the dogs ". Without going into this conclusively, I must express doubt whether, on a fair view of the evidence, the appellant, had he applied his mind at all to the correct criteria, or to the evidence available to him in his file, or had he given the respondent a chance to speak, could possibly have come to the conclusion that the facts relating to this aspect of the matter betrayed an attitude to authority inconsistent with the view that he could at the conclusion of his probationary period become an efficient or well-conducted constable, or that the respondent was in any sense deliberately flouting authority. However this may be, the decision of the appellant was, it seems to me, vitiated beyond repair partly by the fact that the appellant does not appear to have directed his mind to the correct criteria laid down in the Regulations, and partly by the fact that he certainly took into account matters which were never put to the respondent in connexion with the relevant enquiry, one of which, and not the least important, had it been put, would have been immediately exposed as nonsense.

Like my noble and learned friend, I find much more difficulty in deciding the order which it is appropriate for the House to make in a case such as the present. In *Ridge* v. *Baldwin (supra),* a majority of the House, in not dissimilar circumstances, granted a declaration that the decision of the Chief Constable was " void ". This was the language adopted by the Court of Appeal in the instant case. Personally, I find difficulty in applying the language of " void " and " voidable " (appropriate enough in situations of contract or of alleged nullity of marriage) to administrative decisions which give rise to practical and legal consequences which cannot be reversed. Under pressure, which I have considered to be inappropriate and unfair, the respondent, nearly four years ago, was compelled to resign as an alternative to dismissal from office. That was in November 1978. He was then a probationary constable with ten months of service to run. I am inclined to think that his decision, though made under duress, to pursue the option of resignation did put an end to the tenure of his office as constable. If so, a declaration simply to declare void the decision of the appellant to offer the respondent a Hobson's choice between resignation and dismissal is a mere *brutum fulmen* without practical consequences. This may be illustrated by asking a number

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of quasi rhetorical questions. If the decision was " void ", has the respondent been a constable in the police force in North Wales in the intervening four years and what has happened to the ten months of uncompleted probationary service? Since the only decision removing him from office was the decision now impugned has he now become an established constable? Has he acquired pension rights? Is he entitled to back pay? The respondent has moved house. We are told that he has found other, though less rewarding, employment in the Civil Service. Can we simply put the clock back as if nothing

has taken place? Presumably the respondent has lost much of his training and experience. If he returned, and if he is still a probationary constable, he would still be subject to Regulation 16 and the possibility, after a fair enquiry, of dismissal on a month's notice. It might well be thought that after what has happened it might be considered by the new Chief Constable that the respondent could not become an efficient constable or at least not without further training. His counsel said that, if reinstated, he would apply for a transfer to another force. But what possible guarantee have we that another force would now have him, or that the transfer would be in the public interest if it did ? These would be matters for the relevant authority. The respondent has not sought damages, which, in my view, might well have proved substantial, and, though the appellant stated to us that he would be prepared to pay compensation if the appeal went against him on the merits, even in the face of this, through his counsel, the respondent firmly stated that he was not interested in money and simply wanted " reinstatement " whatever that might mean. This problem did not arise in *Ridge* v. *Baldwin* where the Chief Constable did not seek reinstatement, and was content with a declaration and his pension rights.

Are we then to leave the respondent wholly without remedy without spelling out the consequences ? In that case, the order of the Court of Appeal stands and the decision of the Chief Constable is declared " void " without spelling out what this means. It would be possible, of course, simply to quash the decision of the appellant as in the old writ of *certiorari.* But this, too, would leave the parties without a clue as to their present position or any direction as to their future conduct. But what the respondent wishes is reinstatement. There is no cross appeal, but it must be within the power of your Lordships' House to vary the order of the Court of Appeal. My own belief is that this would have been pre-eminently a case which would have been dealt with most effectively either by re-engagement perhaps on a fresh term, which the appellant does not offer, or by substantial monetary compensation for which the respondent does not ask. Your Lordships' House is therefore put in a position in which it is compelled to make an order within the limits of the powers given the court by R.S.C. Or. 53 which must in any circumstances be less than satisfactory. I must confess to surprise, and, even to some degree of indignation, that, despite the offer of compensation should the tide of argument go against him, the appellant gave no instructions to counsel to tender to the respondent the smallest expression of regret at the really extraordinary treatment meted out to him or even the most qualified offer of re-engagement in the face of the respondent's persistent desire to rejoin the force (described in much greater detail and with great restraint by my noble and learned friend). As it is, the order of the Court of Appeal cannot stand unaltered, and the best that your Lordships' House can properly do for the respondent is the course proposed by my noble and learned friend with which I now concur. Happily, the Appeal Committee, as a condition of giving leave to appeal, directed that

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the appellant bear the respondent's costs of the appeal in any event.

Lord Fraser of Tullybelton

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brightman, and I agree with it.

I wish to emphasize that the only matter which I am deciding is that the process by which the Chief Constable reached his decision in this case was unfair in respect that the respondent was never told the reasons why his dismissal was being considered, and that he was given no opportunity of making an explanation about the matters of complaint against him. I am far from saying that, if the procedure had been fair, the Chief Constable would not have been entitled to reach the decision that he did. Whether the decision itself was fair and reasonable is not a matter that can be raised in the present proceedings, but, having regard to the criticisms of the Chief Constable's decision made by the Court of Appeal, I think it is only right to say that if

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he had decided, after hearing the respondent's explanations, that the respondent's conduct in marrying a woman who had been living in the same house as him on the footing that she was his aunt showed that he was not likely to become a well conducted constable, I very much doubt whether the decision could have been said to be unreasonable.

I agree that the two declarations proposed by Lord Brightman should be made.

Lord Roskill

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Brightman, with which I agree and I too would dismiss the appeal.

Lord Bridge of Harwich

My Lords,,

The facts of this most unhappy case are fully set out in the speech of my noble and learned friend, Lord Brightman. There are only certain aspects of the case on which I wish to comment.

The Chief Constable's decision to force the resignation of the respondent was vitiated both by his erroneous assumption that he had an absolute discretion and by his total failure to observe the rules of natural justice. The matters considered fell into two categories, first the respondent's private life and domestic circumstances, secondly his keeping four dogs in the council house rented for his occupation by the police authority. In the first category

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because the Chief Constable gave the respondent no opportunity to refute the allegations against him, he acted on false information. If the truth had been established, the only matters for consideration under this head would have been that the respondent was married to a lady some fourteen years older than himself whom he had previously treated as an aunt, because she had for some years lived as man and wife, although not married, with the respondent's uncle by whom she had four children. For my part, I should regard these matters as irrelevant to the question whether the respondent was likely to become an efficient or well-conducted constable.

With regard to the dogs, I do not dissent from the view that a chief officer of police who is contemplating dispensing with the services of a probationer constable under Regulation 16 of the Police Regulations 1971 may delegate to a suitable subordinate the investigation of a specific complaint with a view to giving the constable a fair opportunity to meet the allegations made against him. But in the case of such delegation certain conditions should be observed. First the delegate should make clear to the constable the precise nature of the complaint and that he, the delegate, is acting on behalf of the chief officer of police to hear whatever the constable wishes to say about it. Secondly, the delegate should make a full report to the chief officer of what the constable has said. Thirdly, the chief officer should himself show the report to the constable and invite any comment on it before reaching any decision under Regulation 16.

The evidence as to what happened with regard to the respondent's dogs is the least satisfactory part of this case. The memorandum of 6th November 1978 of the Deputy Chief Constable exhibited to the affidavit of the Chief Constable contains matter which has never been verified by an affidavit of the Deputy Chief Constable, although much of it is flatly contradicted by the affidavit of the respondent. Of the three conditions I have referred to above as necessary to the investigation of a complaint by a delegate of the chief

officer of police, it is doubtful if the first two were observed. It is certain that the third was not. On the probabilities, it is hard to believe that the respondent, whose dedicated enthusiasm for a police career has never been doubted, if faced with the stark alternatives of removing three of his dogs from his council house or being dismissed from the force, would have chosen the latter.

My Lords, I agree with my noble and learned friends, the Lord Chancellor and Lord Brightman, that the most difficult problem posed by this appeal is to decide what remedy is appropriate and further that the form of declaration made by the Court of Appeal is unsatisfactory in that its practical consequences are uncertain. So far as it lies within our power, we should, above all, make clear to the parties what their respective rights and obligations are in consequence of any order to be pronounced. There is no doubt in my mind that the respondent has suffered a grievous wrong. It should not be beyond the power of the courts to provide a suitable remedy. The respondent has throughout disclaimed any interest in monetary compensation. What he seeks is reinstatement. This could only be secured by an order of mandamus requiring the present Chief Constable of the North Wales Police to reinstate him as a probationer constable who has already completed fourteen months of his probationer service. I have no doubt your Lordships have power to make such an order and was at one time strongly inclined to think that it

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should be made. I know now that none of your Lordships favour such an order and it would therefore be an empty gesture for me to express a formal dissent on the point. But, that apart, I appreciate the weight of the objections to it. Great practical problems would arise in relation to his training and perhaps other matters from the fact that his service has been interrupted for nearly four years. Moreover, human nature being what it is, if the North Wales Police Force had the respondent forced upon them by order of your Lordships' House as the culmination of this lengthy litigation, there would be an obvious danger that an undercurrent of ill-feeling would affect his future relations with his superiors in the force.

I am reluctantly driven to the conclusion that the best service we can render to the respondent—and indeed this is the least we should do—is to make clear to the North Wales Police Force or indeed to any other police force he may now seek to join that he emerges from this litigation with his reputation wholly untarnished, that nothing has ever been proved against him to show that he is unlikely to become an efficient and well-conducted constable, but that, on the contrary, all the formal reports on his work and training during the period of his service in 1977 and 1978 were highly favourable to him.

As regards the formal disposal of the appeal I concur in the order proposed by my noble and learned friend, Lord Brightman.

Lord Brightman

My Lords,

The issue in this case is whether the Chief Constable of North Wales Police acted lawfully when he forced a probationer constable to resign his office; and, if not, what remedies can properly be granted to the aggrieved constable.

The matter first came before a Divisional Court of the Queen's Bench Division. It was heard by Mr. Justice Woolf. He came to the conclusion that the decision reached by the Chief Constable did not accord with the standards of fairness that should have been observed, but that no relief should be granted except in regard to costs. The constable appealed in order to obtain substantive relief. The Chief Constable cross-appealed. The Court of Appeal confirmed the conclusion of the Divisional Court but added a declaration that the Chief Constable's decision to require the constable to resign or be dismissed was void. The Chief Constable now appeals to your Lordships' House.

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My Lords, I will narrate the story as briefly as I can, but some detail is inevitable. In the summer of 1977 the respondent, Mr. Michael John Evans, applied to join the North Wales Police. He had an unfortunate upbringing, His father, who had been in the Royal Navy, died when he was five years old. His mother suffered from ill health and was unable to look after him. In consequence, he was brought up in an orphanage until he was sixteen. In May 1971, when he was about nineteen, he had a serious motor cycle accident. He received a considerable sum of money as compensation. He was in hospital for almost a year. While there, he was visited and befriended by Miss Margaret Farey. She was a lady who had been living with his uncle for a

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number of years. There were four children of the liaison. The respondent believed that his uncle and Miss Farey were married. She called herself Mrs. Evans and he referred to her as his aunt. At about this time, Miss Farey and the respondent's uncle parted company. After the respondent left hospital he stayed for a while with his grandmother, and later with Miss Farey. He came to know that she was unmarried but he continued to refer to her as his aunt.

The respondent went out to work. He was first employed as a chauffeur. He then spent a year as an operating theatre technician in a hospital. This was followed by a spell of unemployment. In the autumn of 1976 he accepted an offer of a place at the University College of North Wales, Bangor, beginning in the autumn of 1976. He first lived in lodgings, but later secured the tenancy of a house on a farm hear Bangor, where Miss Farey and her two younger children joined him.

The respondent's first year at the university was not a success. He did not achieve the requisite academic standard and he left. He applied to join the North Wales Police. He was interviewed in July 1977 by Police Sergeant Morris. The Police Sergeant recorded the following in his suitability report:

> " The address where the applicant resides is a house on Tyddyn
> " Mynyddig Farm some two miles from Bangor, which his aunt rents
> " from the owner of the farm. It is a comfortable home, clean and well
> " cared for ... For the past twelve months he has resided with his aunt,
> " Mrs. Margaret Evans, at the farm, and it appears that she has been the
> " one person in his life who has cared for him, and encouraged him in
> " his studies".

A fortnight later he was interviewed by Superintendent Ellis. Finally he had a brief interview with the Chief Constable, the appellant, and was accepted into the force. He was duly sworn into the office of constable on 31st August and became a probationary member of the police force for a period of two years pursuant to Regulation 15(2) of the Police Regulations 1971. He was then just under 25 years of age.

On 5th September he began his initial course of training at the Police Training Centre at Cwmbran. It lasted for two months. He obtained a good report. The Commandant of the centre described him as " a very good prospect with " all the attributes to develop into a reliable and competent police officer". He then spent a month on the beat at Holyhead attached to a tutor constable. He was given a satisfactory report. During this period he gave formal notice to his Divisional Chief Superintendent of his intention to be married to " Miss Margaret Farey of Tyddyn Mynddig Farm " and requested police accommodation. Within a week the Deputy Chief Constable allocated accommodation to him at Llangefni, and changed his station from Holyhead to Llangefni. The accommodation provided was a house belonging to the local council. On 26th January the respondent gave the Divisional Chief Superintendent formal notification of his marriage. This showed that his wife was 14 years older than he.

On 31st January 1978 Police Sergeant Roberts, of the Llangefni Police Station made a report to the Divisional Chief Superintendent. He said that as a result of various observations and various rumours spread about the police station, he had decided to make some discreet inquiries about the

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respondent and his wife. It is a long report. It is sufficient to pick out these items:

1. A year previously a police officer visiting the Evans' household about the absence from school of one of the children, had been introduced to the respondent as the stepson of Mrs. Evans.

2. Police Sergeant Morris, who had made the suitability report, had been led to believe that Mrs. Evans was the respondent's aunt.

3. The respondent's council house was untidy, poorly carpeted and furnished.

4. Despite the poor state of the house, the respondent had just bought a large car and he also owned an almost new Honda motor cycle; and there were four or five dogs in the house.

5. It was also within the police sergeant's knowledge that the respondent's referees (in the plural) described him as plausible and possibly dishonest.

Inspector Yates added a footnote to the report:

(6) Prior to their marriage, the respondent and Mrs. Evans resided at a hippy commune at Tyddyn Mynyddig; it was believed that Mrs. Evans was the sister of the respondent's mother (and therefore within the prohibited degree of relationship); and there was no proof that Mrs. Evans was divorced from her previous husband (thus also indicating bigamy).

On 3rd February this report was forwarded by the Divisional Chief Superintendent to the Deputy Chief Constable. On 8th February the Divisional Chief Superintendent added fuel to the fire. Current information, he said, suggested that in the past the respondent had had several (query severe) financial difficulties; he was said to be plausible; and he had a medical history of chronic leg injuries.

On 9th February the Deputy Chief Constable asked the Divisional Chief Superintendent to interview the respondent with a view to resolving the various issues which had recently come to notice. The respondent was summoned to an interview. Superintendent Ellis attended with the Divisional Chief Superintendent. The Divisional Chief Superintendent gave the respondent to believe that the interview was concerned only with a discrepancy in the number of children in the family, in order to ensure that the family would obtain the full benefit of the pension arrangements.

According to the evidence, none of the various items—I am tempted to call them smears—appeared to have been brought out into the open so as to enable the respondent to put the record straight. The rumour that Mrs. Evans was still the wife of the respondent's uncle, and the alternative rumour that Mrs. Evans was the sister of the respondent's mother, were ultimately laid to rest by an investigation conducted by New Scotland Yard at the request of the Divisional Chief Superintendent. A report of his investigation was made on 19th July. As to the rest of the items:—

1. As regards the untidy and poorly equipped house the respondent and his wife had only just moved in and there is uncontradicted evidence that they had not had time to get their furniture out of store and carpets fitted.

2. There is uncontradicted evidence that the respondent had suffered

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from no financial difficulties.

3. It was somewhat misleading to record that the respondent's referees (in the plural) had described him as plausible and possibly dishonest. The truth was that one referee, the Dean of the Faculty of Science at the University had concluded his letter as follows—

" I believe Evans to be reasonably intelligent and, on first acquaintance, " he has an outgoing and fairly attractive personality. However, I should " say that I doubt somewhat his plausibility. In some ways it is perhaps " a minor matter but he tendered a number of excuses about his academic

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" performance which I saw no reason to disbelieve. Quite by accident, " as a result of an inquiry from his Local Education Authority, I came to " discover that much of what he had said was in fact untrue. When " subsequently tackled about this matter he still wished me to believe " most of what he had previously told me. He therefore is either dis- " honest with himself and/or is willing himself to believe a situation exists " when it clearly does not. I am sorry to have to report on Evans in this " way because I firmly believe he has had a difficult home environment " in his earlier days and I think he is deserving of some help."

4. The reference to the hippy commune was a most damaging error. Inspector Yates had confused the farm where the respondent lived with another locality where he had never been.

5. The respondent's leg injury had been fully disclosed in his medical report and he had completely recovered from it.

In the meantime the respondent undertook phase 1. of the Headquarters Training Course, a Traffic Course, an Administration Course and a C.I.D. Course. All reports from those instructing him were good.

To go back in time for a moment: in January 1978 when the respondent's house had been allocated to him, the respondent had called at the Council's Housing Department to discover the Council's attitude towards the keeping of domestic pets. He had four dogs. He was told that as a rule pets were not allowed, but that the Council took no notice unless there were complaints. At a routine meeting with the Divisional Chief Superintendent a little later, the respondent told him about the dogs. The Divisional Chief Superintendent informed him that there was no problem as long as the dogs were kept under control. In the autumn of 1978, acting on information that the respondent had four dogs, a Health Inspector called at the house. He said that as a rule only one dog was allowed, but it appeared that no actual complaint had been made by anyone. The Health Inspector agreed that the dogs were well cared for and said that the Health Department could have no complaint. However, two days later a Council official called and told the respondent that he would have to get rid of the dogs.

On 19th October Superintendent Jones of Caernarvon interviewed the respondent as a result of what he had heard about the dogs. On the next day the respondent made a written report to the Divisional Chief Superintendent explaining his predicament. He referred to the interview with Superintendent Jones and added that at this interview he had indicated that he would try to find alternative accommodation, but the possibility of success seemed remote. The respondent handed his memorandum to Superintendent

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Jones who forwarded it to the Divisional Chief Superintendent with his own covering letter. In his covering letter Superintendent Jones wrongly informed the Divisional Chief Superintendent that prior to being moved to Llangefni the respondent and his family were living in a hippy commune at Bangor, and added that his wife continued to dress in the hippy fashion; and that all the dogs were strays. The respondent denies that his wife dressed in hippy clothes, and there is undisputed evidence that none of the dogs was a stray. Superintendent Jones added that he had told the respondent that he had the alternative of getting rid of three of the dogs or finding alternative accommodation.

On 20th October a routine assessment report was made on the respondent. This followed the pattern of earlier reports; his appearance and bearing were of high standard; in the performance of his duties he got through a great deal of work; he accepted responsibility; was considerate and firm in his attitude to the public; showed a great deal of interest; and was well liked and respected by his colleagues. Sergeant Evans, who signed the assessment, considered that he would do well in his career. Inspector Yates, who endorsed the assessment, said the respondent showed a great deal of interest and enthusiasm, and intended to establish a career for himself within the police force. It was Inspector Yates who started the damaging canard about the hippy commune. He did not repeat it. But unfortunately it had already been repeated by Superintendent Jones.

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On 23rd October the respondent visited the Senior Management Officer of the Local Council to discuss the question of the dogs. In a letter of the same day the Senior Management Officer wrote to the respondent requesting him to find other accommodation for the animals within the next four weeks, i.e. by the third week in November.

On 25th October the respondent reported to his Divisional Chief Superintendent. He said that he had been given four weeks to leave the Council house. That was not an accurate account of the Council's letter, although it would come to the same thing if he adhered to his expressed intention of not parting with the dogs. The respondent said that he could see no prospect of finding suitable alternative accommodation.

On 30th October the Divisional Chief Superintendent forwarded the memoranda of 19th, 20th and 25th October to the Deputy Chief Constable.

On 6th November the Deputy Chief Constable interviewed the respondent. He was told that there were only two alternatives, that he " should comply " with the conditions of tenancy or that we should take other action by e.g. " terminating his employment ". The Deputy Chief Constable added in his memorandum of the interview, which he forwarded to the Chief Constable, " it was very doubtful in my view whether people who deliberately flouted " conditions of tenancy were suitable to be in the police service." Your Lordships may feel that an accusation of deliberately flouting the terms of the tenancy is an extravagant description of the respondent's conduct in the light of the clear evidence that he began with a revocable permission to keep the dogs and, though the permission was now revoked, he still had another fortnight within which to comply with the Council's requirements.

On 8th November the respondent was summoned to an interview with the Chief Constable. He was told by the Chief Constable that " I had made a

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mistake in accepting him and gave him the opportunity to resign as an alter- " native to formally dispensing with his services". He was given no indication of the reasons for his enforced resignation. The respondent in his affidavit says this about the interview, and his account is not disputed:— " I asked if " I could have a reason for this action but he refused outright. I was not " informed of what was alleged against me nor afforded any opportunity " to be heard by way of defence or explanation. I asked for time to consider " and he said that I must let him know by 10 a.m. the following morning. " I was not given any document recording this decision." As a result of the Chief Constable's threat, the respondent signed on 9th November a formal letter of resignation.

At the time of his enforced resignation it should be observed that the respondent still had a fortnight within which to comply with the Council's requirements: that all the routine reports on his suitability as a police constable had been highly satisfactory, and likely, viewed in isolation, to lead to his being confirmed in office; and that he was due in only three weeks' time to attend a routine interview with his Divisional Chief Superintendent pursuant to the ordinary probationary procedure.

Within a week of his enforced resignation, the respondent applied to join the Metropolitan Police. The Metropolitan Police, naturally enough, communicated with the North Wales Police. The Deputy Chief Constable replied by letter in fairly innocuous terms. The Chief Constable of the North Wales Police also spoke personally to the Assistant Commissioner of the Metropolitan Police. Not surprisingly his application was rejected. It has no particular importance except to demonstrate the respondent's dedication to police work, and the then practical impossibility of his regaining acceptance into a police force.

My Lords, before I conclude this unhappy story, I must turn to the statutory provision. Regulation 16 of the Police Regulations 1971, which I need not quote verbatim, provides that during his period of probation in the force, the

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services of a constable may be dispensed with at any time if the Chief Officer of Police considers:

1. that he is not fitted, physically or mentally, to perform the duties of his office, or
2. that he is not likely to become an efficient constable, or
3. that he is not likely to become a well conducted constable.

It is plain from the wording of the regulation that the power of a Chief Officer of Police to dispense with the services of a person accepted as a probationer constable is to be exercised, and exercised only, after due consideration and determination of the specified questions. It is not a discretion that may be exercised arbitrally and without accountability.

A year went by. The respondent tried unsuccessfully to pursue a remedy before an Industrial Tribunal. He consulted solicitors and applied for legal aid which took some time to arrange. On 23rd October 1979 his solicitors wrote to the Chief Constable. They indicated that he would be seeking judicial review of the decision to dispense with his services. They asked the Chief Constable to reconsider his decision. They also requested disclosure

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of various reports about him which the respondent knew, or suspected, were in existence. This request was peremptorily refused in a letter despatched by the Chief Constable two days later.

In early January 1980 the respondent filed the requisite statement and swore the requisite affidavit in support of his application for leave to apply for judicial review. At this time he was still unaware of the facts or supposed facts which had led the Chief Constable to force his resignation. So far as he was aware, there was only one matter over which any problem arose, namely, his ownership of the dogs, of which the North Wales Police were aware shortly after he took up accommodation at Llangefni. Leave was given by a Divisional Court on 29th January. On the following day the respondent issued a Notice of Motion seeking (1) an Order of Certiorari to quash the Chief Constable's decision of 8th November 1978, (2) an Order of Mandamus directed to the Chief Constable requiring his reinstatement, and (3) a declaration that the decision of the Chief Constable was illegal, *ultra vires* and void. On 8th May 1980 the respondent obtained a consent order for the discovery of the documents which he had requested six months earlier.

On 12th June 1980 the Chief Constable swore an affidavit in answer to the respondent's filed statement and affidavit. There are two important matters revealed in the affidavit. First, the Chief Constable asserted that Regulation 16(1) gave him an absolute discretion to dispense with a probationer's services. Secondly, in deciding as he did, the Chief Constable was principally concerned with three adverse factors—

1. The respondent had married a woman much older than himself; she was the former mistress of his uncle; such a marriage might give rise to some scandal, which would not be in the interests of the force.
2. The respondent and his wife were keeping four or five dogs in a police/ council house, when there was a permitted limit of one dog.
3. The respondent and his wife had lived a " hippy " life style at the Bangor farm.

The second of these adverse factors was inaccurate, because the dogs were initially kept in the house with the Council permission; and that permission was still extant at the date of the Chief Constable's decision. The third adverse factor was the result of a complete misunderstanding and was devoid of all substance.

The respondent swore an affidavit in reply on 15th January 1981. He furnished his answers to all the criticisms of which he had by now become aware and he convincingly disposed of the damaging statement about the previous life style of himself and his wife. Furthermore, he deposed that if he had realised that he had to choose between keeping his career and keeping the dogs, the dogs would have gone. It is difficult to suppose otherwise.

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The Chief Constable has never challenged the truth of the respondent's second affidavit.

The motion came before Mr. Justice Woolf on 23rd March 1981. The learned judge found in favour of the respondent to the extent that he held that the proper approach to this type of case was that the Chief Constable was bound to act fairly in the course of exercising his statutory discretion under

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Regulation 16; and that the decision which was reached did not accord with the standards of fairness because the respondent was not given an opportunity to answer the accusations which led the Chief Constable to the conclusion which he reached. However, the learned judge declined to grant any relief except in costs. His reasoning was this. The court could give no remedy now which would enable the respondent to serve the period which would have remained if his engagement had not been terminated, because the two year probationary period was long since expired. Even if that period had not ended, the court would not in the normal way make an Order of Mandamus requiring a Chief Constable to re-engage a constable. The only order which could be made would be one which would have required the Chief Constable to reconsider his decision of 8th November. There was no purpose to be served by such an order now that the probationary period had expired. To put the matter shortly, an Order of Mandamus would be contrary to all precedent and an Order of Certiorari would be academic. He could not make a Declaratory Order that the respondent was still a probationary constable, nor could he make a declaration that the Chief Constable's decision was wrong. All that could be declared would be that the decision had been reached irregularly, and such a declaration would serve no purpose.

Mr Lords, I must address myself later to the question of remedy. All that I would say at this moment is that it would, to my mind, be regrettable if a litigant who establishes that he has been legally wronged and particularly in so important a matter as the pursuit of his chosen profession, has to be sent away from a court of justice empty handed save for an order for the recoupment of the expense to which he has been put in establishing a barren victory.

The respondent appealed. By his notice of appeal, he sought an Order of Certiorari, an Order of Mandamus and a declaration in the terms set out in his application for leave to apply for judicial review. The Chief Constable cross-appealed. He attacked the findings of the learned judge. He claimed not only that the decision was fairly reached, but also that the respondent's office was held during pleasure so that, on established principles, he had no right to be heard before dismissal.

Before I turn to the judgments in the Court of Appeal, I would make certain observations on the law as I understand it. I turn first to the decision of this House in *Ridge* v. *Baldwin* (1964) A.C. 40 where I find useful guidance on the proper approach to this type of case. As was pointed out by Lord Reid (page 64 *et seq.*) The application of principles of natural justice to a variety of different situations is likely to lead to varying definitions of those principles. For example, " what a minister ought to do in considering objections to a " scheme may be very different from what a watch committee ought to do in " considering whether to dismiss a Chief Constable." So cases of dismissal need to be considered on their own. Lord Reid divided these into three categories. First, dismissal of a servant by his master. Here no relevant question arises as to whether the master has heard the servant in his defence unless, presumably, the principle of *audi alteram partem* has been made a term of the contract. The question is whether the facts emerging at the trial prove a breach of contract. If so, damages are payable for the breach. Secondly, dismissal from an office held during pleasure. " It has always " been held, I think rightly, that such an officer has no right to be heard before " he is dismissed, and the reason is clear. As the person having the power " of dismissal need not have anything against the officer, he need not give " any reason." (Per Lord Reid, at page 65). Thirdly, dismissal from an office where there must be something against the office holder to warrant his dismissal. " There I find an unbroken line of authority to the effect that an

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" officer cannot lawfully be dismissed without first telling him what is alleged

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" against him and hearing his defence or explanation." (Per Lord Reid, at page 66.)

I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed (at page 96). His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to " a danger of usurpation of power on the part of the courts . . . under the " pretext of having regard to the principles of natural justice." He added " I do observe again that it is not the decision as such which is liable to review; " it is only the circumstances in which the decision was reached, and particularly " in such a case as the present the need for giving to the party dismissed an " opportunity for putting his case." Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

I leave these preliminary observations in order to consider the judgments in the Court of Appeal. It was accepted by each member of the court that the case fell within the third of Lord Reid's categories; that the respondent was entitled to a fair hearing; and that he had not had one. However the learned Master of the Rolls added this:

> " I go further. Not only must he be given a fair hearing, but the " decision itself must be fair and reasonable. That is the protection " afforded to every servant who is employed under a contract of service. " He is protected against unfair dismissal. No less protection should " be afforded to a probationer constable."

The learned Master of the Rolls then concluded by saying that,

> " It is my opinion that the Chief Constable was not justified in dispensing " with the services of Constable Evans or in requiring him to resign."

Lord Justice Shaw and Lord Justice Ackner concurred.

In his submissions to this House, counsel for the appellant submitted that the Chief Constable took into account all the matters which appeared on the respondent's file; that he was entitled to rely on the accuracy of the reports of his officers; and that he was not bound to put every adverse point to the respondent.

My Lords, for my part I emphatically reject the approach of the Chief Constable to his duties under Regulation 16. He made the fundamental mistake, as appears from his affidavit, of assuming that he had an absolute discretion to discharge the respondent under Regulation 16, a right to dismiss him at pleasure. That was not his right. His mistake coloured and indeed tainted the decision-making process. His discretion to discharge was a qualified one, exercisable only if he considered that the respondent was not fitted to perform the duties of the office or was not likely to become an efficient constable or a well conducted constable. It is implicit in Regulation 16 that there must be a fair consideration of the constable's fitness to perform his duties and a fair consideration of the likelihood of his becoming an efficient and well conducted constable. The legality of the choice given to the re-

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spondent to resign or be discharged must be judged by the same criteria as applied to the legality of discharge without the alternative of resignation; for clearly the Chief Constable could not use an invalid threat of discharge to compel resignation, as that would be an abuse of power.

As I have indicated, the Chief Constable forced the respondent's discharge on account of three adverse factors which he believed to exist: the allegedly undesirable marital circumstances, the alleged hippy life style and the alleged flouting of authority. It was the duty of the Chief Constable to deal fairly with the respondent in relation to the adverse factors upon which he was proposing to act. The Chief Constable failed in his performance of that duty because these supposedly adverse factors were never put to the respondent. He was given no opportunity to offer one word of explanation. Your

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Lordships will not doubt the honesty of the Chief Constable and that he reached a decision which he truly believed was in the interests of the North Wales Police on the information that had been laid before him. But the inescapable fact is that he misunderstood the extent of his discretion and the nature of his duty under Regulation 16. The decision-making process was therefore defective.

There is however a wider point than the injustice of the decision-making process of the Chief Constable. With profound respect to the Court of Appeal, I dissent from the view that " Not only must [the probationer constable] be " given a fair hearing, but the decision itself must be fair and reasonable ". If that statement of the law passed into authority without comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. The statement of law which I have quoted implies that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself. In his printed case counsel for the appellant made this submission: " Where Parliament has entrusted to an administrative authority " the duty of making a decision which affects the rights of an individual, " the court's supervisory function on a judicial review of that decision is " limited. The court cannot be expected to possess knowledge of the reasons " of policy which lie behind the administrative decision nor is it desirable that " evidence should be called before the court of the implications of such policy. " It follows that the court ought not to attempt to weigh the merits of the " particular decision but should confine its function to a consideration of " the manner in which the decision was reached." When the sole issue raised on an application for judicial review is whether the rules of natural justice have been observed, these propositions are unexceptionable. Other considerations arise when an administrative decision is attacked on the ground that it is vitiated by self-misdirection, by taking account of irrelevant or neglecting to take account of relevant factors, or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question, could reasonably have made such a decision. See the well known judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

I agree entirely with the Court of Appeal, and indeed with the Divisional Court, that the respondent did not have the fair hearing to which he was entitled. I differ only from the Court of Appeal on the extent of the Court's

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supervisory jurisdiction.

I turn now to the question of remedies. The Court of Appeal granted the respondent a declaration that the decision requiring the respondent to resign or be dismissed was void. I feel some misgivings about a declaration in that form, because it is not clear to me what consequences flow from it. Whatever remedy may be granted by the Court in this case, I think it is highly desirable that the North Wales Police and the respondent should be in no doubt how, under the Order, they will stand in relation to each other.

The conclusion reached by the Divisional Court, the Court of Appeal and by this House, if your Lordships are in agreement with me, is that the Chief Constable acted unlawfully and in breach of his duty under Regulation 16 in threatening to dispense with the respondent's services unless he resigned from the North Wales Police and in thus causing him to resign. That having been established, the respondent is, in my view, entitled at least to a declaration to that effect. But the matter cannot be satisfactorily left there. One must know what are the consequences that flow from the breach of duty.

One possibility would be to add to that declaration an Order of Mandamus. The respondent has one desire and one desire only, namely, to be reinstated in the police force. This would be secured if an Order of Mandamus were to issue, directed to the Chief Constable now in office, requiring him, for example, to restore the respondent to the office of probationer constable as held by him on 8th November 1978.

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An alternative to an Order of Mandamus would be a declaration affirming that, by reason of such unlawfully induced resignation, the respondent thereby became entitled to the same rights and remedies, not including re-instatement, as he would have had if the appellant had unlawfully dispensed with his services under Regulation 16(1). Such a declaration would clarify the status of the respondent vis-a-vis the North Wales Police, and would leave him free to pursue such remedies, short of re-instatement, as may be open to him. I have in mind that under Order 53 Rule 7 an applicant for judicial review may claim damages if they are sought in the filed statement and if damages could have been awarded in an action brought for the purpose. I have not, however, addressed my mind to the question whether it is still open to the respondent to apply to amend his filed statement by adding a claim to damages.

It is possible that the respondent would not wish, nor indeed would have any incentive, to pursue a claim for damages. Counsel for the appellant, acting on instructions, told your Lordships that if the decision of your Lordships' House went in favour of the respondent it would be the intention of the North Wales Police to offer him monetary compensation. I trust that the compensation which the Chief Constable has in mind to offer would be on a generous scale, and amply reflect the fact that the respondent has been unlawfully deprived of his profession as a consequence of the wrongful procedures of the Chief Constable's predecessor in office.

I feel that the choice of remedy is a difficult one. It is a matter of discretion. From the point of view of the respondent who has been wronged in a matter so vital to his life, an Order of Mandamus is the only satisfactory remedy. I have been much tempted to suggest to your Lordships that it would in the circumstances be a remedy proper to be granted. But it is unusual, in a case such as the present, for the court to make an Order of Mandamus, and I think

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that in practice it might border on usurpation of the powers of the Chief Constable, which is to be avoided. With some reluctance and hesitation, I feel that the respondent will have to content himself with the less satisfactory declaration that I have outlined.

So far as I am aware, it would be open to the respondent to apply in the ordinary way to re-join the North Wales Police as a new entrant. If the respondent does make such an application, I for my part express the hope that the North Wales Police will give very serious consideration to it. If an objective assessment of his accomplishments and character were made, the North Wales Police might come to the conclusion that a person so dedicated to the profession is police material which ought not lightly to be discarded. They might feel that his re-acceptance would go some way towards remedying the wrong which he has suffered as well as benefiting the force itself. This would be a happy solution, if it could properly be brought about; it would give the respondent the chance which he merits; and the way that I have expressed myself avoids any usurpation of the power of the Chief Constable, because a decision to accept or reject must lie with him.

My Lords, I would dismiss the appeal but vary the Order of the Court of Appeal by substituting the declarations which I have outlined for that which is contained in the Order of the Court of Appeal.

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ESTES v. TEXAS

No. 256

SUPREME COURT OF THE UNITED STATES

381 U.S. 532; 85 S. Ct. 1628; 14 L. Ed. 2d 543; 1965 U.S. LEXIS 2339; 6 Rad. Reg. 2d (P & F) 2104; 1 Media L. Rep. 1187

April 1, 1965, Argued
June 7, 1965, Decided

PRIOR HISTORY: CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

DISPOSITION: Reversed.

SUMMARY:

A much publicized financier was convicted in the District Court for the Seventh Judicial District of Texas at Tyler of the offense of swindling, after a trial of great notoriety which was televised and broadcast over his objection. The Texas Court of Criminal Appeals affirmed.

On certiorari, the Supreme Court of the United States reversed. In an opinion by Clark, J., expressing the views of five members of the Court, it was held that in view of the great notoriety of the trial, due process of law was denied the accused by the televising and broadcasting of the proceedings.

Warren, Ch. J., with Douglas and Goldberg, JJ., joined in the Court's opinion but filed a separate opinion stating that it violates the *Sixth Amendment* for federal courts and the *Fourteenth Amendment* for state courts to allow criminal trials to be televised to the public at large.

Harlan, J., concurred in the Court's opinion subject to the reservation that the case dealt with a criminal trial of great notoriety and not with one of a more or less routine nature.

Stewart, J., joined by Black, Brennan, and White, JJ., dissented on the ground that the televising of the accused's trial did not violate his constitutional rights.

White, J., joined by Brennan, J., filed a separate dissenting opinion stating that it was premature to promulgate a flat ban on the use of cameras in the courtroom.

Brennan, J., emphasized in a separate memorandum that only four of the majority viewed televised criminal trials as constitutionally infirm, whatever the circumstances.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §839.5

due process -- televising criminal trial --

Headnote:[1]

A much publicized financier, tried before a state court in criminal proceedings of great notoriety, is denied due process of law by the televising and broadcasting of such proceedings over his objection.

[***LEdHN2]

ATTORNEYS §2

bar association canons -- effect --

Headnote:[2]

Neither Canon 35 of the Judicial Canons of the American Bar Association nor Judicial Canon 28 of the Integrated State Bar of Texas, both of which deal with the televising and broadcasting of court proceedings, is of itself law.

[***LEdHN3]

CONSTITUTIONAL LAW §839.5

due process -- pretrial hearing --

Headnote:[3]

The events of a 2-day pretrial hearing on motions to prohibit television coverage and to postpone the trial are relevant on the issue whether an accused in a state criminal proceeding was denied due process by the television coverage of his trial.

[***LEdHN4]

CRIMINAL LAW §47.5

public trial -- purpose --

Headnote:[4]

The purpose of the *Sixth Amendment's* requirement of a public trial is to guarantee that the accused will be fairly dealt with and not unjustly condemned.

[***LEdHN5]

CONSTITUTIONAL LAW §925.7

freedom of speech and press -- televising trials --

Headnote:[5]

First Amendment freedoms do not extend a right to the news media to televise from the courtroom.

[***LEdHN6]

CONSTITUTIONAL LAW §925

freedom of press -- judicial proceedings --

Headnote:[6]

While maximum freedom must be allowed the press in carrying out its important function in a democratic society of informing the public, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.

[***LEdHN7]

COMMUNICATIONS §1

televising trials --

Headnote:[7]

The courts do not discriminate against radio and television media by forbidding the broadcasting or televising of a trial while permitting the newspaper reporter access to the courtroom, since the television and radio reporter has the same privilege and the news reporter is not permitted to bring his typewriter or printing press into the courtroom.

[***LEdHN8]

TRIAL §2

news media -- rights --

Headnote:[8]

In covering trials, all news media are entitled to the same rights as the general public.

[***LEdHN9]

TRIAL §2

purpose -- ascertaining truth --

Headnote:[9A][9B]

Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth, which is the sine qua non of a fair trial.

[***LEdHN10]

TRIAL §2

proper atmosphere --

Headnote:[10]

The atmosphere essential to the preservation of a fair trial, which is the most fundamental of all freedoms, must be maintained at all costs.

[***LEdHN11]

TRIAL §2

court proceedings -- reportorial privilege --

Headnote:[11]

The public has the right to be informed as to what occurs in its courts; reporters of all media, including television, have a right to be present and to report through their respective media whatever occurs in open court.

[***LEdHN12]

APPEAL §1618

televising criminal trial -- showing of prejudice --

Headnote:[12]

A showing of actual prejudice by the broadcasting and televising of a state criminal trial over the accused's objection is not a prerequisite to the reversal of the conviction where the accused was much publicized and the proceedings were of great notoriety.

[***LEdHN13]

CONSTITUTIONAL LAW §746

fair trial --

Headnote:[13]

A fair trial in a fair tribunal is a basic requirement of due process.

[***LEdHN14]

CONSTITUTIONAL LAW §746

justice --

Headnote:[14]

To perform its high function in the best way, justice must satisfy the appearance of justice.

[***LEdHN15]

CONSTITUTIONAL LAW §47.5

public trial --

Headnote:[15]

A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena.Points from Separate Opinions

[***LEdHN16]

CRIMINAL LAW §47.5

televising trial --

Headnote:[16]

It violates the *Sixth Amendment* for federal courts to allow criminal trials to be televised to the public at large. [From separate opinion by Warren, Ch. J., Douglas and Goldberg, JJ.]

[***LEdHN17]

EVIDENCE §80.5

judicial notice -- effect of television --

Headnote:[17]

It is common knowledge that television can work profound changes in the behavior of the people it focuses on. [From separate opinion by Warren, Ch. J., Douglas and Goldberg, JJ.]

[***LEdHN18]

CRIMINAL LAW §47.5

public trial -- size of courtroom -- behavior of observers --

Headnote:[18]

To satisfy the constitutional requirement that trials be public it is not necessary to provide facilities large enough for all who might like to attend a particular trial, or to permit observers to act as they please in the courtroom. [From separate opinion by Warren, Ch. J., Douglas and Goldberg, JJ.]

[***LEdHN19]

CRIMINAL LAW §47.5

public trial -- meaning --

Headnote:[19]

A trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities not not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings. [From separate opinion by Warren, Ch. J., Douglas and Goldberg, JJ.]

[***LEdHN20]

CRIMINAL LAW §47.5

public trial -- television --

Headnote:[20]

The public trial guaranty of the *Sixth Amendment* does not require that television be admitted to the courtroom. [From separate opinion by Harlan, J.]

SYLLABUS

Petitioner had been indicted by a Texas county grand jury for swindling. Massive pretrial publicity had given the case national notoriety. On the trial date, following a change of venue, a hearing commenced on petitioner's motion to prevent telecasting, radio broadcasting, and news photography. The hearing, conducted in the presence of some trial witnesses and veniremen later released, was carried live on television and radio, and news photography was permitted. The original jury panel, petitioner, counsel, and the trial judge were highly publicized during the two days the pretrial hearing lasted, emphasizing throughout the community the notorious character that the trial would take. Four of the jurors selected later at the trial had seen or heard all or part of the broadcasts. The profusion of cameramen with their equipment in various parts of the crowded courtroom caused considerable disruption. The trial court denied petitioner's motion but granted a continuance of almost a month. During the interim a booth was erected in the rear of the courtroom to which television cameramen and equipment were restricted. Live telecasting was prohibited during most of the actual trial. The State's opening and closing arguments were carried live with sound (though because of mechanical difficulty there was no picture of the former), as were the return of the jury's verdict and its receipt by the judge. The court's order allowed videotapes without sound of the whole proceeding and the cameras operated intermittently during the three-day trial, which ended with petitioner's conviction. Film clips of the trial were shown largely on regularly scheduled news programs. Both the trial court and the appellate court rejected petitioner's claim of denial of due process in violation of the *Fourteenth Amendment* by the televising and broadcasting of the trial. *Held*: The televising over petitioner's objections of the courtroom proceedings of petitioner's criminal trial, in which there was widespread public interest, was inherently invalid as infringing the fundamental right to a fair trial guaranteed by the *Due Process Clause of the Fourteenth Amendment*. Pp. 536-552.

(a) The high degree of publicity given to the two-day hearing, which could only have impressed those present and the community at large with the notorious character of the petitioner and the proceeding, made what occurred at the pretrial relevant to determining whether petitioner was accorded due process at his trial. Pp. 536-537.

(b) The constitutional guarantee of a public trial is to ensure that the accused is fairly dealt with and not unjustly condemned. Pp. 538-539.

(c) The freedom granted to the press under the *First Amendment* must be subject to the maintenance of absolute fairness in the judicial process; and in the present state of television techniques such freedom does not confer the right to use equipment in the courtroom which might jeopardize a fair trial, the atmosphere for which must be preserved at all costs. Pp. 539-540.

(d) The public's right to be informed about court proceedings is satisfied if reporters are free to attend and to report on the proceedings through their respective media. Pp. 541-542.

(e) Where, as here, the procedure employed by the State involves the probability that prejudice to the accused will result, that procedure, in line with the principle established in such cases as *Rideau v. Louisiana, 373 U.S. 723,* will be deemed lacking in due process whether or not isolatable prejudice can be demonstrated. Pp. 542-544.

(f) There are numerous respects in which televising court proceedings may alone, and in combination almost certainly will, cause unfairness, such as: (1) improperly influencing jurors by emphasizing the notoriety of the trial and affecting their impartial judgment, distracting their attention, facilitating (in States which do not sequester jurors) their viewing of selected parts of the proceedings, and improperly influencing potential jurors and thus jeopardizing the fairness of new trials; (2) impairing the testimony of witnesses, as by causing some to be frightened and others to overstate their testimony, and generally influencing the testimony of witnesses, thus frustrating invocation of the "rule" against witnesses; (3) distracting judges generally and exercising an adverse psychological effect particularly upon those who are elected; and (4) imposing pressures upon the defendant and intruding into the confidential attorney-client relationship. Pp. 544-550.

(g) The foregoing factors are not merely "hypothetical," as is evidenced by the bar on television in federal criminal trials imposed by the Federal Rules of Criminal Procedure and by such a bar in all but two States. P. 550.

(h) Application of the rule of the *Rideau* case, *supra*, is clearly warranted by the facts of this case. Pp. 550-552.

COUNSEL: John D. Cofer and Hume Cofer argued the cause and filed a brief for petitioner.

Waggoner Carr, Attorney General of Texas, and Leon Jaworski, Special Assistant Attorney General, argued the cause for respondent. With them on the brief were Hawthorne Phillips, Stanton Stone, Howard M. Fender and Gilbert J. Pena, Assistant Attorneys General, and Alton F. Curry, Special Assistant Attorney General.

Briefs of amici curiae, urging reversal, were filed by Whitney North Seymour, Richmond C. Coburn and John H. Yauch for the American Bar Association, and by Norman Dorsen and Melvin L. Wulf for the American Civil Liberties Union et al.

Briefs of amici curiae, urging affirmance, were filed by Davis Grant for the State Bar of Texas, joined by Duke W. Dunbar, Attorney General of Colorado; and by Douglas A. Anello, W. Theodore Pierson and Harold David Cohen for the National Association of Broadcasters et al.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

OPINION BY: CLARK

OPINION

[*534] [***545] [**1628] MR. JUSTICE CLARK delivered the opinion of the Court. *

* MR. JUSTICE HARLAN concurs in this opinion subject to the reservations and to the extent indicated in his concurring opinion, *post*, p. 587.

[***LEdHR1] [1]The question presented here is whether the petitioner, who stands convicted in the District Court for the Seventh Judicial District of Texas at Tyler for swindling, [1] was [*535] deprived of his [**1629] right under the *Fourteenth Amendment* to due process by the televising and broadcasting of his trial. Both the trial court and the Texas Court of Criminal Appeals found against the petitioner. We hold to the contrary and reverse his conviction.

1 The evidence indicated that petitioner, through false pretenses and fraudulent representations, induced certain farmers to purchase fertilizer tanks and accompanying equipment, which in fact did not exist, and to sign and deliver to him chattel mortgages on the fictitious property.

I.

[***546] [***LEdHR2] [2]While petitioner recites his claim in the framework of Canon 35 of the Judicial Canons of the American Bar Association he does not contend that we should enshrine Canon 35 in the *Fourteenth Amendment*, but only that the time-honored principles of a fair trial were not followed in his case and that he was thus convicted without due process of law. Canon 35, of course, has of itself no binding effect on the courts but merely expresses the view of the Association in opposition to the broadcasting, televising and photographing of court proceedings. Likewise, Judicial Canon 28 of the Integrated State Bar of Texas, 27 Tex. B. J. 102 (1964), which leaves to the trial judge's sound discretion the telecasting and photographing of court proceedings, is of itself not law. In short, the question here is not the validity of either Canon 35 of the American Bar Association or Canon 28 of the State Bar

of Texas, but only whether petitioner was tried in a manner which comports with the due process requirement of the *Fourteenth Amendment.*

Petitioner's case was originally called for trial on September 24, 1962, in Smith County after a change of venue from Reeves County, some 500 miles west. Massive pretrial publicity totaling 11 volumes of press clippings, which are on file with the Clerk, had given it national notoriety. All available seats in the courtroom were taken and some 30 persons stood in the aisles. However, at that time a defense motion to prevent telecasting, broadcasting by radio and news photography and a defense motion for continuance were presented, and after a two-day hearing the former was denied and the latter granted.

[*536] [***LEdHR3] [3]These initial hearings were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. Cf. *Wood v. Georgia, 370 U.S. 375, 383 (1962);Turner v. Louisiana, 379 U.S. 466, 472 (1965);Cox v. Louisiana, 379 U.S. 559, 562 (1965).*Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings. Moreover, veniremen had been summoned and were present in the courtroom during the entire hearing but were later released after petitioner's motion for continuance had been granted. The court also had the names of the witnesses called; some answered but the absence of others led to a continuance of the case until October 22, 1962. It is contended that this two-day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence. Though the September hearings dealt with motions to prohibit television coverage [***547] and to postpone the trial, they are unquestionably relevant to the issue before us. All of this two-day affair was highly publicized and could only have impressed those present, and also the community [**1630] at large, with the notorious character of the petitioner as well as the proceeding. The trial witnesses present at the hearing, as well as the original jury panel, were undoubtedly [*537] made aware of the peculiar public importance of the case by the press and television coverage being provided, and by the fact that they themselves were televised live and their pictures rebroadcast on the evening show.

When the case was called for trial on October 22 the scene had been altered. A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

Because of continual objection, the rules governing live telecasting, as well as radio and still photos, were changed as the exigencies of the situation seemed to require. As a result, live telecasting was prohibited during a great portion of the actual trial. Only the opening [2] and closing arguments of the State, the return of the jury's verdict and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury.

2 Due to mechanical difficulty there was no picture during the opening argument.

Because of the varying restrictions placed on sound and live telecasting the telecasts of the trial were confined largely to film clips shown on the stations' regularly scheduled news programs. The news commentators would use the film of a particular part of the day's trial activities as a backdrop for their reports. Their commentary [*538] included excerpts from testimony and the usual reportorial remarks. On one occasion the videotapes of the September hearings were rebroadcast in place of the "late movie."

II.

In *Rideau v. Louisiana, 373 U.S. 723 (1963)*, this Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the *Due Process Clause of the Fourteenth Amendment* even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial. See *id., at 729* (dissenting opinion of CLARK, J.). Here, although there was nothing so dramatic as a home-viewed confession, there had been a bombardment of the community with the sights and sounds of a two-day hearing during which the original jury panel, the petitioner, the lawyers and the judge were highly publicized. The petitioner was subjected to characterization and minute electronic scrutiny to such an extent that at one point the photographers were found attempting to picture [***548] the page of the paper from which he was reading while sitting at the counsel table. The two-day hearing and the order permitting television at the actual trial were widely known throughout the community. This emphasized the notorious character that the trial would take and, therefore, set it apart in the public mind as an extraordinary case or, as Shaw would say, something "not conventionally unconventional." When the new jury was empaneled at the trial four of the jurors selected had seen and heard all or part of the broadcasts of the earlier proceedings.

[**1631] III.

[***LEdHR4] [4]We start with the proposition that it is a "public trial" that the *Sixth Amendment* guarantees to the "accused." The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and [*539] not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression. As our Brother BLACK so well said in *In re Oliver, 333 U.S. 257 (1948)*:

"The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." At 268-270. (Footnotes omitted.)

[***LEdHR5] [5]It is said, however, that the freedoms granted in the *First Amendment* extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press.

[***LEdHR6] [6]The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process. While the state and federal courts have differed over what spectators may be excluded from a criminal trial, 6 Wigmore, Evidence § 1834 (3d ed. 1940), the *amici curiae* brief of the National Association of Broadcasters and the Radio Television News Directors Association, says, as indeed it must, that "neither of these two amendments [First and Sixth] speaks of an unlimited [*540] right of access to the courtroom on the part of the broadcasting media . . . ." At 7. Moreover, they recognize that the "primary concern of all must be the proper administration of justice"; that "the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media"; and that "the due process requirements in both the *Fifth* and *Fourteenth Amendments* and the provisions of the *Sixth Amendment* require a procedure that will assure a fair trial . . . ." At 3-4.

[***LEdHR7] [7] [***LEdHR8] [8] Nor can the courts be said [***549] to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.

IV.

[***LEdHR9A] [9A] [***LEdHR10] [10]Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and

otherwise to protect and facilitate the performance of this high function. As a result, at this time those safeguards do not permit the televising and photographing of a criminal trial, save in two States and there only under restrictions. The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a [**1632] fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial -- the most fundamental of all freedoms -- must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is [*541] clear and certain of application and it is our duty to continue to enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial.

V.

The State contends that the televising of portions of a criminal trial does not constitute a denial of due process. Its position is that because no prejudice has been shown by the petitioner as resulting from the televising, it is permissible; that claims of "distractions" during the trial due to the physical presence of television are wholly unfounded; and that psychological considerations are for psychologists, not courts, because they are purely hypothetical. It argues further that the public has a right to know what goes on in the courts; that the court has no power to "suppress, edit, or censor events which transpire in proceedings before it," citing *Craig v. Harney, 331 U.S. 367, 374 (1947)*; and that the televising of criminal trials would be enlightening to the public and would promote greater respect for the courts.

At the outset the notion should be dispelled that telecasting is dangerous because it is new. It is true that our empirical knowledge of its full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited. However, the nub of the question is not its newness but, as MR. JUSTICE DOUGLAS says, "the insidious influences which it puts to work in the administration of justice." Douglas, The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1 (1960). These influences will be detailed below, but before turning to them the State's argument that the public has a right to know what goes on in the courtroom should be dealt with.

[***LEdHR11] [11]It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be [*542] and are plainly free to report [***550] whatever occurs in open court through their respective media. This was settled in *Bridges v. California, 314 U.S. 252 (1941)*, and *Pennekamp v. Florida, 328 U.S. 331 (1946)*, which we reaffirm. These reportorial privileges of the press were stated years ago:

"The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials, if they can thus have them presented as fully as they are exhibited in court, or at least all the material portion of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions, which he would not have been likely to receive from hearing the trial itself." 2 Cooley's Constitutional Limitations 931-932 (Carrington ed. 1927).

[***LEdHR12] [12]The State, however, says that the use of television in the instant case was "without injustice to the person immediately concerned," basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that in [**1633] most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due [*543] process. Such a case was *In re Murchison, 349 U.S. 133 (1955)*, where MR. JUSTICE BLACK for the Court pointed up with his usual clarity and force:

[***LEdHR13] [13]>

[***LEdHR14] [14]"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . . To perform its

high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States, 348 U.S. 11, 14.*" At 136. (Emphasis supplied.)

And, as Chief Justice Taft said in *Tumey v. Ohio, 273 U.S. 510*, almost 30 years before:

"the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." At 532. (Emphasis supplied.)

This rule was followed in *Rideau, supra*, and in *Turner v. Louisiana, 379 U.S. 466 (1965)*. In each of these cases the Court departed from the approach it charted in *Stroble v. California, 343 U.S. 181 (1952)*, and in *Irvin v. Dowd, 366 U.S. 717* [***551] *(1961)*, where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon v. Wainwright,* [*544] *372 U.S. 335 (1963)*, and *White v. Maryland, 373 U.S. 59 (1963)*, we applied the same rule, although in different contexts.

In this case it is even clearer that such a rule must be applied. In *Rideau, Irvin* and *Stroble*, the pretrial publicity occurred outside the courtroom and could not be effectively curtailed. The only recourse other than reversal was by contempt proceedings. In *Turner* the probability of prejudice was present through the use of deputy sheriffs, who were also witnesses in the case, as shepherds for the jury. No prejudice was shown but the circumstances were held to be inherently suspect, and, therefore, such a showing was not held to be a requisite to reversal. Likewise in this case the application of this principle is especially appropriate. Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. This was found true in *Murchison, Tumey, Rideau* and *Turner*. Such untoward circumstances as were found in those cases are inherently bad and prejudice to the accused was presumed. Forty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom. This fact is most telling in buttressing our conclusion that any change in procedure which would permit its use would [**1634] be inconsistent with our concepts of due process in this field.

VI.

[***LEdHR9B] [9B]

As has been said, the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into court proceedings. In addition experience teaches that there are numerous situations [*545] in which it might cause actual unfairness -- some so subtle as to defy detection by the accused or control by the judge. We enumerate some in summary:

1. The potential impact of television on the jurors is perhaps of the greatest significance. They are the nerve center of the fact-finding process. It is true that in States like Texas where they are required to be sequestered in trials of this nature the jurors will probably not see any of the proceedings as televised from the courtroom. But the inquiry cannot end there. From the moment the trial judge announces that a case will be televised it becomes a *cause celebre*. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the public press and the accused is highly publicized along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts and thus increases the chance of prejudice that is present [***552] in every criminal case. And we must remember that realistically it is only the notorious trial which will be broadcast, because of the necessity for paid sponsorship. The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror,

realizing that he must return to neighbors who saw the trial themselves, may well be led "not to hold the balance nice, clear and true between the State and the accused . . . ."

[*546] Moreover, while it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury "distraction." The State argues this is *de minimis* since the physical disturbances have been eliminated. But we know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

Furthermore, in many States the jurors serving in the trial may see the broadcasts of the trial proceedings. Admittedly, the Texas sequestration rule would prevent this occurring there. [3] In other States following no such practice jurors would return home and turn on the TV if only to see how they appeared upon it. They would also be subjected to re-enactment and emphasis of the selected parts of the proceedings which the requirements of the broadcasters determined would be telecast and would be subconsciously influenced the more by [**1635] that testimony. Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets.

> 3 Only six States, in addition to Texas, require sequestration of the jury prior to its deliberations in a non-capital felony trial. The great majority of jurisdictions leave the matter to the trial judge's discretion, while in at least one State the jury will be kept together in such circumstances only upon a showing of cause by the defendant.

Finally, new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast. Yet viewers may later [*547] be called upon to sit in the jury box during the new trial. These very dangers are illustrated in this case where the court, due to the defendant's objections, permitted only the State's opening and closing arguments to be broadcast with sound to the public.

2. The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement [***553] may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and "cranks" might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot "prove" the existence of such factors. Yet we all know from experience that they exist.

In addition the invocation of the rule against witnesses is frustrated. In most instances witnesses would be able to go to their homes and view broadcasts of the day's trial proceedings, notwithstanding the fact that they had been admonished not to do so. They could view and hear the testimony of preceding witnesses, and so shape their own testimony as to make its impact crucial. And even in the absence of sound, the influences of such viewing on the attitude of the witness toward testifying, his frame of mind upon taking the stand or his apprehension of withering cross-examination defy objective assessment. Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.

[*548] While some of the dangers mentioned above are present as well in newspaper coverage of any important trial, the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage.

3. A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge. His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still when television comes into the courtroom he must also supervise it. In this trial, for example, the judge on several different occasions -- aside from the two days of pretrial -- was obliged to have a hearing or enter an order made necessary solely because of the presence of television. Thus, where telecasting is restricted as it was here, and as even the State concedes it

must be, his task is made much more difficult and exacting. And, as happened here, such rulings may unfortunately militate against the fairness of the trial. In addition, laying physical interruptions aside, there is the everpresent distraction that the mere awareness of television's presence prompts. Judges are human beings also and are subject to the same psychological reactions as laymen. Telecasting is particularly bad where the judge is elected, as is the case in all save a half dozen of our States. The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand -- the fair trial of the accused.

But this is not all. There is the initial decision that must be made as to whether the use of television will be permitted. [**1636] This is perhaps an even more crucial consideration. Our judges are high-minded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly [*549] and through the shaping of public opinion. Moreover, where one judge in a district or even in a State permits telecasting, the requirement that the others do the same is almost mandatory. [***554] Especially is this true where the judge is selected at the ballot box.

[***LEdHR15] [15]4. Finally, we cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental -- if not physical -- harassment, resembling a police line-up or the third degree. The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him -- sometimes the difference between life and death -- dispassionately, freely and without the distraction of wide public surveillance. A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system. Furthermore, telecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses. See Pye, The Lessons of Dallas -- Threats to Fair Trial and Free Press, National Civil Liberties Clearing House, 16th Annual Conference.

The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. While our telecasters are honorable men, they too are human. The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases, such as this one, and invariably focuses the lens upon the unpopular or infamous [*550] accused. Such a selection is necessary in order to obtain a sponsor willing to pay a sufficient fee to cover the costs and return a profit. We have already examined the ways in which public sentiment can affect the trial participants. To the extent that television shapes that sentiment, it can strip the accused of a fair trial.

The State would dispose of all these observations with the simple statement that they are for psychologists because they are purely hypothetical. But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored. Nor are they "purely hypothetical." They are no more hypothetical than were the considerations deemed controlling in *Tumey, Murchison, Rideau* and *Turner.* They are real enough to have convinced the Judicial Conference of the United States, this Court and the Congress that television should be barred in federal trials by the Federal Rules of Criminal Procedure; in addition they have persuaded all but two of our States to prohibit television in the courtroom. They are effects that may, and in some combination almost certainly will, exist in any case in which television is injected into the trial process.

VII.

The facts in this case demonstrate clearly the necessity for the application of the rule announced in *Rideau.* The sole issue before the court for two days of pretrial hearing was the question now before us. The hearing was televised live and repeated on tape in the same evening, reaching approximately 100,000 viewers. In addition, the courtroom was a mass of wires, television cameras, [***555] microphones and photographers. The petitioner, the panel of prospective jurors, who were sworn the second day, the witnesses [**1637] and the lawyers were all exposed to this untoward situation. The judge decided that the trial [*551] proceedings would be telecast. He announced no restrictions at the time. This emphasized the notorious nature of the coming trial, increased the intensity of the publicity on the petitioner

and together with the subsequent televising of the trial beginning 30 days later inherently prevented a sober search for the truth. This is underscored by the fact that the selection of the jury took an entire week. As might be expected, a substantial amount of that time was devoted to ascertaining the impact of the pretrial televising on the prospective jurors. As we have noted, four of the jurors selected had seen all or part of those broadcasts. The trial, on the other hand, lasted only three days.

Moreover, the trial judge was himself harassed. After the initial decision to permit telecasting he apparently decided that a booth should be built at the broadcasters' expense to confine its operations; he then decided to limit the parts of the trial that might be televised live; then he decided to film the testimony of the witnesses without sound in an attempt to protect those under the rule; and finally he ordered that defense counsel and their argument not be televised, in the light of their objection. Plagued by his original error -- recurring each day of the trial -- his day-to-day orders made the trial more confusing to the jury, the participants and to the viewers. Indeed, it resulted in a public presentation of only the State's side of the case.

As Mr. Justice Holmes said in *Patterson v. Colorado, 205 U.S. 454, 462 (1907)*:

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its [*552] presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.

The judgment is therefore

Reversed.

CONCUR BY: WARREN; HARLAN

CONCUR

MR. CHIEF JUSTICE WARREN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE GOLDBERG join, concurring.

While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom.

[***556] I.

Petitioner, a much-publicized financier, was indicted by a Reeves County, Texas, grand jury for obtaining property through false pretenses. The case was transferred to the City of Tyler, in Smith County, Texas, and was set for trial on September 24, 1962. Prior to that date petitioner's counsel informed the trial judge that he would make a motion on September 24 to exclude all cameras from the courtroom during the trial.

On September 24, a hearing was held to consider petitioner's motion to prohibit television, motion pictures, and still photography at the trial. The courtroom was filled with newspaper reporters and [**1638] cameramen, television cameramen, and spectators. At least 12 cameramen with [*553] their equipment were seen by one observer, and there were 30 or more people standing in the aisles. An article appearing in the New York Times the next day stated:

"A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates. . . . Cables and wires snaked over the floor." [1]

With photographers roaming at will through the courtroom, petitioner's counsel made his motion that all cameras be excluded. As he spoke, a cameraman wandered behind the judge's bench and snapped his picture. Counsel argued that the presence of cameras would make it difficult for him to consult with his client, make his client ill at ease, and make it impossible to obtain a fair trial since the cameras would distract the jury, witnesses and lawyers. He also expressed the view

that televising selected cases tends to give the jury an impression that the particular trial is different from ordinary criminal trials. The court, however, ruled that the taking of pictures and televising would be allowed so long as the cameramen stood outside the railing that separates the trial participants from the spectators. The court also ruled that if a complaint was made that any camera was too noisy, the cameramen would have to stop taking pictures; that no pictures could be taken in the corridors outside the courtroom; and that those with microphones were not to pick up conversations between petitioner and his lawyers. Subsequent to the court's ruling petitioner arrived in the courtroom, [2] and the defense introduced testimony [*554] concerning the atmosphere in the court on that day. At the conclusion of the day's hearing the judge reasserted his earlier ruling. He then ordered a roll call of the prosecution witnesses, at least some of whom had been in the courtroom during the proceedings.

1 N. Y. Times, Sept. 25, 1962, p. 46, col. 4. See Appendix, Photographs 1, 2, 3.

2 Counsel explained to the trial court that he desired to protect petitioner from the cameras until the court had made its ruling.

The entire hearing on September 24 was televised live by station KLTV of Tyler, Texas, and station WFAA-TV of Dallas, Texas. Commercials were inserted when there was a pause in the proceedings. On the evening of Monday, September 24, both stations ran an edited tape of the day's proceedings and interrupted the tape to play the commercials ordinarily seen in the particular time slot. In addition to the [***557] live television coverage there was also a live radio pickup of the proceedings by at least one station.

The proceedings continued on September 25. There was again a significant number of cameramen taking motion pictures, still pictures and television pictures. The judge once more ordered cameramen to stay on the other side of the railing and stated that this order was to be observed even during court recesses. The panel from which the petit jury was to be selected was then sworn in the presence of the cameramen. The panel was excused to permit counsel to renew his motion to prohibit photography in the courtroom. The court denied the motion, but granted a continuance of trial until October 22 and dismissed the jury panel. At the suggestion of petitioner's counsel the trial judge warned the prosecution witnesses who were present not to discuss the case during the continuance. The proceedings were televised live and portions of the television tape were shown on the regularly scheduled evening news programs. Live radio transmission apparently occurred as on the day before.

[**1639] On October 1, 1962, the trial judge issued an order explaining what coverage he would permit during the trial. The judge delivered the order in his chambers for the [*555] benefit of television cameramen so that they could film him. The judge ruled that although he would permit television cameras to be present during the trial, they would not be permitted to present live coverage of the interrogation of prospective jurors or the testimony of witnesses. He ruled that each of the three major television networks, NBC, CBS, ABC, and the local television station KLTV could install one camera not equipped to pick up sound and the film would be available to other television stations on a pooled basis. In addition, he ruled that with respect to news photographers only cameramen for the local press, Associated Press, and United Press would be permitted in the courtroom. Photographs taken were also to be made available to others on a pooled basis. The judge did not explain how he decided which television cameramen and which still photographers were to be permitted in the courtroom and which were to be excluded.

For the proceedings beginning on October 22, station KLTV, at its own expense, and with the permission of the court, had constructed a booth in the rear of the courtroom painted the same or near the same color as the courtroom. An opening running lengthwise across the booth permitted the four television cameras to photograph the proceedings. The courtroom was small and the cameras were clearly visible to all in the courtroom. [3] The cameras were equipped with "electronic sound on camera" which permitted them to take both film and sound. Upon entering the courtroom the judge told all those with television cameras to go back to the booth; asked the press photographers not to move around any more than necessary; ordered that no flashbulbs or floodlights be used; and again told cameramen that they could not go inside the railing. Defense counsel renewed his motion [*556] to ban all "sound equipment . . . still cameras, movie cameras and television; and all radio facilities" from the courtroom. Witnesses were again called on this issue, but at the conclusion of the hearing the trial [***558] judge reaffirmed his prior ruling to permit cameramen in the courtroom. In response to

petitioner's argument that his rights under the Constitution of the United States were being violated, the judge remarked that the "case [was] not being tried under the Federal Constitution."

3 See Appendix, Photograph 6.

None of the proceedings on October 22 was televised live. Television cameras, however, recorded the day's entire proceedings with sound for later showings. Apparently none of the October 22 proceedings was carried live on radio, although the proceedings were recorded on tape. The still photographers admitted by the court were free to take photographs from outside the railing.

On October 23 the selection of the jury began. Overnight an additional strip had been placed across the television booth so that the opening for the television cameras was reduced, but the cameras and their operators were still quite visible. [4] A panel of 86 prospective jurors was ready for the *voir dire*. The judge excused the jurors from the courtroom and made still another ruling on news coverage at the trial. He ordered the television recording to proceed from that point on without an audio pickup, and, in addition, forbade radio tapes of any further proceedings until all the evidence had been introduced. During the course of the trial the television cameras recorded without sound whatever matters appeared interesting to them for use on later newscasts; radio broadcasts in the form of spot reports were made from a room next to the courtroom. There was no live television or radio coverage until November 7 when the trial judge permitted live [**1640] coverage of the prosecution's [*557] arguments to the jury, the return of the jury's verdict and its acceptance by the court. Since the defense objected to being photographed during the summation, the judge prohibited television cameramen or still photographers from taking any pictures of the defense during its argument. But the show went on, and while the defense was speaking the cameras were directed at the judge and the arguments were monitored by audio equipment and relayed to the television audience by an announcer. On November 7 the judge, for the first time, directed news photographers desiring to take pictures to take them only from the back of the room. Up until this time the trial judge's orders merely limited news photographers to the spectator section.

4 See Appendix, Photograph 7.

II.

The decision below affirming petitioner's conviction runs counter to the evolution of Anglo-American criminal procedure over a period of centuries. During that time the criminal trial has developed from a ritual practically devoid of rational justification [5] to a fact-finding process, the acknowledged purpose of which is to provide a fair and reliable determination of guilt. [6]

5 Jenks, A Short History of English Law 46-47 (6th ed. 1949); I Stephen, A History of the Criminal Law of England 51-74 (1883).

6 See, *e. g., Craig v. Harney, 331 U.S. 367, 378; Irvin v. Dowd, 366 U.S. 717, 728; Brady v. Maryland, 373 U.S. 83, 87; Jackson v. Denno, 378 U.S. 368, 391.*

An element of rationality was introduced into the guilt-determining [***559] process in England over 600 years ago when a rudimentary trial by jury became "the principal institution for criminal cases." [7] Initially members of the jury were expected to make their own examinations of the cases they were to try and come to court already familiar [*558] with the facts, [8] which made it impossible to limit the jury's determination to legally relevant evidence. Gradually, however, the jury was transformed from a panel of witnesses to a panel of triers passing on evidence given by others in the courtroom. [9] The next step was to insure the independence of the jury, and this was accomplished by the decision in the case of *Edward Bushell*, 6 How. St. Tr. 999 (1670), which put an end to the practice of fining or otherwise punishing jury members who failed to reach the decision directed by the court. As the purpose of trial as a vehicle for discovering the truth became clearer, it was recognized that the defendant should have the right to call witnesses and to place them under oath, [10] to be informed of the charges against him before the trial, [11] and to have counsel assist him with his defense. [12] All these protections, and others which could be cited, were part of a development by which "the administration of criminal justice was set upon a firm and dignified basis." [13]

7 See *Singer v. United States, 380 U.S. 24, 27.*

8 II Pollock and Maitland, The History of English Law 621-622 (2d ed. 1909).

9 I Stephen, *supra*, note 5, at 260.

10 See 7 Will. 3, c. 3 (1695).

11 *Ibid.*

12 *Ibid.*; 6 & 7 Will. 4, c. 114 (1836).
13 I Stephen, *supra*, note 5, at 427.

When the colonists undertook the responsibility of governing themselves, one of their prime concerns was the establishment of trial procedures which would be consistent with the purpose of trial. The Continental Congress passed measures designed to safeguard the right to a fair trial, [14] and the various States adopted constitutional provisions [*559] directed to the [**1641] same end. [15] Eventually the *Sixth Amendment* incorporated into the Constitution certain provisions dealing with the conduct of trials:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Significantly, in the *Sixth Amendment* the words "speedy and public" qualify the term *trial* and the rest of the Amendment defines specific protections the accused is to have at his *trial*. Thus, the *Sixth Amendment*, by its own terms, not only requires that the accused have certain specific rights but also that he enjoy them at a *trial* -- a word with a meaning of its own, see *Bridges v. California, 314 U.S. 252, 271.*

14 I Journals of the Continental Congress 1774-1789, 69 (Ford ed. 1904).
15 Radin, The Right to a Public Trial, 6 Temple L. Q. 381, 383, n. 5a (1932).

The *Fourteenth Amendment* which places limitations on the States' administration of their criminal laws also gives content to the term *trial*. Whether the *Sixth Amendment* as a whole applies to [***560] the States through the Fourteenth, [16] or the *Fourteenth Amendment* embraces only those portions of the *Sixth Amendment* that are "fundamental," [17] or the *Fourteenth Amendment* incorporates a standard of "ordered liberty" apart from the [*560] specific guarantees of the *Bill of Rights*, [18] it has been recognized that state prosecutions must, at the least, comport with "the fundamental conception" of a fair *trial*. [19]

16 *Adamson v. California, 332 U.S. 46, 71-72* (dissenting opinion of MR. JUSTICE BLACK).
17 *Gideon v. Wainwright, 372 U.S. 335, 342.*
18 *Pointer v. Texas, 380 U.S. 400, 408* (opinion of MR. JUSTICE HARLAN, concurring in the result).
19 *Cox v. Louisiana, 379 U.S. 559, 562*; *Frank v. Mangum, 237 U.S. 309, 347* (dissenting opinion of Justice Holmes). See *Adamson v. California, 332 U.S. 46, 53*; *In re Murchison, 349 U.S. 133, 136*; *Irvin v. Dowd, 366 U.S. 717, 722*; *Jackson v. Denno, 378 U.S. 368, 377* (Court opinion), 424 (dissenting opinion of MR. JUSTICE CLARK), 428 (dissenting opinion of MR. JUSTICE HARLAN).

It has been held on one or another of these theories that the fundamental conception of a fair trial includes many of the specific provisions of the *Sixth Amendment*, such as the right to have the proceedings open to the public, *In re Oliver, 333 U.S. 257*; the right to notice of specific charges, *Cole v. Arkansas, 333 U.S. 196*; the right to confrontation, *Pointer v. Texas, 380 U.S. 400*; *Douglas v. Alabama, 380 U.S. 415*; and the right to counsel, *Gideon v. Wainwright, 372 U.S. 335*. But it also has been agreed that neither the Sixth nor the *Fourteenth Amendment* is to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though "every form [be] preserved," the forms may amount to no "more than an empty shell" when considered in the context or setting in which they were actually applied. [20]

20 *Frank v. Mangum, 237 U.S. 309, 346* (dissenting opinion).

In [**1642] cases arising from state prosecutions this Court has acted to prevent the right to a constitutional trial from being reduced to a formality by the intrusion of factors into the trial process that tend to subvert its purpose. The Court recognized in *Pennekamp v. Florida, 328 U.S. 331, 334*, [*561] that the "orderly operation of courts" is "the primary and dominant requirement in the administration of justice." And, in *Moore v. Dempsey, 261 U.S. 86, 90-91*, it was held that the atmosphere in and around the courtroom might be so hostile as to interfere with the trial process, even though an examination of the record disclosed that all the forms of trial conformed to the requirements of law: the

defendant had counsel, the jury members stated they were impartial, the jury was correctly charged, and the evidence was legally sufficient to convict. Moreover, in *Irvin v. Dowd, 366 U.S. 717*, a conviction was reversed where extensive pretrial publicity rendered a fair trial unlikely despite the observance [***561] of the formal requisites of a legal trial. We commented in that case:

"No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." *Id., at 728.*

To recognize that disorder can convert a trial into a ritual without meaning is not to pay homage to order as an end in itself. Rather, it recognizes that the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process. *Craig v. Harney, 331 U.S. 367, 377.* As MR. JUSTICE BLACK said, in another context: "The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." [21] In light of this fundamental conception of what the term *trial* [*562] means, this Court has recognized that often, despite widespread, hostile publicity about a case, it is possible to conduct a trial meeting constitutional standards. Significantly, in each of these cases, the basic premise behind the Court's conclusion has been the notion that judicial proceedings can be conducted with dignity and integrity so as to shield the trial process itself from these irrelevant, external factors, rather than to aggravate them as here. Thus, in reversing contempt convictions for out-of-court statements, this Court referred to "the power of courts to protect themselves from disturbances and disorder *in the court room," Bridges v. California, 314 U.S. 252, 266* (emphasis added); "the necessity for fair adjudication, free from interruption of its processes," *Pennekamp v. Florida, 328 U.S. 331, 336*; "the integrity of the trial," *Craig v. Harney, 331 U.S. 367, 377.* And, in upholding a conviction against a claim of unfavorable publicity, this Court commented "that petitioner's trial was conducted in a calm judicial manner," *Darcy v. Handy, 351 U.S. 454, 463.*

21 *Cox v. Louisiana, 379 U.S. 559, 583* (dissenting opinion).

Similarly, when state procedures have been found to thwart the purpose of trial this Court has declared those procedures to be unconstitutional. In *Tumey v. Ohio, 273 U.S. 510*, the Court considered a state procedure under which judges were paid for presiding over a case only if the defendant was found guilty and costs assessed against him. An argument was [**1643] made that the practice should not be condemned broadly, since some judges undoubtedly would not let their judgment be affected by such an arrangement. However, the Court found the procedure so inconsistent with the conception of what a trial should be and so likely to produce prejudice that it declared the practice unconstitutional even though no specific prejudice was shown.

In *Lyons v. Oklahoma, 322 U.S. 596*, this [***562] Court stated that if an involuntary confession is introduced into evidence [*563] at a state trial the conviction must be reversed, even though there is other evidence in the record to justify a verdict of guilty. We explained the rationale behind this judgment in *Payne v. Arkansas, 356 U.S. 560, 568*:

"Where . . . a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession."

Similar reasoning led to the decision last Term in *Jackson v. Denno, 378 U.S. 368.* We held there that when the voluntariness of a confession is at issue there must be a procedure adopted which provides "a reliable and clearcut determination of . . . voluntariness." *Id., at 391.* We found insufficient a procedure whereby the jury heard the confession but was instructed to disregard it if the jury found the confession involuntary:

"The New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore." *Id., at 389.*

Earlier this Term, in *Turner v. Louisiana, 379 U.S. 466*, we considered a case in which deputy sheriffs, who were the prosecution's principal witnesses, were in charge of a sequestered jury during the trial. The Supreme Court of Louisiana criticized the practice but said that in the absence of a showing of prejudice there was no ground for reversal. We reversed because the "extreme prejudice inherent" in the practice required its condemnation on constitutional grounds.

Finally, the Court has on numerous other occasions reversed convictions, where the formalities of trial were [*564] observed, because of practices that negate the fundamental conception of trial. [22]

22 See *Mooney v. Holohan, 294 U.S. 103*; *Alcorta v. Texas, 355 U.S. 28*; *Napue v. Illinois, 360 U.S. 264*; and *Brady v. Maryland, 373 U.S. 83*.

This line of cases does not indicate a disregard for the position of the States in our federal system. Rather, it stands for the proposition that the criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated.

III.

For the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted. As was said in *Weems v. United States, 217 U.S. 349, 373*, and reaffirmed in *Brown v. Board of Education, 347 U.S. 483, 492-493*:

"Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore [***563] taken. [**1644] Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent [*565] into impotent and lifeless formulas. Rights declared in words might be lost in reality."

[***LEdHR16] [16]I believe that it violates the *Sixth Amendment* for federal courts and the *Fourteenth Amendment* for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds: (1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.

I have attempted to show that our common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose -- to provide a fair and reliable determination of guilt. In *Tumey v. Ohio, supra, at 532*, this Court condemned the procedure there employed for compensating judges because it offered a "possible temptation" to judges "not to hold the balance nice, clear and true between the State and the accused." How much more harmful is a procedure which not only offers the temptation to judges to use the bench as a vehicle for their own ends, but offers the same temptation to every participant in the trial, be he defense counsel, prosecutor, witness or juror! It is not necessary to speak in the abstract on this point. In the present case, on October 1, the trial judge invited the television cameras into his chambers so they could take films of him reading one of his pretrial orders. On this occasion, at least, the trial judge clearly took the initiative in placing himself before the television audience and in giving his order, and himself, the maximum possible publicity. Moreover, on October 22, when trial counsel renewed [*566] his motion to exclude television from the courtroom on the ground that it violated petitioner's rights under the Federal Constitution, the trial judge made the following speech:

"This case is not being tried under the Federal Constitution. This Defendant has been brought into this Court under the state laws, under the State Constitution.

. . . .

"I took an oath to uphold this Constitution; not the

Federal Constitution but the State Constitution; and I am going to do my best to do that as long as I preside on this Court, and if it is distasteful in following my oath and upholding the constitution, it will just have to be distasteful."

One is entitled to wonder if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favor of his viewing [***564] audience. I find it difficult to believe that this trial judge, with over 20 years' experience on the bench, was unfamiliar with the fundamental duty imposed on him by Article VI of the Constitution of the United States:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be [**1645] made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This is not to say that all participants in the trial would distort it by deliberately playing to the television audience, but some undoubtedly would. The even more serious danger is that neither the judge, prosecutor, defense counsel, jurors or witnesses would be able to go [*567] through trial without considering the effect of their conduct on the viewing public. It is admitted in dissent that "if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant." *Post*, p. 612. But it is contended that what went on at the September hearing is irrelevant to the issue before us. With this I cannot agree. We granted certiorari to consider whether petitioner was denied due process when he was required to submit to a televised trial. In this, as in other cases involving rights under the Due Process Clause, we have an obligation to make an independent examination of the record, *e. g., Watts v. Indiana, 338 U.S. 49, 51*; *Norris v. Alabama, 294 U.S. 587, 590*; and the limited grant of certiorari does not prohibit us from considering all the facts in this record relevant to the question before us. The parties to this case, and those who filed briefs as *amici curiae*, recognize this, since they treat the televising of the September proceedings as a factor relevant to our consideration. Our decisions in *White v. Maryland, 373 U.S. 59*, and *Hamilton v. Alabama, 368 U.S. 52*, clearly hold that an accused is entitled to procedural protections at pretrial hearings as well as at actual trial and his conviction will be reversed if he is not accorded these protections. In addition, in *Pointer v. Texas, 380 U.S. 400*, we held that a pretrial hearing can have a profound effect on the trial itself and effectively prevent an accused from having a fair trial. Petitioner clearly did not have a fair determination of his motion to exclude cameras from the courtroom. The very presence of the cameras at the September hearing tended to impress upon the trial judge the power of the communications media and the criticism to which he would have been subjected if he had ruled that the presence of the cameras was inconsistent with petitioner's right to a fair trial. The prejudice to petitioner [*568] did not end here. Most of the trial participants were present at the September hearing -- the judge, defense counsel, prosecutor, prosecution witnesses and defendant himself -- and they saw for themselves the desecration of the courtroom. After undergoing this experience it is unrealistic to suppose that they would come to the October trial unaware that court procedures were being [***565] sacrificed in this case for the convenience of television. The manner in which the October proceedings were conducted only intensified this awareness. It was impossible for any of the trial participants ever to be unaware of the presence of television cameras in court for the actual trial. [23] The snouts of the four television cameras protruded through the opening in the booth, and the cameras and their operators were not only readily visible but were impossible to ignore by all who were surveying the activities in this small courtroom. No one could forget that he was constantly in the focus of the "all-seeing eye." Although the law of Texas purportedly permits witnesses to object to being televised, it is ludicrous to place this burden on them. They would naturally accept the conditions of the [**1646] courtroom as the judge establishes them, and feel that it would be as presumptuous for them to object to the court's permitting television as to object to the court reporter's recording their testimony. Yet, it is argued that no witnesses objected to being televised. This is indeed a slender reed to rely on, particularly in view of the trial judge's failure, in the course of his self-exculpating statements justifying his decision to allow television, to advise the witnesses or the jurors that they had the right to object to being televised. Defense counsel, however, stated forcefully that he could not concentrate on the case because of the distraction caused by the cameras. And the trial judge's attention [*569] was distracted from the

trial since he was compelled to make seven extensive rulings concerning television coverage during the October proceedings alone, when he should, instead, have been concentrating on the trial itself.

23 See Appendix, Photograph 7.

[***LEdHR17] [17] It is common knowledge that "television . . . can . . . work profound changes in the behavior of the people it focuses on." [24] The present record provides ample support for scholars who have claimed that awareness that a trial is being televised to a vast, but unseen audience, is bound to increase nervousness and tension, [25] [***566] cause an increased [*570] concern about appearances, [26] and bring to the surface latent opportunism that the traditional dignity of the courtroom would discourage. Whether they do so consciously or subconsciously, all trial participants act differently in the presence of television cameras. And, even if all participants make a conscientious and studied effort to be unaffected by the presence of television, this effort in itself prevents them from giving their [**1647] full attention to their proper functions at trial. Thus, the evil of televised trials, as demonstrated by this case, lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised. To the extent that television has such an inevitable impact it undercuts the reliability of the trial process.

24 Keating, "Not 'Bonanza,' Not 'Peyton Place,' But the U.S. Senate," N. Y. Times Magazine, April 25, 1965, 67, 72. See, *e. g.*, N. Y. Times, April 22, 1965, p. 43, col. 2 (in describing a televised stockholders' meeting the Times reported, "Some stockholders seemed very much aware they were on camera"); Tinkham, Should Canon 35 Be Amended? A Question of Proper Judicial Administration, 42 A. B. A. J. 843, 845 (1956) (in giving examples of how people react when they know they are on television, the author describes the reactions of a television audience when the camera was turned on it as "contorted, grimacing"); Gould, N. Y. Times, March 11, 1956, § 2, p. X 11, col. 2 ("The most experienced performers in show business know the horrors of stage fright before they go on TV. This psychological and emotional burden must not be placed on a layman whose testimony may have a bearing on whether, in a murder trial, another human being is to live or die.").

25 See, *e. g.*, Douglas, The Public Trial and the Free Press, 46 A. B. A. J. 840, 842 (1960). In *United States v. Kleinman, 107 F.Supp. 407 (D. C. D. C. 1952)*, the court refused to hold in contempt witnesses in a congressional hearing who refused to answer questions while television cameras were focused on them. The court stated:

"The only reason for having a witness on the stand, either before a committee of Congress or before a court, is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished, even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end.

"In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again." *Id., at 408.*

26 See, *e. g.*, *Douglas, supra*, note 25, at 842; Yesawich, Televising and Broadcasting Trials, 37 Cornell L. Q. 701, 717 (1952).

In the early days of this country's development, the entertainment a trial might provide often tended to obfuscate its proper role.

"The people thought holding court one of the greatest performances in the range of their experience. . . . The country folks would crowd in for ten miles to hear these 'great lawyers' plead; and it was a secondary matter with the client whether he won or lost his case, so the 'pleading' was loud and long." [27]

"In early frontier America, when no motion pictures, no television, and no radio provided entertainment,

[*571] trial day in the county was like fair day, and from near and far citizens young and old converged on the county seat. The criminal trial was the theater and *spectaculum* of old rural America. Applause and cat calls were not infrequent. All too easily lawyers and judges became part-time actors at the bar . . . ." [28]

I had thought that these days of frontier justice were long behind us, but the courts below would return the theater to the courtroom.

27 Wigmore, A Kaleidoscope of Justice 487 (1941).

28 Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U. Pa. L. Rev. 1, 6 (1961).

The televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry. In the present case, tapes of the September 24 hearing were run in place of the "Tonight Show" by one station and in place of the late night movie by another. Commercials for soft drinks, soups, eyedrops and seatcovers were inserted when there was a pause in the proceedings. In addition, if trials were televised there would be a natural tendency on the part of broadcasters to develop the personalities of the trial participants, so as to give the proceedings more of an element of drama. This tendency was noticeable in the present case. Television commentators gave the viewing audience a homey, flattering sketch about the trial judge, obviously to add an extra element of viewer appeal to the trial:

"Tomorrow morning at 9:55 the [***567] WFAA T. V. cameras will be in Tyler to telecast live [the trial judge's] decision whether or not he will permit live coverage of the Billie Sol Estes trial. If so, this will be the first such famous national criminal proceeding to be televised in its entirety live. [The trial judge] [*572] was appointed to the bench here in Tyler in 1942 by [the Governor]. The judge has served every two years since then. This *very* beautiful Smith County Courthouse was built and dedicated in 1954, but before that [the trial judge] had made a reputation for himself that reached not only throughout Texas, but throughout the United States as well. It is said that [the trial judge], who is now 53 years old, has tried more cases than any other judge during his time in office."

The television industry might also decide that the bareboned trial itself does not contain sufficient drama to sustain an audience. It might provide expert commentary on the proceedings and hire persons with legal backgrounds to anticipate possible trial strategy, as the football expert anticipates plays for his audience. The trial judge himself stated at the September hearing that if he wanted [**1648] to see a ball game he would turn on his television set, so why not the same for a trial.

Moreover, should television become an accepted part of the courtroom, greater sacrifices would be made for the benefit of broadcasters. In the present case construction of a television booth in the courtroom made it necessary to alter the physical layout of the courtroom and to move from their accustomed position two benches reserved for spectators. [29] If this can be done in order better to accommodate the television industry, I see no reason why another court might not move a trial to a theater, if such a move would provide improved television coverage. Our memories are short indeed if we have already forgotten the wave of horror that swept over this country when Premier Fidel Castro conducted his prosecutions before 18,000 people in Havana Stadium. [30] But in the decision [*573] below, which completely ignores the importance of the courtroom in the trial process, we have the beginnings of a similar approach toward criminal "justice." This is not an abstract fear I am expressing because this very situation confronted the Nebraska Supreme Court in *Roberts v. State, 100 Neb. 199, 203, 158 N. W. 930, 931-932 (1916)*:

"The court removed the trial from the court-room to the theater, and stated as a reason therefor: 'By reason of the insufficiency of the court-room to seat and accommodate the people applying for admission . . . it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where trial proceeded.' The stage was occupied by court, counsel, jury, witnesses, and officers connected with the trial. The theater proper was crowded with curious spectators. Before the trial was completed it was returned to the court-room and concluded there. At the adjournment of court on one occasion the bailiff announced from the stage: 'The regular show will be tomorrow; matinee in the afternoon and another performance at 8:30. Court is now adjourned until 7:30.'"

29 Compare Appendix, Photograph 5, with

Appendix, Photograph 6.
30 N. Y. Times, Jan. 23, 1959, p. 1, col. 1.

There [***568] would be a real threat to the integrity of the trial process if the television industry and trial judges were allowed to become partners in the staging of criminal proceedings. The trial judge in the case before us had several "conferences [with] representatives of the news media." *Post*, p. 606. He then entered into a joint enterprise with a television station for the construction of a booth in his courtroom. The next logical step in this partnership might be to schedule the trial for a time that would permit the maximum number of viewers to watch and to schedule recesses to coincide with the need for station breaks. Should the television industry become an [*574] integral part of our system of criminal justice, it would not be unnatural for the public to attribute the shortcomings of the industry to the trial process itself. The public is aware of the television industry's consuming interest in ratings, and it is also aware of the steps that have been taken in the past to maintain viewer interest in television programs. Memories still recall vividly the scandal caused by the disclosure that quiz programs had been corrupted in order to heighten their dramatic appeal. Can we be sure that similar efforts would not be made to heighten the dramatic appeal of televised trials? Can we be sure that the public would not inherently distrust our system of justice because of its intimate association with a commercial enterprise?

Broadcasting in the courtroom would give the television industry an awesome [**1649] power to condition the public mind either for or against an accused. By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, television directors could give the community, state or country a false and unfavorable impression of the man on trial. Moreover, if the case should end in a mistrial, the showing of selected portions of the trial, or even of the whole trial, would make it almost impossible to select an impartial jury for a second trial. Cf. *Rideau v. Louisiana, 373 U.S. 723*. To permit this powerful medium to use the trial process itself to influence the opinions of vast numbers of people, before a verdict of guilt or innocence has been rendered, would be entirely foreign to our system of justice.

The sense of fairness, dignity and integrity that all associate with the courtroom would become lost with its commercialization. Thus, the televising of trials would not only have an effect on those participating in the trials that are being televised, but also on those who observe the trials and later become trial participants.

[*575] It is argued that television not only entertains but also educates the public. But the function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process. The Soviet Union's trial of Francis Gary Powers provides an example in point. The integrity of the trial was suspect because it was concerned not only with determining the guilt of the individual on trial but also with providing an object lesson to the public. This divided effort undercut confidence in the guilt-determining aspect of the procedure and by so doing rendered [***569] the educational aspect self-defeating.

"Was it prejudicial to [Powers] that the trial took place in a special hall with over 2,000 spectators, that it was televised, that prominent representatives of many organizations in various countries were invited to attend, that simultaneous oral translations of the proceedings . . . were provided, and that detailed . . . reports of the case in various languages were distributed to the press before, during and after the trial?"

". . . The Soviet legal system . . . consciously and explicitly uses the trial, and indeed the very safeguards of justice themselves, as instruments of the social and political objectives of the state. . . .

". . . A Soviet trial is supposed to be correct, impartial, just, reasonable, and at the same time it is supposed to serve as an object-lesson to society, a means of teaching the participants, the spectators and the public generally to be loyal, obedient, disciplined fighters for Communist ideals. . . .

". . . The tension between the demands of justice and the demands of politics can never be entirely [*576] eliminated. The fate of the accused is bound to be influenced in one way or another when the trial is lifted above its individual facts and deliberately made an object-lesson to the public."

". . . The deliberate use of a trial as a means of political education threatens the integrity of the judicial process." [31]

31 Berman, Introduction to the Trial of the U 2 xiii, xii-xiii, xxix (1960).

Finally, if the televising of criminal proceedings were approved, trials would be selected for television coverage for reasons having nothing to do with the purpose of trial. A trial might be televised because a particular judge has gained the fancy of the public by his unorthodox [**1650] approach; or because the district attorney has decided to run for another office and it is believed his appearance would attract a large audience; or simply because a particular courtroom has a layout that best accommodates television coverage. [32] For the most part, however, the most important factor that would draw television to the courtroom would be the nature of the case. The alleged perpetrator of the sensational murder, the fallen idol, or some other person who, like petitioner, has attracted the public interest would find his trial turned into [*577] a vehicle for television. Yet, these are the very persons who encounter the greatest difficulty in securing an impartial trial, even without the presence of television. This Court would no longer be able to point to the dignity and calmness of the courtroom as a protection from outside influences. For the television camera penetrates this protection and brings into the courtroom tangible evidence of the widespread interest in a case -- an interest which has often been fanned by exhaustive reports in the newspapers, [***570] television and radio for weeks before trial. The present case presents a clear example of this danger. In the words of petitioner's counsel:

"The Saturday Evening Post, The Readers Digest, Time, Life all had feature stories upon [petitioner's] story giving in detail his life history and the details of . . . alleged fraudulent transactions . . . .

"The metropolitan papers throughout the country featured the story daily. Each day for weeks the broadcasts carried some features of the story." [33]

After living in the glare of this publicity for weeks, petitioner came to court for a legal adjudication of the charges against him. As he approached the courthouse he was confronted by an army of photographers, reporters and television commentators shoving microphones in his face. [34] When he finally made his way into the courthouse it was reasonable for him to expect that he could have a respite from this merciless badgering and have his case adjudicated in a calm atmosphere. Instead, the carnival atmosphere of the September hearing served only to increase the publicity surrounding petitioner and to condition further the public's mind against him. Then, upon his entrance into the courtroom for his actual trial he was [*578] confronted with the sight of the television camera zeroed in on him and the ever-present still photographers snapping pictures of interest. As he opened a newspaper waiting for the proceedings to begin, the close-up lens of a television camera zoomed over his shoulder in an effort to find out what he was reading. In no sense did the dignity and integrity of the trial process shield this petitioner from the prejudicial publicity to which he had been exposed, because that publicity marched right through the courtroom door and made itself at home in heretofore unfamiliar surroundings. We stated in *Gideon v. Wainwright, 372 U.S. 335, 344*, "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." This [**1651] principle was not applied by the courts below.

32 A revealing dialogue took place in the present case between defense counsel and one of the television executives present in the courtroom during the September 24 hearing.

"Q. The camera on the other side of the room has to look over a corner of the jury box and past the jurors to be aimed at the witness box, does it not?

"A. I think that is pretty clear, sir. I don't think the jurors would be in the way there.

"Q. You don't think the jurors would get in the way of your operations?

"A. I don't mean that exactly, sir."

33 Petition for writ of certiorari, 35a.

34 See Appendix, Photograph 4.

I believe petitioner in this case has shown that he was actually prejudiced by the conduct of these proceedings, but I cannot agree with those who say that a televised trial deprives a defendant of a fair trial only if "actual prejudice" can be shown. The prejudice of television may be so subtle that it escapes the ordinary methods of proof, [35] but it would gradually erode our fundamental conception of trial. [36] A defendant may be unable to prove that he was actually prejudiced by a

televised trial, just as he may be unable to prove that the introduction of a coerced confession at his trial influenced the jury to convict him when there was substantial evidence to support his conviction aside from the confession, *Payne v. Arkansas, supra*; that the jury refrained from making a [*579] clear-cut determination [***571] on the voluntariness question, *Jackson v. Denno, supra*; that a particular judge was swayed by a direct financial interest in his conviction, *Tumey v. Ohio, supra*; or that the jury gave additional weight to the testimony of certain prosecution witnesses because of the jury's repeated contacts with those witnesses during the trial, *Turner v. Louisiana, supra.* How is the defendant to prove that the prosecutor acted differently than he ordinarily would have, that defense counsel was more concerned with impressing prospective clients than with the interests of the defendant, that a juror was so concerned with how he appeared on television that his mind continually wandered from the proceedings, that an important defense witness made a bad impression on the jury because he was "playing" to the television audience, or that the judge was a little more lenient or a little more strict than he usually might be? And then, how is petitioner to show that this combination of changed attitudes diverted the trial sufficiently from its purpose to deprive him of a fair trial? It is no answer to say that an appellate court can review for itself tapes or films of the proceedings. In the first place, it is not clear that the court would be able to obtain unedited tapes or films to review. Even with the cooperation of counsel on both sides, this Court was unable to obtain films of this trial which were in any sense complete. In addition, time limitations might restrict the television companies to taking pictures only of those portions of the trial that are most newsworthy and most likely to attract the attention of the viewing audience. More importantly, the tapes or films, even if unedited, could give a wrong impression of the proceedings. The camera which takes pictures cannot take a picture of itself. In addition, the camera cannot possibly cover the actions of all trial participants during the trial. While the camera is focused on the [*580] judge who is apparently acting properly, a juror may be glancing up to see where the camera is pointing and counsel may be looking around to see whether he can confer with his client without the close-up lens of the camera focusing on them. Needless to say, the camera cannot penetrate the minds of the trial participants and show their awareness that they may at that moment be the subject of the camera's focus. The most the camera can show is that a formally correct trial took place, but our Constitution requires more than form.

35 See, *e. g., Douglas, supra*, note 25, at 844.

36 Cf. *Fay v. New York, 332 U.S. 261, 300* (dissenting opinion of Mr. Justice Murphy).

I recognize that the television industry has shown in the past that it can be an enlightening and informing institution, but like other institutions it must respect the rights of others and cannot demand that we alter fundamental constitutional conceptions for its benefit. We must take notice of the inherent unfairness of television [**1652] in the courtroom and rule that its presence is inconsistent with the "fundamental conception" of what a trial should be. My conviction that this is the proper holding in this case is buttressed by the almost unanimous condemnation of televised court proceedings by the judiciary in this country and by the strong opposition to the practice by the organized bar in this country. Canon 35 of the American Bar Association's Canons of Judicial Ethics prohibits the televising of court trials. [37] With only [***572] two, or possibly three exceptions, [38] the highest court of each [*581] State which has considered the question has declared that televised criminal trials are inconsistent with the Anglo-American conception of "trial." [39] Similarly, [**1653] *Rule 53 of the Federal* [***573] *Rules of Criminal Procedure* prohibits [*582] the "broadcasting" of trials, [40] and the Judicial Conference of the United States has unanimously condemned televised trials. [41] This condemnation rests on more than notions of policy; it arises from an understanding of the [*583] constitutional conception of the term "trial." Such a general consensus is certainly relevant to this Court's determination of the question. See *Mapp v. Ohio, 367 U.S. 643, 651.*

37 The Canon provides in pertinent part:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

38 Colorado, *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P. 2d 465*

(Colo. Sup. Ct. 1956), and Texas permit televising of trials in the discretion of the trial judge. The current situation in Oklahoma is unclear. In *Lyles v. State, 330 P. 2d 734 (1958)*, the Criminal Court of Appeals of Oklahoma stated that the televising of proceedings was in the discretion of the trial judge. In 1959, however, the Supreme Court adopted a rule prohibiting television during actual proceedings. Okla. Stat. Ann., Tit. 5, at 65-66 (1963 Supp.). Nevertheless, in 1961 the court again stated that the televising of trials is a matter for the trial judge's discretion. *Cody v. State, 361 P. 2d 307 (Ct. Crim. App. Okla. 1961)*.

39 With the exceptions stated in note 38, *supra*, no State affirmatively permits televised trials. It has been stated that Canon 35 is in effect in 30 States. 48 J. Am. Jud. Soc. 80 (1964); Brief for Petitioner, p. 39. It is difficult to verify this figure because of the lack of uniformity among the States in reporting their court rules. However, the following States have clearly adopted Canon 35, or its equivalent: Alaska, Alaska Rules Crim. Proc. 48; Arizona, Ariz. *Sup. Ct. Rule 45, 17* Ariz. Rev. Stat. Ann., at 40; Connecticut, Conn. Practice Book 27 (1963); Delaware, Del. *Sup. Ct. Rule 33, 13* Del. Code Ann., at 23 (1964 Supp.) (adopted Canon 35 in its pre-1952 form, which does not explicitly prohibit television, but does prohibit "the taking of photographs" and "broadcasting of court proceedings"); Florida, Code of Ethics, Rule A35, 31 Fla. Stat. Ann., at 285 (1964 Supp.), see *Brumfield v. State, 108 So. 2d 33 (Fla. Sup. Ct. 1958)*; Hawaii, Hawaii Sup. Ct. Rule 16, 43 Haw. 450; Illinois, 1964 Ann. Rep. of the Ill. Judicial Conference 168-169, see *People v. Ulrich, 376 Ill. 461, 34 N. E. 2d 393 (1941)*, *People v. Munday, 280 Ill. 32, 117 N. E. 286 (1917)*; Iowa, Iowa Sup. Ct. Rule 119, 40 Iowa Code Ann., c. 610 (1964 Supp.); Kansas, Kansas Sup. Ct. Rule 117, 191 Kan. xxiv (1963) (does not refer specifically to television); Kentucky, Ky. Ct. App. Rule 3.170, Russell's Kentucky Practice and Service 21 (1964); Louisiana, Canon of Judicial Ethics XXIII, 242 La. LI (1960); Michigan, Canon of Judicial Ethics 35, Callaghan's Michigan Pleading and Practice, Rules at 422-423 (2d ed. 1962); New Jersey, Canon of Judicial Ethics 35, 1 Waltzinger, New Jersey Practice 299 (Rev. ed. 1954); New Mexico, N. M. *Sup. Ct. Rule 27, 4* N. M. Stat. Ann., at 95 (1963 Supp.); New York, N. Y. Rules of the Administrative Board of the Judicial Conference, Rule 5, N. Y. Judiciary Law, at 320 (1964 Supp.); Ohio, 176 Ohio St. lxiv (1964), see *State v. Clifford, 162 Ohio St. 370, 123 N. E. 2d 8 (1954)*, cert. denied, *349 U.S. 929*; Tennessee, Tenn. Sup. Ct. Rule 38, 209 Tenn. 818 (1961); Virginia, 201 Va. cvii (1960) (prohibits taking of photographs and broadcasting, although it does not refer specifically to television); Washington, 61 Wash. 2d xxviii (1963); West Virginia, 141 W. Va. viii (1955).

In addition, Brand, Bar Associations, Attorneys and Judges (1956 and 1959 Supp.) reports that the Idaho Supreme Court adopted Canon 35 in its present form and the Supreme Courts of Oregon, South Dakota and Utah adopted the Canon when it merely prohibited "photographing" and "broadcasting" without specifically mentioning television. It has also been reported that the Supreme Court of Arkansas adopted Canon 35. 44 J. Am. Jud. Soc. 120 (1960).

Moreover, the Supreme Court of California assumed it was "improper" to televise criminal proceedings in *People v. Stroble, 36 Cal. 2d 615, 226 P. 2d 330 (1951)*, affirmed *343 U.S. 181*, rehearing denied *343 U.S. 952*; see the rule adopted by the Conference of California Judges, 24 Cal. State Bar J. 299 (1949); the Court of Appeals of Maryland in *Ex parte Sturm, 152 Md. 114, 122, 136 A. 312, 315 (1927)*, used language indicating that Maryland would probably bar television from the courtroom if faced with the problem; and the Supreme Court of Pennsylvania cited with approval Canon 35 in *Mack Appeal, 386 Pa. 251, 257, n. 5, 126 A. 2d 679, 681-682, n. 4 (1956)*, cert. denied, *352 U.S. 1002*, see 48 J. Am. Jud. Soc. 200 (1965).

40 *Rule 53* provides:

"The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."

41 "Resolved, That the Judicial Conference of the United States condemns the taking of

photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court." Annual Report of the Proceedings of the Judicial Conference of the United States, March 8-9, 1962, p. 10.

IV.

Nothing in this opinion is inconsistent with the constitutional guarantees of a public trial and the freedoms of speech and the press.

This Court explained in *In re Oliver, 333 U.S. 257, 266, 270*, that the public trial provision of the *Sixth Amendment* is a "guarantee to an accused" designed to "safeguard against any attempt to employ our courts as instruments of persecution." Clearly the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come forward with relevant testimony, it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately. [42] But the guarantee of a public trial confers no special benefit on the press, the radio industry or the television industry. A public trial is a necessary component of an accused's right to a fair trial and the concept of public trial cannot be used to defend conditions which prevent the trial process from providing a fair and reliable determination of guilt.

42 See, *e. g.*, 3 Blackstone, Commentaries on the Laws of England 372-373 (15th ed. 1809); 6 Wigmore, Evidence 332-335 (3d ed. 1940).

[***LEdHR18] [18] [***LEdHR19] [19]To satisfy the constitutional requirement that trials be public it is not necessary to provide facilities large enough [*584] for all who might like to attend a particular trial, since to do so would interfere with the integrity of the trial process and make the publicity of trial proceedings an end in itself. Nor does the requirement that trials be public mean that observers are free to act as they please in the courtroom, for persons who attend trials cannot act in such a way as to interfere with the trial [**1654] process, see *Moore v. Dempsey, supra.* When representatives of the communications media attend trials they have no greater rights than other members of the public. Just as an ordinary citizen might be prohibited from using field glasses or a motion picture camera in the courthouse because by so doing he would interfere with the conduct of the trial, representatives of the press and broadcasting industries [***574] are subject to similar limitations when they attend court. Since the televising of criminal trials diverts the trial process from its proper end, it must be prohibited. This prohibition does not conflict with the constitutional guarantee of a public trial, because a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings.

Nor does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. Court proceedings, as well as other public matters, are proper subjects for press coverage.

"A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose [*585] none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." [43]

So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgment of the freedom of press. The right of the communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process.

43 *Craig v. Harney, 331 U.S. 367, 374.* See

Bridges v. California, 314 U.S. 252; *Pennekamp v. Florida, 328 U.S. 331.*

In summary, television is one of the great inventions of all time and can perform a large and useful role in society. But the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights. [44] The television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom. On entering that [*586] hallowed sanctuary, where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.

44 Compare *Olmstead v. United States, 277 U.S. 438, 471* (dissenting opinion of Mr. Justice Brandeis); *On Lee v. United States, 343 U.S. 747, 762* (dissenting opinion of MR. JUSTICE DOUGLAS); *Silverman v. United States, 365 U.S. 505*; *Lopez v. United States, 373 U.S. 427, 445-446* (opinion concurring in the result), 465 (dissenting opinion of MR. JUSTICE BRENNAN).

[For opinion of HARLAN, J., concurring, see *post*, p. 587.]

[SEE PHOTOS IN ORIGINAL]

[*587] [***583] [**1662] MR. JUSTICE HARLAN, concurring.

I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion.

The constitutional issue presented by this case is far-reaching in its implications for the administration of justice in this country. The precise question is whether the *Fourteenth Amendment* prohibits a State, over the objection of a defendant, from employing television in the courtroom to televise contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread public interest. The issue is no narrower than this because petitioner has not asserted any isolatable prejudice resulting from the presence of television apparatus within the courtroom or from the contemporaneous or subsequent broadcasting of the trial proceedings. On the other hand, the issue is no broader, for we are concerned here only with a criminal trial of great notoriety, and not with criminal proceedings of a more or less routine nature.

The question is fraught with unusual difficulties. Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the *Due Process Clause of the Fourteenth Amendment.*

[*588] Some preliminary observations are in order: All would agree, I am sure, that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, "commercials" at frequent intervals, special wearing apparel and makeup for the trial participants -- certainly such things would not conduce to the sound administration of justice by any acceptable standard. But that is not the case before us. We must judge television as we find it in this trial -- relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.

I.

[***LEdHR20] [20]No constitutional provision guarantees a right to televise trials. The "public trial" guarantee of the *Sixth Amendment*, which reflects a concept fundamental to the administration of justice in this Country, *In re Oliver, 333 U.S. 257*, certainly does not require that television be admitted to the courtroom. See *United Press Assns.* v. *Valente, 308 N. Y. 71, 123 N. E. 2d 777.* Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule,

that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. *In re Oliver, supra, at 266-273.* [***584] A fair trial is the objective, and "public trial" is an institutional safeguard for attaining it.

Thus the right of "public trial" is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. Obviously, the public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the "public" will be present in the form of those [**1663] persons [*589] who did gain admission. Even the actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present, although to be sure, the guarantee of public trial does not of itself prohibit such activity.

The free speech and press guarantees of the *First* and *Fourteenth Amendments* are also asserted as embodying a positive right to televise trials, but the argument is greatly overdrawn. Unquestionably, television has become a very effective medium for transmitting news. Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public with the judicial process in action. Albeit these are credible policy arguments in favor of television, they are not arguments of constitutional proportions. The rights to print and speak, over television as elsewhere, do not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.

[*590] I see no force in the argument that to exclude television apparatus from the courtroom, while at the same time permitting newspaper reporters to bring in their pencils and notebooks, would discriminate in favor of the press as against the broadcasting services. The distinctions to be drawn between the accouterments of the press and the television media turn not on differences of size and shape but of function and effect. The presence of the press at trials may have a distorting effect, but it is not caused by their pencils and notebooks. If it were, I would not hesitate to say that such physical paraphernalia should be barred.

II.

The probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved. The impact of television on a trial exciting [***585] wide popular interest may be one thing; the impact on a run-of-the-mill case may be quite another. Furthermore, the propriety of closed circuit television for the purpose of making a court recording or for limited use in educational institutions obviously presents markedly different considerations. The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases; in so doing, however, I wish to make it perfectly clear that I am by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved. When the issue of television in a non-notorious trial is presented it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportions. Compare *Powell v. Alabama, 287 U.S. 45*; *Betts v. Brady, 316 U.S. 455*; *Gideon v. Wainwright, 372 U.S. 335.* The resolution of those further questions should await an appropriate [**1664] case; the [*591] Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now.

I do not deem the constitutional inquiry in this case ended by the finding, in effect conceded by petitioner's counsel, that no isolatable prejudice was occasioned by the manner in which television was employed in this case. [1] Courtroom television introduces into the conduct

of a criminal trial the element of professional "showmanship," an extraneous influence whose subtle capacities for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena. In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a "hidden audience" of unknown but large dimensions. There is certainly a strong possibility that the "cocky" witness having a thirst for the limelight will become more "cocky" under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense counsel, and even a conscientious judge will not stray, albeit unconsciously, from doing what "comes naturally" into pluming themselves for a satisfactory television "performance"?

1 The trial judge ordered that there was to be no audio transmission of the witnesses' testimony. The witnesses, however, were present at the September hearing when everything was broadcast, and the record does not show affirmatively that they were aware that the microphone which confronted them during the actual trial was not being used for the same purpose.

[*592] Surely possibilities of this kind carry grave potentialities for distorting the integrity of the judicial process bearing on the determination of the guilt or innocence of the accused, and, more particularly, for casting doubt on the reliability of the fact-finding process carried on under such conditions. See Douglas, [***586] The Public Trial and the Free Press, 46 A. B. A. J. 840 (1960). To be sure, such distortions may produce no telltale signs, but in a highly publicized trial the danger of their presence is substantial, and their effects may be far more pervasive and deleterious than the physical disruptions which all concede would vitiate a conviction. A lively public interest could increase the size of the viewing audience immensely, and the masses of spectators to whom the trial is telecast would have become emotionally involved with the case through the dissemination of pretrial publicity, the usual concomitant of such a case. The presence of television would certainly emphasize to the trial participants that the case is something "special." Particularly treacherous situations are presented in cases where pretrial publicity has been massive [2] even when jurors positively state they will not be influenced by it; see *Rideau v. Louisiana, 373 U.S. 723*; *Irvin v. Dowd, 366 U.S. 717*. To increase the possibility of influence and the danger of a "popular verdict" by subjecting the jurors to the view of a mass audience whose approach to the case has been conditioned by pretrial publicity can only make a bad situation worse. The entire thrust of rules of evidence and the other protections attendant upon the modern trial is to keep extraneous influences out of the courtroom. *Turner v. Louisiana, 379 U.S. 466, 472-473*. [**1665] As we recently observed in *Turner*, "Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that in spite of forms they [*593] are extremely likely to be impregnated by the environing atmosphere.' *Frank v. Mangum, 237 U.S. 309, at 349* (dissenting opinion)." *Id., at 472*. [3] The knowledge on the part of the jury and other trial participants that they are being televised to an emotionally involved audience can only aggravate the atmosphere created by pretrial publicity.

2 Petitioner in this case amassed 11 volumes of pretrial press clippings.

3 The Court had occasion to recognize in *Cox v. Louisiana, 379 U.S. 559, 565*, that even "judges are human" and not immune from outside environmental influences.

The State argues that specific prejudice must be shown for the Due Process Clause to apply. I do not believe that the *Fourteenth Amendment* is so impotent when the trial practices in question are instinct with dangers to constitutional guarantees. I am at a loss to understand how the *Fourteenth Amendment* can be thought not to encompass protection of a state criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom. The Court has not hesitated in the past to condemn such practices, even without any positive showing of isolatable prejudice. In *Turner v. Louisiana, supra*, decided just this Term, we held that the "potentialities" for distortion of the trial created by a key witness serving as bailiff to a sequestered jury were sufficient to violate the *Due Process Clause of the Fourteenth Amendment*. In *Jackson v. Denno, 378 U.S. 368*, the Court made the judgment that a trial judge's determination of a coerced-confession issue is more

likely to avoid prejudice than a jury [***587] determination, a judgment which indeed overrode a long-standing contrary state practice. And in *Irvin v. Dowd, 366 U.S. 717*, we held that flamboyant pretrial publicity cast sufficient doubt on the impartiality of the jury to vitiate a conviction, even in the face of statements by all the jurors that they were not subject to its influence. See *366 U.S., at 729* (Frankfurter, J., concurring). Other examples of [*594] instances in which the Court has exercised its judgment as to the effects of one thing or another on human behavior are plentiful. See, *e. g., Griffin v. California, 380 U.S. 609*; *Tancil v. Woolls, 379 U.S. 19*; *Mapp v. Ohio, 367 U.S. 643* (compare *People v. Defore, 242 N. Y. 13, 150 N. E. 585*); *Avery v. Georgia, 345 U.S. 559*; *Brown v. Board of Education, 347 U.S. 483*; *Tumey v. Ohio, 273 U.S. 510.*

The judgment that the presence of television in the courtroom represents a serious danger to the trial process is supported by a vast segment of the Bar of this country, as evidenced by Canon 35 of the Canons of Judicial Ethics of the American Bar Association, counseling against such practices, [4] the views of the Judicial Conference of the United States (*infra*, p. 601), *Rule 53 of the Federal Rules of Criminal Procedure*, and even the "personal views" (*post*, pp. 601-602) of the Justices on the dissenting side of the present case.

4 The consistent position of the American Bar Association is set out in the Appendix.

The arguments advanced against the constitutional banning of televised trials seem to me peculiarly unpersuasive. It is said that the pictorial broadcasting of trials will serve to educate the public as to the nature of the judicial process. Whatever force such arguments might [**1666] have in run-of-the-mill cases, they carry little weight in cases of the sort before us, where the public's interest in viewing the trial is likely to be engendered more by curiosity about the personality of the well-known figure who is the defendant (as here), or about famous witnesses or lawyers who will appear on the television screen, or about the details of the particular crime involved, than by innate curiosity to learn about the workings of the judicial process itself. Indeed it would be naive not to suppose that it would be largely such factors that would qualify a trial for commercial television [*595] "billing," and it is precisely that kind of case where the risks of permitting television coverage of the proceedings are at their greatest.

It is also asserted that televised trials will cause witnesses to be more truthful, and jurors, judges, and lawyers more diligent. To say the least this argument is sophistic, for it is impossible to believe that the reliability of a trial as a method of finding facts and determining guilt or innocence increases in relation to the size of the crowd which is watching it. Attendance by interested spectators in the courtroom will fully satisfy the safeguards of "public trial." Once openness is thus assured, the addition of masses of spectators would, I venture to say, detract rather than add to the reliability of the process. See *Cox v. Louisiana, 379 U.S. 559, 562*. A trial in Yankee Stadium, even if the [***588] crowd sat in stony silence, would be a substantially different affair from a trial in a traditional courtroom under traditional conditions, and the difference would not, I think, be that the witnesses, lawyers, judges, and jurors in the stadium would be more truthful, diligent, and capable of reliably finding facts and determining guilt or innocence. [5] There will be no disagreement, I am sure, among those competent to judge that precisely the opposite would likely be the case.

5 There may, of course, be a difference in impact upon the atmosphere and trial participants between the physical presence of masses of people and the presence of a camera lens which permits masses of people to observe the process remotely. However, the critical element is the knowledge of the trial participants that they are subject to such visual observation, an element which is, of course, present in this case.

Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional [*596] judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause. At the present juncture I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned. On these premises I concur in the opinion of the Court.

APPENDIX TO OPINION OF MR. JUSTICE

HARLAN, CONCURRING.

The development of Canon 35 is set out at length in the *amicus curiae* brief of the American Bar Association, pp. 3-8, as follows:

"It [Canon 35] was originally adopted on September 30, 1937 by the House of Delegates [1] in the following form:

"'Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs [**1667] in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.' 62 A. B. A. Rep. 1134-35 (1937).

1 "The House of Delegates is not only the governing body of the American Bar Association; because of the presence of representatives of all State Bar Associations, the largest and most important local bar associations, and of other important national professional groups, it is in fact a broadly representative policy forum for the profession as a whole."

"A Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings had reported to the Association its grave concern with the dangers attendant upon the use of radio in connection with trials, particularly [*597] in light of the spectacular publicity and broadcast of the trial of Bruno Hauptmann. [2] The Committee specifically referred to the evil of 'trial in the air'. [3] 62 A. B. A. REP. 860 (1937).

2 "See *State v. Hauptmann, 115 N. J. L. 412, 180 Atl. 809* (Ct. Err. & App.), *cert. denied, 296 U.S. 649 (1935).*"

3 "Prior to the adoption of Judicial Canon 35, the impropriety of permitting radio broadcasts of court proceedings was recognized by the Committee on Professional Ethics and Grievances of the Association in its Opinion No. 67, March 21, 1932. The Committee had recourse to Judicial Canon 34 which provides that a judge should not administer his office 'for the purpose of advancing his personal ambitions or increasing his popularity.' The Committee found that radio broadcasting of a trial changes 'what should be the most serious of human institutions either into an enterprise for the entertainment of the public or of one for promoting publicity for the judge.' AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 163 (1957)."

"After [***589] the adoption of Judicial Canon 35, the direct radio broadcasting of court proceedings was disapproved by the Association's Committee on Professional Ethics and Grievances in its Opinion No. 212, March 15, 1941, as being specifically condemned. The Committee quoted with approval the following statement of the Michigan and Detroit Bar Associations:

"'Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience. The fear expressed by most persons when facing an audience or microphone is a matter of common knowledge, and but few defendants or witnesses can properly concentrate on facts and testify fully and fairly when so handicapped. . . . Such broadcasts are unfair to the Judge, who should be permitted to devote his undivided attention to the case, unmindful of the effect which his comments or decision may [*598] have upon the radio audience.' AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 426 (1957).

"In 1952, the growing prominence of television as a medium of mass communication was dealt with in a report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings [headed by the late John W. Davis]. 77 A. B. A. REP. 607 (1952). In condemning the practice of televising judicial proceedings, the Committee called attention to the fact that:

"'The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become

over-concerned with the impression their actions, [**1668] rulings or testimony will make on the absent multitude.' *Id.* at 610.

"As a result of this report, and the recommendation of the Committee on Professional Ethics and Grievances, Judicial Canon 35 was amended by inserting a ban on the 'televising' of court proceedings and inserting the descriptive phrase 'distract the witness in giving his testimony' before the phrase 'degrade the court.' In addition, a second paragraph was added providing for the televising and broadcasting of certain ceremonial proceedings. *Id. at 110-11.*

"In October, 1954, the Board of Governors authorized the appointment of a Special Bar-Media Conference Committee on Fair Trial-Free Press to meet with representatives of the press, radio, and television. The views of both sides were thoroughly explored and were presented in detail in the September, [***590] 1956 issue of the American Bar Association Journal. [4] After extensive joint debate, [*599] no solutions or agreements were reached. 83 A. B. A. REP. 790-91 (1958). The Committee did report that it was convinced that

"'courtroom photographing or broadcasting or both would impose undue police duties upon the trial judge[,] . . . that the broadcasting and the photographing in the courtroom might have an adverse psychological effect upon trial participants, judges, lawyers, witnesses and juries[,] . . . [and] that partial broadcasts of trials, particularly on television, might influence public opinion which in turn might influence trial results. . . .' *Id. at 645.*

4 " 42 A.B.A.J. 834, 838, 843 (1956)."

"Following the presentation of the Bar-Media Conference Committee report and in connection with the consideration of a report and recommendation of a Special Committee of the American Bar Foundation created in July, 1955 (83 A. B. A. REP. 643-45 (1958)), the House of Delegates conducted a hearing as a 'Committee of the Whole' during its February, 1958 session at which proponents and opponents of Judicial Canon 35 were fully heard. 83 A. B. A. REP. 648-69 (1958). Thereafter, at the August, 1958 meeting of the House of Delegates, it was decided to have a Special Committee study Canon 35 and

"'conduct further studies of the problem, including the obtaining of a body of reliable factual data on the experience of judges and lawyers in those courts where either photography, televising or broadcasting, or all of them, are permitted. . . . The fundamental objective of the Committee and of all others interested must be to consider and make recommendations which will preserve the right of fair trial.' 83 A. B. A. REP. 284 (1958).

"The Special Committee filed an Interim Report and Recommendations with the House of Delegates in August, [*600] 1962 setting forth the 'Area and Perspective' of its survey and studies. The report included portions of testimony by media representatives taken at a hearing held in Chicago on February 18, 1962, as well as a summary of the Committee's informal conference with certain representatives from Colorado and Texas. In addition, the report included written comments by officers of State Bar Associations responding to a Committee survey, and certain general correspondence received by the Committee regarding Judicial Canon 35. The report also listed significant publications favoring either revision or retention of the Canon. . . . [Hereinafter cited *Int. Rep.*]

"The Special Committee thereafter submitted its final report and recommendations, concluding that the substantive provisions of Judicial Canon 35 remain valid and 'should be retained as essential safeguards of the individual's inviolate [**1669] and personal right of fair trial.' . . . The Committee did recommend certain minor deletions . . . and changes . . . which were adopted by the House of Delegates, after full debate, on February 5, 1963:

"'The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings [are calculated to] detract from the essential dignity of the proceedings, distract [the] *participants and witnesses* in giving [his] testimony, [degrade the court] and create misconceptions [***591] with respect thereto in the mind of the public and should not be permitted.' [5]

5 "The full text of Judicial Canon 35, as amended, is as follows:

"'IMPROPER PUBLICIZING OF COURT PROCEEDINGS

"'Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"'Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.'"

[*601] "A vast majority of the states have voluntarily adopted Judicial Canon 35 in one form or another, and it has been embodied in principle in *Rule 53 of the Federal Rules of Criminal Procedure*. In a recent Resolution of the Judicial Conference of the United States, the philosophy of Canon 35 was unanimously reaffirmed:

"'Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court.' *Int. Rep.* p. 97."

(Footnotes numbered and partially omitted.)

DISSENT BY: STEWART; WHITE; BRENNAN

DISSENT

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE join, dissenting.

I cannot agree with the Court's decision that the circumstances of this trial led to a denial of the petitioner's *Fourteenth Amendment* rights. I think that the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks, and it detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a *per se* constitutional [*602] rule. And I am unable to find, on the specific record of this case, that the circumstances attending the limited televising of the petitioner's trial resulted in the denial of any right guaranteed to him by the United States Constitution.

On October 22, 1962, the petitioner went to trial in the Seventh Judicial District Court of Smith County, Texas, upon an indictment charging him with the offenses of (1) swindling, (2) theft by false pretenses, and (3) theft by a bailee. After a week spent in selecting a jury, the trial itself lasted some three and a half days. At its conclusion the jury found the petitioner guilty of the offense of swindling under the first count of the indictment. The trial judge permitted portions of the trial proceedings [**1670] to be televised, under the limitations described below. He also gave news photographers permission to take still pictures in the courtroom under specified conditions.

The Texas Court of Criminal Appeals affirmed the petitioner's conviction, and we granted certiorari, [***592] limited to a single question. The question, as phrased by the petitioner, is this:

"Whether the action of the trial court, over petitioner's continued objection, denied him due process of law and equal protection of the laws under the *Fourteenth Amendment to the Constitution of the United States*, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas."

The two Canons of Judicial Ethics referred to in the petitioner's statement of the question presented are set [*603] out in the margin. [1] But, as the Court rightly says, the problem before us is not one of choosing between the conflicting guidelines reflected in these Canons of Judicial Ethics. It is a problem rooted in the *Due Process Clause of the Fourteenth Amendment*. We deal here with matters subject to continuous and unforeseeable change --

the [*604] techniques of public communication. In an area where all the [**1671] variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case. There is no claim here based upon any right guaranteed by the [***593] *First Amendment.* But it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any *per se* rule which, in the light of future technology, might serve to stifle or abridge true *First Amendment* rights.

1 Canons of Judicial Ethics. American Bar Association: Judicial Canon 35. Improper publicizing of Court proceedings.

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

Canons of Judicial Ethics, Integrated State Bar of Texas: Judicial Canon 28. Improper Publicizing of Court Proceedings.

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

"In connection with the control of such coverage the following declaration of principles is adopted:

"(1) There should be no use of flash bulbs or other artificial lighting.

"(2) No witness, over his expressed objection, should be photographed, his voice broadcast or be televised.

"(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.

"(4) Any violation of the Court's Rules shall be punished as a contempt.

"(5) Where a judge has refused to allow coverage or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt."

I.

The indictment was originally returned by a grand jury in Reeves County, Texas, and it engendered widespread publicity. After some preliminary proceedings there, the case was transferred for trial to Smith County, more than 500 miles away. The trial was set for September 24, 1962, but it did not commence on that date. Instead, that day and the next were spent in hearings on two motions filed by defense counsel: a motion to bar television and news cameras from the trial, and a motion to continue the trial to a later date. Those proceedings were themselves telecast "live," and news photographers were permitted to take pictures in the courtroom. The activities of the television crews and news photographers led to considerable disruption of the hearings. [2] At the conclusion [*605] of the hearings the motion for a continuance was granted, and the case reset

for trial on October 22. The motion to bar television and news photographers from the trial was denied. [3]

2 A contemporary newspaper account described the scene as follows:

"A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates.

"A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked over the floor." The New York Times, September 25, 1962, p. 46, col. 4.

3 In ruling on the motion, the trial judge stated:

"In the past, it has been the policy of this Court to permit televising in the court room under the rules and supervision of the Court. Heretofore, I have not encountered any difficulty with it. I was unable to observe any detraction from the witnesses or the attorneys in those cases. We have watched television, of course, grow up from its infancy and now into its maturity; and it is a news media. So I really do not see any justified reason why it should not be permitted to take its proper seat in the family circle. However, it will be under the strict supervision of the Court. I know there has been pro and con about televising in the court room. I have heard some say that it makes a circus out of the Court. I had the privilege yesterday morning of sitting in my home and viewing a sermon by the First Baptist Church over in Dallas and certainly it wasn't any circus in that church; and I feel that if it is a proper instrument in the house of the Lord, it is not out of place in the court room, if properly supervised.

"Now, television is going to be televising whatever the scene is here. If you want to watch a ball game and that is what they televise, you are going to see a ball game. If you want to see a preacher and hear a sermon, you tune in on that and that is what you are going to get. If the Court permits a circus in this court room, it will be televised, that is true, but they will not be creating a circus.

"Now, the most important point is whether or not it would interfere with a fair and impartial trial of this Defendant. That is the most important point, and that is the purpose, or will be the primary purpose of the Court, to insure that he gets that fair trial.

. . . .

"There is not anything the Court can do about the interest in this case, but I can control your activities and your conduct here; and I can assure you now that this Court is not going to be turned into a circus with TV or without it. Whatever action is necessary for the Court to take to insure that, the Court will take it.

. . . .

"There has been one consideration that the Court has given and it is that this is a small court room and there will be hundreds of people trying to get into this court room to witness this trial. I believe we would have less confusion if they would stay at home and stay out of the court room and look in on the trial. With all of those people trying to crowd in and push into this court room, that is another consideration I have given to it."

[*606] On [***594] [**1672] October 1, the trial judge issued an order delineating what coverage he would permit during the trial. [4] As a result of that order and ensuing conferences between the judge and representatives of the news media, the environment for the trial, which began on October 22, was in sharp contrast to that of the September hearings. The actual extent of television and news photography in the [*607] courtroom was described by the judge, after the trial had ended, in certifying the petitioner's bill of exceptions. This description is confirmed by my understanding of the entire record and was agreed to and accepted by defense counsel:

"Prior to the trial of October 22, 1962, there was a booth constructed and placed in the rear of the courtroom painted the same or near the same color as the courtroom with a small opening across the top for the use of cameras

. . . .

"Live telecasting and radio broadcasting were not permitted and the only telecasting was on film without sound, and there was not any broadcasting of the trial by radio permitted. Each network, ABC, NBC, CBS and KRLD [KLTV] Television in Tyler was allowed a camera in the courtroom . . . . The telecasting on film of this case was not a continuous camera operation and only pictures being taken at intervals during the day to be used on their regular news casts later in the day. There were some days during the trial that the cameras of only one or two stations were in operation, the others not being in attendance upon the Court each and every day. The Court did not permit any cameras [***595] other than those that were noiseless nor were flood lights and [**1673] flash bulbs allowed to be used in the courtroom. The Court permitted one news photographer with [*608] Associated Press, United Press International and Tyler Morning Telegraph and Courier Times. However, they were not permitted inside the Bar; and the Court did not permit any telecasting or photographing in the hallways leading into the courtroom or on the second floor of the courthouse where the courtroom is situated, in order that the Defendant and his attorneys would not be hindered, molested or harassed in approaching or leaving the courtroom. The Court did permit live telecasting of the arguments of State's counsel and the returning of the verdict by the Jury and its acceptance by the Court. The opening argument of the District Attorney of Smith County was carried by sound and because of transmission difficulty, there was not any picture. The closing argument for the State by the District Attorney of Reeves County was carried live by both picture and sound. The arguments of attorneys for Defendant, John D. Cofer and Hume Cofer, were not telecast or broadcast as the Court granted their Motion that same not be permitted.

"There was not any televising at any time during the trial except from the booth in the rear of the courtroom, and during the argument of counsel to the jury, news photography was required to operate from the booth so that they would not interfere or detract from the attention of either the jurors or the attorneys.

"During the trial that began October 22nd, there was never at any time any radio broadcasting equipment in the courtroom. There was some equipment in a room off of the courtroom where there were periodic news reports given; and throughout the trial that began October 22nd, not any witness requested not to be televised or photographed while they were testifying. Neither did any juror, while being interrogated [*609] on voir dire or at any other time, make any request of the Court not to be televised."

4 "In my statement of September 24, 1962, admitting television and other cameras in the court room during the trial of Billie Sol Estes, I said cameras would be allowed under the control and direction of the Court so long as they did not violate the legal rights of the Defendant or the State of Texas.

. . . .

"In line with my statement of September 24, 1962, I am at this time informing both television and radio that live broadcasting or telecasting by either news media cannot and will not be permitted during the interrogation of jurors in testing their qualifications, or of the testimony given by the witnesses, as to do so would be in violation of Art. 644 of the Code of Criminal Procedure of Texas, which provides as follows: 'At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the case. This is termed placing witnesses under rule.'

". . . Each television network and the local television station will be allowed one film camera without sound in the court room and the film will be made available to other television stations on a pool basis. Marshall Pengra, manager of Television Station KLTV, Tyler, will be in charge of the independent pool and independent stations may contact him. The same will be true of cameras for the press, which will be limited to the local press, Associated Press and United Press.

. . . .

"I am making this statement at this time in order that the two news media affected may have sufficient notice before the case is called on October 22nd.

"The rules I have set forth above concerning the use of cameras are subject to change if I find that they are too restrictive or not workable, for any reason."

Thus, except for the closing arguments for the prosecution and the return of the jury's verdict, there was no "live" telecasting of the trial. And, even for purposes of delayed telecasting on later news programs, no words or other sounds were permitted to be recorded while the members of the jury were being selected or while any witness was testifying. No witnesses and no jurors were televised or photographed over their objection. [5]

5 There were nine witnesses for the prosecution and no witnesses for the defense.

Finally, the members of the jury saw no telecasts and no pictures of anything that went on during the trial. In accord with Texas law, the jurors were sequestered, day and night, from the beginning of the trial until it ended. [6] The jurors were lodged each night in quarters provided for that purpose in the courthouse itself. On the evening of November 6, by agreement of counsel and special permission of the court, the members of the jury were permitted to watch the election returns on television for a short period. For this purpose a portable television was brought into the jury's quarters by a court officer, [***596] and operated by him. Otherwise the jurors were not permitted to watch television at any time during the trial. The only newspapers permitted the jury were ones from which all coverage of the trial had been physically removed.

6 Arts. 668, 745, and 725, Tex. Code Crim. Proc.

II.

It is important to bear in mind the precise limits of the question before us in this case. The petition for a writ of [**1674] certiorari asked us to review four separate constitutional claims. We declined to review three of them, among which was the claim that the members of the jury "had received through the news media damaging and prejudicial [*610] evidence . . . ." [7] We thus left undisturbed the determination of the Texas Court of Criminal Appeals that the members of the jury were *not* prejudiced by the widespread publicity which preceded the petitioner's trial. One ingredient of this pretrial publicity was the telecast of the September hearings. Despite the confusion in the courtroom during those hearings, all that a potential juror could have possibly learned from watching them on television was that the petitioner's case had been called for trial, and that motions had been made and acted upon for a continuance, and to exclude cameras and television. At those hearings, there was no discussion whatever of anything bearing on the petitioner's guilt or innocence. This was conceded by the petitioner's counsel at the trial. [8]

7 Petition for Writ of Certiorari, Question 3, p. 3.

8 "A. [Mr. Hume Cofer, counsel for petitioner] . . . . The publicity that was given this trial on the last occasion and the number of cameras here, I think was sufficient to spread the news of this case throughout the county, to every available juror; and it is my opinion that on that occasion, there were so many cameras and so much paraphernalia here that it gave an opportunity for every prospective juror in Smith County to know about this case.

"Q. Not about the facts of the case?

"A. No, sir; not about the facts, nor any of the evidence."

Because of our refusal to review the petitioner's claim that pretrial publicity had a prejudicial effect upon the jurors in this case, and because, insofar as the September hearings were an element of that publicity, the claim is patently without merit, that issue is simply not here. Our decision in *Rideau v. Louisiana, 373 U.S. 723*, therefore, has no bearing at all in this case. There the record showed that the inhabitants of the small Louisiana parish where the trial was held had repeatedly been exposed to a television film showing "Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff." *373 U.S., at 725.* [*611] We found that "any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id., at 726.* See also *Irvin v. Dowd, 366 U.S. 717.*

The *Rideau* case was no more than a contemporary application of enduring principles of procedural due process, principles reflected in such earlier cases as *Moore v. Dempsey, 261 U.S. 86*; *Brown v. Mississippi, 297 U.S. 278*; and *Chambers v. Florida, 309 U.S. 227, 235-241.* "Under our Constitution's guarantee of due

process," we said, "a person accused of committing a [***597] crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge." *373 U.S., at 726-727.* We had occasion to apply the same basic concepts of procedural due process earlier this Term in *Turner v. Louisiana, 379 U.S. 466.* "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *379 U.S., at 472-473.*

[**1675] But we do not deal here with mob domination of a courtroom, with a kangaroo trial, with a prejudiced judge or a jury inflamed with bias. Under the limited grant of certiorari in this case, the sole question before us is an entirely different one. It concerns only the regulated presence of television and still photography at the trial itself, which began on October 22, 1962. Any discussion of pretrial events can do no more than obscure the important question which is actually before us.

III.

It is obvious that the introduction of television and news cameras into a criminal trial invites many serious constitutional hazards. The very presence of photographers [*612] and television cameramen plying their trade in a courtroom might be so completely and thoroughly disruptive and distracting as to make a fair trial impossible. Thus, if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant. [9] And even if, as was true here, the television cameras are so controlled and concealed as to be hardly perceptible in the courtroom itself, there are risks of constitutional dimensions that lurk in the very process of televising court proceedings at all.

9 See note 2.

Some of those risks are catalogued in the *amicus curiae* brief filed in this case by the American Bar Association: "Potential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant and his trial by viewing televised pre-trial hearings and motions from which the jury is ordinarily excluded. Evidence otherwise inadmissible may leave an indelible mark. . . . Once the trial begins, exposure to nightly rebroadcasts of selected portions of the day's proceedings will be difficult to guard against, as jurors spend frequent evenings before the television set. The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value and not for evidentiary purposes, can serve only to distort the jurors' perspective. . . . Despite the court's injunction not to discuss the case, it seems undeniable that jurors will be subject to the pressure of television-watching family, friends and, indeed, strangers. . . . It is not too much to imagine a juror being confronted with his wife's television-oriented viewpoint. . . . Additionally, the jurors' daily television appearances may make them recognizable celebrities, likely to be stopped by passing [*613] strangers, or perhaps harried by intruding telephone [***598] calls. . . ." Constitutional problems of another kind might arise if a witness or juror were subjected to being televised over his objection.

The plain fact of the matter, however, is that none of these things happened or could have happened in this case. The jurors themselves were prevented from seeing any telecasts of the trial, and completely insulated from association with any members of the public who did see such telecasts. This case, therefore, does not remotely resemble *Turner v. Louisiana, 379 U.S. 466*, where, during the trial, the jurors were subjected outside the courtroom to unmeasured and unmeasurable influences by key witnesses for the prosecution.

In the courtroom itself, there is nothing to show that the trial proceeded in any way other than it would have proceeded if cameras and television had not been present. In appearance, the courtroom was practically unaltered. There was no obtrusiveness and no distraction, no noise and no special lighting. There is no indication anywhere in the record of [**1676] any disturbance whatever of the judicial proceedings. There is no claim that the conduct of the judge, or that any deed or word of counsel, or of any witness, or of any juror, was influenced in any way by the presence of photographers or by television.

Furthermore, from a reading of the record it is crystal clear that this was not a trial where the judge was harassed or confused or lacking in command of the proceedings before the jury. Not once, after the first

witness was called, was there any interruption at all of the trial proper to secure a ruling concerning the presence of cameramen in the courtroom. There was no occasion, during the entire trial -- until after the jury adjourned to reach its verdict -- for any cautionary word to members of the press in the courtroom. The only time a motion was made, the jury was not in the courtroom. The trial itself was a [*614] most mundane affair, totally lacking in the lurid and completely emotionless. The evidence related solely to the circumstances in which various documents had been signed and negotiated. It was highly technical, if not downright dull. The petitioner called no witnesses, and counsel for petitioner made only a brief closing argument to the jury. There is nothing to indicate that the issues involved were of the kind where emotion could hold sway. The transcript of the trial belies any notion that frequent interruptions and inconsistent rulings communicated to the jury any sense that the judge was unable to concentrate on protecting the defendant and conducting the trial in a fair manner, in accordance with the State and Federal Constitutions.

IV.

What ultimately emerges from this record, therefore, is one bald question -- whether the *Fourteenth Amendment of the United States Constitution* prohibits all television cameras from a state courtroom whenever a criminal trial is in progress. In the light of this record and what we now know about the impact of television on a criminal trial, I can find no such prohibition in the *Fourteenth Amendment* or in any other provision of the Constitution. If what occurred did not deprive the petitioner of his constitutional right to a fair trial, then the fact that the public could view the proceeding on television has no constitutional significance. The Constitution [***599] does not make us arbiters of the image that a televised state criminal trial projects to the public.

While no *First Amendment* claim is made in this case, there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the *First* and *Fourteenth Amendments*' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in [*615] the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of *First Amendment* freedoms. See *Speiser v. Randall, 357 U.S. 513, 525.* And the proposition that nonparticipants in a trial might get the "wrong impression" from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the "essential requirement of the fair and orderly administration of justice," "freedom of discussion should be given the widest range." *Pennekamp v. Florida, 328 U.S. 331, 347*; *Bridges v. California, 314 U.S. 252.* Cf. *Cox v. Louisiana, 379 U.S. 559, 563.*

I do not think that the Constitution denies to the State or to individual trial judges all discretion to conduct criminal trials with television cameras present, no [**1677] matter how unobtrusive the cameras may be. I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceedings is televised or recorded on television film. I cannot now hold that the Constitution absolutely bars television cameras from every criminal courtroom, even if they have no impact upon the jury, no effect upon any witness, and no influence upon the conduct of the judge.

For these reasons I would affirm the judgment.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

I agree with MR. JUSTICE STEWART that a finding of constitutional prejudice on this record entails erecting a flat ban on the use of cameras in the courtroom and believe that it is premature to promulgate such a broad constitutional principle at the present time. This is the first case in this Court dealing with the subject of television [*616] coverage of criminal trials; our cases dealing with analogous subjects are not really controlling, cf. *Rideau v. Louisiana, 373 U.S. 723*; and there is, on the whole, a very limited amount of experience in this country with television coverage of trials. In my view, the currently available materials assessing the effect of cameras in the courtroom are too sparse and fragmentary to constitute the basis for a constitutional judgment permanently barring any and all forms of television coverage. As was said in another context, "we know too little of the actual impact . . . to reach a conclusion on the bare bones of the . . . evidence before us." *White Motor Co. v. United States, 372 U.S. 253, 261.* It may well be, however, that as further experience and informed judgment do become available, [***600] the use of

cameras in the courtroom, as in this trial, will prove to pose such a serious hazard to a defendant's rights that a violation of the *Fourteenth Amendment* will be found without a showing on the record of specific demonstrable prejudice to the defendant. Compare *Wolf v. Colorado, 338 U.S. 25*, with *Mapp v. Ohio, 367 U.S. 643*; *Betts v. Brady, 316 U.S. 455*, with *Gideon v. Wainwright, 372 U.S. 335*; *Stein v. New York, 346 U.S. 156*, with *Jackson v. Denno, 378 U.S. 368, 389-390.*

The opinion of the Court in effect precludes further opportunity for intelligent assessment of the probable hazards imposed by the use of cameras at criminal trials. Serious threats to constitutional rights in some instances justify a prophylactic rule dispensing with the necessity of showing specific prejudice in a particular case. *Rideau v. Louisiana, 373 U.S. 723, 727*; *Jackson v. Denno, 378 U.S. 368, 389.* But these are instances in which there has been ample experience on which to base an informed judgment. Here, although our experience is inadequate and our judgment correspondingly infirm, the Court discourages further meaningful study of the use of television at criminal trials. Accordingly, I dissent.

[*617] MR. JUSTICE BRENNAN.

I write merely to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances. Although the opinion announced by my Brother CLARK purports to be an "opinion of the Court," my Brother HARLAN subscribes to a significantly less sweeping proposition. He states:

"The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases . . . . The resolution of [**1678] those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. *The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now." Ante*, pp. 590-591. (Emphasis supplied.)

Thus today's decision is *not* a blanket constitutional prohibition against the televising of state criminal trials.

While I join the dissents of my Brothers STEWART and WHITE, I do so on the understanding that their use of the expressions "the Court's opinion" or "the opinion of the Court" refers only to those views of our four Brethren which my Brother HARLAN explicitly states he shares.

REFERENCES

Annotation References:

Pretrial publicity in criminal case as affecting defendant's right to fair trial. 10 L ed 2d 1243.

Right to public trial in criminal case. 4 L ed 2d 2128.

Broadcasting, recording, or photographing court proceedings. *100 ALR2d 1404.*

Exclusion of public during trial. *156 ALR 265, 48 ALR2d 1436.*

Legal aspects of television. *15 ALR2d 785.*

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A119340

COURT OF APPEALS OF OREGON

197 Ore. App. 59*; *104 P.3d 628*; *2005 Ore. App. LEXIS 15

October 26, 2004, Argued and Submitted
January 12, 2005, Filed

PRIOR HISTORY: [***1] Appeal from Circuit Court, Josephine County. 02CR 0426. William Mackay, Judge.

DISPOSITION: Conviction of possession of a precursor substance with intent to manufacture reversed; otherwise affirmed.

COUNSEL: Rankin Johnson IV, Deputy Public Defender, argued the cause for appellant. With him on the brief were Peter A. Ozanne, Executive Director, Office of Public Defense Services, and Peter Gartlan, Chief Defender.

Joanna L. Jenkins, Assistant Attorney General, argued the cause for respondent. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

JUDGES: Before Haselton, Presiding Judge, and Linder and Ortega, Judges.

OPINION BY: LINDER

OPINION

[*61] [**628] LINDER, J.

Defendant appeals his conviction for possession of a precursor substance with intent to manufacture, *ORS 475.967*, assigning error to the denial of his motion for a judgment of acquittal. On appeal, the only issue is whether stealing and possessing a large quantity of pseudoephedrine is sufficient to support a finding, beyond a reasonable doubt, that defendant intended to manufacture methamphetamine. We conclude that it is not, and we therefore reverse in part. [1]

1 Defendant was also charged with and convicted of unlawful possession of pseudoephedrine, *ORS 475.973*, and theft in the second degree, *ORS 164.045*. On appeal, defendant does not challenge those convictions.

[***2] The pertinent facts are relatively few. [2] Defendant stole five packages of Sudafed [**629] cold medicine, containing a total of approximately 15 grams of pseudoephedrine, from a Rite-Aid pharmacy. Police apprehended him at a nearby apartment complex. Defendant admitted to police that he stole the Sudafed and that he intended to sell it on the street for money, stating that "somebody on the street needs it." Defendant acknowledged to police that he knew that Sudafed contains pseudoephedrine and that pseudoephedrine is a precursor substance used to manufacture methamphetamine. Defendant denied, however, that he intended personally to manufacture methamphetamine or that he even knew how to manufacture it.

2 We set forth the facts in the light most favorable to the state. *State v. Evans, 161 Ore. App. 86, 89, 983 P.2d 1055 (1999)* (on judgment of conviction, facts are viewed in the light most

> favorable to the state to determine whether any rational trier of fact, accepting reasonable inferences and reasonable credibility choices, could have found the essential elements of the crime beyond a reasonable doubt).

[***3] Defendant was charged with and convicted of possession of a precursor substance (pseudoephedrine) with intent to manufacture a controlled substance (methamphetamine), *ORS 475.967*. At trial, in addition to establishing the facts of defendant's theft and his statements to police, the state also established the street uses to which pseudoephedrine is put and the ways in which the drug is obtained. In particular, according to police, the only plausible street use for such a large quantity of pseudoephedrine is to manufacture methamphetamine. Police therefore are involved in tracking [*62] suspicious purchases, and individuals who manufacture methamphetamine generally are aware of that fact. As a result, to avoid personal detection, individuals manufacturing methamphetamine commonly use other people to purchase drugs such as Sudafed that contain pseudoephedrine. On the street, Sudafed can sell for two to three times its normal retail value.

At the close of the state's case, defendant moved for a judgment of acquittal, arguing that there was no evidence from which the jury could find that he intended to personally manufacture methamphetamine. The trial court denied [***4] the motion, reasoning:

> "The information before the jury is that the defendant attempted to steal a larger than normal use quantity of Pseudoephedrine. That the defendant intended to sell that on the street. That Pseudoephedrine is a required product of the manufacture of meth. And that on the street it's sometimes worth two or three or four times more than what it would be in the store. That you can not legally purchase more than 9 grams, other than under certain circumstances. And is that sufficient for a reasonable juror to find the defendant guilty of Possession of a Precursor with Intent to Manufacture?
>
> "Looking at the evidence in the light most favorable to the State the motion is denied."

On appeal, the parties renew the arguments they made below. Defendant asserts that the state presented no evidence from which a jury reasonably could find that he intended personally to manufacture methamphetamine. At most, according to defendant, he intended to sell the Sudafed to someone else who would manufacture methamphetamine, which establishes his knowledge that the Sudafed would be used in that way but not his intent that it be so used. In response, the state points to [***5] the quantity of the Sudafed in defendant's possession, coupled with his admission that he knew that it is used to manufacture methamphetamine. According to the state, that evidence permitted an inference that defendant personally was going to manufacture methamphetamine or was acting "in concert" with someone else who would perform the actual manufacturing steps. Alternatively, the state argues that the evidence permitted the [*63] jury to find defendant guilty on the theory that he was aiding and abetting someone else in the manufacture of methamphetamine. As we explain below, we agree with defendant.

Under *ORS 475.967*,

> "[a] person commits the crime of possession of a precursor substance with intent to manufacture a controlled substance if the person possesses one or more precursor substances with the intent to manufacture a controlled substance in violation of *ORS 475.992(1)*."

[**630] "'Manufacture' means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis[. [***6]]" *ORS 475.005(15)*. "Intent" means that "a person acts with a conscious objective to cause the result or to engage in the conduct so described." *ORS 161.085(7)*.

Thus, to convict a defendant of possession of a precursor substance with intent to manufacture, the state must prove the following: (1) the defendant possessed some amount of a precursor substance; and (2) the defendant did so with the conscious objective of extracting pseudoephedrine and converting it to methamphetamine.

The state's burden in that regard differs significantly from its burden in proving the offense of possession of pseudoephedrine, which is prohibited by *ORS 475.973(1)(a)*:

> "[A] person commits the crime of unlawful possession of ephedrine, pseudoephedrine or phenylpropanolamine if the person knowingly possesses more than nine grams of ephedrine, pseudoephedrine or phenylpropanolamine * * *."

Violation of that statute is a Class A misdemeanor. *ORS 475.973(5)(a)*. By contrast, possession of a precursor substance with intent to manufacture is a Class B felony. *ORS 475.967(2)* [***7] . The key distinctions between the two offenses are the person's mental state and the amount of the pseudoephedrine that the person must possess. The misdemeanor offense is committed by the knowing possession of more than nine grams of pseudoephedrine. The felony offense is committed by possession of any amount, as long as the possession [*64] is with the heightened and more specific mental state of intent to manufacture (*i.e.*, the conscious objective to extract pseudoephedrine and convert it to methamphetamine).

In this case, the evidence was ample to establish defendant's guilt of the misdemeanor offense, but it falls short of providing a basis for a reasonable jury to infer that defendant had the intent required for the felony offense. The direct evidence reduces to proof that defendant stole and possessed 15 grams of Sudafed and that he claimed to have done so to sell it for money on the street. As the state correctly argues, the jury was free to disbelieve defendant's statements to police about his intent to sell it. But, contrary to the state's position, simply disbelieving defendant in that regard does not provide a basis to reasonably infer that defendant consciously intended [***8] to extract the pseudoephedrine himself and make methamphetamine with it. The problem with drawing that inference here--or at least, with drawing it beyond a reasonable doubt--is that the only evidentiary support for it is the mere fact of defendant's possession of 15 grams of Sudafed. The state presented evidence that defendant knew how to extract the pseudoephedrine from Sudafed or how to turn that precursor substance into methamphetamine. Nor does the record suggest that defendant owned or possessed any paraphernalia or chemicals associated with methamphetamine manufacture or that he has a residence or other physical site where he could engage in manufacturing methamphetamine. *See State v. Brown, 109 Ore. App. 636, 644-45, 820 P.2d 878 (1991), rev den, 313 Ore. 210, 830 P.2d 596 (1992)* (evidence that defendant had taken the steps necessary to manufacture methamphetamine sufficient when defendant "possessed precursor chemicals, laboratory equipment, formulas and other" necessary materials).

In effect, the state asks us to conclude that a jury could infer the requisite "conscious objective to" manufacture methamphetamine from the same facts that constitute the [***9] misdemeanor offense of possession of pseudoephedrine. On this record, however, such an inference requires too great a leap and would require speculation, rather than logical inference. *See State v. Lopez-Medina, 143 Ore. App. 195, 201, 923 P.2d 1240 (1996)* (evidence is insufficient to support an inference when the conclusion to be drawn from it requires "too [*65] great an inferential leap" because the logic is too strained). The same is true of any inference that defendant was working "in concert" with a specific individual who had the wherewithal to manufacture methamphetamine and the physical equipment and site to do it. Not a shred of [**631] evidence in this record suggests the existence of such a person.

Nor is the state's case aided if, alternatively, the jury believed--as it reasonably could--that defendant stole the Sudafed intending to sell it on the street for money. To be sure, the jury in that event reasonably could then also conclude that defendant, in intending to sell it, knew that whoever bought it would likely--if not certainly--use it to make methamphetamine. But defendant is correct that such evidence establishes only that he acted with knowledge of how the [***10] Sudafed would be used, not with a "conscious objective" that it be used in that way. Nothing in the record suggests that defendant had a personal interest in selling the Sudafed that went beyond his desire to get money. For example, there is no evidence that he would be paid with some of the methamphetamine produced. Without anything more than defendant's admission that he hoped to sell the Sudafed on the street for money, the jury could not reasonably infer that defendant had the conscious *objective* to have the buyer make methamphetamine out of it, as opposed to the conscious *awareness*--that is, knowledge--that the

buyer likely would do so. Knowledge, however, is not enough to establish liability on the state's alternative theory that defendant aided and abetted another in the commission of the crime. The mental state required for criminal liability on an aid and abet theory is essentially the same as for a principal's liability in this circumstance. A person is guilty of a crime committed by another if that person, "*with the intent to promote or facilitate the commission of the crime*," aids and abets the "other person in planning or committing the crime." *ORS 161.155(2)* [***11] (emphasis added). [3]

3 Because of that conclusion, we need not reach defendant's argument that, in the context of aiding and abetting, an accomplice is criminally liable only for a crime that is actually committed.

For those reasons, we conclude that the established facts are too few and too limited to support the inference that [*66] the state needed to establish--namely, that defendant had the requisite intent to manufacture. Defendant's motion for a judgment of acquittal should have been granted.

Conviction of possession of a precursor substance with intent to manufacture reversed; otherwise affirmed.

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5125

UNITED STATES v. PEONI.

No. 155

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

100 F.2d 401; 1938 U.S. App. LEXIS 2663

December 12, 1938

PRIOR HISTORY: [**1] Appeal from the District Court of the United States for the Eastern District of New York.

COUNSEL: Abraham Solomon, of New York City (Bernard Weiss, of New York City, of counsel), for appellant.

Michael F. Walsh, U.S. Atty., of Brooklyn, N.Y. (Vine H. Smith and James D. Saver, Asst. U.S. Attys., both of Brooklyn, N.Y., of counsel), for the United States.

OPINION BY: L. HAND

OPINION

[*401] Before L. HAND, SWAN and CHASE, Circuit Judges.

L. HAND, Circuit Judge.

Peoni was indicted in the Eastern District of New York upon three counts for possessing counterfeit money, and upon one for conspiracy to possess it. The jury convicted him on all counts, and the only question we need consider is whether the evidence was enough to sustain the verdict. It was this. In the Borough of the Bronx Peoni sold counterfeit bills to one, Regno; and Regno sold the same bills to one, Dorsey, also in the Bronx. All three knew that the bills were counterfeit, and Dorsey was arrested while trying to pass them in the Borough of Brooklyn. The question is whether Peoni was guilty as an accessory to Dorsey's possession, and [*402] whether he was party to a conspiracy by which Dorsey should possess [**2] the bills.

The prosecution's argument is that, as Peoni put the bills in circulation and knew that Regno would be likely, not to pass them himself, but to sell them to another guilty possessor, the possession of the second buyer was a natural consequence of Peoni's original act, with which he might be charged. If this were a civil case, that would be true; as innocent buyer from Dorsey could sue Peoni and get judgment against him for his loss. But the rule of criminal liability is not the same; since Dorsey's possession was not de facto Peoni's, and since Dorsey was not Peoni's agent, Peoni can be liable only as an accessory to Dorsey's act of possession. The test of that must be found in the appropriate federal statute (§ 550 of Title *18, U.S. Code, 18* U.S.C.A. § 550). The first statute dealing with the matter was passed in 1790 (1 St. at L. 114) and made those accessories who should "aid and assist, procure, command, counsel or advise", murder or robbery on land or sea, or piracy at sea. Section 10. This was broadened in 1870 (16 St. at L. 254) to include any felony, and by it an accessory was anyone who "counsels, advises or procures" the crime, section 2: this phrase [**3] was probably regarded as an equivalent of the first. Both those statutes were repealed in 1909 by § 341 of the Criminal Code (35 St. at L. 1088, 1153), and supplanted by § 332 of that act, which like § 550 of Title *18 U.S. Code, 18* U.S.C.A. § 550, read as follows: "aids, abets,

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counsels, commands, induces, or procures". The substance of that formula goes back a long way. Pollock & Maitland, Vol. II, p. 507, in speaking of the English law at the beginning of the 14th Century, say that already "the law of homicide is quite wide enough to comprise * * * those who have 'procured, counselled, commanded or abetted' the felony"; citing Bracton, f. 142, as follows: "for it is colloquially said that he sufficiently kills who advises" (praecipit) the killing. In 1557, by chapter 4 of 4 & 5 P. & M., benefit of clergy was taken away from those who should "command, hire and counsel" another to commit petit treason, murder, robbery or "willful" arson; and the indictment in Parker's Case, 1560, Dyer 186 a, read that the accused had "counselled, commanded, procured and abetted" the murder. Code, Inst. II, p. 182, in commenting on the Stat. of West. 1, Chap. XIV, which dealt with accessories, [**4] declared that they were divided into three "branches"; "commandement, force et aide". "Commandement" was "praeceptum" which included those who "incite, set on or stir up" others to the deed. "Force" was to furnish a weapon; and "aide" ("auxilium") included "all persons counselling, abetting, plotting, assenting, consenting or encouraging to doe the act." In 1691, by Chapter 9 of 3 & 4 W. & M., benefit of clergy was denied those who "comfort, aid, abet, assist, counsel, hire or command" certain enumerated felonies. Hale, Pleas of the Crown p. 615, 1736, defined an accessory as one who "doth * * * procure, counsel, command or abet another". In The Case of Macdaniel & others, 1755, Foster, 125, the question was bruited whether one might be an accessory at one remove, and it was said, though obiter, that he might, for "whoever procured a felony to be committed though it be by the intervention of a third person is an accessory * * * For what is there in the notion of commanding, hiring, counselling, aiding or abetting which may not be effected by the intervention of a third person." Blackstone, 1768, Book IV, pp. 36 & 37, described an accessory as "he who in any wise commands or counsels [**5] another to commit an unlawful act." Hawkins, 1771, Pleas of the Crown Chap. 29 § 16, specified "Those who by Hire, Command, Counsel or Conspiracy; and it seems to be generally holden, That those who by showing an express Liking Approbation or Assent to another's felonious Design of committing Felony abet and encourage him to commit it".

It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used - even the most colorless, "abet" - carry an implication of purposive attitude towards it. So understood, Peoni was not an accessory to Dorsey's possession; his connection with the business ended when he got his money from Regno, who might dispose of the bills as he chose; it was of no moment to him whether Regno passed them himself, and so ended the possibility of further guilty possession, or [*403] whether he sold them to a second possible passer. His utterance [**6] of the bills was indeed a step in the causal chain which ended in Dorsey's possession, but that was all. Perhaps he was Regno's accessory. *Rudner v. United States 6 Cir., 281 F. 516*, and *Anstess v. United States, 7 Cir., 22 F.2d 594*, do indeed hold that a seller, knowing the buyer's criminal purpose, is a conspirator with him. On the other hand in Rex v. Lomas, 22 Cox's Cr. Cas. 765, the court acquitted the accused who had given back to a burglar a jimmy which the burglar had lent him, though he knew the burglar would use it to commit the crime; Lord Reading saying that in such cases "advice or procuring" was a necessary element. Moreover, the law is at least unsettled whether action for the price will not lie, though the seller knows that the buyer means to use the goods to commit a crime, Williston, § 1754, and in perhaps the leading case, *Graves v. Johnson, 179 Mass. 53 60 N.E. 383, 88 Am. St. Rep. 355* the seller recovered. Be that as it may, nobody, so far as we can find, has ever held that a contract is criminal, because the seller has reason to know, not that the buyer will use the goods unlawfully, but that some one further down the line may do so. Nor is it at all desirable [**7] that the seller should be held indefinitely. The real gravamen of the charge against him is his utterance of the bills; and he ought not to be tried for that wherever the prosecution may pick up any guilty possessor - perhaps thousands of miles away. The oppression against which the *Sixth Amendment* is directed could be easily compassed by this device, because if the seller be a real accessory he may be removed to the place of the crime. *Hoss v. United States, 8 Cir., 232 F. 328, 335*; *United States v. Littleton, D.C., 1 F.2d 751.*

The same reasoning applies to the conspiracy count. Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get

them, but a conspiracy also imports a concert of purpose, and again Peoni had no concern with the bills after Regno paid for them. At times it seemed to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable [**8] in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comes change that, he is not liable for the change; his liability is limited to the common purpose while he remains in it. The confusion is perhaps due to the fact that everything done by the conspirators - including the declarations of later entrants - is competent evidence against all, so far as it may fairly be thought to be in execution of the concert to which the accused is privy, though that doctrine too is often abused.

Conviction reversed; accused discharged.

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PENAL CODE
SECTION 2-24

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2. This Code takes effect at twelve o'clock, noon, on the first day of January, eighteen hundred and seventy-three.

3. No part of it is retroactive, unless expressly so declared.

4. The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.

5. The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.

6. No act or omission, commenced after twelve o'clock noon of the day on which this Code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted, under such statutes and in force when this Code takes effect. Any act or omission commenced prior to that time may be inquired of, prosecuted, and punished in the same manner as if this Code had not been passed.

7. Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person; the word "county" includes "city and county"; writing includes printing and typewriting; oath includes affirmation or declaration; and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose"; signature or subscription includes mark, when the person cannot write, his or her name being written near it, by a person who writes his or her own name as a witness; provided, that when a signature is made by mark it must, in order that the same may be acknowledged or serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witnesses thereto.

The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

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1. The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

2. The words "neglect," "negligence," "negligent," and "negligently" import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

3. The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

4. The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

5. The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

6. The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.

7. The word "vessel," when used with reference to shipping, includes ships of all kinds, steamboats, canalboats, barges, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons, except that, as used in Sections 192.5 and 193.5, the word "vessel" means a vessel as defined in subdivision (c) of Section 651 of the Harbors and Navigation Code.

8. The words "peace officer" signify any one of the officers mentioned in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

9. The word "magistrate" signifies any one of the officers mentioned in Section 808.

10. The word "property" includes both real and personal property.

11. The words "real property" are coextensive with lands, tenements, and hereditaments.

12. The words "personal property" include money, goods, chattels, things in action, and evidences of debt.

13. The word "month" means a calendar month, unless otherwise expressed; the word "daytime" means the period between sunrise and sunset, and the word "nighttime" means the period between sunset and sunrise.

14. The word "will" includes codicil.

15. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer, and the word "process" a writ or summons issued in the course of judicial proceedings.

16. Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning.

17. Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

18. When the seal of a court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of

such seal upon the paper alone, or upon any substance attached to the paper capable of receiving a visible impression. The seal of a private person may be made in like manner, or by the scroll of a pen, or by writing the word "seal" against his or her name.

19. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories, and the words "United States" may include the district and territories.

20. The word "section," whenever hereinafter employed, refers to a section of this code, unless some other code or statute is expressly mentioned.

21. To "book" signifies the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest.

7.5. Whenever any offense is described in this code, the Uniform Controlled Substances Act (Division 10 (commencing with Section 11000) of the Health and Safety Code), or the Welfare and Institutions Code, as criminal conduct and as a violation of a specified code section or a particular provision of a code section, in the case of any ambiguity or conflict in interpretation, the code section or particular provision of the code section shall take precedence over the descriptive language. The descriptive language shall be deemed as being offered only for ease of reference unless it is otherwise clearly apparent from the context that the descriptive language is intended to narrow the application of the referenced code section or particular provision of the code section.

8. Whenever, by any of the provisions of this Code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever.

9. The omission to specify or affirm in this Code any liability to damages, penalty, forfeiture, or other remedy imposed by law and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.

10. The omission to specify or affirm in this Code any ground of forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose, or suspend any public officer or other person holding any trust, appointment, or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition, or suspension.

11. This code does not affect any power conferred by law upon any court-martial, or other military authority or officer, to impose or inflict punishment upon offenders; nor, except as provided in Section

19.2 of this code, any power conferred by law upon any public body, tribunal, or officer, to impose or inflict punishment for a contempt.

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12. The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the Court authorized to pass sentence, to determine and impose the punishment prescribed.

13. Whenever in this Code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the Court authorized to pass sentence, within such limits as may be prescribed by this Code.

14. The various sections of this Code which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceeding, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination.

15. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death;
2. Imprisonment;
3. Fine;
4. Removal from office; or,
5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State.

16. Crimes and public offenses include:

1. Felonies;
2. Misdemeanors; and
3. Infractions.

17. (a) A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

(b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the

provisions of subdivision (h) of Section 1170.

(2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

(c) When a defendant is committed to the Division of Juvenile Justice for a crime punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail not exceeding one year, the offense shall, upon the discharge of the defendant from the Division of Juvenile Justice, thereafter be deemed a misdemeanor for all purposes.

(d) A violation of any code section listed in Section 19.8 is an infraction subject to the procedures described in Sections 19.6 and 19.7 when:

(1) The prosecutor files a complaint charging the offense as an infraction unless the defendant, at the time he or she is arraigned, after being informed of his or her rights, elects to have the case proceed as a misdemeanor, or;

(2) The court, with the consent of the defendant, determines that the offense is an infraction in which event the case shall proceed as if the defendant had been arraigned on an infraction complaint.

(e) Nothing in this section authorizes a judge to relieve a defendant of the duty to register as a sex offender pursuant to Section 290 if the defendant is charged with an offense for which registration as a sex offender is required pursuant to Section 290, and for which the trier of fact has found the defendant guilty.

17.5. (a) The Legislature finds and declares all of the following:

(1) The Legislature reaffirms its commitment to reducing recidivism among criminal offenders.

(2) Despite the dramatic increase in corrections spending over the past two decades, national reincarceration rates for people released from prison remain unchanged or have worsened. National data show that about 40 percent of released individuals are reincarcerated within three years. In California, the recidivism rate for persons who have served time in prison is even greater than the national average.

(3) Criminal justice policies that rely on building and operating more prisons to address community safety concerns are not sustainable, and will not result in improved public safety.

(4) California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved public safety returns on this state's substantial investment in its criminal justice system.

(5) Realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society.

(6) Community-based corrections programs require a partnership between local public safety entities and the county to provide and expand the use of community-based punishment for low-level offender populations. Each county's Local Community Corrections Partnership, as established in paragraph (2) of subdivision (b) of Section 1230, should play a critical role in developing programs and ensuring appropriate outcomes for low-level offenders.

(7) Fiscal policy and correctional practices should align to promote a justice reinvestment strategy that fits each county. "Justice reinvestment" is a data-driven approach to reduce corrections and related criminal justice spending and reinvest savings in strategies designed to increase public safety. The purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.

(8) "Community-based punishment" means correctional sanctions and programming encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity. Community-based punishment may be provided by local public safety entities directly or through community-based public or private correctional service providers, and include, but are not limited to, the following:

(A) Short-term flash incarceration in jail for a period of not more than 10 days.

(B) Intensive community supervision.

(C) Home detention with electronic monitoring or GPS monitoring.

(D) Mandatory community service.

(E) Restorative justice programs such as mandatory victim restitution and victim-offender reconciliation.

(F) Work, training, or education in a furlough program pursuant to Section 1208.

(G) Work, in lieu of confinement, in a work release program pursuant to Section 4024.2.

(H) Day reporting.

(I) Mandatory residential or nonresidential substance abuse treatment programs.

(J) Mandatory random drug testing.

(K) Mother-infant care programs.

(L) Community-based residential programs offering structure, supervision, drug treatment, alcohol treatment, literacy programming, employment counseling, psychological counseling, mental health treatment, or any combination of these and other interventions.

(9) "Evidence-based practices" refers to supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or post release supervision.

(b) The provisions of this act are not intended to alleviate state prison overcrowding.

18. (a) Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is

punishable by imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of Section 1170.

(b) Every offense which is prescribed by any law of the state to be a felony punishable by imprisonment or by a fine, but without an alternate sentence to the county jail for a period not exceeding one year, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

19. Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both.

19.2. In no case shall any person sentenced to confinement in a county or city jail, or in a county or joint county penal farm, road camp, work camp, or other county adult detention facility, or committed to the sheriff for placement in any county adult detention facility, on conviction of a misdemeanor, or as a condition of probation upon conviction of either a felony or a misdemeanor, or upon commitment for civil contempt, or upon default in the payment of a fine upon conviction of either a felony or a misdemeanor, or for any reason except upon conviction of a crime that specifies a felony punishment pursuant to subdivision (h) of Section 1170 or a conviction of more than one offense when consecutive sentences have been imposed, be committed for a period in excess of one year; provided, however, that the time allowed on parole shall not be considered as a part of the period of confinement.

19.4. When an act or omission is declared by a statute to be a public offense and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

19.6. An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him or her unless he or she is arrested and not released on his or her written promise to appear, his or her own recognizance, or a deposit of bail.

19.7. Except as otherwise provided by law, all provisions of law relating to misdemeanors shall apply to infractions including, but not limited to, powers of peace officers, jurisdiction of courts, periods for commencing action and for bringing a case to trial and burden of proof.

19.8. The following offenses are subject to subdivision (d) of

Section 17: Sections 193.8, 330, 415, 485, 490.7, 555, 602.13, 652, and 853.7 of this code; subdivision (c) of Section 532b, and subdivision (n) of Section 602 of this code; subdivision (b) of Section 25658 and Sections 21672, 25658.5, 25661, and 25662 of the Business and Professions Code; Section 27204 of the Government Code; subdivision (c) of Section 23109 and Sections 12500, 14601.1, 27150.1, 40508, and 42005 of the Vehicle Code, and any other offense which the Legislature makes subject to subdivision (d) of Section 17. Except where a lesser maximum fine is expressly provided for a violation of any of those sections, any violation which is an infraction is punishable by a fine not exceeding two hundred fifty dollars ($250).

Except for the violations enumerated in subdivision (d) of Section 13202.5 of the Vehicle Code, and Section 14601.1 of the Vehicle Code based upon failure to appear, a conviction for any offense made an infraction under subdivision (d) of Section 17 is not grounds for the suspension, revocation, or denial of any license, or for the revocation of probation or parole of the person convicted.

19.9. For purposes of this code, "mandatory supervision" shall mean the portion of a defendant's sentenced term during which time he or she is supervised by the county probation officer pursuant to subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170.

20. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.

21. (a) The intent or intention is manifested by the circumstances connected with the offense.

(b) In the guilt phase of a criminal action or a juvenile adjudication hearing, evidence that the accused lacked the capacity or ability to control his conduct for any reason shall not be admissible on the issue of whether the accused actually had any mental state with respect to the commission of any crime. This subdivision is not applicable to Section 26.

21a. An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

22. (a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant

premeditated, deliberated, or harbored express malice aforethought.

(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.

23. In any criminal proceeding against a person who has been issued a license to engage in a business or profession by a state agency pursuant to provisions of the Business and Professions Code or the Education Code, or the Chiropractic Initiative Act, the state agency which issued the license may voluntarily appear to furnish pertinent information, make recommendations regarding specific conditions of probation, or provide any other assistance necessary to promote the interests of justice and protect the interests of the public, or may be ordered by the court to do so, if the crime charged is substantially related to the qualifications, functions, or duties of a licensee.

For purposes of this section, the term "license" shall include a permit or a certificate issued by a state agency.

For purposes of this section, the term "state agency" shall include any state board, commission, bureau, or division created pursuant to the provisions of the Business and Professions Code, the Education Code, or the Chiropractic Initiative Act to license and regulate individuals who engage in certain businesses and professions.

24. This Act, whenever cited, enumerated, referred to, or amended, may be designated simply as THE PENAL CODE, adding, when necessary, the number of the section.

Criminal Code (R.S.C., 1985, c. C-46)
Act current to 2012-09-19 and last amended on 2012-08-20. Previous Versions

Compulsion of spouse

18. No presumption arises that a married person who commits an offence does so under compulsion by reason only that the offence is committed in the presence of the spouse of that married person.

R.S., c. C-34, s. 18; 1980-81-82-83, c. 125, s. 4.

Ignorance of the law

19. Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

R.S., c. C-34, s. 19.

Certain acts on holidays valid

20. A warrant or summons that is authorized by this Act or an appearance notice, promise to appear, undertaking or recognizance issued, given or entered into in accordance with Part XVI, XXI or XXVII may be issued, executed, given or entered into, as the case may be, on a holiday.

R.S., c. C-34, s. 20; R.S., c. 2(2nd Supp.), s. 2.

Parties to Offences

Parties to offence

21. (1) Every one is a party to an offence who

(*a*) actually commits it;

(*b*) does or omits to do anything for the purpose of aiding any person to commit it; or

(*c*) abets any person in committing it.

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

R.S., c. C-34, s. 21.

Person counselling offence

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

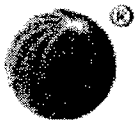
Idem

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Definition of "counsel"

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

R.S., 1985, c. C-46, s. 22; R.S., 1985, c. 27 (1st Supp.), s. 7.



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PRESBYTERIAN CHURCH OF SUDAN, et al., Petitioners, v. TALISMAN ENERGY, INC., Respondent.

No. 09-1262

SUPREME COURT OF THE UNITED STATES

2009 U.S. Briefs 1262; 2010 U.S. S. Ct. Briefs LEXIS 1825

May 19, 2010

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit.

Amicus Brief

COUNSEL: [**1] DAVID J. SCHEFFER, ESQ., CENTER FOR INTERNATIONAL HUMAN RIGHTS, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, Chicago, Illinois, Amicus Curiae. [*i]

INTERESTS: [*1] **INTEREST OF THE AMICUS CURIAE** n1

n1 Counsel of record for all parties received notice at least 10 days prior to the due date of my intention to file this amicus brief; all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, where he teaches international human rights and criminal law and corporate human rights responsibility. He served as U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and counsel to the U.S. Permanent Representative to the United Nations (1993-1997). He was deeply engaged in the policy formulation, negotiations, and drafting of the constitutional documents governing the International Criminal Court. He led the U.S. delegation that negotiated the Rome Statute (Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90 (1998)), and its supplemental documents from 1997 to 2001. He was deputy head of the delegation from 1995 to 1997. On behalf of the U.S. Government, he negotiated the statutes of and coordinated support for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of [*2] Cambodia. He exercised responsibility within the U.S. Government for the investigation and prosecution of atrocity crimes (namely, genocide, crimes against humanity, and war crimes) on a global basis. He has written extensively about the tribunals, including the International Criminal Court, and the negotiations leading to their creation.

Ambassador Scheffer submits this brief out of concern that the Second Circuit erred in its analysis of the Rome Statute's mens rea provision for aiding and abetting liability, most particularly in the Second Circuit's conclusions that this provision of the Rome Statute was meant to reflect customary international law and that the accessorial liability of aiding and abetting arises only when there is shared intent with the perpetrator of the underlying crime. Neither conclusion is correct. Ambassador Scheffer believes this brief is necessary to clarify the meaning of the Rome Statute and aiding and abetting liability thereunder. The Second Circuit judgment reflects serious misunderstandings of the Rome Statute and it merits review by this Court.

TITLE: BRIEF OF DAVID J. SCHEFFER, DIRECTOR OF THE CENTER FOR INTERNATIONAL HUMAN RIGHTS, AS AMICUS CURIAE IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Second Circuit errs in drawing upon Article 25(3)(c) of the Rome Statute of the International Criminal Court as a demonstration of customary international law for aiding and abetting atrocity [*3] crimes under the Court's subject matter jurisdiction. Article 25(3)(c) reads:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> . . . .
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission. . . .

This provision was a negotiated compromise among mostly common law and civil law governments after years [**5] of talks leading to the Rome Statute and was not finalized to express a rule of customary law.

The Rome Statute was never intended, in its entirety, to reflect customary international law. Some of the document's provisions -- particularly those pertaining to the subject matter jurisdiction of the International Criminal Court -- were negotiated for the purpose of codifying customary international law. However, many provisions were not so negotiated and clearly embody compromises unique to the treaty and to the operation of the International Criminal Court. Indeed, aiding and abetting liability remained an unresolved issue until very late in the negotiations. The final wording of Article 25(3)(c) is an example of compromise language far removed from any effort to mirror customary international law.

[*4] The Second Circuit further errs in concluding that the reference to "purpose" in Article 25(3)(c) of the Rome Statute establishes the requirement of a shared intent between the perpetrator of the crime and the aider or abettor. The negotiating history of Article 25(3)(c) demonstrates that there was no definitive agreement pointing to either an intention standard or a knowledge [**6] standard with respect to aiding and abetting liability. The compromise "purpose" language chosen for Article 25(3)(c) reflects the obvious point that an aider or abettor purposely acts in a manner that has the consequence of facilitating the commission of a crime, but the aider or abettor's intention cannot be established without reference to the mens rea principles set forth in Article 30 of the Rome Statute. n2 Since the judges of the International [*5] Criminal Court have had no occasion yet to interpret Article 25(3)(c), particularly in conjunction with Article 30, there is no judicial precedent from which to gain a definitive understanding by anyone of aiding and abetting liability under the Rome Statute. As it now stands, however, the Rome Statute can be reasonably construed as establishing, for purposes of cases before the International Criminal Court, a knowledge standard for aiding and abetting liability.

n2 Article 30 of the Rome Statute reads in its entirety:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

[**7]

This Court should grant certiorari in order to examine whether the mens rea standard for aiding and abetting under the Alien Tort Statute *(28 U.S.C. § 1350)* should be determined by reference to Article 25(3)(c) of the Rome Statute, which represents a negotiated formula uniquely crafted for the International Criminal Court, or whether it should be ascertained from an examination of customary international law, which has long applied the knowledge standard.

ARGUMENT

I. ARTICLE 25(3)(c) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT DOES NOT REFLECT CUSTOMARY INTERNATIONAL LAW

The Second Circuit holds that the mens rea standard for aiding and abetting liability under the Alien Tort Statute must be a "norm of international character accepted by the civilized world and defined [*6] with a specificity comparable to the features of the 18th-century paradigms" recognized by this Court in *Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004)*. Curiously, the Second Circuit looks to the Rome Statute of the International Criminal Court for definitive guidance by interpreting it as both adopting the purpose standard and embodying [**8] the customary international law standard of *Sosa* with respect to aiding and abetting liability. *The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc., 582 F.3d 244, 258-259 (2d Cir. 2009)*. The Second Circuit errs on all counts with these findings. Petitioners correctly point out that customary international law has long established a knowledge standard for aiding and abetting liability and that federal common law, which is informed by customary international law, should guide the courts in determining accessorial liability under the Alien Tort Statute. Petition for Writ of Certiorari, The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc., No. 09-1262 at 19-26 (2d Cir. April 15, 2010).

While fully embracing such reasoning, this amicus brief explicates two narrow but essential points not fully addressed elsewhere. The first objective is to explain, in this Part I, why Article 25(3)(c) of the Rome Statute, which the Second Circuit relies upon for its finding of a purpose standard, should not be interpreted as customary international law. Nonetheless, even if the provision were to be firmly settled as customary international law in the view of [**9] the federal judiciary, the second objective of [*7] this amicus brief is to explain, in Part II, how the Second Circuit's interpretation of the wording of Article 25(3)(c) betrays both what transpired in the negotiations leading to the Rome Statute and how the mens rea standard for aiding and abetting is established under the treaty.

The Rome Statute is a negotiated treaty of considerable complexity designed to govern only the International Criminal Court. The Rome Statute was never intended, in its entirety, to reflect customary international law. Relatively few of the provisions of the Rome Statute merit that rigorous categorization and they do not include Article 25(3)(c). Nonetheless, the Second Circuit leaps to the conclusion that Article 25(3)(c) embodies customary international law.

Article 25(3)(c) was a negotiated compromise among primarily common law and civil law governments after years of talks leading to the Rome Statute and was not finalized to express a rule of customary law. There is no international consensus reflected in Article 25(3)(c), which in any event must be read in conjunction with Article 30, the mens rea provision of the Rome Statute.

A. The substantive [10] crimes within the jurisdiction of the International Criminal Court were drafted to reflect customary international law**

The provisions of the Rome Statute that the drafters understood were being negotiated to record [*8] customary international law were the atrocity crimes defined in Articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes) of the treaty -- the very provisions federal courts should be looking to for guidance about the *primary* violations of international law at stake in Alien Tort Statute litigation. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 103 (3d ed. 2007).

For years the drafters, including myself and a team of State, Defense, and Justice Department lawyers working with our foreign counterparts, examined and debated the development of international humanitarian law and international criminal law to arrive at a general agreement as to what constituted customary international law for the substantive crimes that would be prosecuted before the International Criminal Court. Thus, if one applies the stringent universality requirements of *Sosa* to the Rome Statute, one can confidently identify the atrocity [**11] crimes defined therein as representing the types of crimes (or torts) that have universal character and are of such a magnitude that they fall within the jurisdictional scope of the Alien Tort Statute. But that sharp focus on customary international law never was the aim of the negotiations regarding *other* provisions of the Rome Statute, including the negotiations on accessorial liability. While some other articles of the Rome Statute happened, in the end, to reflect customary international law, Article 25(3)(c) is *not* one of them.

[*9] **B. The general principles of law and other key provisions of the Rome Statute were not all drafted to reflect customary international law**

The general principles of criminal law set forth in Articles 22-33 of the Rome Statute were intensively negotiated, often leading to compromises between common law and civil (Romano-Germanic) law countries in particular and with the active intervention of delegations schooled in *Sharia* law or other major legal systems. In some instances, the end product of this process of negotiation was a provision that mirrors customary international law. For example, the provisions of the Rome Statute that [**12] doubtless fall within this category include Articles 22 (*nullum crimen sine lege*), 23 (*nulla poena sine lege*), 24 (*non-retroactivity ratione personae*), 25(3)(e) (incitement to commit genocide), 32 (mistake of fact or mistake of law), and 67 (rights of the accused).

It would be erroneous to claim, however, following the deals struck and compromises arrived at during years of talks, that all of the provisions on general principles of law and all rules of evidence and procedure, penalties, and sentencing were reflections of customary international law -- many were not. As explained above, negotiators labored very hard to create a subject matter jurisdiction of only crimes of customary international law, but the Rome Statute never would have come to pass if that standard of universal acceptance had been required for other [*10] provisions, including all of the general principles of law.

For example, Article 33, a general principle of law on superior orders and prescription of law, was heavily negotiated, resulting in compromise language that does not mirror comparable provisions in the charters of the Nuremberg and Tokyo International Military Tribunals or the statutes [**13] of the other international or hybrid criminal tribunals of recent years. Indeed, the end result in Rome reflected more what was acceptable to NATO military commanders than what was desired by many other governments. The former President of the International Criminal Tribunal for the Former Yugoslavia, Professor Antonio Cassese, writes, "[Article 33] is at odds with customary international law, for it does not include *war crimes* in the category of offences with regard to which superior order [sic] enjoining their commission are always manifestly unlawful." ANTONIO CASSESE, INTERNATIONAL CRIMINAL

LAW 279 (2d ed. 2008).

Beyond the general principles of law, another example of negotiated compromise language arises with Article 77, which establishes a maximum sentence of life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." Arab and Caribbean delegations strongly objected to the absence of the death penalty in the Rome Statute and would never concede that Article 77 reflects the maximum degree of punishment permitted under customary international law. WILLIAM A. SCHABAS, AN [*11] INTRODUCTION TO THE [**14] INTERNATIONAL CRIMINAL COURT 316 n. 17 (3d ed. 2007). Indeed, the U.S. Government would not concede that point.

C. Article 25(3)(c) of the Rome Statute was not drafted to reflect customary international law

Similarly, Article 25(3)(c) of the Rome Statute was negotiated not to codify customary international law but to accommodate the numerous views of common law and civil law experts about how, precisely, to express the mens rea of the aider or abettor. Per Saland, the Swedish Chairman of the Working Group on the General Principles of Criminal Law for years prior to and throughout the Rome Conference, writes that Article 25

> posed great difficulties to negotiate in a number of ways. One problem was that experts from different legal systems took strongly held positions, based on their national laws, as to the exact content of the various concepts involved. They seemed to find it hard to understand that another legal system might approach the issue in another way: e.g., have a different concept, or give the same name to a concept but with a slightly different content. . . . The text was also burdened with references to the mental element (e.g., intent and knowledge) because [**15] agreement had not yet been reached as to the text of a separate article dealing with the mental element in general terms.

[*12] Per Saland, *International Criminal Law Principles, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 198 (Roy Lee ed., 1999).

As the lead U.S. negotiator, I do not recall hearing directly or being advised by my Justice Department team of negotiators of a single discussion prior to or during the Rome negotiations where the text of what laboriously became Article 25(3)(c) on aiding and abetting as a mode of participation was being settled as a matter of customary international law. It was a very contentious provision, with some delegations seeking explicit reference to intention, notwithstanding the important complication that the word "intention" has different meanings in different legal systems. In some countries, for example, passive intention is inferred from an actor's engaging in conduct with knowledge of some likely consequence of that conduct. Other delegations were wedded to the term "knowledge," believing that it better reflected the standard that was employed in their national practice and that had been endorsed [**16] in the jurisprudence of the Nuremberg and Tokyo International Military Tribunals and of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.

Negotiators struggled to find compromise wording and ultimately settled on using neither "intent" nor "knowledge" but "purpose." Reaching this compromise was made easier, in the end, by the prior resolution of the final language of Article 30, an article that deals expressly with the issue of the mental element of crimes. Finalizing the language of [*13] Article 30 helped enormously, as it enabled negotiators to look to Article 30 for intent and knowledge standards while seeking an accommodation for Article 25(3)(c). However, if anyone had claimed we were writing customary international law on aiding and abetting liability in Article 25(3)(c), they would have been laughed out of the room.

Thus, the wording of Article 25(3)(c) was uniquely crafted for the International Criminal Court, and when read in conjunction with the mens rea standards set forth in Article 30 of the Rome Statute, leaves to the judges of the International Criminal Court the task of determining precisely the proper criteria for accessorial liability. [**17] Nothing discourages or prevents them from looking to the growing jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in

the Courts of Cambodia, to state practice, and to scholarly texts for guidance on this issue.

Article 25(3)(c) is not a statement of customary international law. Since the International Criminal Court has yet to interpret the provision's meaning and application with respect to accessorial liability for aiding and abetting, national courts can only speculate as to its scope and meaning; yet that speculation should be fully informed by the negotiating history. One pillar of certainty in that history is that Article 25(3)(c) has no standing as customary international law.

[*14] II. THE MENS REA REQUIREMENT FOR AIDING AND ABETTING UNDER THE ROME STATUTE IS AMBIGUOUS BUT CAN BE REASONABLY INTERPRETED AS A KNOWLEDGE STANDARD

In the years following the Rome Statute negotiations, scholars have debated what Article 25(3)(c) of the Rome Statute achieves -- whether the provision creates a shared purpose requirement for aiding and abetting or whether, when [**18] joined with the mental element provision of Article 30, it builds upon longstanding and growing precedents from international and hybrid criminal tribunals that sustain the knowledge standard for aiding and abetting. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 74, 214-29 (2d ed. 2008); Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences, 2 CRIM. L.F. 291, 301-03 (2001);* Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849, 854-55 (Otto Trifftrer ed., 2d ed. 2008); Kai Ambos, *Article 25: Individual Criminal Responsibility, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 743, 759-60 (Otto Trifftrer ed., 2d ed. 2008); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 213 (3d ed. 2007); WILLIAM A. SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 435-46 (2010); Albin Eser, *Individual Criminal Responsibility, in* 1 THE [*15] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 798-801, 900-02 (Antonio [**19] Cassese, et al. eds., 2002). Such debate demonstrates that there are reasonable interpretations, one of them certainly being application of the knowledge standard. But until the judges of the International Criminal Court rule on the mens rea requirement for aiding and abetting under the Rome Statute, no national court can dictate that one standard (such as purpose or shared intention) negates a second standard (such as knowledge) in the International Criminal Court's constitutional framework or in its practice.

A. Article 25(3)(c) is reasonably read with a knowledge standard because imposition of an intent standard would destroy the distinction between aider or abettor and co-perpetrator

The great weight of international precedent has identified aiding and abetting with a knowledge standard. *See, e.g.,* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 211, 214-18 (2d ed. 2008); *Prosecutor v. Furundzija,* Case No. IT-95-17/1-T, Judgment, PP 234-35, 245 (Dec. 10, 1998); Brief for International Law Scholars William Aceves et al. as Amici Curiae Supporting Petitioners at 12-15, Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc., No. 09-1262 (2d Cir. April 30, 2010). [**20] The Second Circuit nevertheless reached a contrary conclusion: "Thus, applying international law, we hold that the mens rea [*16] standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Presbyterian Church of Sudan, et al., 582 F.3d at 259.*

Among the problems with this conclusion is that it obliterates the distinction between aiders and abettors, on the one hand, and perpetrators of atrocity crimes on the other hand. The character of atrocity crimes, which are massive assaults on civilian populations or egregious violations of the laws of war, means that: 1) the intention of the perpetrator can often be inferred more readily; and 2) the many additional participants in the vast criminal enterprise necessarily act with a multiplicity of intentions among them, but the aiders and abettors do so only knowing that their participation facilitates the intentional commission of the principal crime while they act upon their separate individual intentions, such as the pursuit of profit, survival, status, or even discrimination against the victims.

Professor William Schabas explains, "Some judgments [of the war crimes tribunals] [**21] have attempted to

explain the distinction [between aiding and abetting and perpetration] in another way, stating that when the accomplice 'shares' the intent of the principal perpetrator, he or she becomes a 'co-perpetrator.'" WILLIAM A. SCHABAS, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 307-08 (2006). Had the drafters of the Rome Statute meant to require an intent standard for aiding and abetting, they would have agreed to recast aiding and abetting more coherently as a co-perpetrator [*17] mode of liability. But they did not. Consequently, a national court would be mistaken to identify the Rome Statute as somehow confirming a shared intention standard and denying the knowledge standard. The final wording of Article 25(3)(c) negated neither the large body of precedents for a knowledge standard in aiding and abetting liability nor the common sense reality of how atrocity crimes are committed.

B. Article 25(3)(c) must be interpreted together with the general principle of law on mental element set forth in Article 30(2)(b) of the Rome Statute

Negotiators repeatedly stumbled over what eventually was consolidated in Article [**22] 30 of the Rome Statute regarding the required mental element for all of the atrocity crimes, including the mental element for accessorial liability for such crimes. There remained a lingering and significant problem prior to Rome among largely common law and civil law delegations about precisely how the mens rea for aiding and abetting should be worded. The Preparatory Committee draft in spring 1998, which was the initial working draft in Rome, reflected this continued indecision with its draft language for the aiding and abetting provision: "[With [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists . . ." *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June* -- [*18] *17 July 1998, Official Records, Volume III,* U.N. Doc. A/CONF.183/13 (Vol. III) (2002), at 31.

It was only after negotiators reached Rome in the summer of 1998 that they finally arrived at compromise language. We knew that Article 30 of the Rome Statute, which deals with the required mental element, would be the agreed formula for how both intent and knowledge would be described and [**23] applied as the mental element for criminal acts, "[u]nless otherwise provided." Rome Statute, art. 30(1). The latter proviso relates to explicit formulations of intent and knowledge for some of the atrocity crimes defined in Articles 6, 7, and 8, for command responsibility under Article 28, and for participants in a "common purpose" under Article 25(3)(d)(ii). WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 224-25 (3d ed. 2007). But the proviso's relevance, if any, to Article 25(3)(c) is far from clear and was never confirmed in the negotiations.

The final text of Article 30(2)(b) easily captures the mens rea requirement for aiding and abetting, namely, "[i]n relation to a consequence, that person means to cause that consequence *or* is aware that it will occur in the ordinary course of events." (emphasis added). At Rome, negotiators did not relegate aiding and abetting to the first prong of this formulation -- "means to cause that consequence" -- which would have injected a shared intention standard into aiding and abetting. Rather, the intent of the aider or abettor is logically discovered within the awareness of the "consequence," namely that he or [**24] she who aids or [*19] abets is someone who "is aware that [the consequence] will occur in the ordinary course of events." Rome Statute, art. 30(2)(b).

Article 25(3)(c)'s opening phrase, "For the purpose of facilitating the commission of such a crime," was agreed to in Rome during the final negotiations as an acceptable compromise phrase to resolve the inconclusive talks over whether to use the word "intent" or the word "knowledge" for this particular mode of participation. The "purpose" language stated the de minimus and obvious point, namely, that an aider or abettor purposely acts in a manner that has the consequence of facilitating the commission of a crime, but one must look to Article 30(2)(b) for guidance on how to frame the intent of the aider or abettor with respect to that consequence.

Donald Piragoff, lead Canadian Government negotiator on general principles of law throughout the years of negotiations culminating in Rome, writes about the relationship between aiding and abetting liability under Article 25(3)(c) and mental element requirements of Article 30(2):

> A question arises as to whether the conjunctive formulation [intent and knowledge] changes existing [**25] international jurisprudence that an accomplice (such as an aider or abettor) need not share the same *mens rea* of the principal, and that a knowing participation in the commission of an offence or awareness of the act of participation coupled with a conscious decision to participate is [*20] sufficient mental culpability for an accomplice. It is submitted that the conjunctive formulation has not altered this jurisprudence, but merely reflects the fact that aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation. . . . Article 30 para. 2(b) makes it clear that "intent" may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of "knowledge," as defined in article 30, para. 3. Therefore, if both "intent" and "knowledge" are required on the part of an accomplice, these mental elements can be satisfied by such awareness.

Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL [**26] CRIMINAL COURT 849, 855 (Otto Trifftrer ed., 2d ed. 2008).

There has been no ruling by the judges of the International Criminal Court on whether the "purpose" language in Article 25(3)(c) constitutes a form of specific intent, whereby evidence of a particular intention must be demonstrated and the mental element of Article 30(2)(a) or the first prong of Article 30(2)(b) ("that person means to cause that consequence") *must* be applied. For the present, the compromise struck in Article 25(3)(c) reflects the [*21] ambiguity that uniquely characterizes the Rome Statute on aiding and abetting liability.

C. The "purpose" requirement was not added to Article 25(3)(c) during the Rome negotiations to require a shared intention by the aider or abettor and the perpetrator of the crime

The Second Circuit equates the "purpose to facilitate" requirement in Article 25(3)(c) with the perpetrator's intent to commit the crime, thus marrying the perpetrator's intent with that of the aider or abettor as a virtual co-perpetrator. That is a mistaken reading of the provision.

Professor William Schabas writes, "The purpose requirement was added during the Rome Conference, but nothing in [**27] the official records provides any clarification for the purposes of interpretation." WILLIAM SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 435 (2010). When the intention of the principal perpetrator is known to the aider or abettor, who nonetheless proceeds to assist such perpetrator in the commission of the principal crime, then aiding and abetting liability logically arises. This is so even though the aider or abettor acts with a different intention, which may be an intent that on its face is perfectly legal (such as seeking to profit from a business enterprise).

The most generous interpretation one can afford Article 25(3)(c) is that it connotes an inferred intent [*22] from the act of providing assistance that one knows is facilitating the commission of a crime. That one can infer intent from knowledge is well established. For example, in the context of the Alien Tort Statute, while making a profit may be a corporation's primary objective, a secondary objective can arise in the realization that one's actions facilitate the commission of the crime and such knowledge can give rise to an inferred intent to *join* in the criminal conduct because [**28] it is profitable. In some cases -- probably rare -- a corporation may actually come to embrace not only its primary objective of making a profit, but also the criminal purpose of the perpetrator. But when that additional objective is fully embraced, it transforms the criminal character of the corporation from that of an aider or abettor into that of a full co-perpetrator of the crime. *See infra* at 15-17.

A small group of European scholars -- with whom the Second Circuit seemingly aligns itself -- seeks to impose a far-reaching and provocative interpretation on Article 25(3)(c), setting aside precedent and favoring a narrow interpretation that attaches to the defendant aider or abettor an intention to join the perpetrator in the commission of the underlying crime. *See* Albin Eser, *Individual Criminal Responsibility, in* 1 THE ROME STATUTE OF THE

INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 767, 798-801, 900-02 (Antonio Cassese, et al. eds., 2002). Such a view, at the heart of the debate in Rome, would lead one to believe that the Rome Statute definitively establishes a whole new playing field for aiding and abetting [*23] that, at a minimum, would have to be uniquely [**29] tailored for the International Criminal Court and far removed from any claim of customary international law.

The Second Circuit succumbs to the notion that insertion of the word "purpose" in Article 25(3)(c) must really mean a purpose or shared intent standard for aiding and abetting, when in reality the phrase "purpose to facilitate" was a compromise usage of those words to avoid any agreement on precisely the issue of shared intent. In Rome there was no agreement to so limit aiding and abetting to such a narrow range of liability requiring the finding of a shared intent to commit the underlying crime. That theory may exist in the aspirations of certain academics determined to declare victory ex post facto at Rome, but it has no reality in either the Rome Statute or the Alien Tort Statute.

Professor Roger Clark, a principal negotiator advising Samoa before and during the Rome Conference, writes:

> Article 25 sometimes uses terms like "purpose" and "with the aim of" that may need to be read in the light of article 30. Speaking generally, one who does not personally "do" the deed, must know of it and intend to associate himself with it. . . . There was considerable debate throughout [**30] the process about the conjunctive "and" between intent and knowledge [in Article 30]. Some delegations, the French in particular, insisted [*24] that both were necessary. Others of us, especially from common law jurisdictions, believed that the appropriate mental element for each separate material element had to be considered on its own merits. Particularly for circumstance elements, as the term "circumstance" is used in article 30(3) (and some consequence ones), knowledge (in the sense of awareness) might well be enough, although intent might be required as to other relevant elements. The debate shed more heat than light. In part, the differences of perspective coincided with the ease with which some of us are prepared to see several different material elements combining with appropriate mental elements (plural) to form "the offence," where others tend to see the material element, a global "thing," and a single intent/knowledge mental element which gets attached to that thing.

Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences, 2 CRIM. L.F. 291, 302-303 (2001).* [**31] Only the judges of the International Criminal Court will sort this out when faced with a real case.

I believe, however, that when Article 25(3)(c) is interpreted by the judges of the International Criminal Court, they are more likely to discover the standard for aiding and abetting as it has developed in the jurisprudence of the international military tribunals at Nuremberg and Tokyo and the international [*25] and hybrid criminal tribunals or recent years, in state practice, and in the writings of leading scholars: a knowledge standard of substantial assistance and an intent standard arising from awareness that the criminal consequence will occur in the ordinary course of events. A fair reading of Articles 25(3)(c), 30(2)(b), and 30(3) of the Rome Statute achieves such a standard.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT LOWER COURTS CANNOT RELY UPON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT FOR A RULE OF CUSTOMARY INTERNATIONAL LAW ON AIDING AND ABETTING LIABILITY

The ambiguity that burdens the meaning of aiding and abetting liability under Article 25(3)(c) of the Rome Statute one day will be replaced with clarity, but only by the judges [**32] of the International Criminal Court when they deliberate on a relevant case. Even then their ruling will not necessarily be formulated to reflect customary international law. Neither the Second Circuit nor this Court can substitute itself for their judgment about the Rome Statute's meaning. Scholars only can speculate at this stage. What can be stated with certainty is that Article 25(3)(c) was a negotiated compromise during the Rome negotiations that achieved the utilitarian objective of ensuring that aiding and abetting liability can be prosecuted before the International Criminal [*26] Court, and that the provision was uniquely crafted for the Court and thus never negotiated as a rule of customary international law.

While the subject matter jurisdiction provisions of the Rome Statute offer a valuable resource for the federal courts in their determination of what violations of international law under the Alien Tort Statute meet this Court's standard set in *Sosa,* an examination of accessorial liability standards for aiding and abetting under the Rome Statute offers no such guidance. This Court would seriously misread the Rome Statute to award Article 25(3)(c) of the Rome [**33] Statute with the weighty significance of customary international law when the facts so clearly challenge that finding. Only the most self-inflated negotiators at Rome would hope for such a prize in the aftermath.

CONCLUSION

As a long-time participant in the American struggle over the merits and risks of the International Criminal Court, I find it ironic that the Second Circuit relies upon a mistaken reading of the Rome Statute to ascertain aiding and abetting liability. The United States has not ratified the Rome Statute because of continuing opposition from some quarters to its purported jurisdictional reach and even, in some respects, to its divergence from customary international law. Many of these critics no doubt would be [*27] surprised to learn that a federal court is relying heavily on the unratified Rome Statute for guidance on a form of accessorial liability -- aiding and abetting -- so easily and correctly found within the federal common law. Even the *Sosa* standard, which focuses on determining the *primary* violations of international law that should qualify for Alien Tort Statute litigation, does not purport to abandon federal common law, which itself [**34] is informed by customary international law, with respect to *secondary,* or accessorial, liability standards.

For the above reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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5150

Security Assistance Reform: "Section 1206" Background and Issues for Congress

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2524

Summary

Section 1206 of the National Defense Authorization Act (NDAA) for Fiscal Year 2006, as amended and regularly extended, provides the Secretary of Defense with authority to train and equip foreign military forces for two specified purposes—counterterrorism and stability operations—and foreign maritime security forces for counterterrorism operations. The Department of Defense (DOD) values this authority as an important tool to train and equip military partners. Funds may be obligated only with the concurrence of the Secretary of State. Thus far, the Department of Defense (DOD) has used Section 1206 authority primarily to provide counterterrorism (CT) support. In FY2010 and FY2011, Section 1206 funds were also used to provide significant assistance to train and equip foreign military forces for military and stability operations in which U.S. forces participate. This authority will expire in FY2013.

Section 1206 allocations or notifications for FY2006-FY2011totaled $1.574 billion. (FY2012 plans are still under consideration.) During this period, Section 1206 supported bilateral programs in 40 countries, 16 multilateral programs, and a global human rights program.

FY2011 funding totaled $247.5 million, significantly below the $350 million cap on Section 1206 funding. The largest amount, totaling $44.8 million or some 18% of the funding, was provided to Uganda and Burundi to improve the tactical effectiveness of their military forces (the Ugandan Peoples Defense Force and the Burundian National Defense Forces) engaged in counterterrorism operations in Somalia. Over $20 million was provided to each Mauritania (for 1 fixed-wing aircraft and the modernization of others) and Georgia (to support Georgian deployments to Afghanistan under the International Security Assistance Force.) By region, FY2012 funding was as follows: Africa $113.9 million; Greater Europe, $88.7 million, Middle East and South/Southwestern Asia, $19.2 million.

Some Members have been concerned with several issues related to Section 1206 authority, both narrow and broad. Specific current concerns include whether Section 1206 funds are being used appropriately and effectively, and whether the authority should be expanded to provide training not only military forces but also to a wide range of foreign security forces. (Currently, Section 1206 limits security force training to maritime security forces.) An overarching issue is whether Congress should place Section 1206 train and equip (T&E) authority under the State Department with other T&E authorities. (Members have thus far refrained from codifying Section 1206 in permanent law, as requested by DOD.) Finally, some Members may wish to examine the status of Section 1206 in the context of broader security assistance reform.

Appendix A. FY2006-FY2010 Recipients and Funding

The $1.3 billion in FY2006-FY2010 Section 1206 funding was divided among more than 34 bilateral recipients and 14 multilateral groups of 2-15 members. Of these, three—Yemen, Pakistan, and Lebanon—received 44% of total Section 1206 assistance for these years. The top seven recipients (i.e., the top three recipients plus the Philippines, Indonesia, Bahrain, and Malaysia) received 63%, or a bit short of two-thirds of total Section 1206 funding. These seven countries constituent one-fifth of all bilateral recipients. Over half the bilateral and multilateral recipients received under $15 million in Section 1206 assistance.

Yemen was the largest recipient during this period. The $252.6 million it received from FY2006 through FY20010 constituted almost a fifth of total Section 1206 funding during this period. Over 60% of Section 1206 assistance to Yemen during this period was provided with FY2010 funds, most used to supply small airplanes and helicopters and other aircraft support to the Yemeni air force, to enable it to support Yemeni CT units, and the rest to enhance the CT capability of Yemeni SOF.

Over a quarter of Section 1206 aid to Yemen was provided through FY2009 funding. This assistance included not only trucks, radio systems (with operation and maintenance training), and body armor to help the Yemeni Border Security Force deter, detect, and detain terrorists along the Yemen, Saudi Arabia, and Oman borders, but also equipment for the Yemeni Coast Guard (patrol boats and accessories, and shipboard radios) and for the Yemini Air Force (helicopter spare parts and surveillance cameras) to enhance CT capability. FY2009 funds also supported Yemen's Ministry of Defense with an explosive ordnance disposal program. Section 1206 assistance to Yemen started in FY2006 with a relatively small package of equipment (small arms and ammunition, computers, radios and their installation, and light tactical vehicles) to aid the Yemeni Armed Forces in preventing cross-border arms trafficking. Significantly more FY2007 funds, about 10% of the current total, were devoted to enhance Yemen's border security CT capability, with vehicles of various types (as well as maintenance training and support), spare parts, crisis action center equipment, and transportation

Pakistan, the second-largest recipient with $203.4 million, or about 15% of total Section 1206 funding, did not receive funds in FY2010. Some $113.5 million, or over half Pakistan's funding, was provided in FY2009. Most Section 1206 funding to Pakistan provided equipment and training to increase the government's ability to counter terrorism threats emanating from the Federally Administered Tribal Areas (FATA).

- A central feature was helicopter support. In FY2006, Section 1206 assistance was first used to address spare part shortages that limited availability from Pakistan's "impressive inventory of helicopters."[66] These funds provided spare parts for Mi-17 and Cobra helicopters, as well as aviation body armor, night vision goggles, and limited visibility training for pilots. FY2008 and FY2009 funds also have provided the means, technical support, and training to repair,

[66] CNA Corporation, *Assessments of the Impact of 1206-Funded Projects in Selected Countries: Lebanon, Pakistan, Yemen, Sao Tome and Principe*, by Eric Thompson and Patricio Asfura-Heim, CRM D0017988.A4/1Rev. July 2008, p. 25, http://www.cna.org/documents/D0017988.A4.pdf. Hereafter referred to as *CNA Corporation Assessments*.

C

Uniform Laws Annotated Currentness
Model Penal Code (Refs & Annos)
Part I. General Provisions
Article 2. General Principles of Liability
→→ § 2.02. General Requirements of Culpability.

(1) **Minimum Requirements of Culpability.** Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) **Kinds of Culpability Defined.**

(a) **Purposely.**

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) **Knowingly.**

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) **Recklessly.**

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a

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law-abiding person would observe in the actor's situation.

(d) **Negligently.**

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(3) **Culpability Required Unless Otherwise Provided.** When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

(4) **Prescribed Culpability Requirement Applies to All Material Elements.** When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(5) **Substitutes for Negligence, Recklessness and Knowledge.** When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

(6) **Requirement of Purpose Satisfied if Purpose Is Conditional.** When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

(7) **Requirement of Knowledge Satisfied by Knowledge of High Probability.** When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

(8) **Requirement of Wilfulness Satisfied by Acting Knowingly.** A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

(9) **Culpability as to Illegality of Conduct.** Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

(10) **Culpability as Determinant of Grade of Offense.** When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or negligently, its grade or degree shall

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be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

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C

Uniform Laws Annotated Currentness
Model Penal Code (Refs & Annos)
Part I. General Provisions
Article 2. General Principles of Liability
→→ § 2.06. Liability for Conduct of Another; Complicity.

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

(a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it, or

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

(5) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

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(6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

(a) he is a victim of that offense; or

(b) the offense is so defined that his conduct is inevitably incident to its commission; or

(c) he terminates his complicity prior to the commission of the offense and

(i) wholly deprives it of effectiveness in the commission of the offense; or

(ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

(7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

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YEMEN

Yemen, with a population of approximately 23 million, is a republic whose law provides for presidential election by popular vote from among at least two candidates endorsed by parliament. In 2006 citizens reelected President Ali Abdullah Saleh to another seven-year term in a generally open and competitive election, but one characterized by multiple problems with the voting process and the use of state resources on behalf of the ruling party. Saleh has led the country since 1978. The president appoints the prime minister, who is the head of government. The prime minister, in consultation with the president, selects the Council of Ministers. Although there are a number of parties, President Saleh's General People's Congress (GPC) dominated the government. Armed conflicts with the Houthi rebels in the North and with elements of the Southern Mobility Movement in southern governorates, as well as with Al-Qaida in the Arabian Peninsula (AQAP) terrorists, affected the government's human rights performance. There were instances in which elements of the security forces acted independently of civilian control.

Armed conflict in the northern Saada region declined markedly after a February 11 ceasefire. Nonetheless, violence and abuses persisted in connection with ongoing protests by the Southern Mobility Movement, a decentralized umbrella group formed in 2008 as a result of widespread antigovernment protests that sought more rights for southerners and during the year increasingly became associated with activists seeking to reestablish an independent South Yemen.

During the year attacks, often by unknown actors, occurred on government security forces, usually attributed to AQAP, although government claims of AQAP responsibility could not be verified in many cases.

The main government human rights abuses included severe limitations on citizens' ability to change their government due to, among other factors, corruption, fraudulent voter registration, administrative weakness, and close political-military relationships at high levels. Arbitrary and unlawful killings, politically motivated disappearances, and reports of torture and other physical abuse accompanied the use of excessive force against civilians in internal conflict. Prisons and detention centers were in poor condition, and some private, largely tribal, ones operated without legal authorization or control. Arbitrary arrest and detention, sometimes incommunicado, and denial of fair public trial were widespread. Official impunity was common. The government restricted civil liberties, including freedoms of

In northern Saada Governorate another round of intense fighting started in August 2009 and lasted until the parties announced partially observed January 23, then February 11 cease-fires, followed by President Saleh officially declaring the war "over" in a March 19 television interview. Large-scale conflict erupted again in August-September and continued sporadically at low levels at year's end.

According to the NGO Human Rights Watch (HRW) and other humanitarian organizations, witnesses reported four separate air raids on September 16 in which government bombs killed almost 90 civilians, mostly women, children, and the elderly in Adl, near Harf Sufyan in Amran Governorate. On September 18, the government announced a plan to investigate the deaths. By year's end no results of an investigation had been presented. Independent investigation into the shelling did not occur because of heightened insecurity in the region.

YODPRL recorded more than 20 forcible disappearances attributed to government forces during the year in connection with the fighting in Saada.

In fighting between government forces and Houthi rebels between August 2009 and February, international NGOs providing humanitarian assistance in Saada estimated more than 300,000 persons were displaced from their homes, then spreading across four northern governorates in search of aid (see section 2.d.).

There were reports during the year of the use by both sides of antipersonnel mines, including antitank and improvised mines, during the conflict in northern Saada Governorate between rebel forces led by Abdul-Malik al-Houthi and government troops. Houthi rebels actively interfered with government demining efforts.

The government and local and international human rights organizations claimed that Houthis also committed human rights violations during the year. According to an August 2009 government report, Houthi abuses included unlawful killing, rape and sexual assault, looting and destruction of civilian property, and plunder and destruction of public buildings. Some human rights activists said Houthis used human shields and killed and threatened civilians who did not support them. Independent verification of these allegations was difficult because the government and Houthi rebels blocked nearly all access to Saada during the year.

Although the law barred the use of underage soldiers, local and international human rights organizations reported that both Houthis and government-affiliated tribes deployed child soldiers into armed conflict during the latest round of fighting

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

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

Article 1
Competence of the Special Court

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

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

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

Article 2
Crimes against humanity

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

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

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

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

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

Article 4
Other serious violations of international humanitarian law

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

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

Article 5
Crimes under Sierra Leonean law

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

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

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

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

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

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

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

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

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

Article 6
Individual criminal responsibility

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

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

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

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

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

Article 7
Jurisdiction over persons of 15 years of age

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

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

Article 8
Concurrent jurisdiction

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

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

Article 9
Non bis in idem

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

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

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

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

Article 10
Amnesty

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

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

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

Article 12
Composition of the Chambers

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

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

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

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

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

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

Article 13
Qualification and appointment of judges

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

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

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

Article 14
Rules of Procedure and Evidence

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

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

Article 15
The Prosecutor

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

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

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

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

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

Article 16
The Registry

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

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

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

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

Article 17
Rights of the accused

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

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

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

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

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

Article 18
Judgement

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

Article 19
Penalties

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

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

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

Article 20
Appellate proceedings

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

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

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

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

Article 21
Review proceedings

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

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

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

Article 22
Enforcement of sentences

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

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

Article 23
Pardon or commutation of sentences

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

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual Report

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

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

RULES OF PROCEDURE AND EVIDENCE

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

Rule 3: **Working Language** *(amended 7 March 2003 and 31 May 2012)*

(A) The working language of the Special Court shall be English.

(B) The accused or suspect or convicted person shall have the right to use his own language.

(C) Any person appearing before or giving evidence to the Special Court, who does not have sufficient knowledge of English, may ask for permission to use his own language.

(D) The Registrar shall make any necessary arrangements for interpretation and translation.

Rule 4: **Sittings away from the Seat of the Special Court** *(amended 7 March 2003)*

A Chamber or a Judge may exercise their functions away from the Seat of the Special Court, if so authorized by the President. In so doing, audio or video-link technology, email or other available electronic instruments may be used if authorised by the President or Presiding Judge.

Rule 5: **Non-compliance with the Rules** *(amended 29 May 2004)*

Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber or the Designated Judge may grant relief if the non-compliance has caused material prejudice to the objecting party.

Rule 6: **Amendment of the Rules** *(amended 29 May 2004)*

(A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor, the Registrar, the Principal Defender and by the Sierra Leone Bar Association or any other entity invited by the President to make proposals for amendments.

(B) Proposals for amendment may be adopted at a Plenary Meeting of the Special Court.

(C) An amendment of the Rules may be adopted otherwise than as stipulated in Sub-Rule (B) above, provided it is approved unanimously by any appropriate means either done in writing or confirmed in writing.

(D) An amendment shall, unless otherwise indicated, enter into force immediately. The Registrar shall publish the amendment by appropriate means.

Rule 7: **Time limits** *(amended 1 August 2003, 13 May 2006 and 24 November 2006)*

(A) Unless otherwise ordered by a Chamber or by a Designated Judge, or otherwise provided by the Rules, the time prescribed by or under the Rules for the doing of any act shall run from the day after the notice of the occurrence of the event has been received in the normal course of transmission by the Registry, counsel for the Accused or the Prosecutor as the case may be.

(B) Where a time limit is expressed in days, only ordinary calendar days shall be counted. Weekdays, Saturdays, Sundays and Public Holidays shall be counted as days. However, should the time limit expire on a Saturday, Sunday, Public Holiday or a day falling within

judicial recess, the time limit shall automatically be extended to the subsequent working day.

(C) Unless otherwise ordered by a Chamber or a Designated Judge, any response to a motion shall be filed within ten days of service of the motion by the Registry. Any reply to the response shall be filed within five days of service of the response by the Registry.

Rule 7*bis*: Motions for extension of time *(adopted 14 May 2005)*

Any response to a motion for extension of time shall be filed within three days of the receipt of the motion. Any reply to the response shall be filed within two days of the receipt of the response. However, a motion for an extension of time may be disposed of without giving the other party the opportunity to respond if a Judge or Chamber is of the opinion that no prejudice will be caused to the other party.

Part II - COOPERATION FROM STATES AND JUDICIAL ASSISTANCE

Rule 8: Requests and Orders *(amended 1 August 2003)*

(A) The Government of Sierra Leone shall cooperate with all organs of the Special Court at all stages of the proceedings. Requests by any organ of the Special Court shall be complied with in accordance with Article 17 of the Agreement. An order issued by a Chamber or by a Judge shall have the same force or effect as if issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court.

(B) Except in cases to which Rule 11, 13, 59 or 60 applies, where a Chamber or a Judge is satisfied that the Government of Sierra Leone has failed to comply with a request made in relation to any proceedings before that Chamber or Judge, the Chamber or Judge may refer the matter to the President to take appropriate action.

(C) The Special Court may invite third States not party to the Agreement to provide assistance on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(D) Where a third State, which has entered into an ad hoc arrangement or an agreement with the Special Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the President may take appropriate action.

(E) Where it appears to the Prosecutor that a crime within the jurisdiction of the Special Court is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect. The Government of Sierra Leone shall transmit to him such information forthwith in accordance with Article 17 of the Agreement.

Rule 9: Application for Deferral *(amended 7 March 2003)*

Where it appears that crimes which are the subject of investigations or proceedings instituted in the courts of a State:

Part III - ORGANIZATION OF THE SPECIAL COURT

Section 1: The Judges

Rule 14: Solemn Declaration *(amended 14 March 2004)*

(A) Before taking up his duties each Judge shall make the following solemn declaration:

> "I solemnly declare that I will without fear or favour, affection or ill-will, serve as a Judge of the Special Court, honestly, faithfully, impartially and conscientiously."

(B) The text of the declaration, signed by the Judge and witnessed by the Secretary-General of the United Nations or his representative, and the President of Sierra Leone or his representative, shall be kept in the records of the Special Court.

Rule 15: Disqualification of Judges *(amended 29 May 2004 and 24 November 2006)*

(A) A Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground.

(B) Any party may apply to the Chamber of which the Judge is a member for the disqualification of the said Judge on the above ground.

C) Where the Judge voluntarily withdraws from the Trial Chamber, the President may assign the alternate judge, in accordance with Article 12(4) of the Statute, or another Trial Chamber Judge to sit in his place. Where a judge voluntarily withdraws from the Appeals Chamber, the Alternate Judge may sit in his place.

(D) The Judge who approves an indictment or who is involved with any pre-trial or interlocutory matter against a suspect or accused, shall not for that reason be disqualified from sitting as a member of a Chamber for the trial or appeal of that accused.

Rule 15 *bis*: Unfitness to Sit *(adopted 24 November 2006)*

(A) Where it is alleged that a Judge is not fit to sit as a member of the Special Court, the President may refer the matter to the Council of Judges.

(B) Should the Council of Judges determine that:

(i) the allegation is of a serious nature, and

(ii) there appears to be a substantial basis for such allegation,

it shall refer the matter to the Plenary Meeting which will consider it and, if necessary, make a recommendation to the body which appointed the Judge.

(C) At each stage, the challenged Judge shall be entitled to present his comments on the matter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) Subject to Rule 6(A) and (B) and Rule 18(C), the decisions of the Plenary Meeting of the Special Court shall be taken by the majority of the Judges present. In the event of an equality of votes, the President or the Judge who acts in his place shall have a casting vote.

Section 4: The Chambers

Rule 26*bis*: The Chambers *(adopted 29 May 2004)*

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Rule 27: The Trial Chambers *(amended 14 May 2005)*

(A) The Presiding Judge of each Trial Chamber shall be elected for a renewable term of one year.

(B) The Presiding Judge shall coordinate the work of the Chamber and liaise with the Registrar on matters affecting the Trial Chamber and will exercise such other functions as may be conferred on him by the Agreement, the Statute, and the Rules.

(C) The Presiding Judge may issue, after appropriate consultations, Practice Directions in relation to the Trial Chamber.

(D) The provisions of Rule 17 will apply in the event of the Presiding Judge being unable to carry out his functions.

Rule 27*bis*: The Appeals Chamber *(amended 29 May 2004)*

(A) The Presiding Judge of the Appeals Chamber shall coordinate the work of the Chamber and liaise with the Registrar on matters affecting the Appeals Chamber and will exercise such other functions as may be conferred on him by the Agreement, the Statute, and the Rules.

(B) The Presiding Judge may issue, after appropriate consultations, Practice Directions in relation to the Appeals Chamber.

(C) The provisions of Rule 17 will apply in the event of the Presiding Judge being unable to carry out his functions.

(D) Unless otherwise provided in these Rules, the Appeals Chamber shall, for each appeal, be composed of all its five members.

Rule 28: Designated Judges *(amended 1 August 2003 and 13 May 2006)*

After consultation with the Judges concerned, the President shall designate for a given period such Judges as necessary to whom indictments, warrants, and all other pre-trial matters not pertaining to a case already assigned to a Chamber, shall be transmitted for review. The Registrar shall publish the information by appropriate means and as soon as possible.

Rule 29: Deliberations

The deliberations of the Chambers shall take place in private and remain secret.

Section 5: The Registrar

Rule 30: Appointment of the Registrar *(amended 7 March 2003)*

The Secretary-General of the United Nations, in consultation with the President of the Special Court, shall appoint a Registrar.

Rule 31: Appointment of the Deputy Registrar and Registry Staff *(amended 7 March 2003)*

The Registrar shall appoint such other staff as may be required for the efficient functioning of the Registry, including a Deputy Registrar, if necessary.

Rule 32: Solemn Declaration *(amended 7 March 2003)*

The Registrar shall make the following declaration before the President:

> "I solemnly declare that I will perform the duties incumbent upon me as Registrar of the Special Court in all loyalty, discretion and good conscience and that I will faithfully observe all the provisions of the Agreement, the Statute and the Rules of Procedure and Evidence of the Special Court."

Rule 33: Functions of the Registrar *(amended 29 May 2004)*

(A) The Registrar shall assist the Chambers, the Plenary Meetings of the Special Court, the Council of Judges, the Judges and the Prosecutor, the Principal Defender and the Defence in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Special Court and shall serve as its channel of communication.

(B) The Registrar, in the execution of his functions, may make oral or written representations to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary.

(C) The Registrar, mindful of the need to ensure respect for human rights and fundamental freedoms and particularly the presumption of innocence, shall, with the approval of the Council of Judges, adopt and amend rules governing the detention of persons awaiting Trial or Appeal or otherwise detained by the Special Court and ensure conditions of detention.

(D) The Registrar may, with the approval of the Council of Judges, issue Practice Directions addressing particular aspects of the practice and procedure in the Registry of the Special Court and in respect of other matters within the powers of the Registrar.

Rule 34: Witnesses and Victims Section *(amended 29 May 2004)*

(A) The Registrar shall set up a Witnesses and Victims Section which, in accordance with the Statute, the Agreement and the Rules, and in consultation with the Office of the Prosecutor,

for Prosecution witnesses, and the Defence Office, for Defence witnesses, shall, amongst other things, perform the following functions with respect to all witnesses, victims who appear before the Special Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

(i) Recommend to the Special Court the adoption of protective and security measures for them;

(ii) Provide them with adequate protective measures and security arrangements and develop long- and short-term plans for their protection and support;

(iii) Ensure that they receive relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children.

(B) The Section personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children. Where appropriate the Section shall cooperate with non-governmental and intergovernmental organizations.

Rule 35: **Minutes** *(amended 7 March 2003)*

Except where a full record is made under Rule 81, the Registrar, or Registry staff designated by him, shall take minutes of the Plenary Meetings of the Special Court and of the sittings of the Chambers or a Judge, other than private deliberations.

Rule 36: **Cause Book** *(amended 7 March 2003)*

The Registrar shall keep a Cause Book which shall list, subject to Rule 53, all the particulars of each case including the index of the contents of the case file.

Section 6: ***The Prosecutor***

Rule 37: **Functions of the Prosecutor** *(amended 7 March 2003)*

(A) The Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and with such Regulations, consistent with the Agreement and the Statute and the Rules, as may be framed by him.

(B) The Prosecutor's powers under Parts IV to VIII of the Rules may be exercised by staff members of the Office of the Prosecutor authorized by him, or by any person acting under his direction.

Rule 38: **The Deputy Prosecutor** *(amended 7 March 2003)*

The Deputy Prosecutor shall exercise the functions of the Prosecutor in the event of his absence or inability to act or upon the Prosecutor's express instructions.

Part IV - INVESTIGATIONS, RIGHTS OF SUSPECTS AND ACCUSED

Section 1: Investigations

Rule 39: Conduct of Investigations *(amended 7 March 2003)*

In the conduct of an investigation, the Prosecutor may:

(i) Summon and question suspects, interview victims and witnesses and record their statements, collect evidence and conduct on-site investigations;

(ii) Take all measures deemed necessary for the purpose of the investigation, including the taking of any special measures to provide for the safety, the support and the assistance of potential witnesses and sources;

(iii) Seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and

(iv) Request such orders as may be necessary from a Trial Chamber or a Judge.

Rule 40: Provisional Measures *(amended 29 May 2004)*

(A) In case of urgency, the Prosecutor may request any State:

(i) To arrest a suspect and place him in custody in accordance with the laws of that State;

(ii) To seize all physical evidence;

(iii) To take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

(B) Within 10 days from any arrest under Sub-Rule (A) above, the Prosecutor shall apply to the Designated Judge for an order pursuant to Rule 40 *bis* to transfer the suspect to the Detention Facility or to such other place as the President may decide, with the advice of the Registrar, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the authorities concerned, and the Registrar.

(C) The suspect shall be released if:

(i) the Chamber so rules; or

(ii) the Prosecutor fails to apply for an order under rule 40 *bis* within ten days of the arrest.

(C) Once the trial of an accused has commenced, the Prosecutor may withdraw an indictment only by leave granted by the Trial Chamber.

(D) The withdrawal of the indictment shall be promptly notified to the accused and to counsel for the accused.

Rule 52: Service of Indictment *(amended 29 May 2004)*

(A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into the custody of the Special Court or as soon as possible thereafter.

(B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment approved in accordance with Rule 47.

(C) An indictment that has been permitted to proceed by the Designated Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Special Court. If the accused does not understand English and if the language understood is a written language known to the Registrar, a translation of the indictment in that language shall also be prepared. In the case that the accused is illiterate or his language is an oral language, the Registrar will ensure that the indictment is read to the accused by an interpreter, and that he is served with a recording of the interpretation.

(D) Subject to Rule 53, upon approval by the Designated Judge the indictment shall be made public.

Rule 53: Non-disclosure *(amended 1 August 2003)*

(A) In exceptional circumstances, the Designated Judge may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.

(B) When approving an indictment the Designated Judge may, on the application of the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.

(C) The Designated Judge or the Trial Chamber may, on the application of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.

Section 2: Orders and Warrants

Rule 54: General Provision

At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

(iii) Applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B);

(iv) Objections based on the denial of request for assignment of counsel; or

(v) Objections based on abuse of process.

(C) Objections based on lack of jurisdiction or to the form of the indictment, including an amended indictment, shall be raised by a party in one motion only, unless otherwise allowed by the Trial Chamber.

(D) The Trial Chamber shall, except as provided by Sub-Rules (E) and (F) below, dispose of preliminary motions before the trial, and its decisions thereon shall not be subject to interlocutory appeal.

(E) Preliminary motions made in the Trial Chamber prior to the Prosecutor's opening statement which raise a serious issue relating to jurisdiction shall be referred to a bench of at least three Appeals Chamber Judges, where they will proceed to a determination as soon as practicable.

(F) Preliminary motions made in the Trial Chamber prior to the Prosecutor's opening statement which, in the opinion of the Trial Chamber, raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial shall be referred to a bench of at least three Appeals Chamber Judges, where they will proceed to a determination as soon as practicable.

(G) Where the Trial Chamber refers a motion to the Appeals Chamber pursuant to Sub-Rules (E) or (F) above, any party wishing to file additional written submissions must seek leave from the Appeals Chamber which will impose time limits for further submissions, responses and replies if leave is granted.

(H) References by the Trial Chamber pursuant to Sub-Rules (E) and (F) above shall not operate as a stay of proceedings. Such references shall not operate as a stay of the trial itself unless the Trial or Appeal Chamber so orders.

(I) This Rule shall be deemed to have entered into force on the 7th of March, 2003.

Part VI - PROCEEDINGS BEFORE TRIAL CHAMBERS

Section 1: General Provisions

Rule 72*bis*: General Provisions on Applicable Law *(adopted 29 May 2004)*

The applicable laws of the Special Court include:

(i) the Statute, the Agreement, and the Rules;

(ii) where appropriate, other applicable treaties and the principles and rules of international customary law;

(iii) general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognized norms and standards.

Rule 73: Motions *(amended 14 May 2005)*

(A) Subject to Rule 72, either party may move before the Designated Judge or a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Designated Judge or the Trial Chamber, or a Judge designated by the Trial Chamber from among its members, shall rule on such motions based solely on the written submissions of the parties, unless it is decided to hear the parties in open Court.

(B) Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

(C) Whenever the Trial Chamber and the Appeals Chamber of the Court are seized of the same Motion raising the same or similar issue or issues, the Trial Chamber shall stay proceedings on the said Motion before it until a final determination of the said Motion by the Appeals Chamber.

(D) Irrespective of any sanctions which may be imposed under Rule 46(A), when a Chamber finds that a motion is frivolous or is an abuse of process, the Registrar shall withhold payment of all or part of the fees associated with the production of that motion and/ or costs thereof.

Rule 73 *bis*: Pre-Trial Conference *(amended 29 May 2004, 13 May 2006 and 24 November 2006)*

(A) The Trial Chamber or a Judge designated from among its members shall hold a Pre-Trial Conference prior to the commencement of the trial.

(B) Prior to the Pre-Trial Conference the Trial Chamber or a Judge designated from among its members may order the Prosecutor, within a time limit set by the Trial Chamber or the said Judge, and before the date set for trial, to file the following:

(i) A pre-trial brief addressing the factual and legal issues;

(ii) Admissions by the parties and a statement of other matters not in dispute;

(iii) A statement of contested matters of fact and law;

(iv) A list of witnesses the Prosecutor intends to call with:

(a) The name or pseudonym of each witness;

Rule 75: Measures for the Protection of Victims and Witnesses *(amended 14 May 2005)*

(A) A Judge or a Chamber may, on its own motion, or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Section, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Judge or a Chamber may hold an *in camera* proceeding to determine whether to order:

(i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:

(a) Expunging names and identifying information from the Special Court's public records;

(b) Non-disclosure to the public of any records identifying the victim or witness;

(c) Giving of testimony through image- or voice- altering devices or closed circuit television, video link or other similar technologies; and

(d) Assignment of a pseudonym;

(ii) Closed sessions, in accordance with Rule 79;

(iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Judge or a Chamber shall control the manner of questioning to avoid any harassment or intimidation.

(D) The Witnesses and Victims Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75(F).

(E) When making an order under Sub-Rule (A) above, a Judge or Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Special Court.

(F) Once protective measures have been ordered in respect of a witness or victim in any proceedings before the Special Court (the "first proceedings"), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Special Court (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but;

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the

Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings shall apply to the Chamber seized of the second proceedings.

(H) Before determining an application under Sub-Rule (G) above, if the effect of the change serves to decrease the protective measures granted to the victim or witness by the Chamber in the first proceedings, the Chamber seized of the second proceedings shall obtain all relevant information from the first proceedings, and may consult with any Judge who ordered the protective measures in the first proceedings, or the relevant Chamber.

(I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber".

(J) If the Chamber seized of the second proceedings rescinds, varies or augments the protective measures ordered in the first proceedings, these changes shall apply only with regard to the second proceedings.

Rule 76: Solemn Declaration by Interpreters and Translators

Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality.

Rule 77: Contempt of the Special Court *(amended 14 May 2005 and 31 May 2012)*

(A) The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and willfully interferes with its administration of justice, including any person who:

(i) being a witness before a Chamber, subject to Rule 90(E) refuses or fails to answer a question;

(ii) discloses information relating to proceedings in knowing violation of an order of a Chamber;

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness;

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber; or

(vi) knowingly assists an accused person to evade the jurisdiction of the Special Court.

(B) Any incitement or attempt to commit any of the acts punishable under Sub-Rule (A) is punishable as contempt of the Special Court with the same penalties.

(C) When a Judge or Trial Chamber has reason to believe that a person may be in contempt of the Special Court , it may:

(i) deal with the matter summarily itself;

(ii) refer the matter to the appropriate authorities of Sierra Leone; or

(iii) direct the Registrar to appoint an experienced independent counsel to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter.

(D) Proceedings under Sub-Rule (C)(iii) above may be assigned to be heard by a single judge of any Trial Chamber or a Trial Chamber.

(E) The rules of procedure and evidence in Parts IV to VIII shall apply, as appropriate, to proceedings under this Rule.

(F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be entitled to legal assistance in accordance with Rule 45.

(G) The maximum penalty that may be imposed on a person found to be in contempt of the Special Court pursuant to Sub-Rule (C)(i) shall be a term of imprisonment not exceeding six months, or a fine not exceeding 2 million Leones, or both; and the maximum penalty pursuant to Sub-Rule (C)(iii) shall be a term of imprisonment for seven years or a fine not exceeding 20 million leones, or both.

(H) Payment of a fine shall be made to the Registrar to be held in a separate account.

(I) If a counsel is found guilty of contempt of the Special Court pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to appear before the Special Court or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both.

(J) Any conviction rendered under this Rule shall be subject to appeal.

(K) Appeals pursuant to this Rule shall be heard by a bench of at least three Judges of the Appeals Chamber. In accordance with Rule 117 such appeals may be determined entirely on the basis of written submissions.

(L) In the event of contempt occurring during proceedings before the Appeals Chamber or a Judge of the Appeals Chamber, the matter may be dealt with summarily from which there shall be no right of appeal or referred to a single Judge of any Trial Chamber or a Trial Chamber for proceedings in accordance with Sub-Rules (C) to (I) above.

Rule 78: Open Sessions

All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.

Rule 79: Closed Sessions *(amended 14 May 2005)*

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

(i) national security; or

(ii) protecting the privacy, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

(iii) protecting the interest of justice.

(B) The Trial Chamber shall make public the reasons for its order.

(C) In the event that it is necessary to exclude the public, the Trial Chamber should if appropriate permit representatives of monitoring agencies to remain. Such representatives should, if appropriate, have access to the transcripts of closed sessions.

Rule 80: Control of Proceedings *(amended 7 March 2003)*

(A) The Trial Chamber may exclude a person from the proceedings in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.

(B) The Trial Chamber may order the removal of an accused from the proceedings and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed. In the event of removal, where possible, provision should be made for the accused to follow the proceedings by video link.

Rule 81: Records of Proceedings and Preservation of Evidence (amended 28 May 2010)

(A) The Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings.

(B) After the publication of the daily final public transcript, the record of proceedings shall not be amended except by order of the Chamber on its own motion or on the application of a party to the Chamber.

(C) The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist.

(D) The Registrar shall retain and preserve all physical evidence offered during the proceedings.

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

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

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

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

Rule 87: Deliberations

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

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

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

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

(A) The judgement shall be pronounced in public.

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

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

Section 3: Rules of Evidence

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

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

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

(C) A Chamber may admit any relevant evidence.

Rule 103: Place of Imprisonment *(amended 14 March 2004)*

(A) Imprisonment shall be served in Sierra Leone, unless circumstances require otherwise. The Special Court may conclude agreements with other countries willing to accept and imprison convicted persons.

(B) The place of imprisonment for each convicted person shall be designated by the President.

(C) Transfer of the convicted person to the place of imprisonment shall be effected as soon as possible after the time limit for appeal has lapsed.

Rule 104: Forfeiture of Property *(amended 7 March 2003)*

(A) After a judgement of conviction containing a specific finding as provided in Rule 88 (B) the Trial Chamber, at the request of the Prosecutor or at its own initiative, may hold a special hearing to determine the matter of property forfeiture, including the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.

(B) The determination may extend to such property or proceeds, even in the hands of third parties not otherwise connected with the crime, for which the convicted person has been found guilty. Such third parties shall be entitled to appear at the hearing.

(C) The Trial Chamber may order the forfeiture of any property, proceeds and any assets it finds has been acquired unlawfully or by criminal conduct, and order its return to the rightful owner, or its transfer to the State of Sierra Leone, as circumstances may require.

Rule 105: Compensation to Victims *(amended 7 March 2003)*

(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

(B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.

(C) For the purposes of a claim made under Sub-Rule (B) the judgement of the Special Court shall be final and binding as to the criminal responsibility of the convicted person for such injury.

Part VII - APPELLATE PROCEEDINGS

Rule 106: General Provisions *(amended 1 August 2003)*

(A) Pursuant to Article 20 of the Statute, the Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

(a) A procedural error;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) The Registrar shall notify the parties accordingly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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PRACTICE DIRECTION ON THE STRUCTURE OF GROUNDS OF APPEAL BEFORE THE SPECIAL COURT

Adopted on 1 July 2011
Amended 23 May 2012

PREAMBLE

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

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

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

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

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

I. FORMAL REQUIREMENTS

The Appellant's Notice of Appeal

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

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

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

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

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

The Appellant's Submissions

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

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

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

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

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

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

The Respondent's Submissions

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

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

Submissions in Reply

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

The Book of Authorities

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

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

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

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

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

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

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

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

Additional Evidence

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

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

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

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

II. GENERAL REQUIREMENTS

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

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

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

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

III. NON-COMPLIANCE WITH THE REQUIREMENTS

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

IV. ENTRY INTO FORCE

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

Justice Jon M. Kamanda
President
23/05/12

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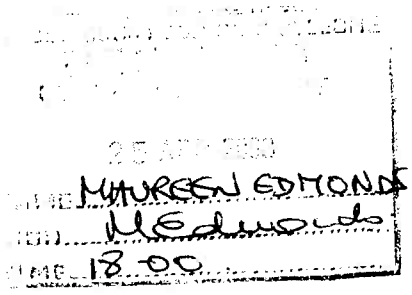
SPECIAL COURT FOR SIERRA LEONE

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

Adopted on 16 January 2008
Amended 25 April 2008



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PREAMBLE

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

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

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

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

Article 1 - General Principles

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

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

Article 2 - Forms

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

Article 3 - Opening and Numbering of Case Files

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

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

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

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

(i) SCSL = Special Court for Sierra Leone;

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

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

(iv)

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

(v) 001 = Number of the document

Article 4 - Format of Documents

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

(i) the case number

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

(iii) the date of filing

(iv) the title of the document;

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

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

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

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

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

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

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

Article 5 - Contents of Documents

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

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

Article 6 - Length of Documents

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

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

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

(ii) For merits of interlocutory appeals:
(a) the brief of an Appellant in an interlocutory appeal shall not exceed 30 pages or 9,000 words, whichever is greater; and
(b) the response brief of a Respondent in an interlocutory appeal shall not exceed 30 pages or 9,000 words, whichever is greater; and
(c) the reply brief of an Appellant in an interlocutory appeal shall not exceed 10 pages or 3,000 words, whichever is greater.

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

(i) The brief of an Appellant against a judgment or a sentence shall not exceed 100 pages or 30,000 words, whichever is greater. Where the Prosecutor, as Appellant, files a consolidated brief against additional Respondents, a further 35 pages or 10,000 words, whichever is greater, may be filed in respect of each additional Respondent;
(ii) The response brief of a Respondent on an appeal against a judgment or a sentence shall not exceed 100 pages or 30,000 words, whichever is greater. Paragraph (D) (I) applies mutatis mutandis to any response brief filed by the Prosecutor; and
(iii) The reply brief of an Appellant on an appeal against a judgment or a sentence shall not exceed 30 pages or 9,000 words, whichever is greater. Where the Prosecutor, as appellant, files a consolidated reply brief against additional Respondents, a further 10 pages or 3,000 words, whichever is greater, may be filed in respect of each additional Respondent.

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

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

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

Article 7 – Filing of Authorities

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

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

(i) Documents of the Special Court:

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

(b) the Statute of the Special Court;

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

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

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

(f) the Practice Directions of the Special Court;

(ii) Sierra Leonean Legislation:

(a) the Constitution of Sierra Leone, 1991;

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

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

(d) the Malicious Damage Act, 1861; and

(e) the Criminal Procedure Act, 1965;

(iii) international conventions and treaties; and

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

(a) the International Criminal Tribunal for Rwanda;

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

(c) The International Criminal Court.

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

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

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

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

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

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

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

Article 8 – Translation of Documents

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

Article 9 –Filing Documents

Method of Filing Documents

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

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

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

Article 9 *bis*, After-Hours Filing:

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

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

Article 9 Ter, Microsoft Word Filing

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

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

Article 10 – Urgent Measures

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

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

Article 11 – Deficient Submissions

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

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

Article 12 – Late Filing

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

Article 13 – Service of Documents

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

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

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

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

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

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

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

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

Article 14 - Transcripts

Production of Transcripts

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

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

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

Mode of Service of the Transcript

Electronic Service

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

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

Hard Copy Service

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

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

Redactions

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

An example of the Redaction Template is contained in Appendix II

Court Reporters

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

Article 15 - Exhibits

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

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

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

Article 16 – Judicial Archives:

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

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

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

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

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

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

Article 17 – Entry into Force

This Practice Direction as amended on 25 April 2008

Herman Von-Hebel
Registrar
25/04/08

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United Nations S/2000/915

Security Council

Distr.: General
4 October 2000

Original: English

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

I. Introduction

1. The Security Council, by its resolution 1315 (2000) of 14 August 2000, requested me to negotiate an agreement with the Government of Sierra Leone to create an independent special court (hereinafter "the Special Court") to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.

2. The Security Council further requested that I submit a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Sierra Leone concerning the establishment of the Special Court. In the report I was requested, in particular, to address the questions of the temporal jurisdiction of the Court; an appeals process, including the advisability, feasibility and appropriateness of an appeals chamber in the Special Court, or of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda; and a possible alternative host State, should it be necessary to convene the Special Court outside the seat of the Court in Sierra Leone, if circumstances so require.

3. Specific recommendations were also requested by the Security Council on the following issues:

(a) Any additional agreements that might be required for the provision of the international assistance necessary for the establishment and functioning of the Special Court;

(b) The level of participation, support and technical assistance of qualified persons required from Member States, including, in particular, States members of the Economic Community of West African States (ECOWAS) and the Commonwealth, and from the United Nations Mission in Sierra Leone (UNAMSIL) that would be necessary for the efficient, independent and impartial functioning of the Special Court;

(c) The amount of voluntary contributions of funds, equipment and services, including expert personnel from States, intergovernmental organizations and non-governmental organizations;

(d) Whether the Special Court could receive, as necessary and feasible, expertise and advice from the International Tribunals for the Former Yugoslavia and for Rwanda.

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and specificity of the Special Court, its jurisdiction (subject-matter, temporal and personal), the organizational structure (the Chambers and the nature of the appeals process, the offices of the Prosecutor and the Registry), enforcement of sentences in third States and the choice of the alternative seat. The second part (chaps. VII and VIII) deals with the practical implementation of the resolution on the establishment of the Special Court. It describes the requirements of the Court in terms of personnel, equipment, services and funds that would be required of States, intergovernmental and non-governmental organizations, the type of advice and expertise that may be expected from the two International Tribunals, and the logistical support and

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security requirements for premises and personnel that could, under an appropriate mandate, be provided by UNAMSIL. The Court's requirements in all of these respects have been placed within the specific context of Sierra Leone, and represent the minimum necessary, in the words of resolution 1315 (2000), "for the efficient, independent and impartial functioning of the Special Court". An assessment of the viability and sustainability of the financial mechanism envisaged, together with an alternative solution for the consideration of the Security Council, concludes the second part of the report.

5. The negotiations with the Government of Sierra Leone, represented by the Attorney General and the Minister of Justice, were conducted in two stages. The first stage of the negotiations, held at United Nations Headquarters from 12 to 14 September 2000, focused on the legal framework and constitutive instruments establishing the Special Court: the Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court which is an integral part thereof. (For the texts of the Agreement and the Statute, see the annex to the present report.)

6. Following the Attorney General's visit to Headquarters, a small United Nations team led by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, visited Freetown from 18 to 20 September 2000. Mr. Zacklin was accompanied by Daphna Shraga, Senior Legal Officer, Office of the Legal Counsel, Office of Legal Affairs; Gerald Ganz, Security Coordination Officer, Office of the United Nations Security Coordinator; and Robert Kirkwood, Chief, Buildings Management, International Tribunal for the Former Yugoslavia. During its three-day visit, the team concluded the negotiations on the remaining legal issues, assessed the adequacy of possible premises for the seat of the Special Court, their operational state and security conditions, and had substantive discussions on all aspects of the Special Court with the President of Sierra Leone, senior government officials, members of the judiciary and the legal profession, the Ombudsman, members of civil society, national and international non-governmental organizations and institutions involved in child-care programmes and rehabilitation of child ex-combatants, as well as with senior officials of UNAMSIL.

7. In its many meetings with Sierra Leoneans of all segments of society, the team was made aware of the high level of expectations created in anticipation of the establishment of a special court. If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities. The purpose of such a campaign would be both to inform and to reassure the population that while a credible Special Court cannot be established overnight, everything possible will be done to expedite its functioning; that while the number of persons prosecuted before the Special Court will be limited, it would not be selective or otherwise discriminatory; and that although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims. For a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an "acquittal" of the accused, but an imposition of a more humane punishment. In this public information campaign, UNAMSIL, alongside the Government and non-governmental organizations, could play an important role.

8. Since the present report is limited to an analysis of the legal framework and the practical operation of the Special Court, it does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone, or between the Court and the National Truth and Reconciliation Commission. It is envisaged, however, that upon the establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.

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II. Nature and specificity of the Special Court

9. The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges,[1] prosecutors and administrative support staff.[2] As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., to be applied as the need arose.[3]

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defer to its jurisdiction (article 8, para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

11. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible. The moral dilemma that some of these choices represent has not been lost upon those who negotiated its constitutive instruments.

III. Competence of the Special Court

A. Subject-matter jurisdiction

12. The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

1. Crimes under international law

13. In its resolution 1315 (2000), the Security Council recommended that the subject-matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law. Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.

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14. The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter. Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused. Under the Statute of the International Criminal Court (ICC), though it is not yet in force, they are recognized as war crimes.

15. Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

(a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities;

(b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; and

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

16. The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established. Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection. The specification of the crime of attacks against peacekeepers, however, does not imply a more serious crime than attacks against civilians in similar circumstances and should not entail, therefore, a heavier penalty.

17. The prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 Additional Protocol II to the Geneva Conventions, article 4, paragraph 3 (c), of which provides that children shall be provided with the care and aid they require, and that in particular:

> "Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

A decade later, the prohibition on the recruitment of children below 15 into armed forces was established in article 38, paragraph 3, of the 1989 Convention on the Rights of the Child; and in 1998, the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.

18. Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or "voluntary", the crime which is included in article 4 (c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense — administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a "child-combatant".

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2. Crimes under Sierra Leonean law

19. The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.

20. The applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime. In that connection, article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable mutatis mutandis to proceedings before the Special Court, and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.

B. Temporal jurisdiction of the Special Court

21. In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.

1. The amnesty clause in the Lomé Peace Agreement

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict,[4] the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

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

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.

2. Beginning date of the temporal jurisdiction

25. It is generally accepted that the decade-long civil war in Sierra Leone dates back to 1991, when on 23 March of that year forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party military rule of the All People's Congress (APC). In determining a beginning date of the temporal jurisdiction of the Special Court within the period since

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23 March 1991, the Secretary-General has been guided by the following considerations: (a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded; (b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and (c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. A temporal jurisdiction limited in any of these respects would rightly be perceived as a selective or discriminatory justice.

26. Imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court. The following alternative dates were therefore considered as realistic options:

(a) *30 November 1996* — the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the Government of Sierra Leone and RUF. Soon after its signature the Peace Agreement had collapsed and large-scale hostilities had resumed;

(b) *25 May 1997* — the date of the coup d'état orchestrated by the Armed Forces Revolutionary Council (AFRC) against the Government that was democratically elected in early 1996. The period which ensued was characterized by serious violations of international humanitarian law, including, in particular, mass rape and abduction of women, forced recruitment of children and summary executions;

(c) *6 January 1999* — the date on which RUF/AFRC launched a military operation to take control of Freetown. The first three-week period of full control by these entities over Freetown marked the most intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population. During its retreat in February 1999, RUF abducted hundreds of young people, particularly young women used as forced labourers, fighting forces, human shields and sexual slaves.

27. In considering the three options for the beginning date of the temporal jurisdiction of the Court, the parties have concluded that the choice of 30 November 1996 would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction. The choice of 25 May 1997 would have all these advantages, with the disadvantage of having a political connotation, implying, wrongly, that the prosecution of those responsible for the most serious violations of international humanitarian law is aimed at punishment for their participation in the coup d'état. The last option marks in many ways the peak of the campaign of systematic and widespread crimes against the civilian population, as experienced mostly by the inhabitants of Freetown. If the temporal jurisdiction of the Court were to be limited to that period only, it would exclude all crimes committed before that period in the rural areas and the countryside. In view of the perceived advantages of the first option and the disadvantages associated with the other options, the date of 30 November 1996 was selected as the beginning date of the temporal jurisdiction of the Special Court, a decision in which the government negotiators have actively concurred.

28. As the armed conflict in various parts of the territory of Sierra Leone is still ongoing, it was decided that the temporal jurisdiction of the Special Court should be left open-ended. The lifespan of the Special Court, however, as distinguished from its temporal jurisdiction, will be determined by a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. In setting an end to the operation of the Court, the Agreement would also determine all matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Special Court.

C. Personal jurisdiction

1. Persons "most responsible"

29. In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", which is understood as an indication of a limitation on the number of accused by reference to

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their command authority and the gravity and scale of the crime. I propose, however, that the more general term "persons most responsible" should be used.

30. While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

31. Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.

2. Individual criminal responsibility at 15 years of age

32. The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.

33. The solution to this terrible dilemma with respect to the Special Court[5] could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

34. The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team: the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes.

35. The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved. While the extent to which this view represents the majority view of the people of Sierra Leone is debatable, it nevertheless underscores the importance of the child rehabilitation programme and the need to ensure that in the prosecution of children presumed responsible, the rehabilitation process of scores of other children is not endangered.

36. Given these highly diverging opinions, it is not easy to strike a balance between the interests at stake. I am mindful of the Security Council's recommendation that only those who bear "the greatest responsibility" should be prosecuted. However, in view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court. I therefore thought that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on

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prosecution of persons below the age of 18 — "children" within the definition of the Convention on the Rights of the Child — before an international jurisdiction could be formulated.[6] Therefore, in order to meet the concerns expressed by, in particular, those responsible for child care and rehabilitation programmes, article 15, paragraph 5, of the Statute contains the following provision:

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

37. Furthermore, the Statute of the Special Court, in article 7 and throughout the text, contains internationally recognized standards of juvenile justice and guarantees that juvenile offenders are treated in dignity and with a sense of worth. Accordingly, the overall composition of the judges should reflect their experiences in a variety of fields, including in juvenile justice (article 13, para. 1); the Office of the Prosecutor should be staffed with persons experienced in gender-related crimes and juvenile justice (article 15, para. 4). In a trial of a juvenile offender, the Special Court should, to the extent possible, order the immediate release of the accused, constitute a "Juvenile Chamber", order the separation of the trial of a juvenile from that of an adult, and provide all legal and other assistance and order protective measures to ensure the privacy of the juvenile. The penalty of imprisonment is excluded in the case of a juvenile offender, and a number of alternative options of correctional or educational nature are provided for instead.

38. Consequently, if the Council, also weighing in the moral-educational message to the present and next generation of children in Sierra Leone, comes to the conclusion that persons under the age of 18 should be eligible for prosecution, the statutory provisions elaborated will strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice. It should also be stressed that, ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case.

IV. Organizational structure of the Special Court

39. Organizationally, the Special Court has been conceived as a self-contained entity, consisting of three organs: the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor's Office and the Registry. In the establishment of ad hoc international tribunals or special courts operating as separate institutions, independently of the relevant national legal system, it has proved to be necessary to comprise within one and the same entity all three organs. Like the two International Tribunals, the Special Court for Sierra Leone is established outside the national court system, and the inclusion of the Appeals Chamber within the same Court was thus the obvious choice.

A. The Chambers

40. In its resolution 1315 (2000), the Security Council requested that the question of the advisability, feasibility and appropriateness of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda should be addressed. In analysing this option from the legal and practical viewpoints, I have concluded that the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound and practically not feasible, without incurring unacceptably high administrative and financial costs.

41. While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of a formal institutional link. Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable mutatis mutandis to the proceedings before the Special Court.

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42. The sharing of one Appeals chamber between all three jurisdictions would strain the capacity of the already heavily burdened Appeals Chamber of the two Tribunals in ways which could either bring about the collapse of the appeals system as a whole, or delay beyond acceptable human rights standards the detention of accused pending the hearing of appeals from either or all jurisdictions. On the assumption that all judgements and sentencing decisions of the Trial Chambers of the Special Court will be appealed, as they have been in the cases of the two International Tribunals, and that the number of accused will be roughly the same as in each of the International Tribunals, the Appeals Chamber would be required to add to its current workload a gradual increase of approximately one third.

43. Faced with an exponential growth in the number of appeals lodged on judgements and interlocutory appeals in relation to an increasing number of accused and decisions rendered, the existing workload of the Appeals Chamber sitting in appeals from six Trial Chambers of the two ad hoc Tribunals is constantly growing. Based on current and anticipated growth in workload, existing trends[7] and the projected pace of three to six appeals on judgements every year, the Appeals Chamber has requested additional resources in funds and personnel. With the addition of two Trial Chambers of the Special Court, making a total of eight Trial Chambers for one Appeals Chamber, the burden on the Yugoslav and Rwanda Appeals Chamber would be untenable, and the Special Court would be deprived of an effective and viable appeals process.

44. The financial costs which would be entailed for the Appeals Chamber when sitting on appeals from the Special Court will have to be borne by the regular budget, regardless of the financial mechanism established for the Special Court itself. These financial costs would include also costs of translation into French, which is one of the working languages of the Appeals Chamber of the International Tribunals; the working language of the Special Court will be English.

45. In his letter to the Legal Counsel in response to the request for comments on the eventuality of sharing the Appeals Chamber of the two international Tribunals with the Special Court, the President of the International Tribunal for the Former Yugoslavia wrote:

> "With regard to paragraph 7 of Security Council resolution 1315 (2000), while the sharing of the Appeals Chamber of [the two International Tribunals] with that of the Special Court would bear the significant advantage of ensuring a better standardization of international humanitarian law, it appeared that the disadvantages of this option — excessive increase of the Appeals Chambers' workload, problems arising from the mixing of sources of law, problems caused by the increase in travelling by the judges of the Appeals Chambers and difficulties caused by mixing the different judges of the three tribunals — outweigh its benefits."[8]

46. For these reasons, the parties came to the conclusion that the Special Court should have two Trial Chambers, each with three judges, and an Appeals Chamber with five judges. Article 12, paragraph 4, provides for extra judges to sit on the bench in cases where protracted proceedings can be foreseen and it is necessary to make certain that the proceedings do not have to be discontinued in case one of the ordinary judges is unable to continue hearing the case.

B. The Prosecutor

47. An international prosecutor will be appointed by the Secretary-General to lead the investigations and prosecutions, with a Sierra Leonean Deputy. The appointment of an international prosecutor will guarantee that the Prosecutor is, and is seen to be, independent, objective and impartial.

C. The Registrar

48. The Registrar will service the Chambers and the Office of the Prosecutor and will have the responsibility for the financial management and external relations of the Court. The Registrar will be appointed by the Secretary-General as a staff member of the United Nations.

V. Enforcement of sentences

49. The possibility of serving prison sentences in third States is provided for in article 22 of the Statute. While imprisonment shall normally be served in Sierra Leone, particular circumstances, such as the security

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risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third State.

50. Enforcement of sentences in third countries will be based on an agreement between the Special Court[9] and the State of enforcement. In seeking indications of the willingness of States to accept convicted persons, priority should be given to those which have already concluded similar agreements with either of the International Tribunals, as an indication that their prison facilities meet the minimum standards of conditions of detention. Although an agreement for the enforcement of sentences will be concluded between the Court and the State of enforcement, the wishes of the Government of Sierra Leone should be respected. In that connection, preference was expressed for such locations to be identified in an East African State.

VI. An alternative host country

51. In paragraph 7 of resolution 1315 (2000), the Security Council requested that the question of a possible alternative host State be addressed, should it be necessary to convene the Special Court outside its seat in Sierra Leone, if circumstances so required. As the efforts of the United Nations Secretariat, the Government of Sierra Leone and other interested Member States are currently focused on the establishment of the Special Court in Sierra Leone, it is proposed that the question of the alternative seat should be addressed in phases. An important element in proceeding with this issue is also the way in which the Security Council addresses the present report, that is, if a Chapter VII element is included.

52. In the first phase, criteria for the choice of the alternative seat should be determined and a range of potential host countries identified. An agreement, in principle, should be sought both from the Government of Sierra Leone for the transfer of the Special Court to the State of the alternative seat, and from the authorities of the latter, for the relocation of the seat to its territory.

53. In the second phase, a technical assessment team would be sent to identify adequate premises in the third State or States. Once identified, the three parties, namely, the United Nations, the Government of Sierra Leone and the Government of the alternative seat, would conclude a Framework Agreement, or "an agreement to agree" for the transfer of the seat when circumstances so required. The Agreement would stipulate the nature of the circumstances which would require the transfer of the seat and an undertaking to conclude in such an eventuality a Headquarters Agreement. Such a principled Agreement would facilitate the transfer of the seat on an emergency basis and enable the conclusion of a Headquarters Agreement soon thereafter.

54. In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused. Such proximity and easy access will greatly facilitate the work of the Prosecutor, who will continue to conduct his investigations in the territory of Sierra Leone.[10] During the negotiations, the Government expressed a preference for a West African alternative seat, in an English-speaking country sharing a common-law legal system.

VII. Practical arrangements for the operation of the Special Court

55. The Agreement and the Statute of the Special Court establish the legal and institutional framework of the Court and the mutual obligations of the parties with regard, in particular, to appointments to the Chambers, the Office of the Prosecutor and the Registry and, the provision of premises. However, the practical arrangements for the establishment and operation of the Special Court remain outside the scope of the Agreement in the sense that they depend on contributions of personnel, equipment, services and funds from Member States and intergovernmental and non-governmental organizations. It is somewhat anomalous, therefore, that the parties which establish the Special Court, in practice, are dependent for the implementation of their treaty obligations on States and international organizations which are not parties to the Agreement or otherwise bound by its provisions.

56. Proceeding from the premise that voluntary contributions would constitute the financial mechanism of the Special Court, the Security Council requested the Secretary-General to include in the report recommendations regarding the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, contributions in

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personnel, the kind of advice and expertise expected of the two ad hoc Tribunals, and the type of support and technical assistance to be provided by UNAMSIL. In considering the estimated requirements of the Special Court in all of these respects, it must be borne in mind that at the current stage, the Government of Sierra Leone is unable to contribute in any significant way to the operational costs of the Special Court, other than in the provision of premises, which would require substantial refurbishment, and the appointment of personnel, some of whom may not even be Sierra Leonean nationals. The requirements set out below should therefore be understood for all practical purposes as requirements that have to be met through contributions from sources other than the Government of Sierra Leone.

A. Estimated requirements of the Special Court for the first operational phase

1. Personnel and equipment

57. The personnel requirements of the Special Court for the initial operational phase[11] are estimated to include:

(a) Eight Trial Chamber judges (3 sitting judges and 1 alternate judge in each Chamber) and 6 Appeals Chamber judges (5 sitting judges and 1 alternate judge), 1 law clerk, 2 support staff for each Chamber and 1 security guard detailed to each judge (14);

(b) A Prosecutor and a Deputy Prosecutor, 20 investigators, 20 prosecutors and 26 support staff;

(c) A Registrar, a Deputy Registrar, 27 administrative support staff and 40 security officers;

(d) Four staff in the Victims and Witnesses Unit;

(e) One correction officer and 12 security officers in the detention facilities.

58. Based on the United Nations scale of salaries for a one-year period, the personnel requirements along with the corresponding equipment and vehicles are estimated on a very preliminary basis to be US$ 22 million. The calculation of the personnel requirements is premised on the assumption that all persons appointed (whether by the United Nations or the Government of Sierra Leone) will be paid from United Nations sources.

59. In seeking qualified personnel from States Members of the United Nations, the importance of obtaining such personnel from members of the Commonwealth, sharing the same language and common-law legal system, has been recognized. The Office of Legal Affairs has therefore approached the Commonwealth Secretariat with a request to identify possible candidates for the positions of judges, prosecutors, Registrar, investigators and administrative support staff. How many of the Commonwealth countries would be in a position to voluntarily contribute such personnel with their salaries and emoluments is an open question. A request similar to that which has been made to the Commonwealth will also be made to the Economic Community of West African States (ECOWAS).

2. Premises

60. The second most significant component of the requirements of the Court for the first operational phase is the cost of premises. During its visit to Freetown, the United Nations team visited a number of facilities and buildings which the Government believes may accommodate the Special Court and its detention facilities: the High Court of Sierra Leone, the Miatta Conference Centre and an adjacent hotel, the Presidential Lodge, the Central Prison (Pademba Road Prison), and the New England Prison. In evaluating their state of operation, the team concluded that none of the facilities offered were suitable or could be made operational without substantial investment. The use of the existing High Court would incur the least expenditure (estimated at $1.5 million); but would considerably disrupt the ordinary schedule of the Court and eventually bring it to a halt. Since it is located in central Freetown, the use of the High Court would pose, in addition, serious security risks. The use of the Conference Centre, the most secure site visited, would require large-scale renovation, estimated at $5.8 million. The Presidential Lodge was ruled out on security grounds.

61. In the light of the above, the team has considered the option of constructing a prefabricated, self-contained compound on government land. This option would have the advantage of an easy expansion paced with the growth of the Special Court, a salvage value at the completion of the activities of the Court, the prospect of a donation in kind and construction at no

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rental costs. The estimated cost of this option is $2.9 million.

62. The two detention facilities visited by the team were found to be inadequate in their current state. The Central Prison (Pademba Road Prison) was ruled out for lack of space and security reasons. The New England Prison would be a possible option at an estimated renovation cost of $600,000.

63. The estimated cost requirements of personnel and premises set out in the present report cover the two most significant components of its prospective budget for the first operational stage. Not included in the present report are the general operational costs of the Special Court and of the detention facilities; costs of prosecutorial and investigative activities; conference services, including the employment of court translators from and into English, Krio and other tribal languages; and defence counsel, to name but a few.

B. Expertise and advice from the two International Tribunals

64. The kind of advice and expertise which the two International Tribunals may be expected to share with the Special Court for Sierra Leone could take the form of any or all of the following: consultations among judges of both jurisdictions on matters of mutual interest; training of prosecutors, investigators and administrative support staff of the Special Court in The Hague, Kigali and Arusha, and training of such personnel on the spot by a team of prosecutors, investigators and administrators from both Tribunals; advice on the requirements for a Court library and assistance in its establishment, and sharing of information, documents, judgements and other relevant legal material on a continuous basis.

65. Both International Tribunals have expressed willingness to share their experience in all of these respects with the Special Court. They have accordingly offered to convene regular meetings with the judges of the Special Court to assist in adopting and formulating Rules of Procedure based on experience acquired in the practice of both Tribunals; to train personnel of the Special Court in The Hague and Arusha to enable them to acquire practical knowledge of the operation of an international tribunal; and when necessary, to temporarily deploy experienced staff, including a librarian, to the Special Court. In addition, the International Tribunal for the Former Yugoslavia has offered to provide to the Special Court legal material in the form of CD-ROMs containing motions, decisions, judgements, court orders and the like. The transmission of such material to the Special Court in the period pending the establishment of a full-fledged library would be of great assistance.

C. Support and technical assistance from UNAMSIL

66. The support and technical assistance of UNAMSIL in providing security, logistics, administrative support and temporary accommodation would be necessary in the first operational phase of the Special Court. In the precarious security situation now prevailing in Sierra Leone and given the state of the national security forces, UNAMSIL represents the only credible force capable of providing adequate security to the personnel and the premises of the Special Court. The specificities of the security measures required would have to be elaborated by the United Nations, the Government of Sierra Leone and UNAMSIL, it being understood, however, that any such additional tasks entrusted to UNAMSIL would have to be approved by the Security Council and reflected in a revised mandate with a commensurate increase in financial, staff and other resources.

67. UNAMSIL's administrative support could be provided in the areas of finance, personnel and procurement. Utilizing the existing administrative support in UNAMSIL, including, when feasible, shared facilities and communication systems, would greatly facilitate the start-up phase of the Special Court and reduce the overall resource requirements. In that connection, limited space at the headquarters of UNAMSIL could be made available for the temporary accommodation of the Office of the Prosecutor, pending the establishment or refurbishment of a site for the duration of the Special Court.

VIII. Financial mechanism of the Special Court

68. In paragraph 8 (c) of resolution 1315 (2000), the Security Council requested the Secretary-General to include recommendations on "the amount of voluntary contributions, as appropriate, of funds, equipment and

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services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations". It would thus seem that the intention of the Council is that a Special Court for Sierra Leone would be financed from voluntary contributions. Implicit in the Security Council resolution, therefore, given the paucity of resources available to the Government of Sierra Leone, was the intention that most if not all operational costs of the Special Court would be borne by States Members of the Organization in the form of voluntary contributions.

69. The experience gained in the operation of the two ad hoc International Tribunals provides an indication of the scope, costs and long-term duration of the judicial activities of an international jurisdiction of this kind. While the Special Court differs from the two Tribunals in its nature and legal status, the similarity in the kind of crimes committed, the temporal, territorial and personal scope of jurisdiction, the number of accused, the organizational structure of the Court and the Rules of Procedure and Evidence suggest a similar scope and duration of operation and a similar need for a viable and sustainable financial mechanism.

70. A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. In entering into contractual commitments which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable.

71. In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding. It is understood, however, that the financing of the Special Court through assessed contributions of the Member States would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules.

72. The Security Council may wish to consider an alternative solution, based on the concept of a "national jurisdiction" with international assistance, which would rely on the existing — however inadequate — Sierra Leonean court system, both in terms of premises (for the Court and the detention facilities) and administrative support. The judges, prosecutors, investigators and administrative support staff would be contributed by interested States. The legal basis for the special "national" court would be a national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra Leonean common-law system). Since the mandate of the Secretary-General is to recommend measures consistent with resolution 1315 (2000), the present report does not elaborate further on this alternative other than to merely note its existence.

IX. Conclusion

73. At the request of the Security Council, the present report sets out the legal framework and practical arrangements for the establishment of a Special Court for Sierra Leone. It describes the requirements of the Special Court in terms of funds, personnel and services and underscores the acute need for a viable financial mechanism to sustain it for the duration of its lifespan. It concludes that assessed contributions is the only viable and sustainable financial mechanism of the Special Court.

74. As the Security Council itself has recognized, in the past circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.

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Notes

[1] At the request of the Government, reference in the Statute and the Agreement to "Sierra Leonean judges" was replaced by "judges appointed by the Government of Sierra Leone". This would allow the Government flexibility of choice between Sierra Leonean and non-Sierra Leonean nationals and broaden the range of potential candidates from within and outside Sierra Leone.

[2] In the case of the Tribunals for the Former Yugoslavia and for Rwanda, the non-inclusion in any position of nationals of the country most directly affected was considered a condition for the impartiality, objectivity and neutrality of the Tribunal.

[3] This method may not be advisable, since the Court would be manned by a substantial number of staff and financed through voluntary contributions in the amount of millions of dollars every year.

[4] Article 6, paragraph 5, of the 1977 Protocol II Additional to the Geneva Conventions and Relating to the Protection of Non-international Armed Conflicts provides that:

> "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[5] The jurisdiction of the national courts of Sierra Leone is not limited by the Statute, except in cases where they have to defer to the Special Court.

[6] While there is no international law standard for the minimum age for criminal responsibility, the ICC Statute excludes from the jurisdiction of the Court persons under the age of 18. In so doing, however, it was not the intention of its drafters to establish, in general, a minimum age for individual criminal responsibility. Premised on the notion of complementarity between national courts and ICC, it was intended that persons under 18 presumed responsible for the crimes for which the ICC had jurisdiction would be brought before their national courts, if the national law in question provides for such jurisdiction over minors.

[7] The Appeals Chamber of the International Tribunal for the Former Yugoslavia has so far disposed of a total of 5 appeals from judgements and 44 interlocutory appeals; and the Appeals Chamber of the Rwanda Tribunal of only 1 judgement on the merits with 28 interlocutory appeals.

[8] Letter addressed to Mr. Hans Corell, Under-Secretary-General, The Legal Counsel, from Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, dated 29 August 2000.

[9] Article 10 of the Agreement between the United Nations and the Government endows the Special Court with a treaty-making power "to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court".

[10] Criteria for the choice of the seat of the Rwanda Tribunal were drawn up by the Security Council in its resolution 955 (1994). The Security Council decided that the seat of the International Tribunal shall be determined by the Council "having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy".

[11] It is important to stress that this estimate should be regarded as an illustration of a possible scenario. Not until the Registrar and the Prosecutor are in place will it be possible to make detailed and precise estimates.

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Annex

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

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

Now therefore the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of two Trial Chambers and an Appeals Chamber.

2. The Chambers shall be composed of eleven independent judges who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by

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the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a four-year term and shall be eligible for reappointment.

5. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a four-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecution of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a four-year term and shall be eligible for reappointment.

Article 5
Premises

The Government shall provide the premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

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Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 8
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 9
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

[a] The formulation of this article is dependent on a decision on the financial mechanism of the Special Court.

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Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 11
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 12
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

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(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 13
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

Article 14
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions.

Article 15
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

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Article 16
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

The official working language of the Special Court shall be English.

Article 18
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

Article 19
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 20
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal instruments for entry into force have been complied with.

DONE at [place] on [day, month] 2000 in two copies in the English language.

For the United Nations

For the Government of Sierra Leone

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Enclosure

Statute of the Special Court for Sierra Leone

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

Article 1
Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2
Crimes against humanity

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

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

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

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

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

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(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

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

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

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

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

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

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

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

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

(i) Setting fire to dwelling-houses, any person being therein to section 2;

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

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

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Article 6
Individual criminal responsibility

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

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

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

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

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

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.

2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.

3. In a trial of a juvenile offender, the Special Court shall:

(a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;

(b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

(f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

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

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

Article 9
Non bis in idem

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

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

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

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

Article 10
Amnesty

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

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of eleven independent judges, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General");

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

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

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

4. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General, to be present at each stage of the trial, and to replace a judge, if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

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

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

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

Article 14
Rules of Procedure and Evidence

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

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not

adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

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

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

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

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

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

Article 16
The Registry

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

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

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

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance

for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

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

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

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

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

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

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

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

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

Article 19
Penalties

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

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

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

Article 20
Appellate proceedings

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

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

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

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

Article 21
Review proceedings

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

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

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

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

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

Article 23
Pardon or commutation of sentences

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

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual report

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

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Treaty Series No. 21 (2007)

Agreement

between the Government of the United Kingdom of Great Britain and Northern Ireland and the Special Court for Sierra Leone on the Enforcement of Sentences of the Special Court for Sierra Leone

London, 10 July 2007

[The Agreement entered into force on 9 August 2007]

Presented to Parliament
by the Secretary of State for Foreign and Commonwealth Affairs
by Command of Her Majesty
September 2007

Cm 7208

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AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE SPECIAL COURT FOR SIERRA LEONE ON THE ENFORCEMENT OF SENTENCES OF THE SPECIAL COURT FOR SIERRA LEONE

The Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the United Kingdom"), and the Special Court for Sierra Leone (hereinafter referred to as "the Special Court"):

Having regard to Article 22 of the Statue of the Special Court annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed at Freetown on 16 January 2002;

Noting the willingness of the United Kingdom to enforce sentences imposed by the Special Court;

Have agreed as follows:

ARTICLE 1

Purpose and Scope of the Agreement

This Agreement shall regulate matters relating to or arising out of all requests to the United Kingdom to enforce sentences imposed by the Special Court.

ARTICLE 2

Procedure

1. A request to the United Kingdom to enforce a sentence shall be made by the Registrar of the Special Court (hereinafter "the Registrar"), with the approval of the President of the Special Court (hereinafter "the President").

2. The Registrar shall submit the request to the United Kingdom Foreign and Commonwealth Office, through the High Commission in Freetown.

3. The Registrar shall provide the following documents to United Kingdom Foreign and Commonwealth Office when making request:

a) a certified copy of the judgement;

b) details of the offences to which the sentence of imprisonment relates:

c) a statement indicating how much of the sentence has already been served, including information on any pre-trial detention, any other measure altering the length or conditions of the sentence and any other factors relevant to the enforcement of the sentence;

d) when appropriate, any medical or psychological reports on the sentenced person, any recommendation for his further treatment in the United Kingdom and any other report relevant to the enforcement of the sentence; and

e) The name, date and place of birth of the sentenced person together with any known family or other ties with United Kingdom or any other reason for making the request.

4. The competent national authorities of the United Kingdom shall decide upon any such request of the Registrar, in accordance with its national law, and the United Kingdom shall promptly inform the Special Court whether or not it agrees to the request.

ARTICLE 3

Enforcement

1. In enforcing the sentence pronounced by the Special Court, the competent national authorities of the United Kingdom shall be bound by the duration of the sentence.

2. The conditions of imprisonment shall be governed by the law of the United Kingdom, subject to the supervision of the Special Court, as provided for in Articles 6 to 9 of this Agreement.

3. The conditions of imprisonment shall be equivalent to those applicable to prisoners serving sentences under the law of the United Kingdom and shall be in accordance with relevant human rights standards.

ARTICLE 4

Transfer of the Convicted Person

The Registrar shall make appropriate arrangements with the United Kingdom for the transfer of the convicted person from the Special Court to the competent authorities of the United Kingdom. Prior to his transfer, the convicted person will be informed by the Registrar of the contents of this Agreement. The transfer shall take place at a time and place agreed between the United Kingdom and the Registrar.

ARTICLE 5

Non-bis-in-idem (rule of speciality)

The convicted person shall not be tried before a court in the United Kingdom for acts which the Special Court has the power to prosecute under Articles 2, 3, 4 and 5 of the Statute of the Special Court, for which he has already been tried by the Special Court.

ARTICLE 6

Inspection

1. The competent authorities of the United Kingdom shall allow the inspection of the conditions of detention and treatment of the prisoners, detained under this Agreement, by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter "the CPT") at any time and on a periodic basis, the frequency of visits to be determined by the CPT. The CPT will submit a confidential report based on the findings of those inspections to the Foreign and Commonwealth Office and to the President of the Special Court. The confidential report shall not be released, by the President of the Special Court to any person or body, outside the Special Court, without the consent of the Government of the United Kingdom.

2. The United Kingdom and the President shall consult each other on the findings of the reports referred to in paragraph 1 of this Article. The President may thereafter request the United Kingdom to report to him or her any changes in the conditions of detention suggested by the CPT.

ARTICLE 7

Information

1. The United Kingdom shall immediately notify the Registrar:

   a) six months prior to the completion of the sentence;

   b) if the sentenced person has escaped from custody before the sentence has been completed;

   c) if the sentenced person has deceased; and

   d) six months prior to the point at which early release would be considered for an equivalent domestic sentence in the jurisdiction of the United Kingdom to which the sentenced person has been transferred.

2. Notwithstanding paragraph 1 of this Article, the Registrar and the United Kingdom shall consult each other on all matters relating to the enforcement of the sentence upon the request of either Party.

3. The Registrar shall, during the course of enforcement of any sentence under this Agreement, provide the United Kingdom with any report or other information requested by the United Kingdom, which is relevant to the enforcement of such a sentence and within the possession of the Registrar.

ARTICLE 8

Early release, pardon and communication of sentences

1. If, pursuant to the applicable national law of the United Kingdom, the sentenced person is eligible for early release, pardon or commutation of the sentence, the United Kingdom shall notify this to the Registrar, in advance of such eligibility, and shall include in any such notification all the circumstances pertaining to the eligibility for early release, pardon or commutation of the sentence.

2. The President of the Special Court shall determine, in consultation with the Judges of the Special Court, whether any early release, pardon or commutation of the sentence is appropriate. The Registrar shall inform the United Kingdom of the President's determination. If the President determines that an early release, pardon or commutation of the sentence is not appropriate, the United Kingdom shall act accordingly.

ARTICLE 9

Termination of enforcement

1. The enforcement of the sentence shall cease:

   a) when the sentence has been completed;

   b) upon the death of the sentenced person;

   c) upon the pardon or commutation of the sentenced person; or

   d) following a decision of the Special Court referred to in paragraph 2 of this Article.

2. The Special Court may at any decide to request the termination of the enforcement of the sentence in the United Kingdom and transfer the sentenced person to another State or to the Special Court.

3. The competent authorities of the United Kingdom shall terminate the enforcement of the sentence as soon as they are informed by the Registrar of any decision or measure as a result of which the sentence shall cease to be enforceable.

4. After the enforcement of the sentence has ceased in accordance with this Agreement, the United Kingdom may transfer or deport the convicted person as appropriate and in accordance with its international obligations.

ARTICLE 10

Impossibility of enforcement of sentence

If, at any time after the decision has been taken to enforce the sentence, for any legal or practical reasons, further enforcement has become impossible, the United Kingdom shall promptly inform the Registrar. The Registrar shall make the appropriate arrangements for the transfer of the sentenced person. The competent authorities of the United Kingdom shall allow at least sixty days following the notification of the Registrar before taking further action on the matter.

ARTICLE 11

Costs

The Special Court shall bear the expenses related to the transfer of the sentenced person to and from the United Kingdom, unless the Parties agree otherwise. The United Kingdom shall pay all other expenses incurred in the enforcements of the sentence.

ARTICLE 12

Entry into force

This Agreement shall enter into force 30 days after signature by the Special Court and the United Kingdom.

ARTICLE 13

Duration of the Agreement

1. This Agreement shall remain in force as long as sentences of the Special Court are being enforced by the United Kingdom under the terms and conditions provided in this Agreement.

2. Either Party may terminate this Agreement following consultations with the other Party and after the expiry of two months from the date on which written notice has been given by the terminating Party to the other Party. This Agreement shall not be terminated before any sentences to which this Agreement applies have been completed or terminated in accordance with this Agreement nor before any sentenced individual has been transferred or deported from the United Kingdom subsequent to the completion or termination of such a sentence.

In witness whereof, the undersigned, duly authorised thereto, have signed this Agreement.

Done at London this tenth day of July 2007, in duplicate, in the English Language.

For the Government of
United Kingdom of Great Britain
and Northern Ireland:

MARK MALLOCH-BROWN

For the Special Court for
Sierra Leone:

HERMAN VON HEBEL

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AGREEMENT BETWEEN THE SPECIAL COURT FOR SIERRA LEONE AND THE GOVERNMENT OF SWEDEN ON THE ENFORCEMENT OF SENTENCES OF THE SPECIAL COURT FOR SIERRA LEONE

The Special Court for Sierra Leone, established by the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone signed on 16 January 2002 (hereinafter "Special Court") and

The Government of Sweden (hereinafter "requested State"),

RECALLING Article 22 of the Statute of the Special Court annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, according to which imprisonment of persons sentenced by the Special Court shall be served in Sierra Leone; or if circumstances so require, in any State that has concluded with the International Criminal Tribunal For Rwanda or the International Criminal Tribunal for former Yugoslavia an agreement for the enforcement of sentences and which has indicated to the Special Court its willingness to accept convicted persons; or alternatively, in any State with which the Special Court has concluded similar agreements;

RECALLING United Nations Security Counsel Resolution 1470 (2003), adopted on 28 March 2003, which urges all the States to cooperate fully with the Special Court;

NOTING the willingness of the requested State to enforce sentences regarding violations of international humanitarian law imposed by the Special Court;

RECALLING the provisions of the Standard Minimum Rules for the Treatment of Prisoners approved by ECOSOC resolutions 663 C XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, and the Basic Principles for the Treatment of Prisoners adopted by General Assembly resolution 45 111 of 14 December 1990;

IN ORDER to give effect to the judgements and sentences of the Special Court;

HAVE AGREED as follows:

Article 1

Purpose and Scope of the Agreement

This Agreement shall regulate matters relating to or arising out of all requests to the requested State to enforce sentences imposed by the Special Court.

Article 2

Procedure

1. A request to the requested State to enforce a sentence shall be made by the Registrar of the Special Court (hereinafter "Registrar"), with the approval of the President of the Special Court.

2. The Registrar shall provide the following documents to the requested State when making the request:

a. a certified copy of the judgement;
b. a statement indicating how much of the sentence has already been served, including information on any pre-trial detention;
c. when appropriate, any medical or psychological reports on the convicted person, any recommendation for his or her further treatment in the requested State and any other factor relevant to the enforcement of the sentence; and
d. certified copies of identification papers of the convicted person in the possession of the Special Court.

3. The requested State shall promptly decide upon the request of the Registrar, in accordance with national law, and inform the Registrar in writing of its decision whether or not to accept the convicted person.

Article 3

Enforcement

1. In enforcing the sentence pronounced by the Special Court, the competent national authorities of the requested State shall be bound by the duration of the sentence.

2. The conditions of imprisonment shall be governed by the law of the requested State, subject to the supervision of the Special Court, as provided for in Articles 6 to 8 and paragraphs 2 and 3 of Article 9 below.

3. The conditions of imprisonment shall be compatible with the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners.

Article 4

Transfer of the convicted person

1. The Registrar shall make appropriate arrangements for the transfer of the convicted person from the Special Court to the competent authorities of the requested State. Prior to his or her transfer, the convicted person will be informed by the Registrar of the contents of this Agreement.

2. If, after the transfer of the convicted person to the requested State, the Special Court, in accordance with its Rules of Procedure and Evidence, orders that the convicted person appears as a witness in a proceeding before it, the convicted person shall, in accordance with the national law of the requested State, be transferred temporarily to the Special Court for that purpose, conditional on his or her return to the requested State within the period decided by the Special Court.

3. The Registrar shall transmit the order for the temporary transfer of the convicted person to the national authorities of the requested State. The Registrar shall ensure the proper transfer of the convicted person from the requested State to the Special Court and back to the requested State for the continued imprisonment after the expiration of the period of temporary transfer decided by the Special Court. The convicted person shall receive credit for the period he or she may have spent in the custody of the Special Court.

Article 5

Non-bis-in-idem

The convicted person shall not be tried before a court of the requested State for acts constituting a crime falling within the jurisdiction of the Special Court, for which he or she has already been tried by the Special Court.

Article 6

Inspection

1. The competent authorities of the requested State shall allow the inspection of the conditions of detention and the treatment of the prisoner(s) by the International Committee of the Red Cross (hereinafter "ICRC"). The frequency of visits shall be determined by the ICRC. The Special Court can furthermore request the ICRC to carry out such an inspection. The ICRC shall submit a confidential report based on the findings of these inspections to the requested States and to the President of the Special Court.

2. The requested State and the President of the Special Court shall consult each other on the findings of the reports referred to in the previous paragraph. The President of the Special Court may thereafter request the requested State to report to him or her any changes in the conditions of detention suggested by the ICRC.

Article 7

Information

1. The requested State shall immediately notify the Registrar of the following:

a. if the convicted person has completed his or her sentence, two months prior to such completion;
b. if the convicted person has escaped from custody;
c. if the convicted person has deceased; and

d. if the convicted person becomes eligible for early release, pardon or commutation of sentence, six months or as soon as practicable prior to such early release, pardon or commutation of sentence.

2. Notwithstanding the previous paragraph, the Registrar and the requested State shall consult each other on all matters relating to the enforcement of the sentence upon the request of either party.

Article 8

Early release, pardon and commutation of sentences

1. If, pursuant to the applicable national law of the requested State, the convicted person is eligible for early release, pardon or commutation of the sentence, the requested State shall notify this to the Registrar, in advance of such eligibility, and shall include in any such notification all the circumstances pertaining to the eligibility for early release, pardon or commutation of the sentence.

2. The Special Court will give its view as to whether early release, pardon or commutation of sentence is appropriate. The requested State will take these views into consideration and respond to the Special Court prior to taking any decision in the matter.

3. Following the receipt of the response, the Special Court may request the transfer of the convicted person in accordance with paragraph 2 of Article 9.

Article 9

Termination of enforcement

1. The enforcement of the sentence shall terminate:

a. when the convicted person has completed his or her sentence;
b. when the convicted person has died;
c. when the convicted has been released as a result of being granted early release, pardon or commutation of sentence; or
d. when the Special Court has issued a decision as referred to in paragraph 2.

2. The Special Court may at any time decide to request the termination of the enforcement in the requested State and transfer the convicted person to another State or to the Special Court.

3. The competent authorities of the requested State shall terminate the enforcement of the sentence as soon as it is informed by the Registrar of any decision or measure as a result of which the sentence ceases to be enforceable.

4. Upon the termination of the enforcement of a sentence, the Registrar shall in consultation with the requested State make the appropriate arrangements for the transfer of the convicted person from the requested State or in the case of death, the repatriation of the convicted person's body.

Article 10

Impossibility to enforce sentence

If, at any time after the decision has been taken to enforce the sentence, for any legal or practical reasons, further enforcement has become impossible, the requested State shall promptly inform the Registrar. The Registrar shall make the appropriate arrangements for the transfer of the convicted person. The competent authorities of the requested State shall allow for at least sixty days following the notification of the Registrar before taking other measures on the matter.

Article 11

Costs

1. Unless the parties agree otherwise, the Special Court shall bear the expenses related to the following:

a. the transfer of the convicted person to and from the requested State, including the temporary transfer to and from the Special Court for the purposes of appearing as a witness in a proceeding before the Special Court, and
b. the repatriation of the body of the convicted person, in case of his or her death.

2. The requested State shall pay all other expenses incurred by the enforcement of the sentence, including, but not limited to, medical treatment for the convicted person, if needed.

Article 12

Entry into force

This Agreement shall be signed by both Parties. It shall be subject to ratification by Sweden, and shall enter into force on the first day of the first month following the date of receipt by the Special Court of the notification from Sweden of its ratification.

Article 13

Duration of the Agreement

1. This Agreement shall remain in force as long as sentences of the Special Court are being enforced by the requested State under the terms and conditions of this Agreement.

2. Upon consultation, either party may terminate this Agreement, with two months' prior notice in writing. This Agreement shall not be terminated before the sentences to which this Agreement applies have been terminated and, if applicable, before the transfer of the convicted person as provided for in Article 10 has been effected.

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Article 14

Amendment

This Agreement may be amended by mutual consent of the parties.

IN WITNESS WHEREOF, the undersigned, duly authorized thereto, have signed this Agreement.

Done at Freetown this 15th day of October, 2004, in duplicate, in the English language.

FOR THE SPECIAL COURT FOR SIERRA LEONE

Robin Vincent
Registrar

FOR THE GOVERNMENT OF SWEDEN

Hans Dahlgren
State Secretary for Foreign Affairs

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AGREEMENT
BETWEEN
THE SPECIAL COURT FOR SIERRA LEONE
AND
THE GOVERNMENT OF FINLAND
ON THE ENFORCEMENT OF SENTENCES
OF THE SPECIAL COURT FOR SIERRA LEONE

THE SPECIAL COURT FOR SIERRA LEONE, established by the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone signed on 16 January 2002 (hereinafter "the Special Court") and

THE GOVERNMENT OF FINLAND (hereinafter "the Requested State"),

RECALLING Article 22 of the Statute of the Special Court annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, according to which imprisonment of persons sentenced by the Special Court shall be served in Sierra Leone; or if circumstances so require, in any State that has concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for former Yugoslavia an agreement for the enforcement of sentences and which has indicated to the Special Court its willingness to accept convicted persons; or alternatively, in any State with which the Special Court has concluded similar agreements;

RECALLING United Nations Security Council Resolution 1470 (2003), adopted on 28 March 2003, which urges all the States to cooperate fully with the Special Court;

NOTING the willingness of the Requested State to enforce sentences imposed by the Special Court;

RECALLING the widely accepted international standards governing the treatment of prisoners, including the Standard Minimum Rules for the Treatment of Prisoners approved by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, the Basic Principles for the Treatment of Prisoners adopted by General Assembly resolution 45/111 of 14 December 1990, and the Recommendation Rec(2006)2 of the Council of Europe Committee of Ministers to member states on the European Prison Rules;

IN ORDER to give effect to the judgements and sentences of the Special Court;

HAVE AGREED as follows:

Article 1

Purpose and Scope of the Agreement

This Agreement shall regulate matters relating to or arising out of all requests to the Requested State to enforce sentences imposed by the Special Court.

Article 2

Procedure

1. A request to the Requested State to enforce a sentence shall be made by the Registrar of the Special Court (hereinafter "Registrar"), with the approval of the President of the Special Court.

2. The Registrar shall provide the following documents to the Requested State when making the request:

   a. a certified copy of the judgement;
   b. a statement indicating how much of the sentence has already been served, including information on any pre-trial detention;
   c. when appropriate, any medical or psychological reports on the convicted person, any recommendation for his or her further treatment in the Requested State and any other factor relevant to the enforcement of the sentence; and
   d. certified copies of identification papers of the convicted person in the possession of the Special Court.

3. The Requested State shall transmit the request and all communications relating to matters provided for in this Agreement to the competent national authorities.

4. The competent national authorities of the Requested State shall promptly decide upon the request of the Registrar, in accordance with national law, and inform the Registrar in writing of its decision whether or not to accept the convicted person.

Article 3

Enforcement

1. In enforcing the sentence pronounced by the Special Court, the Requested State shall be bound by the duration of the sentence.

2. The conditions of imprisonment shall be governed by the laws of the Requested State, subject to the supervision of the Special Court, as provided for in Articles 7 to 9 and paragraphs 2 and 3 of Article 10 below.

3. The conditions of imprisonment shall be consistent with the widely accepted international standards governing treatment of prisoners; in no case shall such

conditions be more or less favourable than those available to prisoners convicted of similar offences in the Requested State.

4. When a convicted person is eligible for a prison programme or benefit available under the national law of the Requested State which may entail some activity outside the prison facilities, the Requested State shall communicate that fact to the Registrar of the Special Court, together with any relevant information or observation, to enable the Special Court to exercise its supervisory function.

Article 4

Transfer of the convicted person

1. The Registrar shall make appropriate arrangements for the transfer of the convicted person from the Special Court to the competent authorities of the Requested State. Prior to his or her transfer, the convicted person will be informed by the Registrar of the contents of this Agreement.

2. If, after the transfer of the convicted person to the Requested State, the Special Court, in accordance with its Rules of Procedure and Evidence, orders that the convicted person appears in a proceeding before it, the convicted person shall be transferred temporarily to the Special Court for that purpose, conditioned upon his or her return to the Requested State within the period decided by the Special Court.

3. The Registrar shall transmit the order for the temporary transfer of the convicted person to the national authorities of the Requested State. The Registrar shall ensure the proper transfer of the convicted person from the Requested State to the Special Court and back to the Requested State for the continued imprisonment after the expiration of the period of temporary transfer decided by the Special Court. The duration of the temporary transfer shall be deducted from the overall sentence to be served in the Requested State.

Article 5

Non-bis-in-idem

The convicted person shall not be tried before a court of the Requested State for acts constituting a crime falling within the jurisdiction of the Special Court, for which he or she has already been tried by the Special Court.

Article 6

Rule of speciality

1. The convicted person in the custody of the Requested State shall not be subject to prosecution, punishment or to extradition to a third State for any conduct engaged in prior to that person's transfer to the territory of the Requested State, unless such prosecution, punishment or extradition has been approved by the President of the Special Court, at the request of the Requested State.

2. When the Requested State intends to prosecute or enforce a sentence against the convicted person, it shall notify its intention to the Registrar of the Special Court, and transmit the following documents:

a. a statement of the facts of the case and their legal characterization;
b. a copy of any applicable legal provisions, including those concerning statutes of limitation and applicable penalties;
c. a copy of any sentence, warrant of arrest or other document having the same force, or of any other legal writ which the Requested State intends to enforce;
d. a protocol containing views of the sentenced person obtained after the person has been informed sufficiently about the proceedings.

3. In the event of a request for extradition made by a third State, the Requested State shall transmit the entire request to the Registrar of the Special Court, with a protocol containing the views of the convicted person obtained after informing the person sufficiently about the extradition request.

4. The Registrar of the Special Court may, in relation to paragraphs 2 and 3 of this Article, request any document or additional information from the Requested State or the third State requesting the extradition.

5. The Registrar, in consultation with the President of the Special Court, shall make a determination as soon as possible. This determination shall be notified to all those who have participated in the proceedings. If the request submitted under paragraphs 2 and 3 of this Article concerns the enforcement of a sentence, the convicted person may serve that sentence in the Requested State or be extradited to a third State only after the enforcement of the sentence imposed by the Special Court has been terminated.

6. The Registrar, in consultation with the President of the Special Court, may authorize the temporary extradition of the convicted person to a third State for prosecution only if it has obtained assurances which it deems to be sufficient that the convicted person will be kept in custody in the third State during prosecution, and transferred back to the Requested State after the prosecution, until termination of enforcement of the sentence imposed by the Special Court.

7. Paragraph 1 of this Article shall cease to apply if the convicted person remains voluntarily for more than 30 days in the territory of the Requested State after termination of enforcement of the sentence imposed by the Special Court, or returns to the territory of that State after having left it.

Article 7

Inspection

1. The competent authorities of the Requested State shall allow the inspection of the conditions of detention and the treatment of the prisoner(s) by the International Committee of the Red Cross (hereinafter the ICRC). The frequency of visits will be determined by the ICRC. The Special Court may furthermore request the ICRC to carry out such an inspection. The ICRC will

submit a confidential report based on the findings of these inspections to the Requested State as well as to the President and the Registrar of the Special Court.

2. The Requested State, the President and the Registrar of the Special Court shall consult each other on the findings of the reports referred to in the previous paragraph. The President of the Special Court may thereafter request the Requested State to report to him or her any changes in the conditions of detention suggested by the ICRC.

Article 8

Information

1. The Requested State shall immediately notify the Registrar of the following:

   a. if the convicted person has completed his or her sentence, two months, or as soon as practicable, prior to such completion;
   b. if the convicted person has escaped from custody;
   c. if the convicted person has deceased; and
   d. if the convicted person becomes eligible for early release, pardon or commutation of sentence, six months or as soon as practicable prior to such early release, pardon or commutation of sentence.

2. Notwithstanding the previous paragraph, the Registrar of the Special Court and the Requested State shall consult each other on all matters relating to the enforcement of the sentence upon the request of either party.

Article 9

Early release, pardon and commutation of sentences

1. If, pursuant to the applicable national law of the Requested State, the convicted person is eligible for early release, pardon or commutation of the sentence, the Requested State shall notify this to the Registrar of the Special Court in advance of such eligibility, and shall include in any such notification all the circumstances pertaining to the eligibility for early release, pardon or commutation of the sentence.

2. The President of the Special Court shall determine, in consultation with the Judges of the Special Court, whether any early release, pardon or commutation of the sentence is appropriate in the interest of justice and the general principles of law. The Registrar shall inform the Requested State of the President's decision. If the President determines that early release, pardon or commutation of the sentence is not appropriate, the Requested State shall act accordingly.

Article 10

Termination of enforcement

1. The enforcement of the sentence shall terminate:

   a. when the convicted person has completed his or her sentence;
   b. when the convicted person has died;
   c. when the convicted person has been released as a result of being granted early release, pardon or commutation of sentence; or
   d. when the Special Court has issued a decision as referred to in paragraph 2.

2. The Special Court may at any time decide to request the termination of the enforcement in the Requested State and transfer the convicted person to another State or to the Special Court.

3. The competent authorities of the Requested State shall terminate the enforcement of the sentence as soon as it is informed by the Registrar of any decision or measure as a result of which the sentence ceases to be enforceable.

4. Upon the termination of the enforcement of a sentence, the Registrar shall in consultation with the Requested State make the appropriate arrangements for the transfer of the convicted person from the Requested State or, in the case of death, the repatriation of the convicted person's body.

Article 11

Impossibility to enforce sentence

If, at any time after the decision has been taken to enforce the sentence, for any legal or practical reasons, further enforcement has become impossible, the Requested State shall promptly inform the Registrar of the Special Court. The Registrar shall then make the appropriate arrangements for the transfer of the convicted person. The competent authorities of the Requested State shall allow for at least sixty days following the notification of the Registrar before taking other measures on the matter.

Article 12

Costs

1. Unless the parties agree otherwise, the Special Court shall bear the expenses related to the following:

   a. the transfer of the convicted person to and from the Requested State, including the temporary transfer to and from the Special Court for the purposes of appearing in a proceeding before the Special Court; and
   b. the repatriation of the body of the convicted person, in case of his or her death.

2. The Requested State shall pay all other expenses incurred by the enforcement of the sentence, including, but not limited to, medical treatment of the convicted person, if needed.

Article 13

Substitution Clause

Upon completion of the mandate of the Special Court for Sierra Leone, as per Article 23 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, and Article 1 of the Statute of the Special Court, its designated successor body, mandated to discharge all residual functions of the Special Court, will take over all functions of the President, the Registrar and the Judges pertaining to the execution of this Agreement.

Article 14

Entry into force

This Agreement shall enter into force on the 30th day following receipt by the Special Court of the notification by the Requested State that it has completed its constitutional requirements for the entry into force of this Agreement.

Article 15

Duration of the Agreement

1. This Agreement shall remain in force as long as sentences of the Special Court are being enforced by the Requested State under the terms and conditions of this Agreement.

2. Upon consultation, either party may terminate this Agreement, with six months prior notice in writing. This Agreement shall not be terminated before the sentences to which this Agreement applies have been terminated and, if applicable, before the transfer of the convicted person as provided for in Article 11 has been effected.

Article 16

Amendment

This Agreement may be amended by mutual consent of the parties.

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IN WITNESS WHEREOF, the undersigned, duly authorized thereto, have signed this Agreement.

Done at The Hague this 21 day of June 2009, in duplicate, in the English language.

FOR THE SPECIAL COURT FOR SIERRA LEONE

Binta Mansaray
Acting Registrar of
the Special Court for Sierra Leone

FOR THE GOVERNMENT OF FINLAND

Mikko Jokela
Ambassador of Finland
to the Netherlands

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AMENDED AGREEMENT BETWEEN THE SPECIAL COURT FOR SIERRA LEONE AND THE GOVERNMENT OF THE REPUBLIC OF RWANDA ON THE ENFORCEMENT OF SENTENCES OF THE SPECIAL COURT FOR SIERRA LEONE

The Special Court for Sierra Leone, established by the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone signed on 16 January 2002 (hereinafter "the Special Court") and

The Government of the Republic of Rwanda (hereinafter "the Government of Rwanda"),

RECALLING Article 22 of the Statute of the Special Court annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, according to which imprisonment of persons sentenced by the Special Court shall be served in Sierra Leone; or if circumstances so require, in any State that has concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for former Yugoslavia an agreement for the enforcement of sentences and which has indicated to the Special Court its willingness to accept convicted persons; or alternatively, in any State with which the Special Court has concluded similar agreements;

RECALLING United Nations Security Council Resolution 1470 (2003), adopted on 28 March 2003, which urges all the States to cooperate fully with the Special Court;

NOTING the willingness of the Government of Rwanda to enforce sentences imposed by the Special Court for violations of international humanitarian law and Sierra Leonean law in the territory of Sierra Leone since 30 November 1996;

RECALLING the widely accepted international standards governing the treatment of prisoners, including the Standard Minimum Rules for the Treatment of Prisoners approved by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, and the Basic Principles for the Treatment of Prisoners adopted by General Assembly resolution 45/111 of 14 December 1990;

IN ORDER to give effect to the judgements and sentences of the Special Court;

HAVE AGREED as follows:

Article 1

Purpose and Scope of the Agreement

This Agreement shall regulate matters relating to or arising out of all requests to the Government of Rwanda to enforce sentences imposed by the Special Court.

Article 2
Procedure

1. A request to the Government of Rwanda to enforce a sentence shall be made by the Registrar of the Special Court (hereinafter "the Registrar"), with the approval of the President of the Special Court.

2. The Registrar shall provide the following documents to the Government of Rwanda when making the request:

   a. a certified copy of the judgement;

   b. a statement indicating how much of the sentence has already been served, including information on any pre-trial detention;

   c. when appropriate, any medical or psychological reports on the convicted person, any recommendation for his further treatment in the Government of Rwanda and any other factor relevant to the enforcement of the sentence;

   d. certified copies of identification papers of the convicted person in the possession of the Special Court;

3. All communications to the Government of Rwanda relating to matters provided for in this Agreement shall be made to the Minister in charge of Penitentiary Administration through the Minister in charge of Foreign Affairs.

4. The competent national authorities of the Government of Rwanda shall promptly decide upon the request of the Registrar, in accordance with national law, and inform the Registrar in writing of its decision whether or not to accept the convicted person(s).

Article 3
Enforcement

1. In enforcing the sentence pronounced by the Special Court, the Government of Rwanda shall be bound by the duration of the sentence so pronounced and ensure the sentence is served in a prison facility identified and agreed to by the parties.

2. The conditions of imprisonment shall be governed by the laws of the Government of Rwanda, exclusive of Article 4.2 of Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, and any other provisions relating to holding convicted persons in isolation.

3. The conditions of imprisonment shall be subject to the supervision of the Special Court, as provided for in Articles 6 to 8 and paragraphs 2 and 3 of Article 9 below.

4. The conditions of imprisonment shall be consistent with the widely accepted international standards governing treatment of prisoners.

Article 4
Transfer of the convicted person

1. The Registrar shall make appropriate arrangements for the transfer of the convicted person from the Special Court to the competent authorities of the Government of Rwanda. Prior to his transfer, the convicted person will be informed by the Registrar of the contents of this Agreement.

2. If, after the transfer of the convicted person to the Government of Rwanda, the Special Court, in accordance with its Rules of Procedure and Evidence, orders that the convicted person appears in a proceeding before it, the convicted person shall be transferred temporarily to the Special Court for that purpose, conditioned upon his return to the Government of Rwanda within the period decided by the Special Court.

3. The Registrar shall transmit the order for the temporary transfer of the convicted person to the national authorities of the Government of Rwanda. The Registrar shall ensure the proper transfer of the convicted person from the Government of Rwanda to the Special Court and back to the Government of Rwanda for the continued imprisonment after the expiration of the period of temporary transfer decided by the Special Court. The duration of the temporary transfer shall be deducted from the overall sentence to be served in the Government of Rwanda.

Article 5
Non-bis-in-idem

The convicted person shall not be tried before a court of the Government of Rwanda for acts constituting a crime falling within the jurisdiction of the Special Court, for which he has already been tried by the Special Court.

Article 6
Inspection

1. The competent authorities of the Government of Rwanda shall allow the inspection of the conditions of detention and the treatment of the prisoner(s) at any time and on a periodic basis by the International Committee of the Red Cross (hereinafter the ICRC) or such other body or person as the Special Court may designate for that purpose. The frequency of visits will be determined by the ICRC or the designated body or person. The Special Court may furthermore request the ICRC or the designated body or person to carry out such an inspection. The ICRC or the designated body or person will submit a confidential report based on the findings of these inspections to the Government of Rwanda and to the President and the Registrar of the Special Court.

2. Representatives of the Government of Rwanda, the President and the Registrar of the Special Court shall consult each other on the findings of the reports referred to in the previous paragraph. The President of the Special Court may thereafter request the

Government of Rwanda to report to him or her any changes in the conditions of detention suggested by the ICRC or the designated body or person.

Article 7
Information

1. The Government of Rwanda shall immediately notify the Registrar of the following:

   a. if the convicted person has completed his sentence, two months, or as soon as practicable, prior to such completion;

   b. if the convicted person has escaped from custody;

   c. if the convicted person has deceased;

2. Notwithstanding the previous paragraph, the Registrar of the Special Court and the Government of Rwanda shall consult each other on all matters relating to the enforcement of the sentence upon the request of either party.

Article 8
Early release, pardon and commutation of sentences

1. If, pursuant to the applicable national law of the Government of Rwanda, the convicted person is eligible for early release, pardon or commutation of the sentence, the Government of Rwanda shall notify this to the Registrar of the Special Court in advance of such eligibility, and shall include in any such notification all the circumstances pertaining to the eligibility for early release, pardon or commutation of the sentence.

2. In the determination of eligibility of the convicted person, consideration shall be given to the length of the sentence imposed by the Special Court and the necessity to ensure equality of treatment among convicted persons.

3. The President of the Special Court shall determine, in consultation with the Judges of the Special Court, whether any early release, pardon or commutation of the sentence is appropriate in the interest of justice and the general principles of law. The Registrar of the Special Court shall inform the Government of Rwanda of the President's decision. If the President determines that early release, pardon or commutation of the sentence is not appropriate, the Government of Rwanda shall act accordingly.

Article 9
Termination of enforcement

1. The enforcement of the sentence shall terminate:

   a. when the convicted person has completed his sentence;

   b. when the convicted person has died;

   c. when the convicted person has been released as a result of being granted early release, pardon or commutation of sentence;

d. when the Special Court has issued a decision as referred to in paragraph 2;

2. The Special Court may at any time decide to request the termination of the enforcement in the Government of Rwanda and transfer the convicted person to another State or to the Special Court.

3. The competent authorities of the Government of Rwanda shall terminate the enforcement of the sentence as soon as it is informed by the Registrar of any decision or measure as a result of which the sentence ceases to be enforceable.

4. Upon the termination of the enforcement of a sentence, the Registrar shall in consultation with the Government of Rwanda make the appropriate arrangements for the transfer of the convicted person from the Government of Rwanda or, in the case of death, the repatriation of the convicted person's body.

Article 10

Impossibility to enforce sentence

If, at any time after the decision has been taken to enforce the sentence, for any legal or practical reasons, further enforcement has become impossible, the Government of Rwanda shall promptly inform the Registrar of the Special Court. The Registrar shall then make the appropriate arrangements for the transfer of the convicted person. The competent authorities of the Government of Rwanda shall allow for at least sixty days following the notification of the Registrar before taking other measures on the matter.

Article 11

Costs

1. Unless the parties agree otherwise, the Special Court shall bear the expenses related to the following:

   a. the transfer of the convicted person to and from the Government of Rwanda, at the beginning and at the end of the sentence, including the temporary transfer to and from the Special Court for the purposes of appearing in a proceeding before the Special Court;

   b. in case of death, the cost of transportation and return of the body of the deceased to the family members of the deceased, for burial, or if and when necessary, the costs of the burial by the Rwanda authorities, in the event that the family of the deceased does not take possession of the body; and

   c. upkeep and maintenance costs (related to meals, sanitation and communications) as well as incidentals and special medical care which may entail extraordinary costs in respect of a convicted person who is to serve a sentence in the Government of Rwanda pursuant to this Agreement.

2. The Government of Rwanda shall pay all other expenses incurred by the enforcement of the sentence, including:

a. safety and security of the identified quarters for persons convicted by the Special Court;

b. prison wardens' remuneration and basic utilities (water, electricity, sewage, etc);

c. any travel document necessary to authorize the convicted person to exit Rwanda upon completion of his sentence, in accordance with Rwanda laws.

3. The Government of Rwanda and the Registrar will conclude a Memorandum of Understanding detailing the average yearly costs that are to be borne by the Special Court for Sierra Leone, in accordance with paragraph 1 above.

Article 12
Substitution Clause

Upon completion of the mandate of the Special Court for Sierra Leone, as per Article 23 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, and Article 1 of the Statute of the Special Court, its designated successor body, mandated to discharge all residual functions of the Special Court, will take over all functions of the President, the Registrar and the Judges pertaining to the execution of this Agreement.

Article 13
Entry into force

This Agreement shall enter into force provisionally upon the signature of both parties, and definitely upon the date of notification by the Government of Rwanda of ratification or approval of the Agreement by its competent authorities.

Article 14
Duration of the Agreement

1. This Agreement shall remain in force as long as sentences of the Special Court are being enforced by the Government of Rwanda under the terms and conditions of this Agreement.

2. Upon consultation, either party may terminate this Agreement, with six months prior notice in writing. This Agreement shall not be terminated before the sentences to which this Agreement applies have been terminated and, if applicable, before the transfer of the convicted person as provided for in Article 10 has been effected.

Article 15
Amendment

This Agreement may be amended by mutual consent of the parties.

IN WITNESS WHEREOF, the undersigned, duly authorized thereto, have signed this Agreement.

Done at Kigali, on the Eighteenth day of March in the year Two Thousand and Nine, in duplicate, in English and French, both texts being equally authentic, with Articles 3.2 and 8.2 having been amended on this Sixteenth day of September in the year Two Thousand and Nine, in English.

FOR THE SPECIAL COURT FOR SIERRA LEONE

Binta Mansaray,
Acting Registrar of the Special Court for Sierra Leone

FOR THE GOVERNMENT OF THE REPUBLIC OF RWANDA

H.E. Mrs. Rosemary Museminali,
Minister of Foreign Affairs and Cooperation of the Republic of Rwanda

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STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

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Article 1

The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

CHAPTER I - ORGANIZATION OF THE COURT

Article 2

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

Article 5

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

Article 6

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7

1. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

Article 8

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

Article 9

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 10

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

3. In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

Article 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Article 12

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

3. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

Article 13

1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for transmission to the Secretary-General. This last notification makes the place vacant.

Article 14

Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

Article 15

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 16

1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.

2. Any doubt on this point shall be settled by the decision of the Court.

Article 17

1. No member of the Court may act as agent, counsel, or advocate in any case.

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

3. Any doubt on this point shall be settled by the decision of the Court.

Article 18

1. No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions.

2. Formal notification thereof shall be made to the Secretary-General by the Registrar.

3. This notification makes the place vacant.

Article 19

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

Article 21

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.

2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

Article 22

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.

2. The President and the Registrar shall reside at the seat of the Court.

Article 23

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

2. Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

3. Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

Article 24

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.

3. If in any such case the member Court and the President disagree, the matter shall be settled by the decision of the Court.

Article 25

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

2. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. A quorum of nine judges shall suffice to constitute the Court.

Article 26

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this article if the parties so request.

Article 27

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

Article 28

The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.

Article 29

With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.

Article 30

1. The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

2. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

Article 31

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members

of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

Article 32

1. Each member of the Court shall receive an annual salary.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for every day on which he acts as President.

4. The judges chosen under Article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions.

5. These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.

6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.

7. Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded.

8. The above salaries, allowances, and compensation shall be free of all taxation.

Article 33

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.

CHAPTER II - COMPETENCE OF THE COURT

Article 34

1. Only states may be parties in cases before the Court.

2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

1. The Court shall be open to the states parties to the present Statute.

2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex *aequo et bono*, if the parties agree thereto.

CHAPTER III - PROCEDURE

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

Article 40

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 42

1. The parties shall be represented by agents.

2. They may have the assistance of counsel or advocates before the Court.

3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 43

1. The procedure shall consist of two parts: written and oral.

2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.

3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

4. A certified copy of every document produced by one party shall be communicated to the other party.

5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

Article 44

1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.

2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 45

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

Article 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted .

Article 47

1. Minutes shall be made at each hearing and signed by the Registrar and the President.

2. These minutes alone shall be authentic.

Article 48

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 49

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Article 50

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

Article 51

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Article 52

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Article 53

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Article 54

1. When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.

2. The Court shall withdraw to consider the judgment.

3. The deliberations of the Court shall take place in private and remain secret.

Article 55

1. All questions shall be decided by a majority of the judges present.

2. In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

Article 56

1. The judgment shall state the reasons on which it is based.

2. It shall contain the names of the judges who have taken part in the decision.

Article 57

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 58

The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 61

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

Article 62

I. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2 It shall be for the Court to decide upon this request.

Article 63

1. Whenever the construction of a convention to which states other than those concemed in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Article 64

Unless otherwise decided by the Court, each party shall bear its own costs.

CHAPTER IV - ADVISORY OPINIONS

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 67

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Article 68

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

CHAPTER V - AMENDMENT

Article 69

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

Article 70

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.

Statute of the International Tribunal for Rwanda

The Security Council,

Reaffirming all its previous resolutions on the situation in Rwanda,

Having considered the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) 1 July 1994 (S/1994/879 and S/1994/906), and having taken note of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

Expressing appreciation for the work of the Commission of Experts established pursuant to resolution 935 (1994), in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of 1 October 1994 (S/1994/1125),

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large

numbers of suspects,

Considering that the Commission of Experts established pursuant to resolution 935 (1994) should continue on an urgent basis the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda and should submit its final report to the Secretary-General by 30 November 1994,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures;

4.The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 20: Rights of the Accused

1.All persons shall be equal before the International Tribunal for Rwanda.

2.In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.

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

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

a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

c) To be tried without undue delay;

d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

f) To have the free assistance of an interpreter if her or she cannot understand or speak the language used in the International Tribunal for Rwanda;

g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21: Protection of victims and witnesses

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim=s identity.

Article 22: Judgement

1.The Trial Chambers shall pronounce judgements and Impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

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

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STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

(ADOPTED 25 MAY 1993 by Resolution 827)
(AS AMENDED 13 MAY 1998 by Resolution 1166)
(AS AMENDED 30 NOVEMBER 2000 by Resolution 1329)

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2
Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.

2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

Article 13
Qualifications of judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 13 *bis*
Election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") in accordance with article 12 of the Statute of that Tribunal.

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world.

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 13 *ter*
Election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.

(e) The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.

2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 13 *quater*
Status of *ad litem* judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:

(a) benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;

(b) enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;

(c) enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal.

Article 20
Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

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

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

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

Article 22
Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

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Cour
Pénale
Internationale

International
Criminal
Court

Rome Statute of the International Criminal Court

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PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24
Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25[8]
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

8 As amended by resolution RC/Res.6 of 11 June 2010 (adding paragraph 3 *bis*).

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26
Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27
Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29
Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30
Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32
Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33
Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40
Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41
Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

   (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

   (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42
The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

   (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

   (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66
Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

   (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

   (c) To be tried without undue delay;

   (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68
Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75
Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

   Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76
Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

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United Nations S/RES/1757 (2007)

Security Council

Distr.: General
30 May 2007

Resolution 1757 (2007)

Adopted by the Security Council at its 5685th meeting, on 30 May 2007

The Security Council,

Recalling all its previous relevant resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1636 (2005) of 31 October 2005, 1644 (2005) of 15 December 2005, 1664 (2006) of 29 March 2006 and 1748 (2007) of 27 March 2007,

Reaffirming its strongest condemnation of the 14 February 2005 terrorist bombings as well as other attacks in Lebanon since October 2004,

Reiterating its call for the strict respect of the sovereignty, territorial integrity, unity and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon,

Recalling the letter of the Prime Minister of Lebanon to the Secretary-General of 13 December 2005 (S/2005/783) requesting inter alia the establishment of a tribunal of an international character to try all those who are found responsible for this terrorist crime, and the request by this Council for the Secretary-General to negotiate an agreement with the Government of Lebanon aimed at establishing such a Tribunal based on the highest international standards of criminal justice,

Recalling further the report of the Secretary-General on the establishment of a special tribunal for Lebanon on 15 November 2006 (S/2006/893) reporting on the conclusion of negotiations and consultations that took place between January 2006 and September 2006 at United Nations Headquarters in New York, the Hague, and Beirut between the Legal Counsel of the United Nations and authorized representatives of the Government of Lebanon, and the letter of its President to the Secretary-General of 21 November 2006 (S/2006/911) reporting that the Members of the Security Council welcomed the conclusion of the negotiations and that they were satisfied with the Agreement annexed to the Report,

Recalling that, as set out in its letter of 21 November 2006, should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal,

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Recalling also that the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon was signed by the Government of Lebanon and the United Nations respectively on 23 January and 6 February 2007,

Referring to the letter of the Prime Minister of Lebanon to the Secretary-General of the United Nations (S/2007/281), which recalled that the parliamentary majority has expressed its support for the Tribunal, and asked that his request that the Special Tribunal be put into effect be presented to the Council as a matter of urgency,

Mindful of the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and brought to justice,

Commending the Secretary-General for his continuing efforts to proceed, together with the Government of Lebanon, with the final steps for the conclusion of the Agreement as requested in the letter of its President dated 21 November 2006 and referring in this regard to the briefing by the Legal Counsel on 2 May 2007, in which he noted that the establishment of the Tribunal through the Constitutional process is facing serious obstacles, but noting also that all parties concerned reaffirmed their agreement in principle to the establishment of the Tribunal,

Commending also the recent efforts of parties in the region to overcome these obstacles,

Willing to continue to assist Lebanon in the search for the truth and in holding all those involved in the terrorist attack accountable and reaffirming its determination to support Lebanon in its efforts to bring to justice perpetrators, organizers and sponsors of this and other assassinations,

Reaffirming its determination that this terrorist act and its implications constitute a threat to international peace and security,

1. *Decides*, acting under Chapter VII of the Charter of the United Nations, that:

(a) The provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date;

(b) If the Secretary-General reports that the Headquarters Agreement has not been concluded as envisioned under Article 8 of the annexed document, the location of the seat of the Tribunal shall be determined in consultation with the Government of Lebanon and be subject to the conclusion of a Headquarters Agreement between the United Nations and the State that hosts the Tribunal;

(c) If the Secretary-General reports that contributions from the Government of Lebanon are not sufficient to bear the expenses described in Article 5 (b) of the annexed document, he may accept or use voluntary contributions from States to cover any shortfall;

2. *Notes* that, pursuant to Article 19 (2) of the annexed document, the Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government of Lebanon, taking into account the progress of the work of the International Independent Investigation Commission;

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3. *Requests* the Secretary-General, in coordination, when appropriate, with the Government of Lebanon, to undertake the steps and measures necessary to establish the Special Tribunal in a timely manner and to report to the Council within 90 days and thereafter periodically on the implementation of this resolution;

4. *Decides* to remain actively seized of the matter.

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Annex

Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon

Whereas the Security Council, in its resolution 1664 (2006) of 29 March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, recalled all its previous resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1636 (2005) of 31 October 2005 and 1644 (2005) of 15 December 2005,

Whereas the Security Council has requested the Secretary-General of the United Nations (hereinafter "the Secretary-General") "to negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice", taking into account the recommendations of the Secretary-General's report of 21 March 2006 (S/2006/176) and the views that have been expressed by Council members,

Whereas the Secretary-General and the Government of the Lebanese Republic (hereinafter "the Government") have conducted negotiations for the establishment of a Special Tribunal for Lebanon (hereinafter "the Special Tribunal" or "the Tribunal"),

Now therefore the United Nations and the Lebanese Republic (hereinafter referred to jointly as the "Parties") have agreed as follows:

Article 1
Establishment of the Special Tribunal

1. There is hereby established a Special Tribunal for Lebanon to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

2. The Special Tribunal shall function in accordance with the Statute of the Special Tribunal for Lebanon. The Statute is attached to this Agreement and forms an integral part thereof.

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Article 2
Composition of the Special Tribunal and appointment of judges

1. The Special Tribunal shall consist of the following organs: the Chambers, the Prosecutor, the Registry and the Defence Office.

2. The Chambers shall be composed of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Tribunal, the Secretary-General or the President of the Special Tribunal so requests.

3. The Chambers shall be composed of no fewer than eleven independent judges and no more than fourteen such judges, who shall serve as follows:

(a) A single international judge shall serve as a Pre-Trial Judge;

(b) Three judges shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;

(c) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (b) above;

(d) Five judges shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges; and

(e) Two alternate judges, of whom one shall be a Lebanese judge and one shall be an international judge.

4. The judges of the Tribunal shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

5. (a) Lebanese judges shall be appointed by the Secretary-General to serve in the Trial Chamber or the Appeals Chamber or as an alternate judge from a list of twelve persons presented by the Government upon the proposal of the Lebanese Supreme Council of the Judiciary;

(b) International judges shall be appointed by the Secretary-General to serve as Pre-Trial Judge, a Trial Chamber Judge, an Appeals Chamber Judge or an alternate judge, upon nominations forwarded by States at the invitation of the Secretary-General, as well as by competent persons;

(c) The Government and the Secretary-General shall consult on the appointment of judges;

(d) The Secretary-General shall appoint judges, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.

6. At the request of the presiding judge of a Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

7. Judges shall be appointed for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

8. Lebanese judges appointed to serve in the Special Tribunal shall be given full credit for their period of service with the Tribunal on their return to the Lebanese national judiciaries from which they were released and shall be reintegrated at a level at least comparable to that of their former position.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government, shall appoint a Prosecutor for a three-year term. The Prosecutor may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

2. The Secretary-General shall appoint the Prosecutor, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.

3. The Government, in consultation with the Secretary-General and the Prosecutor, shall appoint a Lebanese Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

4. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

5. The Prosecutor shall be assisted by such Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Tribunal.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

Article 5
Financing of the Special Tribunal

1. The expenses of the Special Tribunal shall be borne in the following manner:

(a) Fifty-one per cent of the expenses of the Tribunal shall be borne by voluntary contributions from States;

(b) Forty-nine per cent of the expenses of the Tribunal shall be borne by the Government of Lebanon.

2. It is understood that the Secretary-General will commence the process of establishing the Tribunal when he has sufficient contributions in hand to finance the establishment of the Tribunal and twelve months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Tribunal's operation. Should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal.

Article 6
Management Committee

The parties shall consult concerning the establishment of a Management Committee.

Article 7
Juridical capacity

The Special Tribunal shall possess the juridical capacity necessary:

(a) To contract;

(b) To acquire and dispose of movable and immovable property;

(c) To institute legal proceedings;

(d) To enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Tribunal.

Article 8
Seat of the Special Tribunal

1. The Special Tribunal shall have its seat outside Lebanon. The location of the seat shall be determined having due regard to considerations of justice and fairness as well as security and administrative efficiency, including the rights of victims and access to witnesses, and subject to the conclusion of a headquarters agreement between the United Nations, the Government and the State that hosts the Tribunal.

2. The Special Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions.

3. An Office of the Special Tribunal for the conduct of investigations shall be established in Lebanon subject to the conclusion of appropriate arrangements with the Government.

Article 9
Inviolability of premises, archives and all other documents

1. The Office of the Special Tribunal in Lebanon shall be inviolable. The competent authorities shall take appropriate action that may be necessary to ensure

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that the Tribunal shall not be dispossessed of all or any part of the premises of the Tribunal without its express consent.

2. The property, funds and assets of the Office of the Special Tribunal in Lebanon, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Office of the Special Tribunal in Lebanon, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 10
Funds, assets and other property

The Office of the Special Tribunal, its funds, assets and other property in Lebanon, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Tribunal has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

Article 11
Privileges and immunities of the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office

1. The judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office, while in Lebanon, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the Vienna Convention on Diplomatic Relations of 1961.

2. Privileges and immunities are accorded to the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office in the interest of the Special Tribunal and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purposes for which it is accorded shall lie with the Secretary-General, in consultation with the President of the Tribunal.

Article 12
Privileges and immunities of international and Lebanese personnel

1. Lebanese and international personnel of the Office of the Special Tribunal, while in Lebanon, shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Office of the Special Tribunal;

(b) Exemption from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

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(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Lebanon.

3. The privileges and immunities are granted to the officials of the Office of the Special Tribunal in the interest of the Tribunal and not for their personal benefit. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Tribunal.

Article 13
Defence counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Tribunal shall not be subjected, while in Lebanon, to any measure that may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused;

(d) Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Tribunal and back.

Article 14
Security, safety and protection of persons referred to in this Agreement

The Government shall take effective and adequate measures to ensure the appropriate security, safety and protection of personnel of the Office of the Special Tribunal and other persons referred to in this Agreement, while in Lebanon. It shall take all appropriate steps, within its capabilities, to protect the equipment and premises of the Office of the Special Tribunal from attack or any action that prevents the Tribunal from discharging its mandate.

Article 15
Cooperation with the Special Tribunal

1. The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to:

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(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Tribunal.

Article 16
Amnesty

The Government undertakes not to grant amnesty to any person for any crime falling within the jurisdiction of the Special Tribunal. An amnesty already granted in respect of any such persons and crimes shall not be a bar to prosecution.

Article 17
Practical arrangements

With a view to achieving efficiency and cost-effectiveness in the operation of the Special Tribunal:

(a) Appropriate arrangements shall be made to ensure that there is a coordinated transition from the activities of the International Independent Investigation Commission, established by the Security Council in its resolution 1595 (2005), to the activities of the Office of the Prosecutor;

(b) Judges of the Trial Chamber and the Appeals Chamber shall take office on a date to be determined by the Secretary-General in consultation with the President of the Special Tribunal. Pending such a determination, judges of both Chambers shall be convened on an ad hoc basis to deal with organizational matters and serving, when required, to perform their duties.

Article 18
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation or by any other mutually agreed upon mode of settlement.

Article 19
Entry into force and commencement of the functioning of the Special Tribunal

1. This Agreement shall enter into force on the day after the Government has notified the United Nations in writing that the legal requirements for entry into force have been complied with.

2. The Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government, taking into account the progress of the work of the International Independent Investigation Commission.

Article 20
Amendment

This Agreement may be amended by written agreement between the Parties.

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Article 21
Duration of the Agreement

1. This Agreement shall remain in force for a period of three years from the date of the commencement of the functioning of the Special Tribunal.

2. Three years after the commencement of the functioning of the Special Tribunal the Parties shall, in consultation with the Security Council, review the progress of the work of the Special Tribunal. If at the end of this period of three years the activities of the Tribunal have not been completed, the Agreement shall be extended to allow the Tribunal to complete its work, for a further period(s) to be determined by the Secretary-General in consultation with the Government and the Security Council.

3. The provisions relating to the inviolability of the funds, assets, archives and documents of the Office of the Special Tribunal in Lebanon, the privileges and immunities of those referred to in this Agreement, as well as provisions relating to defence counsel and the protection of victims and witnesses, shall survive termination of this Agreement.

In witness whereof, the following duly authorized representatives of the United Nations and of the Lebanese Republic have signed this Agreement.

Done at _____ on _____ 2006, in three originals in the Arabic, French and English languages, all texts being equally authentic.

For the United Nations:

_____

For the Lebanese Republic:

_____

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Attachment
Statute of the Special Tribunal for Lebanon

Having been established by an Agreement between the United Nations and the Lebanese Republic (hereinafter "the Agreement") pursuant to Security Council resolution 1664 (2006) of 29 March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, the Special Tribunal for Lebanon (hereinafter "the Special Tribunal") shall function in accordance with the provisions of this Statute.

Section I
Jurisdiction and applicable law

Article 1
Jurisdiction of the Special Tribunal

The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

Article 2
Applicable criminal law

The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:

(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and

(b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".

Article 3
Individual criminal responsibility

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:

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(a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or

(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

2. With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

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

Article 4
Concurrent jurisdiction

1. The Special Tribunal and the national courts of Lebanon shall have concurrent jurisdiction. Within its jurisdiction, the Tribunal shall have primacy over the national courts of Lebanon.

2. Upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.

3. (a) At the request of the Special Tribunal, the national judicial authority seized with any of the other crimes committed between 1 October 2004 and 12 December 2005, or a later date decided pursuant to article 1, shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, for review by the Prosecutor;

(b) At the further request of the Tribunal, the national authority in question shall defer to the competence of the Tribunal. It shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, and persons detained in connection with any such case shall be transferred to the custody of the Tribunal;

(c) The national judicial authorities shall regularly inform the Tribunal of the progress of their investigation. At any stage of the proceedings, the Tribunal may formally request a national judicial authority to defer to its competence.

Article 5
Non bis in idem

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

2. A person who has been tried by a national court may be subsequently tried by the Special Tribunal if the national court proceedings were not impartial or independent, were designed to shield the accused from criminal responsibility for crimes within the jurisdiction of the Tribunal or the case was not diligently prosecuted.

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

Article 6
Amnesty

An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution.

Section II
Organization of the Special Tribunal

Article 7
Organs of the Special Tribunal

The Special Tribunal shall consist of the following organs:

(a) The Chambers, comprising a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber;

(b) The Prosecutor;

(c) The Registry; and

(d) The Defence Office.

Article 8
Composition of the Chambers

1. The Chambers shall be composed as follows:

(a) One international Pre-Trial Judge;

(b) Three judges who shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;

(c) Five judges who shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges;

(d) Two alternate judges, one of whom shall be a Lebanese judge and one shall be an international judge.

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

3. At the request of the presiding judge of the Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign the alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 9
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the established competence of the judges in criminal law and procedure and international law.

3. The judges shall be appointed by the Secretary-General, as set forth in article 2 of the Agreement, for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

Article 10
Powers of the President of the Special Tribunal

1. The President of the Special Tribunal, in addition to his or her judicial functions, shall represent the Tribunal and be responsible for its effective functioning and the good administration of justice.

2. The President of the Special Tribunal shall submit an annual report on the operation and activities of the Tribunal to the Secretary-General and to the Government of Lebanon.

Article 11
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the Special Tribunal. In the interest of proper administration of justice, he or she may decide to charge jointly persons accused of the same or different crimes committed in the course of the same transaction.

2. The Prosecutor shall act independently as a separate organ of the Special Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Prosecutor shall be appointed, as set forth in article 3 of the Agreement, by the Secretary-General for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

4. The Prosecutor shall be assisted by a Lebanese Deputy Prosecutor and by such other Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

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

Article 12
The Registry

1. Under the authority of the President of the Special Tribunal, the Registry shall be responsible for the administration and servicing of the Tribunal.

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

3. The Registrar shall be appointed by the Secretary-General and shall be a staff member of the United Nations. He or she shall serve for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, and such other appropriate assistance for witnesses who appear before the Special Tribunal and others who are at risk on account of testimony given by such witnesses.

Article 13
The Defence Office

1. The Secretary-General, in consultation with the President of the Special Tribunal, shall appoint an independent Head of the Defence Office, who shall be responsible for the appointment of the Office staff and the drawing up of a list of defence counsel.

2. The Defence Office, which may also include one or more public defenders, shall protect the rights of the defence, provide support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Pre-Trial Judge or a Chamber in respect of specific issues.

Article 14
Official and working languages

The official languages of the Special Tribunal shall be Arabic, French and English. In any given case proceedings, the Pre-Trial Judge or a Chamber may decide that one or two of the languages may be used as working languages as appropriate.

Section III
Rights of defendants and victims

Article 15
Rights of suspects during investigation

A suspect who is to be questioned by the Prosecutor shall not be compelled to incriminate himself or herself or to confess guilt. He or she shall have the following rights of which he or she shall be informed by the Prosecutor prior to questioning, in a language he or she speaks and understands:

(a) The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Special Tribunal;

(b) The right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he or she makes shall be recorded and may be used in evidence;

(c) The right to have legal assistance of his or her own choosing, including the right to have legal assistance provided by the Defence Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it;

(d) The right to have the free assistance of an interpreter if he or she cannot understand or speak the language used for questioning;

(e) The right to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 16
Rights of the accused

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

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

3. (a) The accused shall be presumed innocent until proved guilty according to the provisions of this Statute;

(b) The onus is on the Prosecutor to prove the guilt of the accused;

(c) In order to convict the accused, the relevant Chamber must be convinced of the guilt of the accused beyond reasonable doubt.

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

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) Subject to the provisions of article 22, to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

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

(f) To examine all evidence to be used against him or her during the trial in accordance with the Rules of Procedure and Evidence of the Special Tribunal;

(g) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Tribunal;

(h) Not to be compelled to testify against himself or herself or to confess guilt.

5. The accused may make statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue. The Chambers shall decide on the probative value, if any, of such statements.

Article 17
Rights of victims

Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Judge or the Chamber considers it appropriate.

Section IV
Conduct of proceedings

Article 18
Pre-Trial proceedings

1. The Pre-Trial Judge shall review the indictment. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If he or she is not so satisfied, the indictment shall be dismissed.

2. The Pre-Trial Judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest or transfer of persons, and any other orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial.

Article 19
Evidence collected prior to the establishment of the Special Tribunal

Evidence collected with regard to cases subject to the consideration of the Special Tribunal, prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the International Independent Investigation Commission in accordance with its mandate as set out in Security Council resolution 1595 (2005) and subsequent resolutions, shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers.

Article 20
Commencement and conduct of trial proceedings

1. The Trial Chamber shall read the indictment to the accused, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment and instruct the accused to enter a plea.

2. Unless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence.

3. Upon request or *proprio motu*, the Trial Chamber may at any stage of the trial decide to call additional witnesses and/or order the production of additional evidence.

4. The hearings shall be public unless the Trial Chamber decides to hold the proceedings in camera in accordance with the Rules of Procedure and Evidence.

Article 21
Powers of the Chambers

1. The Special Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.

2. A Chamber may admit any relevant evidence that it deems to have probative value and exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

3. A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

4. In cases not otherwise provided for in the Rules of Procedure and Evidence, a Chamber shall apply rules of evidence that will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

Article 22
Trials in absentia

1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:

(a) Has expressly and in writing waived his or her right to be present;

(b) Has not been handed over to the Tribunal by the State authorities concerned;

(c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.

2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:

(a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;

(b) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;

(c) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.

3. In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement.

Article 23
Judgement

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

Article 24
Penalties

1. The Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years. In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon.

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

Article 25
Compensation to victims

1. The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.

2. The Registrar shall transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim.

3. Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.

4. For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person.

Article 26
Appellate proceedings

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

(a) An error on a question of law invalidating the decision;

(b) An error of fact that has occasioned a miscarriage of justice.

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

Article 27
Review proceedings

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

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

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 28
Rules of Procedure and Evidence

1. The judges of the Special Tribunal shall, as soon as practicable after taking office, adopt Rules of Procedure and Evidence for the conduct of the pre-trial, trial and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate.

2. In so doing, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial.

Article 29
Enforcement of sentences

1. Imprisonment shall be served in a State designated by the President of the Special Tribunal from a list of States that have indicated their willingness to accept persons convicted by the Tribunal.

2. Conditions of imprisonment shall be governed by the law of the State of enforcement subject to the supervision of the Special Tribunal. The State of enforcement shall be bound by the duration of the sentence, subject to article 30 of this Statute.

Article 30
Pardon or commutation of sentences

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

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RULES OF PROCEDURE AND EVIDENCE
RÈGLEMENT DE PROCÉDURE ET DE PREUVE

Adopted on 29 June 1995; as amended on:

12 January 1996
15 May 1996
4 July 1996
5 June 1997
8 June 1998
1 July 1999
21 February 2000
26 June 2000
3 November 2000
31 May 2001
6 July 2002
27 May 2003
15 May 2004
7 June 2005
10 November 2006
15 June 2007, and
14 March 2008
2 February 2009
1 October 2009

Adopté le 29 juin 1995 et modifié successivement les :

12 janvier 1996
15 mai 1996
4 juillet 1996
5 juin 1997
8 juin 1998
1 juillet 1999
21 février 2000
26 juin 2000
3 novembre 2000
31 mai 2001
6 juillet 2002
27 mai 2003
15 mai 2004
7 juin 2005
10 novembre 2006
15 juin 2007
14 mars 2008
2 février 2009
1 octobre 2009

Rule 98 *bis*: Motion for Judgement of Acquittal

If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts.

Section 4: Sentencing Procedure

Rule 99: Status of the Acquitted Person

(A) In case of acquittal, the accused shall be released immediately.

(B) If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of his intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, at the request of the Prosecutor, issue a warrant for the arrest and further detention of the accused to take effect immediately.

Rule 100: Sentencing Procedure on a Guilty Plea

(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.

(B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Sub-Rule 102 (B).

Rule 101: Penalties

(A) A person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23 (2) of the Statute, as well as such factors as:

(i) Any aggravating circumstances;

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

(iii) The general practice regarding prison sentences in the courts of Rwanda;

(iv) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9 (3) of the Statute.

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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

IT/32/Rev. 47
28 August 2012

Original:
English & French

The Hague
The Netherlands
28 August 2012

RULES OF PROCEDURE AND EVIDENCE

Section 5: Sentencing and Penalties

Rule 100
Sentencing Procedure on a Guilty Plea
(Adopted 11 Feb 1994, amended 10 July 1998)

(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence. (Amended 25 June 1996, amended 5 July 1996)

(B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Rule 102 (B).

Rule 101
Penalties
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 10 July 1998, amended 1 Dec 2000, amended 13 Dec 2000)

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life. (Amended 12 Nov 1997)

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

(i) any aggravating circumstances;

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

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

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
(Amended 30 Jan 1995, amended 10 July 1998)

(Amended 10 July 1998)

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Organization of American States

Department of International Law
Secretariat for Legal Affairs

Multilateral Treaties Home Page >>> click aquí
Treaty Home Page >>> click aquí
Signatories and Ratifications Home Page >>> click aquí

MULTILATERAL TREATIES

» AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA" (B-32)

Preamble

The American states signatory to the present Convention,

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the

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1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defense;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 9. Freedom from Ex Post Facto Laws

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Article 10. Right to Compensation

Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

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HUMAN CONSTITUTIONAL RIGHTS DOCUMENTS

OAS Declaration of the Rights and Duties of Man

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Chapter 1

Rights continued

Right to leisure time and to the use thereof.
Article XV. Every person has the right to leisure time, to wholesome recreation, and to the opportunity for advantageous use of his free time to his spiritual, cultural and physical benefit.

Right to social security.
Article XVI. Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.

Right to recognition of juridical personality and civil rights.
Article XVII. Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

Right to a fair trial.
Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Right to nationality.
Article XIX. Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.

Right to vote and to participate in government.
Article XX. Every person having legal capacity is entitled to participate in the government of his country, directly or through

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his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

Right of assembly.
Article XXI. Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.

Right of association.
Article XXII. Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.

Right to property.
Article XXIII. Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

Right of petition.
Article XXIV. Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

Right of protection from arbitrary arrest.
Article XXV. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

Right to due process of law.
Article XXVI. Every accused person is presumed to be innocent until proved guilty.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Right of asylum.
Article XXVII. Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

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Scope of the rights of man.
Article XXVIII. The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

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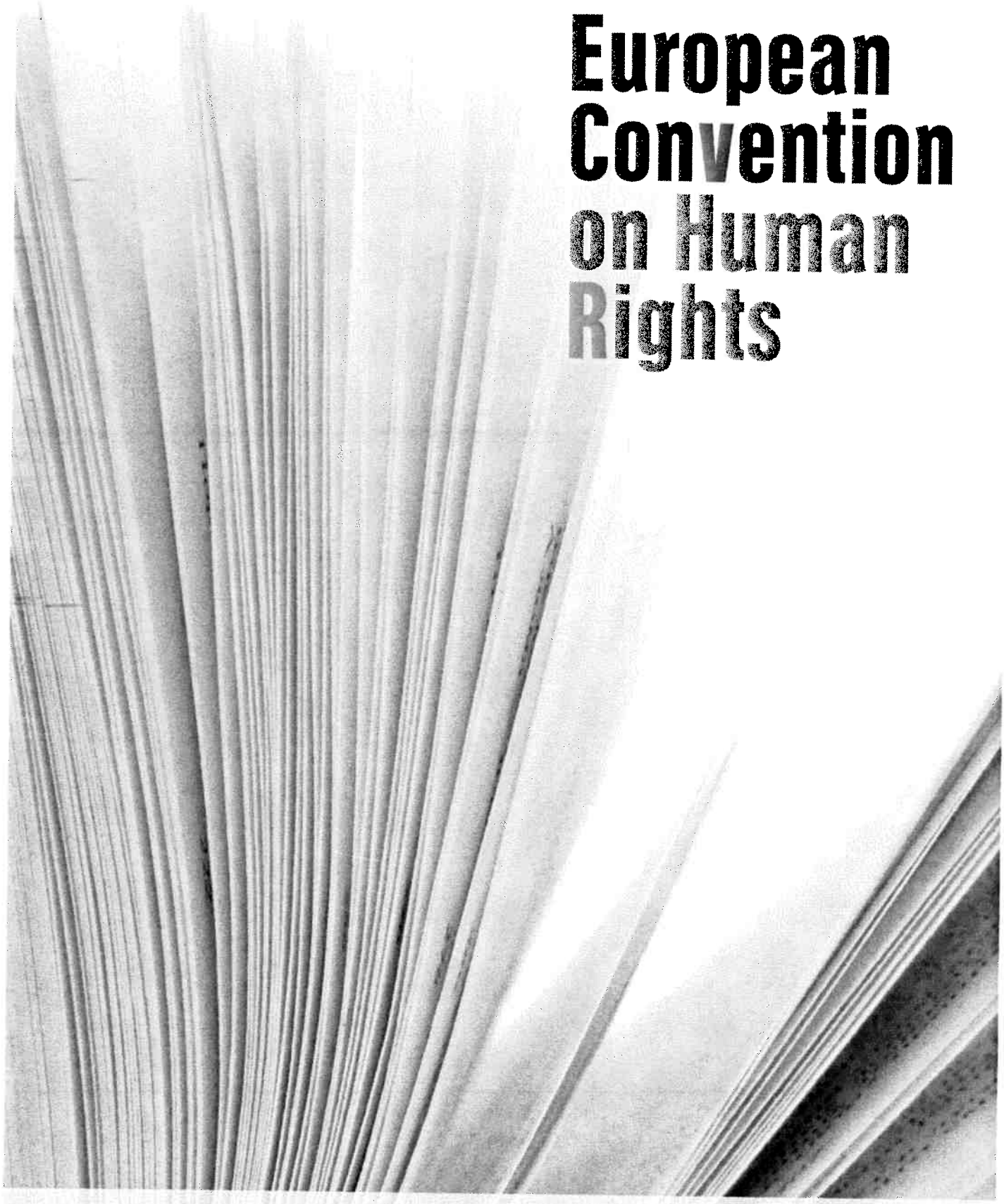
European Convention on Human Rights



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

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

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

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

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and

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SECTION II
EUROPEAN COURT OF HUMAN RIGHTS

ARTICLE 19

Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

ARTICLE 20

Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

ARTICLE 21

Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

2. The judges shall sit on the Court in their individual capacity.

3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

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Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Full text

Preamble

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929, have agreed as follows:

Chapter I. General Provisions

Art 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Art. 2. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
(2) The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Art. 4. Neutral Powers shall apply by analogy the provisions of the present Convention to the wounded and sick, and to members of the medical personnel and to chaplains of the armed forces of the Parties to the conflict, received or interned in their territory, as well as to dead persons found.

Art. 5. For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation.

Art. 6. In addition to the agreements expressly provided for in Articles 10, 15, 23, 28, 31, 36, 37 and 52, the High Contracting Parties may conclude other special agreements for all matters concerning which they may

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

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

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

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

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

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Dignity and justice for all of us

United Nations

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UNIVERSAL DECLARATION OF HUMAN RIGHTS

All human beings are born with equal and inalienable rights and fundamental freedoms.

The United Nations is committed to upholding, promoting and protecting the human rights of every individual. This commitment stems from the United Nations Charter, which reaffirms the faith of the peoples of the world in fundamental human rights and in the dignity and worth of the human person.

In the Universal Declaration of Human Rights, the United Nations has stated in clear and simple terms the rights which belong equally to every person.

These rights belong to you.

They are your rights. Familiarize yourself with them. Help to promote and defend them for yourself as well as for your fellow human beings.

Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission

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which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

(1) Everyone has the right to freedom of movement and residence within the borders of each State.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right to equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

United Nations Department of Public Information

For more information

www.ohchr.org/english/issues/education/training/udhr.htm

www.un.org/cyberschoolbus/humanrights/index.asp

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The Burgh House Principles On The Independence Of The International Judiciary

The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals:

Recognising the need for guidelines of general application to contribute to the independence and impartiality of the international judiciary, with a view to ensuring the legitimacy and effectiveness of the international judicial process;

Having regard to the United Nations Basic Principles on the Independence of the Judiciary (1985) and other international rules and standards relating to judicial independence and the right to a fair trial;

Mindful of the special challenges facing the international judiciary in view of the non-national context in which they operate;

Noting in particular that each court or tribunal has its own characteristics and functions and that in certain instances judges serve on a part-time basis or as *ad hoc* or *ad litem* judges;

Considering the following principles of international law to be of general application:

- to ensure the independence of the judiciary, judges must enjoy independence from the parties to cases before them, their own states of nationality or residence, the host countries in which they serve, and the international organisations under the auspices of which the court or tribunal is established;
- judges must be free from undue influence from any source;
- judges shall decide cases impartially, on the basis of the facts of the case and the applicable law;
- judges shall avoid any conflict of interest, as well as being placed in a situation which might reasonably be perceived as giving rise to any conflict of interests;
- judges shall refrain from impropriety in their judicial and related activities;

Proposes the following Principles which shall apply primarily to standing international courts and tribunals (hereafter "courts") and to full-time judges. The Principles should also be applied as appropriate to judges *ad hoc*, judges *ad litem* and part-time judges, to international arbitral proceedings and to other exercises of international judicial power.

1. Independence and freedom from interference

1.1 The court and the judges shall exercise their functions free from direct or indirect interference or influence by any person or entity.

1.2 Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

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1.3 The court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.

1.4 Deliberations of the court shall remain confidential.

2. Nomination, election and appointment

2.1 In accordance with the governing instruments, judges shall be chosen from among persons of high moral character, integrity and conscientiousness who possess the appropriate professional qualifications, competence and experience required for the court concerned.

2.2 While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.

2.3 Procedures for the nomination, election and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations.

2.4 Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organisation or other body responsible for the nomination, election and appointment process.

2.5 Where the governing instruments of the court concerned permits the re-election of judges, the principles and criteria set out above for the nomination, election and appointment of judges shall apply *mutatis mutandis* to their re-election.

3. Security of tenure

3.1 Judges shall have security of tenure in relation to their term of office. They may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance.

3.2 The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner.

4. Service and remuneration

4.1 Judges' essential conditions of service shall be enumerated in legally binding instruments.

4.2 No adverse changes shall be introduced with regard to judges' remuneration and other essential conditions of service during their terms of office.

4.3 Judges should receive adequate remuneration which should be periodically adjusted in line with any increases in the cost of living at the seat of the court.

4.4 Conditions of service should include adequate pension arrangements.

5. Privileges and immunities

5.1 Judges shall enjoy immunities equivalent to full diplomatic immunities, and in particular shall enjoy immunities from all claims arising from the exercise of their judicial function.

5.2 The court alone shall be competent to waive the immunity of judges; it should waive immunity in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the exercise of the judicial function.

5.3 Documents and papers of the court, judges and registry, in so far as they relate to the business of the court, shall be inviolable.

5.4 The state in which an international court has its seat shall take the necessary measures to protect the security of the judges and their families, and to protect them from adverse measures related to the exercise of their judicial function.

6. Budget

States parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.

7. Freedom of expression and association

7.1 Judges shall enjoy freedom of expression and association while in office. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.

7.2 Judges shall maintain the confidentiality of deliberations, and shall not comment extrajudicially upon pending cases.

7.3 Judges shall exercise appropriate restraint in commenting extrajudicially upon judgments and procedures of their own and other courts and upon any legislation, drafts, proposals or subject-matter likely to come before their court.

8. Extra-judicial activity

8.1 Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality.

8.2 Judges shall not exercise any political function.

8.3 Each court should establish an appropriate mechanism to give guidance to judges in relation to extra-judicial activities, and to ensure that appropriate means exist for parties to proceedings to raise any concerns.

9. Past links to a case

9.1 Judges shall not serve in a case in which they have previously served as agent, counsel, adviser, advocate, expert or in any other capacity for one of the parties, or as a member of a

national or international court or other dispute settlement body which has considered the subject matter of the dispute.

9.2 Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.

10. Past links to a party

Judges shall not sit in any case involving a party for whom they have served as agent, counsel, adviser, advocate or expert within the previous three years or such other period as the court may establish within its rules; or with whom they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.

11. Interest in the outcome of a case

11.1 Judges shall not sit in any case in the outcome of which they hold any material personal, professional or financial interest.

11.2 Judges shall not sit in any case in the outcome of which other persons or entities closely related to them hold a material personal, professional or financial interest.

11.3 Judges must not accept any undisclosed payment from a party to the proceedings or any payment whatsoever on account of the judge's participation in the proceedings.

12. Contacts with a party

12.1 Judges shall exercise appropriate caution in their personal contacts with parties, agents, counsel, advocates, advisers and other persons and entities associated with a pending case. Any such contacts should be conducted in a manner that is compatible with their judicial function and that may not affect or reasonably appear to affect their independence and impartiality.

12.2 Judges shall discourage *ex parte* communications from parties, and except as provided by the rules of the court such communications shall be disclosed to the court and the other party.

13. Post-service limitations

13.1 Judges shall not seek or accept, while they are in office, any future employment, appointment or benefit, from a party to a case on which they sat or from any entity related to such a party, that may affect or may reasonably appear to affect their independence or impartiality.

13.2 Former judges shall not, except as permitted by rules of the court, act in any capacity in relation to any case on which they sat while serving on the court.

13.3 Former judges shall not act as agent, counsel, adviser or advocate in any proceedings before the court on which they previously served for a period of three years after they have left office or such other period as the court may establish and publish.

13.4 Former judges should exercise appropriate caution as regards the acceptance of any employment, appointment or benefit, in particular from a party to a case on which they sat or from any entity related to such a party

14. Disclosure

14.1 Judges shall disclose to the court and, as appropriate, to the parties to the proceedings any circumstances which come to their notice at any time by virtue of which any of Principles 7 to 13 apply.

14.2 Each court shall establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relation to any particular case.

15. Waiver

Notwithstanding Principles 7 to 13, judges shall not be prevented from sitting in a case where they have made appropriate disclosure of any facts bringing any of those Principles into operation, and where the court expresses no objections and the parties give their express and informed consent to the judge acting.

16. Withdrawal or disqualification

Each court shall establish rules of procedure to enable the determination whether judges are prevented from sitting in a particular case as a result of the application of these Principles or for reasons of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.

17. Misconduct

17.1 Each court shall establish rules of procedure to address a specific complaint of misconduct or breach of duty on the part of a judge that may affect independence or impartiality.

17.2 Such a complaint may, if clearly unfounded, be resolved on a summary basis. In any case where the court determines that fuller investigation is required, the rules shall establish adequate safeguards to protect the judges' rights and interests and to ensure appropriate confidentiality of the proceedings.

17.3 The governing instruments of the court shall provide for appropriate measures, including the removal from office of a judge.

17.4 The outcome of any complaint shall be communicated to the complainant.

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International Law Association Study Group
on the Practice and Procedure of International Courts and Tribunals[1]

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[1] The Burgh House Principles are issued on the authority of the Co-Chairs and members of the Study Group. They reflect the discussions that took place in the Study Group as a whole, and have been the subject of extensive review, consultation and comment. The members participated in the Study Group in their personal capacity. Additionally, the Study Group has benefited from input from advisers, also acting in their personal capacity. The content of the Principles should not be attributed to any individual member of the Study Group or be taken as representing the view of any institution to which anyone associated with the Study Group's work may be affiliated.

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Strasbourg, 19 November 2002

CCJE (2002) Op. N° 3

Consultative Council of European Judges (CCJE)

Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality

1. The Consultative Council of European Judges (CCJE) drafted this opinion on the basis of replies by the Member States to a questionnaire and texts drawn up by the CCJE Working Party and the specialist of the CCJE on this topic, Mr Denis SALAS (France).

2. The present opinion makes reference to CCJE Opinion No. 1 (2001) (www.coe.int/legalprof, CCJE(2001) 43) on standards concerning the independence of the judiciary and the irremovability of judges, particularly paragraphs 13, 59, 60 and 71.

3. In preparing this opinion, the CCJE took into account a number of other documents, in particular:

- the United Nations "Basic principles on the independence of the judiciary" (1985);

- Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges;

- the European Charter on the Statute for Judges (1998) (DAJ/DOC(98) 23);

- the Code of judicial conduct, the Bangalore draft[1].

4. The present opinion covers two main areas:

- the principles and rules governing judges' professional conduct, based on determination of ethical principles, which must meet very high standards and may be incorporated in a statement of standards of professional conduct drawn up by the judges themselves (A);

- the principles and procedures governing criminal, civil and disciplinary liability of judges (B).

5. The CCJE questioned, in this context, whether existing rules and principles were in all respects consistent with the independence and impartiality of tribunals required by the European Convention on Human Rights.

6. The CCJE therefore sought to answer the following questions:

- What standards of conduct should apply to judges?

- How should standards of conduct be formulated?

- What if any criminal, civil and disciplinary liability should apply to judges?

7. The CCJE believes that answers to these questions will contribute to the implementation of the framework global action plan for judges in Europe, especially the priorities relating to the rights and responsibilities of judges, professional conduct and ethics (see doc. CCJE (2001) 24, Appendix A, part III B), and refers in this context its conclusions in paragraphs 49, 50, 75, 76 and 77 below.

A. STANDARDS OF JUDICIAL CONDUCT

8. The ethical aspects of judges' conduct need to be discussed for various reasons. The methods used in the settlement of disputes should always inspire confidence. The powers entrusted to judges are strictly linked to the values of justice, truth and freedom. The standards of conduct applying to judges are the corollary of these values and a precondition for confidence in the administration of justice.

9. Confidence in the justice system is all the more important in view of the increasing globalisation of disputes and the wide circulation of judgments. Further, in a State governed by the rule of law, the public is entitled to expect general principles, compatible with the notion of a fair trial and guaranteeing fundamental rights, to be set out. The obligations incumbent on judges have been put in place in order to guarantee their impartiality and the effectiveness of their action.

1°) What standards of conduct should apply to judges?

10. Any analysis of the rules governing the professional demands applicable to judges should include consideration of the underlying principles and the objectives pursued.

11. Whatever methods are used to recruit and train them and however broad their mandate, judges are entrusted with powers and operate in spheres which affect the very fabric of people's lives. A recent research report points out that, of all the public authorities, it is probably the judiciary which has changed the most in the European countries[2]. In recent years, democratic societies have been placing increasing demands on their judicial systems. The increasing pluralism of our societies leads each group to seek recognition or protection which it does not always receive. Whilst

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the architecture of democracies has been profoundly affected, national variations remain marked. It is a truism that the East European countries that are emerging from authoritarian regimes see law and justice as providing the legitimacy essential for the reconstruction of democracy. There more than elsewhere, the judicial system is asserting itself in relation to other public authorities through its function of judicial supervision.

12. The powers entrusted to judges are subject not only to domestic law, an expression of the will of the nation, but also to the principles of international law and justice as recognised in modern democratic societies.

13. The purpose for which these powers are entrusted to judges is to enable them to administer justice, by applying the law, and ensuring that every person enjoys the rights and/or assets that are legally theirs and of which they have been or may be unfairly deprived.

14. This aim is expressed in Article 6 of the European Convention on Human Rights which, speaking purely from the point of view of users of the judicial system, states that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". Far from suggesting that judges are all-powerful, the Convention highlights the safeguards that are in place for persons on trial and sets out the principles on which the judge's duties are founded: independence and impartiality.

15. In recent years, there has been some recognition of the need for increased assurances of judicial independence and impartiality; independent bodies have been set up to protect the judiciary from partisan interference; the significance of the European Convention on Human Rights has been developed and felt through the case-law of the European Court in Strasbourg and national courts.

16. Independence of the judge is an essential principle and is the right of the citizens of each State, including its judges. It has both an institutional and an individual aspect. The modern democratic State should be founded on the separation of powers. Each individual judge should do everything to uphold judicial independence at both the institutional and the individual level. The rationale of such independence has been discussed in detail in the Opinion N° 1 (2001) of the CCJE, paragraphs 10-13. It is, as there stated, inextricably complemented by and the pre-condition of the impartiality of the judge, which is essential to the credibility of the judicial system and the confidence that it should inspire in a democratic society.

17. Article 2 of the "Basic principles on the independence of the judiciary" drawn up by the United Nations in 1985 stipulates that "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason". Under Article 8, judges "shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary".

18. In its Recommendation N° R (94) 12 on the independence, efficiency and role of judges (Principle I.2.d), the Committee of Ministers of the Council of Europe stated that "judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law".

19. The European Charter on the Statute for Judges indicates that the statute for judges should ensure the impartiality which all members of the public are entitled to expect of the courts (paragraph 1.1). The CCJE fully endorses this provision of the Charter.

20. Impartiality is determined by the European Court both according to a *subjective* approach, which takes into account the personal conviction or interest of a particular judge in a given case, and according to an *objective* test, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect[3].

21. Judges should, in all circumstances, act impartially, to ensure that there can be no legitimate reason for citizens to suspect any partiality. In this regard, impartiality should be apparent in the exercise of both the judge's judicial functions and his or her other activities.

a. Impartiality and conduct of judges in the exercise of their judicial functions

22. Public confidence in and respect for the judiciary are the guarantees of the effectiveness of the judicial system: the conduct of judges in their professional activities is understandably seen by members of the public as essential to the credibility of the courts.

23. Judges should therefore discharge their duties without any favouritism, display of prejudice or bias. They should not reach their decisions by taking into consideration anything which falls outside the application of the rules of law. As long as they are dealing with a case or could be required to do so, they should not consciously make any observations which could reasonably suggest some degree of pre-judgment of the resolution of the dispute or which could influence the fairness of the proceedings. They should show the consideration due to all persons (parties, witnesses, counsel, for example) with no distinction based on unlawful grounds or incompatible with the appropriate discharge of their functions. They should also ensure that their professional competence is evident in the discharge of their duties.

24. Judges should also discharge their functions with due respect for the principle of equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring that each receives a fair hearing.

25. The effectiveness of the judicial system also requires judges to have a high degree of professional awareness. They should ensure that they maintain a high degree of professional competence through basic and further training, providing them with the appropriate qualifications.

26. Judges must also fulfil their functions with diligence and reasonable despatch. For this, it is of course necessary that they should be provided with proper facilities, equipment and assistance. So provided, judges should both be mindful of and be able to perform their obligations under Article 6.1 of the European Convention on Human Rights to deliver judgment within a reasonable time.

b. Impartiality and extra-judicial conduct of judges

27. Judges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality. Moreover, as citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc). They should therefore remain generally free to engage in the extra-professional activities of their choice.

28. However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties. In the last analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality

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impartiality.

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29. Judges should conduct themselves in a respectable way in their private life. In view of the cultural diversity of the member states of the Council of Europe and the constant evolution in moral values, the standards applying to judges' behaviour in their private lives cannot be laid down too precisely. The CCJE encourages the establishment within the judiciary of one or more bodies or persons having a consultative and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge. The presence of such bodies or persons could encourage discussion within the judiciary on the content and significance of ethical rules. To take just two possibilities, such bodies or persons could be established under the aegis of the Supreme Court or judges' associations. They should in any event be separate from and pursue different objectives to existing bodies responsible for imposing disciplinary sanctions.

30. Judges' participation in political activities poses some major problems. Of course, judges remain citizens and should be allowed to exercise the political rights enjoyed by all citizens. However, in view of the right to a fair trial and legitimate public expectations, judges should show restraint in the exercise of public political activity. Some States have included this principle in their disciplinary rules and sanction any conduct which conflicts with the obligation of judges to exercise reserve. They have also expressly stated that a judge's duties are incompatible with certain political mandates (in the national parliament, European Parliament or local council), sometimes even prohibiting judges' spouses from taking up such positions.

31. More generally, it is necessary to consider the participation of judges in public debates of a political nature. In order to preserve public confidence in the judicial system, judges should not expose themselves to political attacks that are incompatible with the neutrality required by the judiciary.

32. From reading the replies to the questionnaire, it seems that in some States a restrictive view is taken of judges' involvement in politics.

33. The discussions within the CCJE have shown the need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality.

34. However, judges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. This subject also raises the question of whether judges should be allowed to join trade unions. Under their freedom of expression and opinion, judges may exercise the right to join trade unions (freedom of association), although restrictions may be placed on the right to strike.

35. Working in a different field offers judges an opportunity to broaden their horizons and gives them an awareness of problems in society which supplements the knowledge acquired from the exercise of their profession. In contrast, it entails some not inconsiderable risks: it could be viewed as contrary to the separation of powers, and could also weaken the public view of the independence and impartiality of judges.

36. The question of judges' involvement in a certain governmental activities, such as service in the private offices of a minister (*cabinet ministériel*), poses particular problems. There is nothing to prevent a judge from exercising functions in an administrative department of a ministry (for example a civil or criminal legislation department in the Ministry of Justice); however, the matter is more delicate with regard to a judge who becomes part of the staff of a minister's private office. Ministers are perfectly entitled to appoint whomsoever they wish to work in their private office but, as the minister's close collaborators, such staff participate to a certain extent in the minister's political activities. In such circumstances, before a judge enters into service in a minister's private office, an opinion should ideally be obtained from the independent organ responsible for the appointment of judges, so that this body could set out the rules of conduct applicable in each individual case.

c. Impartiality and other professional activities of judges [4]

37. The specific nature of the judicial function and the need to maintain the dignity of the office and protect judges from all kinds of pressures mean that judges should behave in such a way as to avoid conflicts of interest or abuses of power. This requires judges to refrain from any professional activity that might divert them from their judicial responsibilities or cause them to exercise those responsibilities in a partial manner. In some States, incompatibilities with the function of judge are clearly defined by the judges' statute and members of the judiciary are forbidden from carrying out any professional or paid activity. Exceptions are made for educational, research, scientific, literary or artistic activities.

38. Different countries have dealt with incompatible activities to varying effects (a brief summary is annexed) and by various procedures, though in each case with the general objective of avoiding erecting any insurmountable barrier between judges and society.

39. The CCJE considers that rules of professional conduct should require judges to avoid any activities liable to compromise the dignity of their office and to maintain public confidence in the judicial system by minimising the risk of conflicts of interest. To this end, they should refrain from any supplementary professional activity that would restrict their independence and jeopardise their impartiality. In this context, the CCJE endorses the provision of the European Charter on the Statute for Judges under which judges' freedom to carry out activities outside their judicial mandate "may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her" (para. 4.2). The European Charter also recognises the right of judges to join professional organisations and a right of expression (para. 1.7) in order to avoid "excessive rigidity" which might set up barriers between society and the judges themselves (para. 4.3). It is however essential that judges continue to devote the most of their working time to their role as judges, including associated activities, and not be tempted to devote excessive attention to extra-judicial activities. There is obviously a heightened risk of excessive attention being devoted to such activities, if they are permitted for reward. The precise line between what is permitted and not permitted has however to be drawn on a country by country basis, and there is a role here also for such a body or person as recommended in paragraph 29 above.

d. Impartiality and judges' relations with the media

40. There has been a general trend towards greater media attention focused on judicial matters, especially in the criminal law field, and in particular in certain west European countries. Bearing in mind the links which may be forged between judges and the media, there is a danger that the way judges conduct themselves could be influenced by journalists. The CCJE points out in this connection that in its Opinion No. 1 (2001) it stated that, while the freedom of the press was a pre-eminent principle, the judicial process had to be protected from undue external influence. Accordingly, judges have to show circumspection in their relations with the press and be able to maintain their independence and impartiality, refraining from any personal exploitation of any relations with journalists and any

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unjustified comments on the cases they are dealing with. The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the European Convention on Human Rights. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions. Judges should also be free to prepare a summary or communiqué setting up the tenor or clarifying the significance of their judgements for the public. Besides, for the countries where the judges are involved in criminal investigations, it is advisable for them to reconcile the necessary restraint relating to the cases they are dealing with, with the right to information. Only under such conditions can judges freely fulfil their role, without fear of media pressure. The CCJE has noted with interest the practice in force in certain countries of appointing a judge with communication responsibilities or a spokesperson to deal with the press on subjects of interest to the public.

2°) How should standards of conduct be formulated?

41. Continental judicial tradition strongly supports the idea of codification. Several countries have already established codes of conduct in the public sector (police), in regulated professions (solicitors, doctors) and in the private sector (press). Codes of ethics have also recently been introduced for judges, particularly in East European countries, following the example of the United States.

42. The oldest is the Italian "Ethical Code" adopted on 7 May 1994 by the Italian Judges' Association, a professional organisation of the judiciary. The word "code" is inappropriate, since it consists of 14 articles which cover the conduct of judges (including presidents of courts) in its entirety and includes public prosecutors[5]. It is clear that the code does not consist of disciplinary or criminal rules, but is a self-regulatory instrument generated by the judiciary itself. Article 1 sets out the general principle: "In social life, the judge must behave with dignity and propriety and remain attentive to the public interest. Within the framework of his functions and in each professional act he must be inspired by the values of personal disinterest, independence and impartiality".

43. Other countries, such as Estonia, Lithuania, Ukraine, Moldova, Slovenia, the Czech Republic and Slovakia, have a "judicial code of ethics" or "principles of conduct" adopted by representative assemblies of judges and distinct from disciplinary rules.

44. Codes of conduct have some important benefits: firstly, they help judges to resolve questions of professional ethics, giving them autonomy in their decision-making and guaranteeing their independence from other authorities. Secondly, they inform the public about the standards of conduct it is entitled to expect from judges. Thirdly, they contribute to give the public assurance that justice is administrated independently and impartially.

45. However, the CCJE points out that independence and impartiality cannot be protected solely by principles of conduct and that numerous statutory and procedural rules should also play a part. Standards of professional conduct are different from statutory and disciplinary rules. They express the profession's ability to reflect its function in values matching public expectations by way of counterpart to the powers conferred on it. These are self-regulatory standards which involve recognising that the application of the law is not a mechanical exercise, involves real discretionary power and places judges in a relationship of responsibility to themselves and to citizens.

46. Codes of professional conduct also create a number of problems. For example, they can give the impression that they contain all the rules and that anything not prohibited must be admissible. They tend to oversimplify situations and, finally, they create the impression that standards of conduct are fixed for a certain period of time, whereas in fact they are constantly evolving. The CCJE suggests that it is desirable to prepare and speak of a "statement of standards of professional conduct", rather than a code.

47. The CCJE considers that the preparation of such statements is to be encouraged in each country, even though they are not the only way of disseminating rules of professional conduct, since:

- appropriate basic and further training should play a part in the preparation and dissemination of rules of professional conduct[6];

- in States where they exist, judicial inspectorates, on the basis of their observations of judges' behaviour, could contribute to the development of ethical thinking; their views could be made known through their annual reports;

- through its decisions, the independent authority described in the European Charter on the Statute for Judges, if it is involved in disciplinary proceedings, outlines judges' duties and obligations; if these decisions were published in an appropriate form, awareness of the values underlying them could be raised more effectively;

- high-level groups, consisting of representatives of different interests involved in the administration of justice, could be set up to consider ethical issues and their conclusions disseminated;

- professional associations should act as forums for the discussion of judges' responsibilities and deontology; they should provide wide dissemination of rules of conduct within judicial circles.

48. The CCJE would like to stress that, in order to provide the necessary protection of judges' independence, any statement of standards of professional conduct should be based on two fundamental principles:

i) firstly, it should address basic principles of professional conduct. It should recognise the general impossibility of compiling complete lists of pre-determined activities which judges are forbidden from pursuing; the principles set out should serve as self-regulatory instruments for judges, i.e. general rules that guide their activities. Further, although there is both an overlap and an interplay, principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence;

ii) secondly, principles of professional conduct should be drawn up by the judges themselves. They should be self-regulatory instruments generated by the judiciary itself, enabling the judicial authority to acquire legitimacy by operating within a framework of generally accepted ethical standards. Broad consultation should be organised, possibly under the aegis of a person or body as stated in paragraph 29, which could also be responsible for explaining and interpreting the statement of standards of professional conduct.

3°) Conclusions on the standards of conduct

49. The CCJE is of the opinion that:

i) judges should be guided in their activities by principles of professional conduct,

ii) such principles should offer judges guidelines on how to proceed, thereby enabling them to overcome the difficulties they are faced with as regards their independence and impartiality,

iii) the said principles should be drawn up by the judges themselves and be totally separate from the judges' disciplinary system,

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iv) it is desirable to establish in each country one or more bodies or persons within the judiciary to advise judges confronted with a problem related to professional ethics or compatibility of non judicial activities with their status.

50. As regards the rules of conduct of every judge, the CCJE is of the opinion that:

i) each individual judge should do everything to uphold judicial independence at both the institutional and the individual level,

ii) judges should behave with integrity in office and in their private lives,

iii) they should at all times adopt an approach which both is and appears impartial,

iv) they should discharge their duties without favountism and without actual or apparent prejudice or bias,

v) their decisions should be reached by taking into account all considerations material to the application of the relevant rules of law, and excluding from account all immaterial considerations,

vi) they should show the consideration due to all persons taking part in the judicial proceedings or affected by these proceedings,

vii) they should discharge their duties with due respect for the equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring each a fair hearing,

viii) they should show circumspection in their relations with the media, maintain their independence and impartiality by refraining from any personal exploitation of any relations with the media and from making any unjustified comments on the cases they are dealing with,

ix) they should ensure they maintain a high degree of professional competence,

x) they should have a high degree of professional awareness and be subject to an obligation of diligence in order to comply with the requirement to deliver their judgments in a reasonable time,

xi) they should devote the most of their working time to their judicial functions, including associated activities,

xii) they should refrain from any political activity which could compromise their independence and cause detriment to their image of impartiality.

B. CRIMINAL, CIVIL AND DISCIPLINARY LIABILITY OF JUDGES

4°) What criminal, civil and disciplinary liability should apply to judges?

51. The corollary of the powers and the trust conferred by society upon judges is that there should be some means of holding judges responsible, and even removing them from office, in cases of misbehaviour so gross as to justify such a course. The need for caution in the recognition of any such liability arises from the need to maintain judicial independence and freedom from undue pressure. Against this background, the CCJE considers in turn the topics of criminal, civil and disciplinary liability. In practice, it is the potential disciplinary liability of judges which is most important.

a. Criminal liability

52. Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process. The answers to questionnaire show that in some countries even well-intentioned judicial failings could constitute crimes. Thus, in Sweden and Austria judges (being assimilated to other public functionaries) can be punished (e.g. by fine) in some cases of gross negligence (e.g. involving putting or keeping someone in prison for too long).

53. Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.

54. The vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has became common in some European states. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge.

b. Civil liability

55. Similar considerations to those identified in paragraph 53 apply to the imposition on judges personally of civil liability for the consequences of their wrong decisions or for other failings (e.g. excessive delay). As a general principle, judges personally should enjoy absolute freedom from liability in respect of claims made directly against them relating to their exercise in good faith of their functions. Judicial errors, whether in respect of jurisdiction or procedure, in ascertaining or applying the law or in evaluating evidence, should be dealt with by an appeal; other judicial failings which cannot be rectified in this way (including e.g. excessive delay) should, at most, lead to a claim by the dissatisfied litigant against the State. That the state may, in some circumstances, be liable under the European Convention of Human Rights, to compensate a litigant, is a different matter, with which this opinion is not directly concerned.

56. There are however European countries, in which judges may incur civil liability for grossly wrong decisions or other gross failings[7], particularly at the instance of the state, after the dissatisfied litigant has established a right to compensation against the state. Thus, for example, in the Czech Republic the state may be held liable for damages caused by a judge's illegal decision or incorrect judicial action, but may claim recourse from the judge if and after the judge's misconduct has been established in criminal or disciplinary proceedings. In Italy, the state may, under certain conditions, claim to be reimbursed by a judge who has rendered it liable by either wilful deceit or "gross negligence", subject in the latter case to a potential limitation of liability.

57. The European Charter on the statute for judges contemplates the possibility of recourse proceedings of this nature in paragraph 5.2 of its text - with the safeguard that prior agreement should obtained from an independent authority with substantial judicial representation, such as that commended in paragraph 43 of the CCJE's opinion no. 1 (2001). The commentary to the Charter emphasises in its paragraph 5.2 the need to restrict judges' civil liability to (a) reimbursing the state for (b) "gross and inexcusable negligence" by way of (c) legal proceedings (d) requiring the prior agreement of such an independent authority. The CCJE endorses all these points, and goes further. The application of concepts such as gross or inexcusable negligence is often difficult. If there was any potential for a recourse action by

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the state, the judge would be bound to have to become closely concerned at the stage when a claim was made against the state. The CCJE's conclusion is that it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.

c. Disciplinary liability

58. All legal systems need some form of disciplinary system, although it is evident from the answers given by different member states to the questionnaires that the need is much more directly felt in some, as opposed to other, member states. There is in this connection a basic distinction between common-law countries, with smaller professional judiciaries appointed from the ranks of experienced practitioners, and civil law countries with larger and on average younger, career judiciaries.

59. The questions which arise are:

i) What conduct is it that should render a judge liable to disciplinary proceedings?

ii) By whom and how should such proceedings be initiated?

iii) By whom and how should they be determined?

iv) What sanctions should be available for misconduct established in disciplinary proceedings?

60. As to question (i), the first point which the CCJE identifies (repeating in substance a point made earlier in this opinion) is that it is incorrect to correlate breaches of proper professional standards with misconduct giving rise potentially to disciplinary sanctions. Professional standards, which have been the subject of the first part of this opinion, represent best practice, which all judges should aim to develop and towards which all judges should aspire. It would discourage the future development of such standards and misunderstand their purpose to equate them with misconduct justifying disciplinary proceedings. In order to justify disciplinary proceedings, misconduct must be serious and flagrant, in a way which cannot be posited simply because there has been a failure to observe professional standards set out in guidelines such as those discussed in the first part of this opinion.[8]

61. This is not to say that breach of the professional standards identified in this opinion may not be of considerable relevance, where it is alleged that there has been misconduct sufficient to justify and require disciplinary sanction. Some of the answers to questionnaires recognise this explicitly: for example, professional standards are described as having "a certain authority" in disciplinary proceedings in Lithuania and as constituting a way "of helping the judge hearing disciplinary proceedings by illuminating the provisions of the law on judges" in Estonia. They have also been used in disciplinary proceedings in Moldova. (On the other hand, the Ukrainian and Slovakian answers deny that there is any relationship between the two).

62. In some countries, separate systems have even been established to try to regulate or enforce professional standards. In Slovenia, failure to observe such standards may attract a sanction before a "Court of Honour" within the Judges' Association, and not before the judges' disciplinary body. In the Czech Republic, in a particularly serious situation of non-observance of the rules of professional conduct, a judge may be excluded from the "Judges' Union", which is the source of these principles.

63. The second point which the CCJE identifies is that it is for each State to specify by law what conduct may give rise to disciplinary action. The CCJE notes that in some countries attempts have been made to specify in detail all conduct that might give grounds for disciplinary proceedings leading to some form of sanction. Thus, the Turkish law on Judges and Prosecutors specifies gradations of offence (including for example staying away from work without excuse for various lengths of period) with matching gradations of sanction, ranging from a warning, through condemnation [i.e. reprimand], various effects on promotion to transfer and finally dismissal. Similarly, a recent 2002 law in Slovenia seeks to give effect to the general principle nulla poena sine lege by specifying 27 categories of disciplinary offence. It is, however, very noticeable in all such attempts that, ultimately, they all resort to general "catch-all" formulations which raise questions of judgment and degree. The CCJE does not itself consider that it is necessary (either by virtue of the principle nulla poena sine lege or on any other basis) or even possible to seek to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings and sanctions. The essence of disciplinary proceedings lies in conduct fundamentally contrary to that to be expected of a professional in the position of the person who has allegedly misconducted him or herself.

64. At first sight, Principle VI.2 of Recommendation No. R (94) 12 might be thought to suggest that precise grounds for disciplinary proceedings should always "be defined" in advance "in precise terms by the law". The CCJE fully accepts that precise reasons must be given for any disciplinary action, as and when it is proposed to be or is brought. But, as it has said, it does not conceive it to be necessary or even possible at the European level to seek to define all such potential reasons in advance in other terms than the general formulations currently adopted in most European countries. In that respect therefore, the CCJE has concluded that the aim stated in pragraph 60 c) of its Opinion No. 1 (2001) cannot be pursued at a European level.

65. Further definition by individual member States by law of the precise reasons for disciplinary action as recommended by Recommended No. R (94) 12 appears, however, to be desirable. At present, the grounds for disciplinary action are usually stated in terms of great generality.

66. The CCJE next considers question (ii): by whom and how should disciplinary proceedings be initiated? Disciplinary proceedings are in some countries brought by the Ministry of Justice, in others they are instigated by or in conjunction with certain judges or councils of judges or prosecutors, such as the First President of the Court of Appeal in France or the General Public Prosecutor in Italy. In England, the initiator is the Lord Chancellor, but he has agreed only to initiate disciplinary action with the concurrence of the Lord Chief Justice.

67. An important question is what if any steps can be taken by persons alleging that they have suffered by reason of a judge's professional error. Such persons must have the right to bring any complaint they have to the person or body responsible for initiating disciplinary action. But they cannot have a right themselves to initiate or insist upon disciplinary action. There must be a filter, or judges could often find themselves facing disciplinary proceedings, brought at the instance of disappointed litigants.

68. The CCJE considers that the procedures leading to the initiation of disciplinary action need greater formalisation. It proposes that countries should envisage introducing a specific body or person in each country with responsibility for receiving complaints, for obtaining the representations of the judge concerned upon them and for deciding in their light whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action, in which case it would pass the matter to the disciplinary authority.

69. The next question (iii) is: by whom and how should disciplinary proceedings be determined? A whole section of the United Nations Basic Principles is devoted to discipline, suspension and removal. Article 17 recognises judges' "right to a fair hearing". Under Article 19, "all disciplinary (...) proceedings shall be determined in accordance with established

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standards of judicial conduct". Finally, Article 20 sets out the principle that "decisions in disciplinary, suspension or removal proceedings should be subject to an independent review". At the European level, guidance is provided in Principle VI of Recommendation No. R (94) 12, which recommends that disciplinary measures should be dealt with by "a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself" and that judges should in this connection benefit, at the least, by protections equivalent to those afforded under Article 6.1 of the Convention on Human Rights. Further, the CCJE emphasises in this context that disciplinary measures include any measures adversely affecting a judge's status or career, including transfer of court, loss of promotion rights or pay.

70. The replies to the questionnaire show that, in some countries, discipline is ensured by courts specialising in cases of this type: the disciplinary committee of the Supreme Court (Estonia, Slovenia - where each level is represented). In Ukraine, there is a committee including judges of the same level of jurisdiction as the judge concerned. In Slovakia, there are now two tiers of committee, one of three judges, the second of five Supreme Court judges. In Lithuania, there is a committee of judges from the various tiers of general jurisdiction and administrative courts. In some countries, judgment is given by a Judicial Council, sitting as a disciplinary court (Moldova, France, Portugal).[9]

71. The CCJE has already expressed the view that disciplinary proceedings against any judge should only be determined by an independent authority (or "tribunal") operating procedures which guarantee full rights of defence - see para. 60(b) of CCJE Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges. It also considers that the body responsible for appointing such a tribunal can and should be the independent body (with substantial judicial representation chosen democratically by other judges) which, as the CCJE advocated in paragraph 46 of its first Opinion, should generally be responsible for appointing judges. That in no way excludes the inclusion in the membership of a disciplinary tribunal of persons other than judges (thus averting the risk of corporatism), always provided that such other persons are not members of the legislature, government or administration.

72. In some countries, the initial disciplinary body is the highest judicial body (the Supreme Court). The CCJE considers that the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court.

73. The final question (iv) is: what sanctions should be available for misconduct established in disciplinary proceedings? The answers to questionnaire reveal wide differences, no doubt reflecting the different legal systems and exigencies. In common law systems, with small, homogeneous judiciaries composed of senior and experienced practitioners, the only formal sanction evidently found to be necessary (and then only as a remote back-up possibility) is the extreme measure of removal, but informal warnings or contact can prove very effective. In other countries, with larger, much more disparate and in some cases less experienced judiciaries, a gradation of formally expressed sanctions is found appropriate, sometimes even including financial penalties.

74. The European Charter on the Statute for Judges (Article 5.1) states that "the scale of sanctions which may be imposed is set out in the statute and must be subject to the principle of proportionality". Some examples of possible sanctions appear in Recommendation No. R (94) 12 (Principle VI.1). The CCJE endorses the need for each jurisdiction to identify the sanctions permissible under its own disciplinary system, and for such sanctions to be, both in principle and in application, proportionate. But it does not consider that any definitive list can or should be attempted at the European level.

5°) Conclusions on liability

75. As regards criminal liability, the CCJE considers that:

i) judges should be criminally liable in ordinary law for offences committed outside their judicial office;

ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.

76. As regards civil liability, the CCJE considers that, bearing in mind the principle of independence:

i) the remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals (whether with or without permission of the court);

ii) any remedy for other failings in the administration of justice (including for example excessive delay) lies only against the state;

iii) it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default.

77. As regards disciplinary liability, the CCJE considers that:

i) in each country the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed;

ii) as regard the institution of disciplinary proceedings, countries should envisage introducing a specific body or person with responsibility for receiving complaints, for obtaining the representations of the judge and for considering in their light whether or not there is a sufficient case against the judge to call for the initiation of such proceedings;

iii) any disciplinary proceedings initiated should be determined by an independent authority or tribunal, operating a procedure guaranteeing full rights of defence;

iv) when such authority or tribunal is not itself a court, then its members should be appointed by the independent authority (with substantial judicial representation chosen democratically by other judges) advocated by the CCJE in paragraph 46 of its Opinion N° 1 (2001);

v) the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court;

vi) the sanctions available to such authority in a case of a proven misconduct should be defined, as far as possible in specific terms, by the statute or fundamental charter of judges, and should be applied in a proportionate manner.

APPENDIX

SUMMARY OF THE REPLIES TO THE QUESTIONNAIRE ON THE CONDUCT, ETHICS AND RESPONSIBILITY OF JUDGES

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What are the obligations by which judges are bound ?

	Source	Date	In relation to the law	In relation to the office	Personal qualities
ANDORRA	Qualified Justice Act	1993		professional secrecy	Duty to act with reservation
AZERBAIJAN			loyalty to the law	honesty, objectivity, incorruptibility	
BELGIUM	Judicial code	1967, an Act of 1999 was to reform the system, but the implementing decree was never adopted and now Parliament is seeking to repeal the Act	obligation to adjudicate under pain of a denial of justice	obligation under the Constitution to state the reasons for decisions, to deal with cases within a specified time	
CYPRUS	Courts of justice law		oath of loyalty to the Republic and to the Constitution	judicial oath to exercise his duties without favoritism, without allowing himself to be impressed, without allowing himself to be influenced by his passions	
CZECH REP	New Act on courts and judges	Entered into force on 1 April 2002	must interpret the law to the best of his abilities, according to his knowledge and his convictions	impartiality, reasonable time, loyalty in carrying out duties, must do nothing which would compromise the dignity of the judicial system and the confidence which it must inspire	no right to strike, no right to take part in a public demonstration prejudicial to his activities, must not be a member of a political party.
ESTONIA	Status of Judges Act	a new Act is being debated in 2002			
FINLAND	Constitution, oath, Code of Procedure, Act on Civil Servants		obey the law	impartiality, efficiency, reasonable time, secrecy of deliberations	behaviour in accordance with the office
FRANCE			judges are required to adjudicate, even when the law is silent, under pain of a denial of justice	not to infringe the principle of the secrecy of the deliberations, duty of reserve, no right to strike	refrain from any political deliberation, from any display of hostility to the powers of the Republic
GERMANY	German Judiciary Act			principle of moderation in expressing views, keeping the deliberations secret, not compromising confidence in the independence of the judicial system in his work	... and outside his duties
ICELAND	Constitution and European Act on the Judiciary	1998		must carry out their duties with complete independence, without ever being subject to the authority of anyone whomsoever, within a reasonable time	must maintain their level of legal knowledge and be attentive to their extra-judicial activities
IRELAND	Oath provided for in the Constitution	1937	comply with the Constitution and the law	Carry out his duties as a judge faithfully and to the best of his abilities, without fear or favour	
ITALY	Law on the judges' discipline	1946			
JAPAN	Constitution, Court Organisation Law	1947 (both)	compliance with the Constitution and with law	independence in the exercise of their conscience, impartiality and fairness	requirements of devotion to duty and secrecy; must refrain from any conduct casting doubt on their integrity
LIECHTENSTEIN	Constitution and Court Organisation Act	1921 and 1922, Bill on judiciary currently being examined	duties of officials in general, Civil Servants Act 1938		
LITHUANIA	Courts Act	2002	obey the Constitution and the law	satisfy the requirements of judicial ethics, impartiality, deal with cases within a reasonable time, stand down if necessary, disclose that members of his family are to appear before the court in which he works	

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LUXEMBOURG	No law defining judges' duties				
MALTA	First oath of allegiance before the President provided for in the Constitution, second oath in the Code of Judicial Organisation and Procedure		adjudicate in accordance with the law and Maltese custom, to the honour of God and the Maltese Republic	act honestly and fairly, must not communicate with the parties or advise them except in public, in court or with the leave of the President, provide reasons for his decisions, explain the reasons for delays	
MOLDOVA	Law on the status of the judiciary		strict observance of the requirements of the law in the interests of justice, protector of individual freedoms	safeguard the honour and dignity of citizens, the high culture of the judiciary, be impartial and human, not discredit justice, compromise the honour or dignity of the judiciary, cause doubts as to their objectivity	
NETHERLANDS	Art. 29 of the "Organisation of the Judiciary Act"	1827	They will be loyal to the King, they will maintain and obey the Constitution	They will carry out their duties impartially, honestly and conscientiously	
NORWAY	Constitution, oath of obedience and loyalty to the Constitution and the King, Court of Justice Act			must give an undertaking in writing to carry out the duties of his post conscientiously	
POLAND	Constitution, laws, codes and rules of procedure – oath before the President, internal rules of the courts	Acts of 1984, 1995 and 1997 updated in October 2001	loyalty to the nation, guardian of the law	Meticulously observe the obligations associated with his work, comply with the oath, loyalty, impartiality, dignity and honesty in the administration of justice, secrecy of the deliberations	obligation to declare assets and resources, avoid any conflict of interests
PORTUGAL	The status of judges			Common duties to all the public function, duty of reservation, must wear gown	must reside in the place in which they sit; judges of the lower courts must not be absent from that place except at weekends and during holidays; other judges must not be absent for more than three consecutive days and not more than 10 days in a year, declared to the Judicial Service Board; political activities prohibited
ROMANIA	Article 24 of the Constitution	1991	Oath of loyalty to the constitution	must not do anything which would compromise the dignity of the profession	must not do anything which would compromise their personal dignity
	Articles 82-87 of the Judicial Organization 92/92 Act	1992	and law		
SLOVAK REP	Act on judges and lay judges	2000		Impartiality, reasonable time, loyalty in carrying out duties, must do nothing which would compromise the dignity of judicial system and the confidence which it must inspire, must refuse gifts, not allow himself to be influenced by his relationships, including by the media	must have reached the age of 30 years, have completed higher studies in law, be capable of being a judge, in particular as regards his health and his integrity, must reside permanently in Slovakia, must have been through a selection procedure
SLOVENIA	Judicial Service Act	1994, 1996 et 1998		conduct himself in his professional life in such a way as not to call in question his impartiality, his independence or the reputation of the judicial system.	In the exercise of his personal freedoms and rights, a judge must always take into account his duty to protect the independence and impartiality of justice and must not compromise the reputation of justice.
SWEDEN	Constitution, Codes of Procedure (oath) and Public Employment Act		must observe the law, must not manipulate it	an honest and upright judge: impartial, must administer justice to the best of his abilities and his conscience, must not be involved in corruption or personal, family or	

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				friendly favours, must not find the innocent guilty or vice versa, must observe the secrecy of the deliberations	
SWITZERLAND					
TURKEY	Constitution of the Republic of Turkey and Law on the Judges and Public Prosecutors.	Both in 1982	loyalty to the Constitution, to the law and to his convictions provided they are compatible with the law	protect their independence, even though they may be linked to the Ministry in their administrative duties	no official functions, unless prescribed by law
UKRAINE	Law on the status of judges		Loyalty to the law and to the Constitution, objectivity, must deal fully and conscientiously with the cases brought before him	must submit himself to the discipline and to the organisation of work in the court; professional secrecy	
UNITED KINGDOM	Common law		Oath of loyalty and allegiance to the Crown while observing the law	apply the law independently and impartially	

Is there a judge's code of conduct?

	Drafted by...	Adopted by...	Date	Obligations	Sanction
ANDORRA	NO				
AZERBAIJAN	YES, prepared and adopted by all the judges and by the Judicial Council			Same as the provisions of the Statutes	Disciplinary proceedings
BELGIUM	NO				
CYPRUS	NO, but standards exist on recruitment in order to ensure the high moral quality of the future judge noted in his practice as a lawyer				
CZECH REP	YES AND NO, but 7 brief principles have been drawn up by the Judges' Union (an organisation representing 50% of judges) and could be made into a Code	Approved by a representative assemble of judges	2000	7 principles setting out the duties and conduct of the judge in his professional life	No cases
ESTONIA	YES, Association of Estonian Judges	Delegation by Parliament in the Judges Act for adoption by the Judges' Conference	1994	35 basic rules on professional conduct (conscience and diligence in work, professional relations, independence and impartiality) and restriction of personal freedoms (extra-judicial activities, private relations)	No actual sanction but may help to judge in disciplinary proceedings by shedding light on the provisions of the Judges Act
FINLAND	NO				
FRANCE	NO				
GERMANY	NO				
ICELAND	NO, some unwritten rules				
IRELAND	NO, but a report on the ethics and professional conduct of judges in 1999 recommended that an ethics and professional conduct committee draw up a Code which would be given to all new judges when taking up their posts. Such a committee does not yet exist. The law is in the course of being reformed.				
ITALY	YES, National Association of Judges	National Association of Judges, with the authority of the government and	1994	Dignity and correctness in private life, sense of public duty, disinterested exercise of the judicial function, independence, impartiality,	It is primarily a means of self-regulation. A sanction may

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		the legislature		attention given to relations with citizens, professional conscience, continuous training, procedures for using the resources of the administration, professional secrecy, discipline of relations with the media, no protection from conflicts of political or financial interests, concern to examine his impartiality, relations with his peers and judicial personnel	be available if the breach is one covered by the disciplinary provisions or the general law.
JAPAN	YES, stipulated in certain laws, although there is no independent code of conduct				
LIECHTENSTEIN	NO				
LITHUANIA	YES, National Judges' Association	National Congress of all judges	1998	Independence, conduct and duties of the judge, then outside his judicial duties, etc.	NO, but authority in disciplinary proceedings
LUXEMBOURG	NO, a Committee which examined the question concluded that it was preferable to stick to general unwritten rules.				
MALTA	YES, drafted by the judiciary	All except 1 judge, presented to the President at the head of the Justice Administration Committee, which accepted the Code with few amendments	2000	28 paragraphs reflecting agreement on good practice, confirming the values to which judges have adhered when taking the oath, image of justice for those subject to it who must also be effectively sanctioned if necessary	"The Code itself" is nto accompanied by sanctions
MOLDOVA	YES, by the CSM	Judges' Conference	2000	Confidentiality, correctness, punctuality, temperance, must be sober, polite, formal, calm, tolerant, must listen, must sanction those who do show contempt of court, , must not discuss the case with the parties other then during the proceedings, respect human rights, no discrimination	YES, disciplinary
NETHERLANDS	NO				
NORWAY	No code, despite an attempt in 1999 by the Norwegian Law Court Commission, which is now pending before Parliament				
POLAND	NO, but the National Council on the Judiciary is authorised to draft such a code, and has since July 2001 been working on a collection of principles relating to judges' ethics				
PORTUGAL	NO				
ROMANIA	NO, but there are some general rules in the Judicial Organisation Act	Romanian Parliament	1992	Magistrates shall refrain from any acts or deeds able to compromise their dignity in function and in society. Magistrates shall be forbidden to be affiliated to political parties or to be engaged in public activities with a political character. Magistrature is incompatible with any other public a private office, except that of an academic professional activity. Magistrates shall be forbidden the exercise of trading activities, participation in the management of trading, civil companies or of autonomous companies, either directly or through interposed persons	Penal and disciplinary proceedings.

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				through interposed persons. They shall also be forbidden the participation in the administration of such companies or autonomous companies. Other obligations for judges are considered conditions for being judge: ex. Good reputation or characteristic for judge's activity: ex. independence, impartiality, secret of deliberation	
SLOVAK REP	YES	President of the Council of the Judiciary and the Minister for Justice	2001	Private life, professional life and professional duties	NO, only the Judges Act
SLOVENIA	YES (it has just replaced a former Code of Professional Responsibility dating from 1972), by a group of judges from the Judges' Association	Association	2001	9 principles : independence, impartiality and neutrality, ability, diligence, incompatibilities/compatibilities, discretion, professional relations, reputation.	No, but there is a Court of Honour which may deal with an infringement without any sanction being imposed.
SWEDEN	No specific code, but there is an historical model which serves to inspire judges' conduct, namely the General Code of Law (1734), which includes an old code which is not binding on judges	Olaus Petri in the sixteenth century; a judges' association has recently been working on a draft code which has not been completed, in the face of numerous critics	1540		By another system, the law empowers the Ombudsman and the Justice Chancellor to criticise a judge publicly for his conduct
SWITZERLAND	There are practically no written rules at federal level or to a large extent at local level				
TURKEY	Law on the Judges and the Public Prosecutors and rules of conduct	Parliament, Supreme Council of Judges and Public Prosecutors	1982	Same as the provisions of the Statutes	Disciplinary proceedings
UKRAINE	YES, taken up by a Congress of Judges in 1999 on the basis of experiences in Canada, America and Russia, in particular, together and amendments and proposals by Ukrainian judges	Council of Judges	2002	Obedience of the law, impartiality, maintenance of legitimate expectations, loyalty, justice and equity, sincerity, conduct faithful to the oath	NO, in accordance with the wishes of the Congress of Judges
UNITED KINGDOM	NO, but there are some informal guides which some (Judicial Studies Board, Scottish Justice Minister and a doctrine in Northern Ireland) would wish to see placed on a formal basis without constituting statutory duties	Established by the Lord Chancellor by agreement with the Lord Chief Justice		Before being appointed, judges are informed of what is expected of them in terms of conduct	

Incompatibilities

	Source	Type of incompatibility	Exceptions
ANDORRA	Law on Justice (L.Q.J.)	Any other public office; commercial, industrial or professional activities; work as a lawyer or legal aid work	
AZERBAIJAN	"this question is unclear for us"		
BELGIUM		A judge may not, at the same time, be a public prosecutor, elected representative, solicitor, bailiff, barrister, soldier or religious officer, or hold paid political or administrative office of any kind	
CYPRUS		Any other post or profession	Lectures and legal writings
CZECH REPUBLIC		No political office (eg President of the Republic or member of parliament), no	

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		government department or business activity. Scientific work, teaching and literary and artistic activities are allowed, as is work as a political adviser, if they do not undermine the dignity of the judiciary and the confidence it should inspire.	
ESTONIA		No political mandate or activity, no other posts except teaching or research; may not sit on the boards of public or private companies	
FINLAND	Act on Civil Servants	any public office, any civil, commercial and salaried profession or activity	permission may be obtained from the court or a higher court
FRANCE		Incompatibility with all types of public office, any civilian, commercial or salaried profession and work as an arbitrator	
GERMANY	German Judiciary Act	Idea of the separation of powers: no administrative activity (except in the court, research and teaching); may belong to a political party and stand for election as member of parliament: if elected, is suspended from duties as a judge; advisory and conciliation activities prohibited	The government may authorise a judge to sit as an arbitrator or be heard as an expert by an arbitration tribunal
ICELAND	1998 Act on the Judiciary	May not accept a post or have a holding in a company if this is incompatible with his/her office or likely to impair the quality of his or her work.	Teaching, chairing committees, lectures writings, etc. Permission to engage in non-judicial activities must be requested from the Judicial Office Committee
IRELAND	Constitution of 1937	No judge shall be eligible. to be a member of either house of parliament or to hold "any other office or position of emolument".	
ITALY	Royal decree of 30 January 1941	No job or public or private office except as member of parliament or of a charitable organisation, no commercial, industrial or professional activity. The High Council for the Judiciary may authorize "tasks of any other kind".	Teaching and scientific activities possible with authorisation - under strict conditions - from High Council. Arbitration is only exceptionally authorised.
JAPAN	Court Organisation Law	Prohibition of political and commercial activities and of receiving remuneration other than for holding judicial office.	Permission may be obtained from the Supreme Court for receiving remuneration other than for holding judicial office
LIECHTENSTEIN	Article 6, 1938 Civil Servants Act	No other remunerated or particularly time-consuming activity without authorisation from the government, which considers whether it is compatible with the work of a judge, which is generally the case for part-time research and teaching	
LITHUANIA	2002 Judicial Act	No political activity, may not be called up for military service, no lucrative private activity, though compensation is allowed in the case of teaching, no work in an association if it impairs the judge's independence	Lecturing and legal writings
LUXEMBOURG	Constitution and Judicial Organisation Act	No paid employment	
MALTA	Code of Organisation and Civil Procedure, Code of Ethics	No personal involvement or involvement as counsel in a case that has already been opened or is probably within the judge's remit, no other activity, even temporary, except in an international judicial body or the university	With the consent of the President of the Republic
MOLDOVA	Status of Judges Act	No other public or private office or post as member of parliament or local authority adviser; may not belong to political parties or other socio-political organisations; may not engage in business or in written or oral consultation except for close relatives. Publications and media appearances possible if they do not concern domestic policy issues.	
NETHERLANDS	Art. 44 "Organisation of the Judiciary Act (1827/2001)":	Judges may not be (the Dutch equivalent of) barrister, solicitor	

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	Judiciary Act (1827/2001), Act concerning incompatibilities national and European parliaments (1994)	equivalent of) barrister, solicitor, notary-public; they may not act in other professions that entail the giving of legal aid or advice; judges of the Supreme Court may not be a member of the Dutch or the European Parliament.	
NORWAY	Courts of Justice Act and State Basic Agreement	Judges are relatively free; only Supreme Court judges are subject to specific provisions. Generally speaking, however, they may be barristers, mediators or jurors without having to resign.	The law before parliament, which is to replace tolerant case law, contains strict provisions on the prohibition, authorisation and declaration of ancillary activities and makes the incompatibility rules stricter.
POLAND	Constitution and Statute	No other work except scientific publications and part-time teaching, provided these do not affect the judge's work; no activity or lucrative position that could tarnish the image of the judiciary; no political activity	The application must be forwarded to the hierarchical superior (president of the court or supreme court or the minister)
PORTUGAL		No public or private professional post; incompatibilities applicable to civil servants in general	Teaching and legal research may be authorised by the Judicial Service Commission, but may not be remunerated
ROMANIA		No political activity, no post other than collaboration with scientific publications and teaching	
SLOVAK REPUBLIC	2000 Act	No political posts in the broad sense of the term, including government departments and the army, no lucrative private activity except scientific, teaching or artistic activity, and then on condition that it does not undermine the dignity of the post of judge.	
SLOVENIA	Constitution and Judicial Organisation Act	Any administrative or political post, any commercial or professional activity, lucrative activity or involvement in the management of companies, and anything that might tarnish the reputation of the judiciary. Teaching and research are authorised subject to this condition.	
SWEDEN	Laws and constitution	No judge is subordinate to another judge or public official	
SWITZERLAND		No other public office or post, no other career or profession, no post as director, manager or member of a body running a lucrative establishment, no post assigned or title or declaration awarded by foreign authorities	The court may authorise work as an expert or arbitrator and other ancillary activities and lay down the relevant conditions provided the independence and prestige of the judiciary are not impaired
TURKEY	Law on the Judges and Public Prosecutors	No public activity unless authorised by law, no profit bringing activity.	
UKRAINE	No incompatibilities formally provided for		
UNITED KINGDOM	Guidelines	May not sit as an arbitrator or engage in any lucrative professional activity (save writing or editing) or any professional activity (save writing or editing) or any political activity; substantial restrictions also apply when a judge has left office	

Circumstances in which impartiality may be called into question

	Source	Circumstances
ANDORRA	Law on Justice (L.Q.J.)	Family proximity, to have been lawyer or representative; commercial or economic legal relationship. To have had a litigation with a Party or his lawyer, interest in the object of the litigation, hierarchical or friendly relationship.
AZERBAIJAN	Question brought to the discussion by the Attorney General's Department in a situation referred to by law	
BELGIUM	Case-law based on the provisions of the Code and the legislation on standing down and on incompatibilities	
CYPRUS	Case-law of the Supreme Court	Conflict of family or personal interests, knowing the case or the parties
CZECH REP	Codes of Civil and Criminal Procedure.	

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	[illegible], mechanism for ... seeking damages from a judge who has misused his authority	
ESTONIA		Conflict of interests, any relationship which might adversely affect the credibility of the judicial system, bias
FINLAND	Code or Procedure	Family connections, conflict of interest, bias, involvement in the case and other reasons, which bring the judge's impartiality under reasonable suspicion
FRANCE		A judge may be challenged and must refrain from hearing a case in various circumstances which call his objective and subjective impartiality into question: family or friendly relations, conflict of financial interests, where he has already taken a decision or delivered an delivered in the same case, where there is a link of subordination
GERMANY	Code of Civil Procedure	Family connections, a case in which the judge has given evidence or been examined as an expert, or in which he has already taken a decision, doubts in respect of his impartiality may thus be revealed by a conflict of financial or friendly interests or a stated preference for one of the parties
ICELAND	Law on Civil Procedure and Law on Criminal Procedure	Party to the dispute, has given advice to a party to a case, having a family, friendly or professional relationship with one of the parties; is a witness in a case or has a close relation to a witness.
IRELAND	*Nemo judex in causa sua* rule of law	No conflict of personal, family or financial interests, no bias or prejudice, otherwise the judge must stand down
ITALY	Codes of Civil and Criminal Procedure	Conflict of family, personal or professional interests, knowledge of the case or of the parties, bias and prejudice.
JAPAN	Constitution and Codes of Civil and Criminal Procedure such as the party of a case being his/her relative	Apart from compliance with the rules on incompatibilities, judges may be challenged and/or are required to withdraw from proceedings in certain circumstances
LIECHTENSTEIN		Conflicts of personal or family interests, bias, raised by the Court of its own motion or by the parties
LITHUANIA	Code of civil procedure	Conflict of personal or family interests, bias, involvement in the case as a witness
LUXEMBOURG	Article 521 of the New Code of Civil Procedure, Article 542 of the Code of Criminal Investigation, Article 6 of the European Convention on Human Rights	Where the judge's impartiality is challenged or where there is a reasonable doubt as to the fairness of the proceedings
MALTA	A comprehensive list of circumstances in which the judge must stand down or the parties refuse to allow him to deal with the case is set out in the code of Judicial Organisation and Civil Procedure	Conflict of personal or family interests, bias, involvement in the case as a witness
MOLDOVA	Codes of Civil Procedure and Criminal Procedure	Must stand down where he has a direct or indirect interest in the case or where there is a family connection with the parties
NETHERLANDS	Civil Procedure Act, Criminal Procedure Act, Administrative Procedure Act	"Facts or circumstances that could call the impartiality of the judge into question" (The law does not go into detail, jurisprudence conforms to the guidelines set by the European Court of Justice)
NORWAY	Courts of Justice Act	Family connections with the parties or their legal advisers, provided that confidence in the judge may be affected, the judge must stand down (conflict of interests in the majority of cases)
POLAND	Laws on Criminal and Civil Procedure	Where the judge knows the parties or is familiar with the case because he has already taken part in it (close involvement with one of the parties or with the case in a personal or professional capacity); two categories of case: *iudex inhabilis* and *iudex suspectus*
PORTUGAL	Statute on the Judiciary, Code of Civil Procedure, Code of Criminal Procedure	A judge may not sit in a court in which a member of his family works, where there is a reasonable doubt as to the fairness of the proceedings or where he asks to be relieved of the case in the event of a conflict of personal, economic or family interests, he cannot have been involved in the case or have taken part in it in a different capacity
ROMANIA	Legislation	Close connection with one of the parties, political influence, media pressure, friendly relations
SLOVAK REP		Any circumstances in which, in the performance of his duties, in his private life or after he has left office, the judge brings the dignity of his office into disrepute or jeopardises the necessary confidence in the judicial system.
SLOVENIA	Codes of Civil and Criminal Procedure, ECHR	Where the judge is a party to the proceedings or is involved in the case, or has a connection with such a person, if he has given evidence or been involved in the case as an expert witness, if he has taken part in a decision taken or delivered in the case, if there is a reasonable doubt as to his

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		impartiality.
SWEDEN	Codes of Procedure	Family connection, conflict of personal, financial or political interests, bias, professional or personal involvement in the case
SWITZERLAND	Legislation and case-law	...consistent with the case-law of the European Court of Human Rights
TURKEY	Codes of Criminal and Civil Procedure	Bias, conflict of interests, personal involvement in an offence as victim, witness, counsel, arbitrator or through a family connection
UKRAINE	Codes of Procedure	Close connection with one of the parties, personal interest in the case, or where the performance of the judge's duties would in any way call his impartiality into question
UNITED KINGDOM	ECHR	

Criminal or civil liability of judges

	Criminal liability		**Civil liability**	**Procedures**
	Offences	Sanctions		
ANDORRA	Criminal code, Article 114, corruption, corrupt practices		Judges bear civil liability in the event of fraud in the performance of their duties	In criminal matters, a judge can be arrested only where is caught in the act of committing an offence; temporary suspension from duties is automatic, with the consent of the Supreme Judicial Council
AZERBAIJAN	Where a judge knowingly convicts an innocent party, for example	Prison or damages	A higher court rehearing a case may find that the judge who dealt with the case at first instance is liable	The President and the Council of Judges decide to proceed by referring the matter to the Attorney General's department, the judge will be tried by an ordinary court
BELGIUM	Offences against the general law on the occasion or in the exercise of his duties	Penalties prescribed under the general law	Mechanism for seeking damages from a judge who has misused his authority which allows a judge to be held personally liable in the event of fraudulent intent or fraud on the part of the judge, the State may also be held liable for misconduct by a judge	In criminal matters, the action is in the hands of the Public Prosecutor attached to the Court of Appeal, in civil matters the proceedings are held before the Court of Cassation
CYPRUS	The Constitution guarantees immunity for the judges of the Supreme Constitutional Court and of the High Court (now combined into the Supreme Court).. Common law and equity ensure that judges of the lower courts also enjoy immunity			
CZECH REP	In connection with the exercise of duties		Where there has been an unlawful decision or a harmful activity, the damage is made good by the State, which is entitled to bring an action for indemnity if the judge has been found guilty of a disciplinary offence	Criminal proceedings against a judge must be authorised by the President of the Republic; jurisdiction lies with the ordinary courts, according to the procedures of the general law
ESTONIA	Where the judge has deliberately delivered an illegal decision	Removal from office	No personal liability on the part of the judge, State liability	The representative of the Attorney General's department addresses the Supreme Court, which ascertains that the prosecution may be brought under the Criminal Code and the Code of Criminal Procedure, with the consent of the President of the Republic.
FINLAND	Offences described in the Criminal Code committed in the course of duties	Penalties prescribed by general law, including removal from office	Liability for damage caused in the exercise of the judge's duties. The compensation is as a rule paid by the State,	Ordinary procedures, which, according to the Constitution, may be instituted by anyone whose rights

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			which in certain cases may be reimbursed by the judge.	have been offended (exceptions and special procedure for members of the Supreme Courts).
FRANCE	Offences defined by law	Penalties prescribed by the general law	Civil liability only where the judge is personally at fault	Normal criminal procedure, a civil action is available only against the State, which has a right to bring an action for indemnity
GERMANY	Breaches of the Criminal Code involving misuse of their judicial office and corruption.	Penalties prescribed under the general law	Personal civil liability limited by Article 839(2) of the Civil Code, where the act giving rise to the damage is a criminal offence. State liability is incurred in other cases, and the State can bring an action for indemnity whenever it is ordered to pay damages	Normal criminal and civil procedures
ICELAND	Where the judge has deliberately delivered an unjust decision, where he uses illegal procedures to obtain admissions or where he orders illegal arrests or investigations	Aggravated penalties prescribed by the general law	The State bears civil liability but may recover from the judge if the fault was deliberate	Procedures laid down by the general law
IRELAND	Complete immunity for judicial office is recognised at common law			
ITALY	Prescribed in the Criminal Code and aimed particularly at the judge in the performance of his judicial duties, such as corruption	Penalties prescribed by the general law	Civil liability for gross negligence or a denial of justice was provided for in a Law of 1988 which marked a break from the relative immunity from liability denounced in a referendum. The State acts as guarantor and can bring an action for indemnity against the judge, the amount of damages is limited if the damage was caused unintentionally.	Specific rules on jurisdiction in order to ensure that the case is dealt with in a different area, examination of the admissibility of applications (can a problem raised by corrected by a remedy? does the complaint relate to the interpretation of the law?). Cases are heard by the ordinary courts
JAPAN	Ordinary criminal liability		Under a precedent established by the Supreme Court in 1955, judges have no personal, civil liability for damage caused to parties in the performance of duty	
LIECHTENSTEIN	Offences under the general law, plus certain particular offences such as malfeasance in office or corruption	Penalties prescribed by the general law, a judge who is sentenced to a term of imprisonment of more than one year is removed from his post	General rules on the civil liability of the State, which may bring an action for indemnity	Ordinary courts and procedures in criminal matters and in civil matters; the Supreme Court has jurisdictions to hear appeals
LITHUANIA	Breaches of the Criminal Code involving misuse of their judicial office and corruption	Penalties prescribed under the general law	The State alone is liable, but has a right to bring an action for indemnity against the judge	Any criminal prosecution or detention must be approved by Parliament; the judge is then suspended from office pending the outcome of the proceedings.
LUXEMBOURG	Article 4 of the Civil Code, abuse of powers and denial of justice	Fines, prohibition on exercising duties or from occupying public posts or office	Only State liability can be incurred (procedure under the general law, Law of 1 September 1988)	Article 639 of the New Code of Civil Procedure for seeking damages from a judge who has misused his authority
MALTA	The Criminal Code makes express provision for cases in which a judge dismisses or refuses to hear a lawfully submitted application for habeas corpus: like any holder	Penalties prescribed by the general law	No special rules; there is no known case of an attempt to render a judge civilly liable	The ordinary procedures of the ordinary criminal courts

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	of public authority: misuse of powers or malfeasance, corruption, financial misappropriation			
MOLDOVA	The general law, under the principle that all are equal before the law		No civil liability for judges	Criminal prosecution authorised by the CSM and the President of the Republic or Parliament, depending on circumstances, and heard before the higher courts.
NETHERLANDS	General law applies		Only State liability can be incurred	General law applies, no special procedures
NORWAY	Offences against the general law		An action to establish civil liability on the part of the judge is available only if the decision has been set aside and if the judge committed an offence when taking it	The charges against a judge are defined by the King's Council and the judge is always tried by a higher court than the one in which he sits
POLAND	Offences connected with judicial activities and duties		The judge may be held personally liable in accordance with the general law, the State may be held liable in a case of unintentional fault or misconduct in office (an action for indemnity is limited to three months' salary, is unlimited in a case of serious breach), there is no liability for the consequences of a judgment	Criminal proceedings and custodial measures must be authorised by the Disciplinary Court (except where the person is caught in the act of committing the offence): the Disciplinary Court may also suspend the judge from office; an appeal lies to a higher court
PORTUGAL	Offences against the general law committed on the occasion or in the exercise of the judge's duties, special offences of misuse of powers, abuse of authority, misappropriation of public funds, denial of justice, breach of secrecy	Penalties prescribed by the general law	A judge incurs civil liability only where the facts causing the damage have lead to a criminal conviction for bribery, misappropriation of public funds or prevarication, the judge is required to reimburse the compensation paid by the State or to indemnify the State	Ordinary criminal procedure before a higher court than that in which the judge sits in criminal matters, and before the court where the facts arose in civil matters
ROMANIA	General law	General law	General law	Ordinary procedures and courts in civil matters; in criminal matters, prior opinion of the Minister or the President, then ordinary procedures and courts (higher courts for judges at a certain level in the hierarchy)
SLOVAK REP	Offences committed in the course of the judge's duties	Imprisonment, loss of professional and honorary qualifications, prohibition on practising, fines		In criminal matters, proceedings must be authorised by the body which appointed or elected the judge and are brought at the initiative of the President of the court concerned or the Minister for Justice
SLOVENIA	Malfeasance having given rise to a deliberate offence	Penalties prescribed by the general law, which may have the consequence of removal from office		In criminal matters, any proceedings or detention must be authorised by Parliament
SWEDEN	Offence committed in the exercise of duties set out in the Criminal Code: breach of duty, corruption, breach of professional secrecy	Penalties prescribed by the general law (fines, prison) and possibly disciplinary consequences, including removal from office	Damage caused in the exercise of the judge's duties, the State is generally liable for the negligence of a public servant, the judge may be personally liable where there are aggravating circumstances	In criminal matters, if the judge is a judge of the Supreme Court on the Ombudsman and the Justice Chancellor can bring proceedings

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SWITZERLAND	Offences connected with the judge's activities or official position		Only the State can bear civil liability, the direct civil liability of the judge is precluded	In criminal matters, only Parliament can authorise proceedings; it may also provisionally suspend the judge from office; the case falls within the jurisdiction of the ordinary courts
TURKEY	Code of Criminal Procedure: misuse or abuse of office, corruption, favouritism	Imprisonment	Code of Civil Procedure: civil consequences of a criminal offence, arbitrary decisions, illegal decisions, decisions dictated by personal considerations or by considerations extraneous to the case	Criminal proceedings require the consent of the Supreme Council of Judges and Public Prosecutors, which who appoints the investigators and the prosecutor, decides if a matter is disciplinary and forwards the documents to the competent authorities – special procedure in cases of treachery (felony)
UKRAINE		Penalties prescribed by the general law, plus removal from office.	No civil liability for judges	Ordinary criminal procedure, however any preventive detention of a judge must be exceptional and authorise by the Supreme Council. The judge is suspended from office immediately an action is initiated. The competent court is a Court of Appeal designated for the purpose, where the judge has never worked
UNITED KINGDOM	Immunity at common law in the exercise of judicial duties, otherwise immunity only if the judge has acted in good faith			

Disciplinary proceedings

	Circumstances	Procedure	Authority	Sanction
ANDORRA	Serious or very serious breaches set out in Articles 83 and 84 of L.Q.J.	The Supreme Judicial Council takes the initiative for an investigation upon application by an injured person, a citizen who was aware of the facts, the Attorney General's department or the president of the court concerned	Supreme Judicial Council	Article 85 of L.Q.J., reprimand, fine, suspension of post, removal from office
AZERBAIJAN		In the even of minor offences	The Minister requests the Judges' Council to deal with the case	Warning or dismissal
BELGIUM	Breach of the rules of conduct laid down by law or deriving from case-law, i.e. confidence in the judicial institution		The judge appears before his President, the First President of the Court of Appeal or before the General disciplinary Assembly of either the Court of Appal or the Court of Cassation, depending on his grade and the gravity of the breach or of the penalty available	Warning, simple censure, censure with a reprimand, suspension for between 15 days and 1 year, dismissal
CYPRUS	Mental or physical incapacity preventing the judge from carrying out his duties, breach of his ethical duties	The Supreme Court appoints an investigating judge and then decides to send the judge before the disciplinary body	Supreme Council of the Judicature	Reprimand or removal from office
CZECH REP	Breach of the disciplinary rules laid down in a Law of 2002	The Minister for Justice or the President of the Court concerned or the President of the Supreme Court decide	Disciplinary Court composed of five judges appointed by a President of a Court appointed by agreement with the Judicial Council for a	Reprimand, temporary reduction in salary, suspension from duties as president, suspension from duties as a judge

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		to bring proceedings within two months of becoming aware of the facts, which must not have happened more than two years previously	period of three years, an appeal lies to the Supreme Court.	
ESTONIA	Failure to follow procedures and any breach or conduct that jeopardises confidence in the judicial system	Proceedings initiated by the President of the Supreme Court or the Minister for Justice	Disciplinary Committee of the Supreme Court	Warning, reprimand, fine, removal from office (can only be ordered by the Supreme Court in plenary assembly)
FINLAND	No disciplinary proceedings: also minor offences (breach of duty) may result in criminal proceedings			
FRANCE	Breach of the duties associated with his post, dishonourable unscrupulous or undignified conduct		Supreme Council of the Judiciary, under the presidency of the First President of the Court of Cassation	From a simple reprimand recorded in the file to removal from office
GERMANY	Breach of the duties defined in the Statutes, proceedings are very rarely brought	Procedure administered by a special department	The Federal Service Court, a Division of the Federal Court of Justice composed of professional judges appointed for life and other career judges	Reprimand, fine, reduction in salary, transfer to another post, removal from office
ICELAND	A breach in discharge of judicial functions.	A complaint in writing may be lodged before the Committee on Judicial Functions by any person who has suffered harm owing to the conduct of a judge. If found valid, the judge is invited to comment before the Committee rules.	a) Committee on Judicial Functions composed of three members appointed by the Minister for Justice (one proposed by the Assembly of Icelandic Judges and one proposed by the Faculty of Law) b) President of Court	Admonition, personal opinion (removal from office only by conclusions of court proceedings in a more serious matters)
IRELAND	There is only a procedure before Parliament for removal from office; it resembles the impeachment procedure deriving from common law and is rarely used.			
ITALY	Any breach of the duties associated with his post, public or private conduct adversely affecting the confidence and prestige that a judge and the judicial institution must inspire (cases determined by the case-law)	Proceedings initiated by the Attorney General's representative at the Court of Cassation or on application by the Minister for Justice. The procedure is judicial in nature, with all the guarantees provided by such a procedure	Disciplinary court composed of nine judges who are members of the Supreme Council of the Judiciary elected by their peers; two of them must have been nominated by Parliament	
JAPAN	Court Organisation Law, Law for Impeachment of Judges and Law on Disciplinary Actions against Judges	Stipulated in the Law on Disciplinary Actions against Judges and Law for Impeachment of Judges	Hearing by a court of a level higher than that to which the judge concerned belongs in the impeachment procedure in which the most serious cases are handled, hearing by the Court of Impeachment made up of Diet members.	The disciplinary procedure: Caution or fines / the impeachment procedure: Dismissal
LIECHTENSTEIN	Those laid down in the Statutes of Officials of the State	No specific procedure, similar to criminal procedure	Higher court in the case of ordinary judges and Supreme Court in the case of higher judges	Reprimand, temporary reduction in salary, dismissal
LITHUANIA	Breach of judge's duties, flagrant breach of the law, failure to observe rules on incompatibility	The Judicial Council or the President of the Court may initiate disciplinary proceedings	Ethical and Disciplinary Committee of the Judicial Council (composed of judges – elected or appointed – and of representatives of the other Powers), which refers the case to a Court of Honour, which, where it decides that a judge is to be dismissed, proposes that sanction to the President or to Parliament	Reprimand or removal from office

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LUXEMBOURG	Article 155 of the Law on the Judicial Organisation, wide definition	Article 157 *et seq.*		Article 156
MALTA	Constitution. Inability (physical or mental) to carry out his duties or particularly serious misconduct	S. 971 of the Constitution S. 8 of Act No. 41 of 1944	Removal from office by the President on an address from Parliament (approved by two thirds of the votes). Before this steps is taken the case is investigated by the Commission for the Administration of Justice when it is found that the judge has a case to answer	Removal from office
MOLDOVA	Premeditated breach of the law in administering justice, disciplinary offence, public activity of a political nature, breach of the rules on incompatibilities, systematic or serious breach of the Code of Conduct	Disciplinary proceedings may be brought by: the President of the Supreme Court, the President of the Supreme Council of the Judiciary, any member of the Supreme Council of the Judiciary	Disciplinary Board of the supreme council of the Judiciary	Observation, warning, dismissal
NETHERLANDS	In case of minor breaches of duties or rules of conduct by the judge, the president of the court can issue a warning. It the judge is convicted or committing a crime and/or is sentenced to a prison sentence, if he is declared bankrupt or legally unfit and, more generally, if he acts in such a way that justice or the confidence of the judiciary is seriously impaired, the Supreme Court can suspend or dismiss the judge.			
NORWAY	A current Bill seeks to put an end to the practice whereby judges, like all senior officials, are not subject to disciplinary proceedings	A party, a witness or a lawyer with a complaint about the conduct of a judge in the exercise of his duties may bring the matter before the Disciplinary Committee – the Committee's decision may be reviewed by an ordinary court composed of lay judges	A committee composed of two judges, one lawyer and two outsiders, all appointed by the Government	Warning and reprimand only; removal from office, as provided for in the Constitution, for grave and repeated offences involves a special procedure provided for in the Constitution
POLAND	Breach of the dignity of his office, flagrant breach of the rules of law, minor offences	Closely resembles criminal proceedings; proceedings are administered by judges elected for the purpose, on application by the Minister, the Supreme Court or any head of court, the National Council of the Judiciary or Prosecutor elected himself; the proceedings are held in public and the judge is defended by counsel	Different disciplinary courts deal with matters arising in the ordinary courts, the administrative courts, the military courts and the Supreme Court: there are three judges at first instance and seven judges hear appeals	Warning, reprimand, removal from post – whether definitive or merely be way of transfer – removal from office
PORTUGAL	Breach of professional duties, acts or omissions in the capacity of judge which are incompatible with the dignity essential to the exercise of judicial functions (in varying degrees, which determine the sanction)	Provided for in the Statutes of Judges	Supreme Council of the Judiciary; and appeal lies to the Supreme Court	Fine of between 5 days' and 90 days' remuneration, transfer, suspension for between 20 days and 240 days, compulsory retirement, removal from office
ROMANIA	Professional misconduct and conduct contrary to	Proceedings initiated by the Ministry	Supreme Council of the Judiciary, then at last	Reprimand, warning, reduction in salary

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	and conduct contrary to the interests of the service or to the prestige of the judicial system (delays in dealing with cases, absence, acting in the judge's personal interest, interference in the work of judges, breach of secrecy)	by the Ministry, investigation carried out by judges of the same rank, defense provided by a judge	judiciary, then at last resort before the Supreme Court	reduction in salary, block on promotion, transfer, suspension, removal from office
SLOVAK REP	Breach of the disciplinary rules laid down in a Law of 2000 or the consequences of a criminal conviction	The Minister of Justice or the President of the Court concerned are competent to initiate proceedings	Disciplinary Courts	Admonition, temporary reduction in salary, suspension, removal from office
SLOVENIA	Very strict cases provided for by the Law on the Judicial Organisation	Proceedings on the initiative of the President of the Court, then application of the ordinary criminal procedure	Disciplinary Court composed of one judge of the Supreme Court as President and four judges representing the different levels of courts	Transfer, suspension of all promotion, reduction in salary, removal from office
SWITZERLAND	Switzerland is not concerned			
TURKEY	Failure to carry out duties, misconduct, insulting behaviour in the course of work, absence, delays, time-wasting, bringing the image of justice into disrepute, malfeasance, failure to fulfil administrative and ministerial duties	Depending on the hierarchical level, inspectors appointed by the Minister, who takes the initiative for proceedings, observance of the rights of defence	Supreme Council of the Judges and Prosecutors (which is also competent for appointments and career management)	Warning, reprimand, delay in and block on promotion, withholding of salary, compulsory transfer, dismissal
UKRAINE	Flagrant breach of the law, failure to fulfil duties as judge and those duties which that post imposes in the judge's private life		Disciplinary Committees	Reprimand or recommandation to the High Council on Justice that the judge be removed from office
UNITED KINGDOM	Particular serious misconduct	On the initiative of the Lord Chancellor and the Lord Chief Justice	By the Queen on address of both Houses of Parliament in the case of the senior judiciary and by the Lord Chancellor in the case of the rest of the judiciary (but in each case, no such steps would be taken without obtaining an independent judicial report and without the concurrence of the Lord Chief Justice)	Removal from office (extremely rare)

[1] This has since been revised in November 2002, to become The Bangalore Principles of Judicial Conduct. The CCJE did not have these Principles before it. The Explanatory Note to them acknowledges the input of the CCJE' s Working Party in June 2002.

[2] *Les mutations de la justice. Comparaisons européennes*, Ph. Robert and A. Cottino (ed.), Harmattan, 2001.

[3] See for exemple Piersack case, judgment of 1 October 1982, Series A 53, para. 30, De Cubber case, judgment of 26 October 1984, Series A 86, para. 24, Demicoli case, judgment of 27 August 1991, Series A 210, para. 40, Sainte-Marie case, judgment of 16 December 1992, Series A 253-A, para. 34.

[4] For a detailed analysis of incompatibilities, see the Communication by Jean-Pierre Atthenont, presented at the seminar organised by the Council of Europe on the statute for judges (Bucharest, 19-21 March 1997) and the Communication by Pierre Cornu presented at a seminar organised by the Council of Europe on the statute for judges (Chisinau, 18-19 September 1997).

[5] It covers relations with individuals, the duty of competence, the use of public resources, the use of professional information, relations with the press, membership of associations, the image of impartiality and independence, the obligation to act correctly with collaborators, conduct in office and outside and the duties of presiding judges.

[6] In his summary report, presented following the first meeting of the Lisbon Network, Daniel Ludet stressed that training should offer a link and encourage discussion of judges' professional practices and the ethical principles on which they are based (see *Training of judges and prosecutors in matters relating to their professional obligations and ethics.* 1st meeting of the members of the network for the exchange of information on the training of judges and prosecutors, Council of Europe Publishing).

[7] Merely because the State has been held liable for excessive delay, it by no means follows, of course, that any individual judge is at fault. The CCJE repeats what it said in paragraph 27 above.

[8] It was for these reasons that the CCJE Working Party, during and after its meeting with the United Nations Commissioner for Human Rights on 18th June 2002, qualified its otherwise substantially positive attitude to the Bangalore Code in its present draft form by disagreeing with the direct link which it drew between the principles of conduct which it stated and the subjects of complaints and discipline (see paragraph 2(iii) of Appendix V, doc. CCJE-GT (2002) 7): see the CCJE-GT's comments No. 1 (2002) on the Bangalore draft.

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[3] In England, the Lord Chancellor is responsible for initiating and deciding disciplinary action. By agreement disciplinary action is initiated only with the concurrence of the Lord Chief Justice, and thereafter (unless the judge concerned waives this) another judge of appropriate standing, nominated by the Lord Chief Justice, is appointed to investigate the facts and to report, with recommendations. If the Lord Chief Justice concurs the Lord Chancellor may then refer the matter to Parliament (in the case of higher tier judges) or remove a lower tier judge from office, or take or authorise any other disciplinary action.

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Activities for the development and consolidation
of democratic stability

THEMIS PLAN
Project n° 3

European Charter on the statute for judges

and

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FOREWORD

The activities carried out in the Council of Europe for many years now, on the organisation of Justice in a democratic State governed by the rule of law, have allowed the various aspects of the issue of the status of judges to be addressed on numerous occasions. These meetings over the past years have been devoted to the recruitment, training, career and responsibilities of judges, as well as the disciplinary system governing them. The number of these meetings has increased since the end of the eighties due to the profound changes that have taken place in Eastern Europe.

In 1997, the idea developed to maximise the results of the work and discussions in order to give this work better 'visibility' and above all to give a new impulse to the continuing effort to improve legal institutions as an essential element of the rule of law.

The need to draft a European charter on the statute for judges was confirmed in July 1997, following a first multilateral meeting in Strasbourg devoted to the Status of Judges in Europe. The participants at this meeting came from 13 Western, Central and Eastern European countries, as well as from the European Association of Judges (EAJ) and the European Association of Judges for Democracy and Freedom (MEDEL). The participants expressed a wish for the Council of Europe to give the necessary framework and support to the elaboration of the Charter.

On the basis of these conclusions, the Directorate of Legal Affairs entrusted three experts from France, Poland and United Kingdom with the realisation of a draft charter.

This draft, created in Spring 1998, was laid before the participants of a second multilateral meeting, also held in Strasbourg, on 8-10 July 1998. At the end of the three days of discussion, the text, after having been improved by a certain number of amendments, was unanimously adopted.

The value of this Charter is not a result of a formal status, which, in fact, it does not have, but of the relevance and strength that its authors intended to give to its contents. A thorough knowledge of its contents and a wide distribution of the Charter are essential for its goals to be realised . The Charter is aimed at judges, lawyers, politicians and more generally to every person who has an interest in the rule of law and democracy.

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EUROPEAN CHARTER ON THE STATUTE FOR JUDGES

The participants at the multilateral meeting on the statute for judges in Europe, organized by the Council of Europe, between 8-10 July 1998,

Having regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" ;

Having regard to the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985;

Having referred to Recommendation No R (94) 12 of the Committee of Ministers to member states on the independence, efficiency and role of judges, and having made their own, the objectives which it expresses ;

Being concerned to see the promotion of judicial independence, necessary for the strengthening of the pre-eminence of law and for the protection of individual liberties within democratic states, made more effective ;

Conscious of the necessity that provisions calculated to ensure the best guarantees of the competence, independence and impartiality of judges should be specified in a formal document intended for all European States ;

Desiring to see the judges' statutes of the different European States take into account these provisions in order to ensure in concrete terms the best level of guarantees;

Have adopted the present European Charter on the statute for judges.

1. GENERAL PRINCIPLES

1.1. The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality. The present Charter is composed hereafter of the provisions which are best able to guarantee the achievement of those objectives. Its provisions aim at raising the level of guarantees in the various European States. They cannot justify modifications in national statutes tending to decrease the level of guarantees already achieved in the countries concerned.

1.2. In each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level.

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

1.4. The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.

1.5. Judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion - decisions on which depend the guarantee of individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings.

1.6. The State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.

1.7. Professional organizations set up by judges, and to which all judges may freely adhere, contribute notably to the defence of those rights which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them.

1.8. Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.

2. SELECTION, RECRUITMENT, INITIAL TRAINING

2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.

2.2. The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties.

2.3. The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.

3. APPOINTMENT AND IRREMOVABILITY

3.1. The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal, or its recommendation or with its agreement or following its opinion.

3.2. The statute establishes the circumstances in which a candidate's previous activities, or those engaged in by his or her close relations, may, by reason of the legitimate and objective

doubts to which they give rise as to the impartiality and independence of the candidate concerned, constitute an impediment to his or her appointment to a court.

3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.

3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

4. CAREER DEVELOPMENT

4.1. When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions as to promotion are then pronounced by the authority referred to at paragraph 1.3 hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority.

4.2. Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laiddown by the statute.

4.3. Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence.

4.4. The statute guarantees to judges the maintenance and broadening of their knowledge, technical as well as social and cultural, needed to perform their duties, through regular access to training which the State pays for, and ensures its organization whilst respecting the conditions set out at paragraph 2.3 hereof.

5. LIABILITY

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in

which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

5.2. Compensation for harm wrongfully suffered as a result of the decision or the behaviour of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to at paragraph 1.3 hereof.

5.3. Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.

6. REMUNERATION AND SOCIAL WELFARE

6.1. Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.

6.2. Remuneration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions.

6.3. The statute provides a guarantee for judges acting in a professional capacity against social risks linked with illness, maternity, invalidity, old age and death.

6.4. In particular the statute ensures that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.

7. TERMINATION OF OFFICE

7.1. A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.

7.2. The occurence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof.

EXPLANATORY MEMORANDUM TO THE EUROPEAN CHARTER ON THE STATUTE FOR JUDGES

1. GENERAL PRINCIPLES

The provisions of the European Charter cover not only professional but also non-professional judges, because it is important that all judges should enjoy certain safeguards relating to their recruitment, incompatibilities, conduct outside, and the termination of their office.

However, the Charter also lays down specific provisions on professional judges, and in fact this specificity is inherent in certain concepts such as careers.

The provisions of the Charter concern the statute for judges of all jurisdictions to which people are called to submit their case or which are called upon to decide their case, be it a civil, criminal, administrative or other jurisdiction.

1.1 The Charter endeavours to define the content of the statute for judges on the basis of the objectives to be attained: ensuring the competence, independence and impartiality which all members of the public are entitled to expect of the courts and judges entrusted with protecting their rights. The Charter is therefore not an end in itself but rather a means of guaranteeing that the individuals whose rights are to be protected by the courts and judges have the requisite safeguards on the effectiveness of such protection.

These safeguards on individuals' rights are ensured by judicial competence, in the sense of ability, independence and impartiality. These are positive references because the judge's statute must strive to guarantee them; however, they are also negative because the statute must not include any element which might adversely affect public confidence in such competence, independence and impartiality.

The question arose whether the provisions of the Charter should be mandatory, ie whether it should be made compulsory to include them in national statutes regulating the judiciary, or whether they should have the force of recommendations, so that different provisions deemed capable of ensuring equivalent guarantees could be implemented instead.

The latter approach could be justified by a reluctance to criticise national systems in which a long-standing, well-established practice has ensured effective guarantees on statutory protection of the judiciary, even if the system barely mentions such protection.

However, it has also been argued that in a fair number of countries, including new Council of Europe member States, which do not regulate the exercise by political authorities of powers in the area of appointing, assigning, promoting or terminating the office of judges, the safeguards on competence, independence and impartiality are ineffective.

This is why, even though the Charter's provisions are not actually mandatory, they are presented as being the optimum means of ensuring that the aforementioned objectives are attained.

Many of the Charter's provisions are inapplicable in systems where judges are directly elected by the citizens. It would have been impossible to draw up a Charter exclusively comprising provisions compatible with such elective systems, as this would have reduced the text to the lowest common denominator. Nor is the Charter aimed at "invalidating" elective systems, because where they do exist they may be regarded by nationals of the countries concerned as "quintessentially democratic". We might consider that the provisions apply as far as possible to systems in which the judiciary is elected. For instance, the provisions set out in paragraphs 2.2 and 2.3 (first sentence) are certainly applicable to such systems, for which they provide highly appropriate safeguards.

The provisions of the Charter aim to raise the level of guarantees in the various European States. The importance of such raising will depend on the level already achieved in a country. But the provisions of the Charter must not in any way serve as the basis for modifying national statutes so as on the contrary to decrease the level of guarantees already achieved in any one country.

1.2 The fundamental principles constituting a statute for judges, determining the safeguard on the competence, independence and impartiality of the judges and courts, must be enacted in the normative rules at the highest level, that is to say in the Constitution, in the case of European States which have established such a basic text. The rules included in the statute will normally be enacted at the legislative level, which is also the highest level in States with flexible constitutions.

The requirement to enshrine the fundamental principles and rules in legislation or the Constitution protects the latter from being amended under a cursory procedure unsuited to the issues at stake. In particular, where the fundamental principles are enshrined in the Constitution, it prevents the enactment of legislation aimed at or having the effect of infringing them.

In stipulating that these principles must be included in domestic legal systems, the Charter is not prejudging the respect that is due under such systems for protective provisions set out in international instruments binding upon the European States. This is especially true because the Charter takes the foremost among these provisions as a source of inspiration, as stated in the preamble.

1.3 The Charter provides for the intervention of a body independent from the executive and the legislature where a decision is required on the selection, recruitment or appointment of judges, the development of their careers or the termination of their office.

The wording of this provision is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body to actual decisions by the independent body.

Account had to be taken here of certain differences in the national systems. Some countries would find it difficult to accept an independent body replacing the political body responsible for appointments. However, the requirement in such cases to obtain at least the recommendation or the opinion of an independent body is bound to be a great incentive, if not an actual obligation, for the official appointments body. In the spirit of the Charter, recommendations and opinions of the independent body do not constitute guarantees that they will in a general way be followed in practice. The political or administrative authority which does not follow such recommendation or opinion should at the very least be obliged to make known its reasons for its refusal so to do.

The wording of this provision of the Charter also enables the independent body to intervene either with a straightforward opinion, an official opinion, a recommendation, a proposal or an actual decision.

The question arose of the membership of the independent body. The Charter at this point stipulates that at least one half of the body's members should be judges elected by their peers, which means that it wants neither to allow judges to be in a minority in the independent body nor to require them to be in the majority. In view of the variety of philosophical conceptions and debates in European States, a reference to a minimum of 50% judges emerged as capable of ensuring a fairly high level of safeguards while respecting any other considerations of principle prevailing in different national systems.

The Charter states that judges who are members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature.

There would be a risk of party-political bias in the appointment and role of judges under such a procedure. Judges sitting on the independent body are expected, precisely, to refrain from seeking the favour of political parties or bodies that are themselves appointed or elected by or through such parties.

Finally, without insisting on any particular voting system, the Charter indicates that the method of electing judges to this body must guarantee the widest representation of judges.

1.4 The Charter enshrines the "right of appeal" of any judge who considers that his or her rights under the statute or more generally independence, or that of the legal process, is threatened or infringed in any way, so that he or she can refer the matter to an independent body as described above.

This means that judges are not left defenceless against an infringement of their independence. The right of appeal is a necessary safeguard because it is mere wishful thinking to set out principles to protect the judiciary unless they are consistently backed with mechanisms to guarantee their effective implementation. The intervention of the independent body before any decision is taken on the judge's individual status does not necessarily cover all possible situations in which his or her independence is affected, and it is vital to ensure that judges can apply to this body on their own initiative.

The Charter stipulates that the body thus applied to must have the power to remedy the situation affecting the judge's independence of its own accord, or to propose that the competent authority remedy it. This formula takes account of the diversity of national systems, and even a straightforward recommendation from an independent body on a given situation provides a considerable incentive for the authority in question to remedy the situation complained of.

1.5 The Charter sets out the judge's main duties in the exercise of his or her functions. "Availability" refers both to the time required to judge cases properly and to the attention and alertness that are obviously required for such important duties, since it is the judge's decision that safeguards individual rights. Respect for individuals is particularly vital in positions of power such as that occupied by the judge, especially since individuals often feel very vulnerable when confronted with the judicial system. This paragraph also mentions the judge's obligation to respect the confidentiality of information which comes to his or her attention in the course of proceedings. It ends by pointing out that judges must ensure that they maintain the high level of

competence that the hearing of cases demands. This means that the high level of competence and of ability is a constant requirement for the judge in examining and adjudicating on cases, and also that he or she must maintain this high level, if necessary through further training. As is pointed out later in the text, judges must be granted access to training facilities.

1.6 The Charter makes it clear that the State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.

Without explicit indication of this obligation which is the responsibility of the State, the justifications of the propositions related to the responsibility of the judges would be deteriorated.

1.7 The Charter recognises the role of professional associations formed by judges, to which all judges are freely entitled to adhere, which precludes any form of legal discrimination vis-à-vis the right to join them. It also points out that such associations contribute in particular to the defence of judges' statutory rights before such authorities and bodies as may be involved in decisions affecting them. Judges may therefore not be prohibited from forming or adhering to professional associations.

Although the Charter does not assign these associations exclusive responsibility for defending judges' statutory rights, it does indicate that their contribution to such defence before the authorities and bodies involved in decisions affecting judges must be recognised and respected. This applies, inter alia, to the independent authority referred to in paragraph 1.3.

1.8 The Charter provides that judges should be associated through their representatives, particularly those that are members of the authority referred to in paragraph 1.3, and through their professional associations, with any decisions taken on the administration of the courts, the determination of the courts' budgetary resources and the implementation of such decisions at the local and national levels.

Without advocating any specific legal form or degree of constraint, this provision lays down that judges should be associated in the determination of the overall judicial budget and the resources earmarked for individual courts, which implies establishing consultation or representation procedures at the national and local levels. This also applies more broadly to the administration of justice and of the courts. The Charter does not stipulate that judges should be responsible for such administration, but it does require them not to be left out of administrative decisions.

Consultation of judges by their representatives or professional associations on any proposed change in their statute or any change proposed as to the basis on which they are remunerated, or as to their social welfare, including their retirement pension, should ensure that judges are not left out of the decision-making process in these fields. Nevertheless, the Charter does not authorise encroachment on the decision-making powers vested in the national bodies responsible for such matters under the Constitution.

2. SELECTION, RECRUITMENT AND INITIAL TRAINING

2.1 Judicial candidates must be selected and recruited by an independent body or panel. The Charter does not require that the latter be the independent authority referred to in paragraph 1.3, which means, for instance, that examination or selection panels can be used,

provided they are independent. In practice, the selection procedure is often separate from the actual appointment procedure. It is important to specify the particular safeguards accompanying the selection procedure.

The choice made by the selection body must be based on criteria relevant to the nature of the duties to be discharged.

The main aim must be to evaluate the candidate's ability to assess independently cases heard by judges, which implies independent thinking. The ability to show impartiality in the exercise of judicial functions is also an essential element. The ability to apply the law refers both to knowledge of the law and the capacity to put it into practice, which are two different things. The selection body must also ensure that the candidate's conduct as a judge will be based on respect for human dignity, which is vital in encounters between persons in positions of power and the litigants, who are often people in great difficulties.

Lastly, selection must not be based on discriminatory criteria relating to gender, ethnic or social origin, philosophical or political opinions or religious convictions.

2.2 In order to ensure the ability to carry out the duties involved in judicial office, the rules on selection and recruitment must set out requirements as to qualifications and previous experience. This applies, for instance, to systems in which recruitment is conditional upon a set number of years' legal or judicial experience.

2.3 The nature of judicial office, which requires the judge to intervene in complex situations that are often difficult in terms of respect for human dignity, is such that "abstract" verification of aptitude for such office is not enough.

Candidates selected to discharge judicial duties must therefore be prepared for the task by means of appropriate training, which must be financed by the State.

Certain precautions must be taken in preparing judges for the giving of independent and impartial decisions, whereby competence, impartiality and the requisite open-mindedness are guaranteed in both the content of the training programmes and the functioning of the bodies implementing them. This is why the Charter provides that the authority referred to in paragraph 1.3 must ensure the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties. The said authority must have the resources so to ensure. Accordingly, the rules set out in the the statute must specify the procedure for supervision by this body in relation to the requirements in question concerning the programmes and their implementation by the training bodies.

3. APPOINTMENT AND IRREMOVABILITY

3.1 National systems may draw a distinction between the actual selection procedure and the procedures of appointing a judge and assigning him or her to a specific court. It should be noted that decisions to appoint or assign judges are taken by the independent authority referred to at paragraph 1.3 hereof or are reached upon its proposal or recommendation or with its agreement or following its opinion.

3.2 The Charter deals with the question of incompatibilities. It discarded the hypothesis of absolute incompatibilities as this would hamper judicial appointments on the grounds of

candidates' or their relatives' previous activities. On the other hand, it considers that when a judge is to be assigned to a specific court, regard must be had to the above-mentioned circumstances where they give rise to legitimate and objective doubts as to his or her impartiality and independence.

For example, a lawyer who has previously practised in a given town cannot possibly be immediately assigned as a judge to a court in the same town. It is also difficult to imagine a judge being assigned to a court in a town in which his or her spouse, father or mother, for instance, is mayor or member of parliament. Therefore, where judges are to be assigned to a given court, the relevant statute must take account of situations liable to give rise to legitimate and objective doubts as to their independence and impartiality.

3.3 The recruitment procedure in some national systems provides for a probationary period before a permanent judicial appointment is made, and others recruit judges on fixed-term renewable contracts.

In such cases the decision not to make a permanent appointment or not to renew an appointment can only be taken by the independent authority referred to at paragraph 1.3 hereof or upon its proposal, recommendation or following its opinion. Clearly, the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed. Safeguards must therefore be provided through the intervention of the independent authority. In so far as the quality as a judge of an individual who is the subject of a trial period may be under discussion, the Charter lays down that the right to make a reference to an independent authority, as referred to in paragraph 1.4, is applicable to such an individual.

3.4 The Charter enshrines the irremovability of judges, which means that a judge cannot be assigned to another court or have his or her duties changed without his or her free consent. However, exceptions must be allowed where transfer is provided for within a disciplinary framework, when a lawful re-organization of the court system takes place involving for example the closing down of a court or a temporary transfer is required to assist a neighbouring court. In the latter case, the duration of the temporary transfer must be limited by the relevant statute. Nevertheless, since the problem of transferring a judge without his or her consent is highly sensitive, it is recalled that under the terms of paragraph 1.4 he or she has a general right of appeal before an independent authority, which can investigate the legitimacy of the transfer. In fact, this right of appeal can also remedy situations which have not been specifically catered for in the provisions of the Charter where a judge has such an excessive workload as to be unable in practice to carry out his or her responsibilities normally.

4. CAREER DEVELOPMENT

4.1 Apart from cases where judges are promoted strictly on the basis of length of service, a system which the Charter did not in any way exclude because it is deemed to provide very effective protection for independence, but which presupposes that high-quality recruitment will be absolutely guaranted in the countries concerned, it is important to ensure that the judge's independence and impartiality are not infringed in the area of promotion. It must be specified that there are two potential issues here: judges illegitimately barred from promotion, and judges unduly promoted.

This is why the Charter defines the criteria for promotion exclusively as the qualities and merits observed in the performance of judicial duties by means of objective assessments carried out by one or more judges and discussed with the judge assessed.

Decisions concerning promotion are then taken on the basis of these assessments in the light of the proposal by the independent authority referred to in paragraph 1.3 or upon its recommendation or with its agreement or following its opinion. It is expressly stipulated that a judge who is proposed with a view to promotion submitted for examination by the independent authority must be entitled to present his or her case before the said authority.

The provisions of paragraph 4.1 are obviously not intended to apply to systems in which judges are not promoted, and there is no judicial hierarchy, systems which are also in this regard highly protective of judicial independence.

4.2 The Charter deals here with activities conducted alongside judicial functions. It provides that judges may freely exercise activities outside their judicial mandate, including those which are the embodiment of their rights as citizens. This freedom, which constitutes the principle, may not know of limitation except only in so far as judges engage in outside activities incompatible either with public confidence in their impartiality and independence or with the availability required to consider the cases submitted to them with due care and within a reasonable time. The Charter does not specify any particular type of activity. The negative effects of outside activities on the conditions under which judicial duties are discharged must be pragmatically assessed. The Charter stipulates that judges should request authorisation to engage in activities other than literary or artistic when they are renumerated.

4.3 The Charter addresses the question of what is sometimes called "judicial discretion". It adopts a position which derives from Article 6 of the European Convention on Human Rights and the case-law of the European Court of Human Rights thereupon, laying down that judges must refrain from any behaviour, action or expression likely to affect public confidence in their impartiality and independence. The reference to the risk of such confidence being undermined obviates any excessive rigidity which would result in the judge becoming a social and civic outcast.

4.4 The Charter lays down "the judge's right to in-house training": he or she must have regular access to training courses organized at public expense, aimed at ensuring that judges can maintain and improve their technical, social and cultural skills. The State must ensure that such training programmes are so organised as to respect the conditions set out in paragraph 2.3, which relate to the role of the independent authority referred to in paragraph 1.3, in order to guarantee appropriateness in the content of training courses and in the functioning of the bodies implementing such courses, to the requirements of open-mindedness, competence and impartiality.

The definition of these guarantees set out in paragraphs 2.3 and 4.4 on training is very flexible, enabling them to be tailored to the various national training systems: training colleges administered by the Ministry of Justice, institutes operating under the higher council of judges, private law foundations, etc.

5. LIABILITY

5.1 The Charter deals here with the judge's disciplinary liability. It begins with a reference to the principle of the legality of disciplinary sanctions, stipulating that the only valid reason for

imposing sanctions is the failure to perform one of the duties explicitly defined in the Judges' Statute and that the scale of applicable sanctions must be set out in the judges' statute. Moreover, the Charter lays down guarantees on disciplinary hearings: disciplinary sanctions can only be imposed on the basis of a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges. The judge must be given a full hearing and be entitled to representation. If the sanction is actually imposed, it must be chosen from the scale of sanctions, having due regard to the principle of proportionality. Lastly, the Charter provides for a right of appeal to a higher judicial authority against any decision to impose a sanction taken by an executive authority, tribunal or body, at least half of whose membership are elected judges.

The current wording of this provision does not require the availability of such a right of appeal against a sanction imposed by Parliament.

5.2 Here the Charter relates to judges' civil and pecuniary liability. It posits the principle that State compensation shall be paid for damage sustained as a result of a judge's wrongful conduct or unlawful exercise of his or her functions whilst acting as a judge. This means that it is the State which is in every case the guarantor of compensation to the victim for such damage.

In specifying that such a State guarantee applies to damage sustained as a result of a judge's wrongful conduct or unlawful exercise of his or her functions, the Charter does not necessarily refer to the wrongful or unlawful nature of the conduct or of the exercise of functions, but rather emphasises the damage sustained as a result of that "wrongful" or "unlawful" nature. This is fully compatible with liability based not upon misconduct by the judge, but upon the abnormal, special and serious nature of the damage resulting from his or her wrongful conduct or unlawful exercise of functions. This is important in the light of concerns that judges' judicial independence should not be affected through a civil liability system.

The Charter also provides that, when the damage which the State had to guarantee is the result of a gross and inexcusable breach of the rules governing the performance of judicial duties, the statute may confer on the State the possibility of bringing legal proceedings with a view to requiring the judge to reimburse it for the compensation paid within a limit fixed by the statute. The requirement for gross and inexcusable negligence and the legal nature of the proceedings to obtain reimbursement must constitute significant guarantees that the procedure is not abused. An additional guarantee is provided by way of the prior agreement which the authority referred to at paragraph 1.3 must give before a claim may be submitted to the competent court.

5.3 Here the Charter looks at the issue of complaints by members of the public about miscarriages of justice.

States have organised their complaints procedures to varying degrees, and it is not always very well organised.

This is why the Charter provides for the possibility to be open to an individual to make a complaint of miscarriage of justice in a given case to an independent body, without having to observe specific formalities. Were full and careful consideration by such a body to reveal a clear prima facie disciplinary breach by a judge, the body concerned would have the power to refer the matter to the disciplinary authority having jurisdiction over judges, or at least to a body competent, under the rules of the national statute, to make such referral. Neither this body nor this authority will be constrained to adopt the same opinion as the body to which the complaint was made. In the outcome there are genuine guarantees against the risks of the complaints

procedure being led astray by those to be tried, desiring in reality to bring pressure to bear on the justice system.

The independent body concerned would not necessarily be designed specifically to verify whether judges have committed breaches. Judges have no monopoly on miscarriages of justice. It would therefore be conceivable for this same independent body similarly to refer matters, when it considers such referral justified, to the disciplinary authority having jurisdiction over, or to the body responsible for taking proceedings against lawyers, court officials, bailiffs, etc.

The Charter, however, relating to the judges' statute, has to cover in greater detail only the matter of referral relating to judges.

6. REMUNERATION AND SOCIAL WELFARE

The provisions under this heading relate only to professional judges.

6.1 The Charter provides that the level of the remuneration to which judges are entitled for performing their professional judicial duties must be set so as to shield them from pressures intended to influence their decisions or judicial conduct in general, impairing their independence and impartiality.

It seemed preferable to state that the level of the remuneration paid had to be such as to shield judges from pressures, rather than to provide for this level to be set by reference to the remuneration paid to holders of senior posts in the legislature or the executive, as the holders of such posts are far from being treated on a comparable basis in the different national systems.

6.2 The level of remuneration of one judge as compared to another may be subject to variations depending on length of service, the nature of the duties which they are assigned to discharge and the importance of the tasks which are imposed on them, such as weekend duties. However, such tasks justifying higher remuneration must be assessed on the basis of transparent criteria, so as to avoid differences in treatment unconnected with considerations relating to the work done or the availability required.

6.3 The Charter provides for judges to benefit from social security, ie protection against the usual social risks, namely illness, maternity, invalidity, old age and death.

6.4 It specifies in this context that judges who have reached the age of judicial retirement after the requisite time spent as judges must benefit from payment of a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.

7. TERMINATION OF OFFICE

7.1 Vigilance is necessary about the conditions in which judges' employment comes to be terminated. It is important to lay down an exhaustive list of the reasons for termination of employment. These are when a judge resigns, is medically certified as physically unfit for further judicial office, reaches the age limit, comes to the end of a fixed term of office or is dismissed in the context of disciplinary liability.

7.2 On occurrence of the events which are grounds for termination of employment other than the ones - ie the reaching of the age limit or the coming to an end of a fixed term of office - which may be ascertained without difficulty, they must be verified by the authority referred to in paragraph 1.3. This condition is easily realised when the termination of office results from a dismissal decided precisely by this authority, or on its proposal or recommendation, or with its agreement.

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CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Resolution on Judicial Ethics

Adopted by the Plenary Court on 23 June 2008

2758

The European Court of Human Rights,

Having regard to Article 21 of the European Convention on Human Rights, which sets forth the criteria for judicial office;

Having regard to Rules 3, 4 and 28 of the Rules of Court, which develop these criteria;

Considering that it is appropriate, in the interests of clarity and transparency, to articulate the principles underlying these criteria, without prejudice to the interpretation or application of the provisions referred to above;

Considering that the principles set forth in this text should enhance public confidence in the Court, which is an international court for the protection of human rights;

Adopts the present resolution on judicial ethics:

I. Independence

In the exercise of their judicial functions, judges shall be independent of all external authority or influence. They shall refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence.

II. Impartiality

Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations that may be reasonably perceived as giving rise to a conflict of interest.

III. Integrity

Judges' conduct must be consistent with the high moral character that is a criterion for judicial office. They should be mindful at all times of their duty to uphold the standing and reputation of the Court.

IV. Diligence and competence

Judges shall perform the duties of their office diligently. In order to maintain a high level of competence, they shall continue to develop their professional skills.

V. Discretion

Judges shall exercise the utmost discretion in relation to secret or confidential information relating to proceedings before the Court. They shall respect the secrecy of deliberations.

VI. Freedom of expression

Judges shall exercise their freedom of expression in a manner compatible with the dignity of their office. They shall refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality.

VII. Additional activity

Judges may not engage in any additional activity except insofar as this is compatible with independence, impartiality and the demands of their full-time office. They shall declare any additional activity to the President of the Court, as provided for in Rule 4 of the Rules of Court.

VIII. Favours and advantages

Judges shall not accept any gift, favour or advantage that could call their independence or impartiality into question.

IX. Decorations and honours

Judges may accept decorations and honours only where such acceptance does not give rise to a reasonable doubt as to their independence or impartiality. They should inform the President of the Court beforehand.

X. Scope of this resolution

The principles set forth above apply to the members of the Court and, where relevant, to former judges and *ad hoc* judges.

Final provisions

In case of doubt as to application of these principles in a given situation, a judge may seek the advice of the President of the Court. The President may consult the Bureau if necessary.

The President may report to the Plenary Court on the application of these principles.

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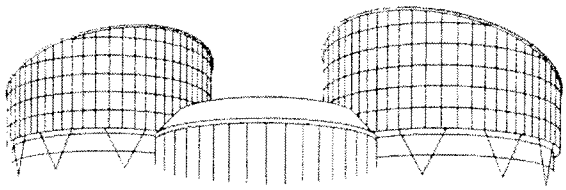

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Rules of Court

1 September 2012

Registry of the Court

Strasbourg

2761

Title I - Organisation and Working of the Court

Chapter I - Judges

Rule 2[1] - Calculation of term of office

1. Where the seat is vacant on the date of the judge's election, or where the election takes place less than three months before the seat becomes vacant, the term of office shall begin as from the date of taking up office which shall be no later than three months after the date of election.

2. Where the judge's election takes place more than three months before the seat becomes vacant, the term of office shall begin on the date on which the seat becomes vacant.

3. In accordance with Article 23 § 3 of the Convention, an elected judge shall hold office until a successor has taken the oath or made the declaration provided for in Rule 3.

Rule 3 - Oath or solemn declaration

1. Before taking up office, each elected judge shall, at the first sitting of the plenary Court at which the judge is present or, in case of need, before the President of the Court, take the following oath or make the following solemn declaration:

> "I swear" - or "I solemnly declare" - "that I will exercise my functions as a judge honourably, independently and impartially and that I will keep secret all deliberations."

2. This act shall be recorded in minutes.

Rule 4[2] - Incompatible activities

1. In accordance with Article 21 § 3 of the Convention, the judges shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office. Each judge shall declare to the President of the Court any additional activity. In the event of a disagreement between the President and the judge concerned, any question arising shall be decided by the plenary Court.

2. A former judge shall not represent a party or third party in any capacity in proceedings before the Court relating to an application lodged before the date on which he or she ceased to hold office. As regards applications lodged subsequently, a former judge may not represent a party or third party in any capacity in proceedings before the Court until a period of two years from the date on which he or she ceased to hold office has elapsed.

1. As amended by the Court on 13 November 2006 and 2 April 2012.
2. As amended by the Court on 29 March 2010.

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PROTOCOLS

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PROTOCOL (No 3)

ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES,

DESIRING to lay down the Statute of the Court of Justice of the European Union provided for in Article 281 of the Treaty on the Functioning of the European Union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community:

Article 1

The Court of Justice of the European Union shall be constituted and shall function in accordance with the provisions of the Treaties, of the Treaty establishing the European Atomic Energy Community (EAEC Treaty) and of this Statute.

TITLE I

JUDGES AND ADVOCATES-GENERAL

Article 2

Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

Article 3

The Judges shall be immune from legal proceedings. After they have ceased to hold office, they shall continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written.

The Court of Justice, sitting as a full Court, may waive the immunity. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Where immunity has been waived and criminal proceedings are instituted against a Judge, he shall be tried, in any of the Member States, only by the court competent to judge the members of the highest national judiciary.

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Articles 11 to 14 and Article 17 of the Protocol on the privileges and immunities of the European Union shall apply to the Judges, Advocates-General, Registrar and Assistant Rapporteurs of the Court of Justice of the European Union, without prejudice to the provisions relating to immunity from legal proceedings of Judges which are set out in the preceding paragraphs.

Article 4

The Judges may not hold any political or administrative office.

They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority.

When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

Any doubt on this point shall be settled by decision of the Court of Justice. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Article 5

Apart from normal replacement, or death, the duties of a Judge shall end when he resigns.

Where a Judge resigns, his letter of resignation shall be addressed to the President of the Court of Justice for transmission to the President of the Council. Upon this notification a vacancy shall arise on the bench.

Save where Article 6 applies, a Judge shall continue to hold office until his successor takes up his duties.

Article 6

A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office. The Judge concerned shall not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

The Registrar of the Court shall communicate the decision of the Court to the President of the European Parliament and to the President of the Commission and shall notify it to the President of the Council.

In the case of a decision depriving a Judge of his office, a vacancy shall arise on the bench upon this latter notification.

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Article 7

A Judge who is to replace a member of the Court whose term of office has not expired shall be appointed for the remainder of his predecessor's term.

Article 8

The provisions of Articles 2 to 7 shall apply to the Advocates-General.

TITLE II

ORGANISATION OF THE COURT OF JUSTICE

Article 9

When, every three years, the Judges are partially replaced, 14 and 13 Judges shall be replaced alternately.

When, every three years, the Advocates-General are partially replaced, four Advocates-General shall be replaced on each occasion.

Article 10

The Registrar shall take an oath before the Court of Justice to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court of Justice.

Article 11

The Court of Justice shall arrange for replacement of the Registrar on occasions when he is prevented from attending the Court of Justice.

Article 12

Officials and other servants shall be attached to the Court of Justice to enable it to function. They shall be responsible to the Registrar under the authority of the President.

Article 13

At the request of the Court of Justice, the European Parliament and the Council may, acting in accordance with the ordinary legislative procedure, provide for the appointment of Assistant Rapporteurs and lay down the rules governing their service. The Assistant Rapporteurs may be required, under conditions laid down in the Rules of Procedure, to participate in preparatory inquiries in cases pending before the Court and to cooperate with the Judge who acts as Rapporteur.

The Assistant Rapporteurs shall be chosen from persons whose independence is beyond doubt and who possess the necessary legal qualifications; they shall be appointed by the Council, acting by a simple majority. They shall take an oath before the Court to perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

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Article 14

The Judges, the Advocates-General and the Registrar shall be required to reside at the place where the Court of Justice has its seat.

Article 15

The Court of Justice shall remain permanently in session. The duration of the judicial vacations shall be determined by the Court with due regard to the needs of its business.

Article 16

The Court of Justice shall form chambers consisting of three and five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The Grand Chamber shall consist of 13 Judges. It shall be presided over by the President of the Court. The Presidents of the chambers of five Judges and other Judges appointed in accordance with the conditions laid down in the Rules of Procedure shall also form part of the Grand Chamber.

The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests.

The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union.

Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.

Article 17

Decisions of the Court of Justice shall be valid only when an uneven number of its members is sitting in the deliberations.

Decisions of the chambers consisting of either three or five Judges shall be valid only if they are taken by three Judges.

Decisions of the Grand Chamber shall be valid only if nine Judges are sitting.

Decisions of the full Court shall be valid only if 15 Judges are sitting.

In the event of one of the Judges of a chamber being prevented from attending, a Judge of another chamber may be called upon to sit in accordance with conditions laid down in the Rules of Procedure.

Article 18

No Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.

If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate-General should not sit or make submissions in a particular case, he shall notify him accordingly.

Any difficulty arising as to the application of this Article shall be settled by decision of the Court of Justice.

A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.

TITLE III

PROCEDURE BEFORE THE COURT OF JUSTICE

Article 19

The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner.

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.

As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.

University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.

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Article 20

The procedure before the Court of Justice shall consist of two parts: written and oral.

The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.

Communications shall be made by the Registrar in the order and within the time laid down in the Rules of Procedure.

The oral procedure shall consist of the reading of the report presented by a Judge acting as Rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts.

Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

Article 21

A case shall be brought before the Court of Justice by a written application addressed to the Registrar. The application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based.

The application shall be accompanied, where appropriate, by the measure the annulment of which is sought or, in the circumstances referred to in Article 265 of the Treaty on the Functioning of the European Union, by documentary evidence of the date on which an institution was, in accordance with those Articles, requested to act. If the documents are not submitted with the application, the Registrar shall ask the party concerned to produce them within a reasonable period, but in that event the rights of the party shall not lapse even if such documents are produced after the time limit for bringing proceedings.

Article 22

A case governed by Article 18 of the EAEC Treaty shall be brought before the Court of Justice by an appeal addressed to the Registrar. The appeal shall contain the name and permanent address of the applicant and the description of the signatory, a reference to the decision against which the appeal is brought, the names of the respondents, the subject-matter of the dispute, the submissions and a brief statement of the grounds on which the appeal is based.

The appeal shall be accompanied by a certified copy of the decision of the Arbitration Committee which is contested.

If the Court rejects the appeal, the decision of the Arbitration Committee shall become final.

If the Court annuls the decision of the Arbitration Committee, the matter may be re-opened, where appropriate, on the initiative of one of the parties in the case, before the Arbitration Committee. The latter shall conform to any decisions on points of law given by the Court.

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Article 23

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement which may, within two months of notification, where one of the fields of application of that Agreement is concerned, submit statements of case or written observations to the Court.

Where an agreement relating to a specific subject matter, concluded by the Council and one or more non-member States, provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the decision of the national court or tribunal containing that question shall also be notified to the non-member States concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations.

Article 23a [1]

The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.

Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General.

In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23, authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted.

[1] Article inserted by Decision 2008/79/EC, Euratom (OJ L 24, 29.1.2008, p. 42).

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Article 24

The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal.

The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings.

Article 25

The Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.

Article 26

Witnesses may be heard under conditions laid down in the Rules of Procedure.

Article 27

With respect to defaulting witnesses the Court of Justice shall have the powers generally granted to courts and tribunals and may impose pecuniary penalties under conditions laid down in the Rules of Procedure.

Article 28

Witnesses and experts may be heard on oath taken in the form laid down in the Rules of Procedure or in the manner laid down by the law of the country of the witness or expert.

Article 29

The Court of Justice may order that a witness or expert be heard by the judicial authority of his place of permanent residence.

The order shall be sent for implementation to the competent judicial authority under conditions laid down in the Rules of Procedure. The documents drawn up in compliance with the letters rogatory shall be returned to the Court under the same conditions.

The Court shall defray the expenses, without prejudice to the right to charge them, where appropriate, to the parties.

Article 30

A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court of Justice, the Member State concerned shall prosecute the offender before its competent court.

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Article 31

The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.

Article 32

During the hearings the Court of Justice may examine the experts, the witnesses and the parties themselves. The latter, however, may address the Court of Justice only through their representatives.

Article 33

Minutes shall be made of each hearing and signed by the President and the Registrar.

Article 34

The case list shall be established by the President.

Article 35

The deliberations of the Court of Justice shall be and shall remain secret.

Article 36

Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.

Article 37

Judgments shall be signed by the President and the Registrar. They shall be read in open court.

Article 38

The Court of Justice shall adjudicate upon costs.

Article 39

The President of the Court of Justice may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Statute and which shall be laid down in the Rules of Procedure, adjudicate upon applications to suspend execution, as provided for in Article 278 of the Treaty on the Functioning of the European Union and Article 157 of the EAEC Treaty, or to prescribe interim measures pursuant to Article 279 of the Treaty on the Functioning of the European Union, or to suspend enforcement in accordance with the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or the third paragraph of Article 164 of the EAEC Treaty.

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Should the President be prevented from attending, his place shall be taken by another Judge under conditions laid down in the Rules of Procedure.

The ruling of the President or of the Judge replacing him shall be provisional and shall in no way prejudice the decision of the Court on the substance of the case.

Article 40

Member States and institutions of the Union may intervene in cases before the Court of Justice.

The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.

Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned.

An application to intervene shall be limited to supporting the form of order sought by one of the parties.

Article 41

Where the defending party, after having been duly summoned, fails to file written submissions in defence, judgment shall be given against that party by default. An objection may be lodged against the judgment within one month of it being notified. The objection shall not have the effect of staying enforcement of the judgment by default unless the Court of Justice decides otherwise.

Article 42

Member States, institutions, bodies, offices and agencies of the Union and any other natural or legal persons may, in cases and under conditions to be determined by the Rules of Procedure, institute third-party proceedings to contest a judgment rendered without their being heard, where the judgment is prejudicial to their rights.

Article 43

If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein.

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Article 44

An application for revision of a judgment may be made to the Court of Justice only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision.

The revision shall be opened by a judgment of the Court expressly recording the existence of a new fact, recognising that it is of such a character as to lay the case open to revision and declaring the application admissible on this ground.

No application for revision may be made after the lapse of 10 years from the date of the judgment.

Article 45

Periods of grace based on considerations of distance shall be determined by the Rules of Procedure.

No right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*.

Article 46

Proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European Union shall apply where appropriate.

This Article shall also apply to proceedings against the European Central Bank regarding non-contractual liability.

TITLE IV

GENERAL COURT

Article 47

The first paragraph of Article 9, Articles 14 and 15, the first, second, fourth and fifth paragraphs of Article 17 and Article 18 shall apply to the General Court and its members.

The fourth paragraph of Article 3 and Articles 10, 11 and 14 shall apply to the Registrar of the General Court *mutatis mutandis*.

Article 48

The General Court shall consist of 27 Judges.

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Article 49

The Members of the General Court may be called upon to perform the task of an Advocate-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on certain cases brought before the General Court in order to assist the General Court in the performance of its task.

The criteria for selecting such cases, as well as the procedures for designating the Advocates-General, shall be laid down in the Rules of Procedure of the General Court.

A Member called upon to perform the task of Advocate-General in a case may not take part in the judgment of the case.

Article 50

The General Court shall sit in chambers of three or five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The composition of the chambers and the assignment of cases to them shall be governed by the Rules of Procedure. In certain cases governed by the Rules of Procedure, the General Court may sit as a full court or be constituted by a single Judge.

The Rules of Procedure may also provide that the General Court may sit in a Grand Chamber in cases and under the conditions specified therein.

Article 51

By way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against:

(a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly, except for:

— decisions taken by the Council under the third subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union;

— acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 of the Treaty on the Functioning of the European Union;

— acts of the Council by which the Council exercises implementing powers in accordance with the second paragraph of Article 291 of the Treaty on the Functioning of the European Union;

(b) against an act of or failure to act by the Commission under the first paragraph of Article 331 of the Treaty on the Functioning of the European Union.

Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same Articles when they are brought by an institution of the Union against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Union against an act of or failure to act by the European Central Bank.

Article 52

The President of the Court of Justice and the President of the General Court shall determine, by common accord, the conditions under which officials and other servants attached to the Court of Justice shall render their services to the General Court to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the General Court under the authority of the President of the General Court.

Article 53

The procedure before the General Court shall be governed by Title III.

Such further and more detailed provisions as may be necessary shall be laid down in its Rules of Procedure. The Rules of Procedure may derogate from the fourth paragraph of Article 40 and from Article 41 in order to take account of the specific features of litigation in the field of intellectual property.

Notwithstanding the fourth paragraph of Article 20, the Advocate-General may make his reasoned submissions in writing.

Article 54

Where an application or other procedural document addressed to the General Court is lodged by mistake with the Registrar of the Court of Justice, it shall be transmitted immediately by that Registrar to the Registrar of the General Court; likewise, where an application or other procedural document addressed to the Court of Justice is lodged by mistake with the Registrar of the General Court, it shall be transmitted immediately by that Registrar to the Registrar of the Court of Justice.

Where the General Court finds that it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice has jurisdiction, it shall refer that action to the Court of Justice; likewise, where the Court of Justice finds that an action falls within the jurisdiction of the General Court, it shall refer that action to the General Court, whereupon that Court may not decline jurisdiction.

Where the Court of Justice and the General Court are seised of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the General Court may, after hearing the parties, stay the proceedings before it until such time as the Court of Justice has delivered judgment or, where the action is one brought pursuant to Article 263 of the Treaty on the Functioning of the European Union, may decline jurisdiction so as to allow the Court of Justice to rule on such actions. In the same circumstances, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the General Court shall continue.

Where a Member State and an institution of the Union are challenging the same act, the General Court shall decline jurisdiction so that the Court of Justice may rule on those applications.

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Article 55

Final decisions of the General Court, decisions disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility, shall be notified by the Registrar of the General Court to all parties as well as all Member States and the institutions of the Union even if they did not intervene in the case before the General Court.

Article 56

An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the General Court directly affects them.

With the exception of cases relating to disputes between the Union and its servants, an appeal may also be brought by Member States and institutions of the Union which did not intervene in the proceedings before the General Court. Such Member States and institutions shall be in the same position as Member States or institutions which intervened at first instance.

Article 57

Any person whose application to intervene has been dismissed by the General Court may appeal to the Court of Justice within two weeks from the notification of the decision dismissing the application.

The parties to the proceedings may appeal to the Court of Justice against any decision of the General Court made pursuant to Article 278 or Article 279 or the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or Article 157 or the third paragraph of Article 164 of the EAEC Treaty within two months from their notification.

The appeal referred to in the first two paragraphs of this Article shall be heard and determined under the procedure referred to in Article 39.

Article 58

An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court.

No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.

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Article 59

Where an appeal is brought against a decision of the General Court, the procedure before the Court of Justice shall consist of a written part and an oral part. In accordance with conditions laid down in the Rules of Procedure, the Court of Justice, having heard the Advocate-General and the parties, may dispense with the oral procedure.

Article 60

Without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, an appeal shall not have suspensory effect.

By way of derogation from Article 280 of the Treaty on the Functioning of the European Union, decisions of the General Court declaring a regulation to be void shall take effect only as from the date of expiry of the period referred to in the first paragraph of Article 56 of this Statute or, if an appeal shall have been brought within that period, as from the date of dismissal of the appeal, without prejudice, however, to the right of a party to apply to the Court of Justice, pursuant to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, for the suspension of the effects of the regulation which has been declared void or for the prescription of any other interim measure.

Article 61

If the appeal is well founded, the Court of Justice shall quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

Where a case is referred back to the General Court, that Court shall be bound by the decision of the Court of Justice on points of law.

When an appeal brought by a Member State or an institution of the Union, which did not intervene in the proceedings before the General Court, is well founded, the Court of Justice may, if it considers this necessary, state which of the effects of the decision of the General Court which has been quashed shall be considered as definitive in respect of the parties to the litigation.

Article 62

In the cases provided for in Article 256(2) and (3) of the Treaty on the Functioning of the European Union, where the First Advocate-General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court.

The proposal must be made within one month of delivery of the decision by the General Court. Within one month of receiving the proposal made by the First Advocate-General, the Court of Justice shall decide whether or not the decision should be reviewed.

Article 62a

The Court of Justice shall give a ruling on the questions which are subject to review by means of an urgent procedure on the basis of the file forwarded to it by the General Court.

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Those referred to in Article 23 of this Statute and, in the cases provided for in Article 256(2) of the EC Treaty, the parties to the proceedings before the General Court shall be entitled to lodge statements or written observations with the Court of Justice relating to questions which are subject to review within a period prescribed for that purpose.

The Court of Justice may decide to open the oral procedure before giving a ruling.

Article 62b

In the cases provided for in Article 256(2) of the Treaty on the Functioning of the European Union, without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union, proposals for review and decisions to open the review procedure shall not have suspensory effect. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, it shall refer the case back to the General Court which shall be bound by the points of law decided by the Court of Justice; the Court of Justice may state which of the effects of the decision of the General Court are to be considered as definitive in respect of the parties to the litigation. If, however, having regard to the result of the review, the outcome of the proceedings flows from the findings of fact on which the decision of the General Court was based, the Court of Justice shall give final judgment.

In the cases provided for in Article 256(3) of the Treaty on the Functioning of the European Union, in the absence of proposals for review or decisions to open the review procedure, the answer(s) given by the General Court to the questions submitted to it shall take effect upon expiry of the periods prescribed for that purpose in the second paragraph of Article 62. Should a review procedure be opened, the answer(s) subject to review shall take effect following that procedure, unless the Court of Justice decides otherwise. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, the answer given by the Court of Justice to the questions subject to review shall be substituted for that given by the General Court.

TITLE IVa

SPECIALISED COURTS

Article 62c

The provisions relating to the jurisdiction, composition, organisation and procedure of the specialised courts established under Article 257 of the Treaty on the Functioning of the European Union are set out in an Annex to this Statute.

TITLE V

FINAL PROVISIONS

Article 63

The Rules of Procedure of the Court of Justice and of the General Court shall contain any provisions necessary for applying and, where required, supplementing this Statute.

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Article 64

The rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting unanimously. This regulation shall be adopted either at the request of the Court of Justice and after consultation of the Commission and the European Parliament, or on a proposal from the Commission and after consultation of the Court of Justice and of the European Parliament.

Until those rules have been adopted, the provisions of the Rules of Procedure of the Court of Justice and of the Rules of Procedure of the General Court governing language arrangements shall continue to apply. By way of derogation from Articles 253 and 254 of the Treaty on the Functioning of the European Union, those provisions may only be amended or repealed with the unanimous consent of the Council.

ANNEX I

THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL

Article 1

The European Union Civil Service Tribunal (hereafter 'the Civil Service Tribunal') shall exercise at first instance jurisdiction in disputes between the Union and its servants referred to in Article 270 of the Treaty on the Functioning of the European Union, including disputes between all bodies or agencies and their servants in respect of which jurisdiction is conferred on the Court of Justice of the European Union.

Article 2

The Civil Service Tribunal shall consist of seven judges. Should the Court of Justice so request, the Council, acting by a qualified majority, may increase the number of judges.

The judges shall be appointed for a period of six years. Retiring judges may be reappointed.

Any vacancy shall be filled by the appointment of a new judge for a period of six years.

Article 3

1. The judges shall be appointed by the Council, acting in accordance with the fourth paragraph of Article 257 of the Treaty on the Functioning of the European Union, after consulting the committee provided for by this Article. When appointing judges, the Council shall ensure a balanced composition of the Civil Service Tribunal on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented.

2. Any person who is a Union citizen and fulfils the conditions laid down in the fourth paragraph of Article 257 of the Treaty on the Functioning of the European Union may submit an application. The Council, acting on a recommendation from the Court of Justice, shall determine the conditions and the arrangements governing the submission and processing of such applications.

3. A committee shall be set up comprising seven persons chosen from among former members of the Court of Justice and the General Court and lawyers of recognised competence. The committee's membership and operating rules shall be determined by the Council, acting on a recommendation by the President of the Court of Justice.

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4. The committee shall give an opinion on candidates' suitability to perform the duties of judge at the Civil Service Tribunal. The committee shall append to its opinion a list of candidates having the most suitable high-level experience. Such list shall contain the names of at least twice as many candidates as there are judges to be appointed by the Council.

Article 4

1. The judges shall elect the President of the Civil Service Tribunal from among their number for a term of three years. He may be re-elected.

2. The Civil Service Tribunal shall sit in chambers of three judges. It may, in certain cases determined by its rules of procedure, sit in full court or in a chamber of five judges or of a single judge.

3. The President of the Civil Service Tribunal shall preside over the full court and the chamber of five judges. The Presidents of the chambers of three judges shall be designated as provided in paragraph 1. If the President of the Civil Service Tribunal is assigned to a chamber of three judges, he shall preside over that chamber.

4. The jurisdiction of and quorum for the full court as well as the composition of the chambers and the assignment of cases to them shall be governed by the rules of procedure.

Article 5

Articles 2 to 6, 14, 15, the first, second and fifth paragraphs of Article 17, and Article 18 of the Statute of the Court of Justice of the European Union shall apply to the Civil Service Tribunal and its members.

The oath referred to in Article 2 of the Statute shall be taken before the Court of Justice, and the decisions referred to in Articles 3, 4 and 6 thereof shall be adopted by the Court of Justice after consulting the Civil Service Tribunal.

Article 6

1. The Civil Service Tribunal shall be supported by the departments of the Court of Justice and of the General Court. The President of the Court of Justice or, in appropriate cases, the President of the General Court, shall determine by common accord with the President of the Civil Service Tribunal the conditions under which officials and other servants attached to the Court of Justice or the General Court shall render their services to the Civil Service Tribunal to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the Civil Service Tribunal under the authority of the President of that Tribunal.

2. The Civil Service Tribunal shall appoint its Registrar and lay down the rules governing his service. The fourth paragraph of Article 3 and Articles 10, 11 and 14 of the Statute of the Court of Justice of the European Union shall apply to the Registrar of the Tribunal.

Article 7

1. The procedure before the Civil Service Tribunal shall be governed by Title III of the Statute of the Court of Justice of the European Union, with the exception of Articles 22 and 23. Such further and more detailed provisions as may be necessary shall be laid down in the rules of procedure.

2. The provisions concerning the General Court's language arrangements shall apply to the Civil Service Tribunal.

3. The written stage of the procedure shall comprise the presentation of the application and of the statement of defence, unless the Civil Service Tribunal decides that a second exchange of written pleadings is necessary. Where there is such second exchange, the Civil Service Tribunal may, with the agreement of the parties, decide to proceed to judgment without an oral procedure.

4. At all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal may examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement.

5. The Civil Service Tribunal shall rule on the costs of a case. Subject to the specific provisions of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs should the court so decide.

Article 8

1. Where an application or other procedural document addressed to the Civil Service Tribunal is lodged by mistake with the Registrar of the Court of Justice or General Court, it shall be transmitted immediately by that Registrar to the Registrar of the Civil Service Tribunal. Likewise, where an application or other procedural document addressed to the Court of Justice or to the General Court is lodged by mistake with the Registrar of the Civil Service Tribunal, it shall be transmitted immediately by that Registrar to the Registrar of the Court of Justice or General Court.

2. Where the Civil Service Tribunal finds that it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice or the General Court has jurisdiction, it shall refer that action to the Court of Justice or to the General Court. Likewise, where the Court of Justice or the General Court finds that an action falls within the jurisdiction of the Civil Service Tribunal, the Court seised shall refer that action to the Civil Service Tribunal, whereupon that Tribunal may not decline jurisdiction.

3. Where the Civil Service Tribunal and the General Court are seised of cases in which the same issue of interpretation is raised or the validity of the same act is called in question, the Civil Service Tribunal, after hearing the parties, may stay the proceedings until the judgment of the General Court has been delivered.

Where the Civil Service Tribunal and the General Court are seised of cases in which the same relief is sought, the Civil Service Tribunal shall decline jurisdiction so that the General Court may act on those cases.

Article 9

An appeal may be brought before the General Court, within two months of notification of the decision appealed against, against final decisions of the Civil Service Tribunal and decisions of that Tribunal disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of jurisdiction or inadmissibility.

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the Civil Service Tribunal directly affects them.

Article 10

1. Any person whose application to intervene has been dismissed by the Civil Service Tribunal may appeal to the General Court within two weeks of notification of the decision dismissing the application.

2. The parties to the proceedings may appeal to the General Court against any decision of the Civil Service Tribunal made pursuant to Article 278 or Article 279 or the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or Article 157 or the third paragraph of Article 164 of the EAEC Treaty within two months of its notification.

3. The President of the General Court may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Annex and which shall be laid down in the rules of procedure of the General Court, adjudicate upon appeals brought in accordance with paragraphs 1 and 2.

Article 11

1. An appeal to the General Court shall be limited to points of law. It shall lie on the grounds of lack of jurisdiction of the Civil Service Tribunal, a breach of procedure before it which adversely affects the interests of the appellant, as well as the infringement of Union law by the Tribunal.

2. No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.

Article 12

1. Without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, an appeal before the General Court shall not have suspensory effect.

2. Where an appeal is brought against a decision of the Civil Service Tribunal, the procedure before the General Court shall consist of a written part and an oral part. In accordance with conditions laid down in the rules of procedure, the General Court, having heard the parties, may dispense with the oral procedure.

Article 13

1. If the appeal is well founded, the General Court shall quash the decision of the Civil Service Tribunal and itself give judgment in the matter. It shall refer the case back to the Civil Service Tribunal for judgment where the state of the proceedings does not permit a decision by the Court.

2. Where a case is referred back to the Civil Service Tribunal, the Tribunal shall be bound by the decision of the General Court on points of law.

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CODE OF JUDICIAL ETHICS

ICC-BD/02-01-05

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Preamble

The judges of the International Criminal Court;

Noting the solemn undertaking required by article 45 of the Rome Statute of the International Criminal Court (the "Statute") and rule 5 (1) (a) of the Rules of Procedure and Evidence (the "Rules");

Recalling the principles concerning judicial independence, impartiality and proper conduct specified in the Statute and the Rules;

Recognising the need for guidelines of general application to contribute to judicial independence and impartiality and with a view to ensuring the legitimacy and effectiveness of the international judicial process;

Having regard to the United Nations Basic Principles on the Independence of the Judiciary (1985) and other international and national rules and standards relating to judicial conduct;

Mindful of the international character of the Court and the special challenges facing the judges of the Court in the performance of their responsibilities;

Have agreed as follows:

Article 1
Adoption of the Code

This Code has been adopted by the judges pursuant to regulation 126 and shall be read subject to the Statute, the Rules and the Regulations of the Court.

Article 2
Use of terms

In this Code of Judicial Ethics the terms "Court", "Statute", "Rules" and "Regulations" shall have the meaning attached to them in the Regulations of the Court.

Article 3
Judicial independence

1. Judges shall uphold the independence of their office and the authority of the Court and shall conduct themselves accordingly in carrying out their judicial functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

Article 4
Impartiality

1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.
2. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.

Article 5
Integrity

1. Judges shall conduct themselves with probity and integrity in accordance with their office, thereby enhancing public confidence in the judiciary.
2. Judges shall not directly or indirectly accept any gift, advantage, privilege or reward that can reasonably be perceived as being intended to influence the performance of their judicial functions.

Article 6
Confidentiality

Judges shall respect the confidentiality of consultations which relate to their judicial functions and the secrecy of deliberations.

Article 7
Diligence

1. Judges shall act diligently in the exercise of their duties and shall devote their professional activities to those duties.
2. Judges shall take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.
3. Judges shall perform all judicial duties properly and expeditiously.
4. Judges shall deliver their decisions and any other rulings without undue delay.

Article 8
Conduct during proceedings

1. In conducting judicial proceedings, judges shall maintain order, act in accordance with commonly accepted decorum, remain patient and courteous towards all participants and members of the public present and require them to act likewise.
2. Judges shall exercise vigilance in controlling the manner of questioning of witnesses or victims in accordance with the Rules and give special attention to the right of participants to the proceedings to equal protection and benefit of the law.
3. Judges shall avoid conduct or comments which are racist, sexist or otherwise degrading and, to the extent possible, ensure that any person participating in the proceedings refrains from such comments or conduct.

Article 9
Public expression and association

1. Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality.
2. While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the Court.

Article 10
Extra-judicial activity

1. Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the Court, or that may affect or may reasonably appear to affect their independence or impartiality.
2. Judges shall not exercise any political function.

Article 11
Observance of the Code

1. The principles embodied in this Code shall serve as guidelines on the essential ethical standards required of judges in the performance of their duties. They are advisory in nature and have the object of assisting judges with respect to ethical and professional issues with which they are confronted.
2. Nothing in this Code is intended in any way to limit or restrict the judicial independence of the judges.

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United Nations

A/65/855–S/2011/329

General Assembly
Security Council

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25 May 2011

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General Assembly
Sixty-fifth session
Agenda item 125
International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994

Security Council
Sixty-sixth year

Identical letters dated 20 May 2011 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council

I have the honour to transmit to you the attached letter dated 5 May 2011 that I have received from Judge Dennis Byron, President of the International Criminal Tribunal for Rwanda (see annex).

The letter contains two requests. The first relates to filling the position of President of the Tribunal. President Byron's term of office expires at the end of this month. The Statute of the Tribunal requires that the President be elected from among the permanent judges and be a member of one of the Trial Chambers. However, two permanent judges will resign and four will be redeployed to the Appeals Chamber in The Hague upon the completion of their remaining cases this year or early next year, leaving the Tribunal without any Arusha-based permanent judges. President Byron therefore requests amendments to the Statute of the Tribunal in order to allow the President to be a member of the Appeals Chamber and to be based in The Hague.

As an alternative, if it is decided that the President should continue to be a member of one of the Trial Chambers and to be based in Arusha, President Byron proposes that the Statute be amended to allow an ad litem judge to be eligible for election as President.

The second request is that President Byron be permitted to work part-time at the Tribunal and simultaneously to engage in another occupation from 1 September 2011. This is because President Byron has been appointed as President of the Caribbean Court of Justice and will be sworn in on 1 September 2011. He intends to resign from the Tribunal upon the delivery of the judgement in the *Karemera et al.* case around December 2011.

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As a result of President Byron's intended resignation from the Tribunal upon the completion of his remaining case, Judge Bakhtiyar Tuzmukhamedov will be redeployed to the Appeals Chamber instead of him.

It falls to the General Assembly and the Security Council to consider and decide on these requests. Accordingly, I would be grateful if you would bring the letter from President Byron to the attention of the members of the General Assembly and the members of the Security Council.

(*Signed*) **BAN** Ki-moon

Annex

Letter dated 5 May 2011 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General

I would be grateful if you could bring these three urgent matters to the attention of the Security Council.

1. The Offices of President and Vice-President of the International Criminal Tribunal for Rwanda

I hereby request that the Security Council remove the requirement in article 13 (2) of the Statute that the President be a trial judge and the requirement pursuant to article 12 bis (3) with reference to article 13 bis (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia with reference to article 22 (2) of the Statute of the International Court of Justice that the President be resident at the seat of the Court to enable the President to be redeployed to the Appeals Chamber and reside in The Hague, if need be, and authorize and make provision for an ad litem judge to be elected Vice-President, to act as President in the absence of the President and, if required, to become President by election or otherwise.

Background

On 1 April 2011, the Tribunal held a plenary, which all permanent appeals and trial judges, except Judge de Silva, and most ad litem judges attended, at which it was discussed how to fill the managerial posts of the Tribunal in order to accomplish the Tribunal's completion strategy. I was authorized by all judges to request the assistance of the Office of Legal Affairs to obtain the approval and the necessary action of the Secretary-General and the Security Council with respect to what needs to be done for the Tribunal to fill its managerial posts after the expiry in May 2011 of my second term as President and of Judge Khan's second term as Vice-President.

Rationale

The discussion at the plenary was caused by the fact that by March 2012, all permanent judges, after completion of their judgements, will either have resigned (Judge De Silva and I) or be redeployed to the Appeals Chamber (Judges Khan, Sekule, Ramaroson and Tuzmukhamedov). It is expected that there will be trial activities until June 2012. The enclosure to this letter shows the residual tasks of the Tribunal for which provision is being made in the budget for service until the end of 2012.

The plenary was in agreement that the Tribunal's completion strategy requires that the Tribunal, at least until the completion of all trial activities, retain a President and a Vice-President who both must be resident in Arusha as required by the Statute with respect to the President, and that all appeals judges reside in The Hague. Furthermore, there was agreement that the Rules should not be amended to allow an extension of my term as President. To this end, no intervention of the Security Council will be required, as a permanent judge should be elected as the new President. During discussions, Judge Sekule agreed to consider whether to accept election as President, but underscored that he will not forgo his redeployment to the

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Appeals Chamber after the delivery of the judgement in *Ngirabatware*, currently scheduled for March 2012. The Security Council could consider that it may facilitate the Tribunal in case the President to be elected is redeployed to the Appeals Chamber, if article 13 (2) of the Statute were amended to remove the provision that the President must be a trial judge and if article 13 bis (3) were modified to allow the President, after redeployment to the Appeals Chamber, to reside in The Hague.

With respect to the Vice-President, the majority of the permanent judges and all ad litem judges agreed that the unavailability of any permanent judges made it necessary that an experienced ad litem judge could be elected Vice-President and act as President during the absence of the President. Should the Security Council consider that it cannot provide for the President to be redeployed to the Appeals Chamber and reside in The Hague, we would request, as an alternate solution, that if for any reason the President/permanent judge ceased to be President and no other permanent judge was available to serve in Arusha, the ad litem judge/Vice-President could become President, by election or otherwise.

2. Part-time service of Judge Dennis Byron

Leave is requested for Judge Dennis Byron (myself) to demit office as a permanent judge of the Tribunal on the delivery of the judgement in the *Karemera et al.* case and to work on a part-time basis from 1 September 2011 until the date of that judgement while engaged in another judicial occupation.

Background

I have been at the Tribunal since June 2004, and have sat as a judge in the *Simba* case and as Presiding Judge in the *Rwamakuba*, *Nchamihigo*, *GAA*, *Kalimanzira*, *Muvunyi* (retrial) and *Karemera et al.* cases. In addition, I presided over the pretrial of several cases and performed many other judicial functions. Since May 2007, I have been President of the Tribunal, and I am due to conclude my tour of duty in that Office on 27 May 2011. At that time, my main remaining duty will be the delivery of the judgement in the *Karemera et al.* case. The case is very advanced. The evidence phase is completed; the closing arguments are scheduled for 22 August 2011 and judgement delivery for December 2011. This workplan takes into account my work on a part-time basis from September until judgement delivery.

The Caribbean Community Heads of Government appointed me to be the next President of the Caribbean Court of Justice and to succeed the current President when he retires later this year. The action plan is for me to be sworn in on 1 September 2011 and to work part-time at the Tribunal until I have completed my obligations to the Tribunal.

I would like to assure you of my commitment to the work of the Tribunal and the complete and honourable discharge of my obligations. This arrangement will not give rise to any conflict of interest and will not delay the judgement delivery in this case. I should point out, however, that we have prepared a very aggressive deliberation schedule as part of our determination to meet the completion strategy targets and reduce delay in the judicial process.

In these exceptional circumstances, and considering the importance of the timely completion of the *Karemera et al.* case, I request that the Security Council

authorize me to work part-time from September 2011 until the delivery of the judgement in the *Karemera et al.* case and to engage in another judicial occupation in my home region during that period.

3. **Assignment of Judge Tuzmukhamedov to the Appeals Chamber**

I would like to refer to my letter of 29 May 2009, in which I discussed the expansion of the Appeals Chamber and redeployment of trial judges. I now confirm that I have decided not to join the Appeals Chamber. After consultation with the permanent judges, I have decided to assign Judge Tuzmukhamedov (Russian Federation) to the Appeals Chamber upon the completion of his current cases.

Judge Tuzmukhamedov joined the Tribunal as a permanent judge in September 2009. Since then, he has been assigned to the *Bagaragaza*, *Ndahimana* and *Nzabonimana* cases. Judgement delivery in the last of these cases is scheduled for December 2011.

(*Signed*) Dennis **Byron**
President

Enclosure

Initial projections for the remaining caseload of the International Criminal Tribunal for Rwanda

Second half of 2011:

(i) Completion of three current trial cases (*Karemera*, *Nzabonimana* and *Ndahimana*)

(ii) Completion of Prosecution evidence preservation in *Bizimana* and *Mpiranya* and of any defence evidence preservation in *Kabuga*

(iii) Completion of referral applications concerning *Sikubwabo* and *Kayishema*

(iv) Pretrial proceedings in cases against fugitive accused arrested before 1 July 2011 and in *Uwinkindi*, if not referred

(v) Possible revocation proceedings in cases against *Bucyibaruta* and *Munyeshyaka*, referred to France in November 2007

(vi) Review of witness protection orders concerning 508 witnesses

First half of 2012:

(vii) Continuation into early 2012 of *Ngirabatware* and *Nizeyimana*

(viii) Preservation of defence evidence in *Bizimana* and *Mpiranya*

(ix) Three genocide trials, cf. (iv), if *Uwinkindi* is not referred

(x) Two more genocide trials, cf. (v), if revocation is decided

(xi) Three contempt/false testimony trials

(xii) Pretrial proceedings in cases of fugitive accused arrested after 30 June 2011

(xiii) Pretrial proceedings in a number of contempt/false testimony cases, where an indictment is confirmed before 1 July 2012

(xiv) Indictment amendment decisions in the cases of seven fugitives

(xv) Ongoing review of witness protection orders, cf. (vi)

Second half of 2012:

(xvi) Spillover of trials, cf. (ix)-(xi)

(xvii) A number of contempt/false testimony trials, cf. (xii)

Mt. Scopus Approved Revised International Standards of Judicial Independence

Approved March 19, 2008

Preamble

These Revised standards are approved in recognition of the need for the revision of the guidelines of general application to contribute to the independence and impartiality of the judiciary, with a view to ensuring the legitimacy and effectiveness of the judicial process;

In formulating these standards due regard has been given to the IBA Minimum Standards on Judicial independence 1982 and the UN Basic Principles of Judicial Independence 1985 and the long series of sets of other international rules and standards relating to judicial independence and the right to a fair trial; and *The Burgh House Principles of Judicial Independence in International Law* (for the international judiciary). Inspiration has also been drawn from the *Tokyo Law Asia Principles*; the *Montréal Universal Declaration on the Independence of Justice*; *Council of Europe Staetements on judicial independence* particularly Recommendation of the Committee of Ministers to Member States on the independence, efficiency and role of judges. Council of Europe *1998*[1] *,The Bangalore Principles of Judicial Conduct* November 2002,[2] and the *American Bar Association*'s revision of its ethical standards for judges

The Standards were drafted bearing in mind the special challenges facing the judiciary in view of the challenges and problems in both the national and international spheres.

An updated comprehensive revision of minimum standards for judicial independence is called for in order to give appropriate response to the developments and challenges regarding the position of courts and judges in contemporary society. This revision is important to enable the judiciary to play a role in the adequate protection of human rights and in the operation of an efficient and fair market economy with a human face in the era of globalisation.

The standards give due consideration particularly to the fact that that each jurisdiction and legal tradition has own characteristics that must be recognised .It is also recognized that in the international judiciary each court or tribunal has its unique features and functions and that in certain instances judges serve on a part-time basis or as *ad hoc* or *ad litem* judges.

A. NATIONAL JUDGES

1. THE SIGNIFICANCE OF THE INDEPENDENCE OF THE JUDICIARY

1.1. An independent and impartial[3] judiciary is an institution of the highest value in every society[4] and an essential pillar of liberty[5] and the rule of law.

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[1] http://www.coe.int

[2] adopted by *Judicial Group on Strengthening Judicial Integrity*, AJA, http://www.ajs.org

[3] Stating this in the body of the standards themselves in addition to the preamble helps stress the section's importance and ensures that it is more easily referred to.

→This is preferred to the first version as it describes exactly what elements are required in the Judiciary

→Tokyo Law Asia Principles. Stating this in the body of the standards themselves rather than in a preamble helps stress the section's importance and ensures that it is more easily referred to.

1.2. The objectives and functions of the judiciary shall include:

1.2.1.1. To resolve disputes and to administer the law impartially between persons and between persons and public authorities;

1.2.1.2. To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

1.2.1.3. To ensure that all people are able to live securely under the rule of law.[6]

2. THE JUDICIARY[7] AND THE EXECUTIVE

2.1. The Judiciary as a whole shall be independent.

2.2. Each judge shall enjoy both personal independence and substantive independence:[8]

2.2.1. Personal independence means that the terms and conditions of judicial service are adequately secured by law[9] so as to ensure that individual judges are not subject to executive control; and

2.2.2. Substantive independence means that in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.

2.3. The Judiciary as a whole shall[10] enjoy collective independence and autonomy vis-à-vis the Executive.

2.4. Judicial appointments and promotions by the Executive are not inconsistent with judicial independence as long as they are in accordance with Principles 4.

2.5. No executive decree shall reverse specific court decisions, or change the composition of the court in order to affect its decision-making.[11]

2.6. The Executive may only participate in the discipline of judges by referring complaints against judges, or by the initiation of disciplinary proceedings, but not by the adjudication of such matters.

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[5] Preamble, Montréal Declaration.

[6] Montréal Declaration.

→Recall competing values of judicial independence and judicial accountability: "As phrased by a Canadian judge, Mr. Justice Riddell, commenting on an arrangement of divisions of labour among the judges, 'Judges are the servants, not the masters of the people.' Servants are accountable, so are judges." From Shetreet, *Judicial Independence: The Contemporary Debate*, at 593, referring to *Davis Acetylene Gas Co. v. Morrison*, (1915) 34 O.L.R. 155, 23 D.L.R. 871 (C.A.).

[7] The focus is really on the relationship with the judiciary as a whole, rather than with individual judges.

[8] Although substantive independence warrants wide protection, it is not without boundaries. Judges must exercise their powers subject to the general limit of mutual respect between the various branches of the government and accepted lines of demarcation of their respective responsibilities. The mutual respect is expressed in judge-made rules, including the rule that courts will not engage in the adjudication of unjusticiable issues, such as political questions: Shetreet, Judicial Independence :New Conceptual Dimensions and Contemporary Challenges , in Shetreet and Descenes *Judicial Independence: The Contemporary Debate* at 635.(1985)

[9] To clarify that these important conditions must be legally entrenched.

[10] Adds mandatory language.

[11] Montréal Declaration section 2.08.

2.7. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.

2.8. The power of removal of a judge shall preferably be vested in a judicial tribunal.

2.9. The Executive shall not have control over judicial functions.

2.10. Rules of procedure and practice shall be made by legislation or by the Judiciary in cooperation with the legal profession, subject to parliamentary approval.

2.11. The state shall have a duty to provide for the execution of judgments of the Court. The Judiciary shall exercise supervision over the execution process.

2.12. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

2.13. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.

2.14. The principle of democratic accountability should be respected and therefore it is legitimate for the legislature to play a role in judicial appointments and central administration of justice provided that due consideration is given to the principle of judicial independence.

2.15. The process and standards of judicial selection shall give due consideration to the principle of fair reflection by the judiciary of the society in all its aspects.[12]

2.15.1. Taking into consideration the principle of fair reflection by the judiciary of the society in all its aspects, in the selection of judges, there shall be no discrimination on the grounds of race, colour, gender, language, religion, national or social origin, property, birth or status, subject however to citizenship requirements.[13].

2.16. Candidates for judicial office shall be individuals of integrity[14] and ability, well- trained in the law. They shall have equality of access to judicial office.[15]

2.17. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.

2.18. Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.

2.18.1. In countries where the power of division of judicial work is vested in the chief justice, it is not considered inconsistent with judicial independence to accord to

[12] Montréal Declaration section 2.13. See also Shetreet, *Judicial Independence: The Contemporary Debate*, at 401.
[13] Montréal Declaration
→"Political opinion" is also taken from PH Lane, *Fragile Bastion: Constitutional Aspects of Judicial Independence* (judicial independence is composed of at least five aspects: (1) non-political appointments to a court; (2) guaranteed tenure and salary; (3) executive and legislative interference with court proceedings or office holders; (4) budgetary autonomy; (5) administrative autonomy.
[14] Montréal Declaration section 2.11.
[15] Exact wording of the Montréal Declaration, section 2.11.

the chief justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.

2.18.2. Subject to 2.18.1, the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.

2.19. The power to transfer a judge from one court to another shall be vested in a judicial authority according to grounds provided by law and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.

2.20. Judicial salaries and pensions shall be adequate at all times, fixed by law, and should be periodically reviewed independently of Executive control

2.21. The position of the judges, their independence, their security of tenure, and their adequate remuneration shall be entrenched constitutionally[16] or secured by law.

2.22. Judicial salaries, pensions, and benefits[17] cannot be decreased during judges' service except as a coherent part of an overall public economic measure.

2.23. The Ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges, or of the Judiciary as a whole.

2.24. The power of pardon shall be exercised cautiously so as to avoid its use as an interference with judicial decision.

2.25. The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute, or frustrates the proper execution of a court judgment.

2.26. The Executive shall not have the power to close down, or suspend, or delay, the operation of the court system at any level.

3. THE JUDICIARY[18] AND THE LEGISLATURE

3.1. The Legislature shall not pass legislation which reverses specific court decisions.

3.2. Legislation introducing changes in the terms and conditions of judicial service shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service and are generally applied.[19]

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[16] UN Basic Principles.
→Change suggested in order to provide additional flexibility, and also to stress how this is an important enough issue to be constitutionally entrenched.

[17] In the interests of completeness

[18] The focus is really on the relationship with the judiciary as a whole, rather than with individual judges.

[19] In order to prevent "rewarding" specific judges.
→The US Constitution's Compensation Clause guarantees federal judges a "Compensation, which shall not be diminished during their Continuance in Office." *U.S. Const.*, Art. III, §1.
→See *US v. Hatter* (99-1978) 532 U.S. 557 (2001) 203 F.3d 795: Congress is prohibited from singling out judges for specially unfavourable taxation treatment, although it is permitted to impose a "non-discriminatory tax laid generally" upon judges and other citizens.

3.3. In case of legislation reorganising or abolishing courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same or materially comparable[20] status.

3.4. Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts.[21]

3.5. Part-time judges should be appointed only with proper safeguards secured by law.

3.6. The Legislature may be vested with the powers of removal of judges, upon a recommendation of a judicial commission or pursuant to constitutional provisions or validly enacted legislation.[22]

4. TERMS AND NATURE OF JUDICIAL APPOINTMENTS

4.1. The method of judicial selection shall safeguard against judicial appointments for improper motives[23] and shall not threaten judicial independence.

4.2. a) The principle of democratic accountability should be respected and therefore it is legitimate for the Executive and the Legislature to play a role in judicial appointments provided that due consideration is given to the principle of Judicial Independence.

b) The recent trend of establishing judicial selection boards or commissions in which members or representatives of the Legislature ,the Executive ,the Judiciary and the legal profession take part ,should be viewed favourably, provided that a proper balance is maintained in the composition of such boards or commissions of each of the branches of government

4.3. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

4.3.1. Retirement age shall not be reduced for existing judges.[24]

→See *United States v. Will*, 449 U.S. 200, 220-21 (1980): though Congress may not rescind a salary increase for judges once it has gone into effect - that would be a diminishment of compensation - Congress is under no constitutional obligation to grant salary increases.

→See *Evans v. Gore*, 253 U.S. 245, 253 (1920): The imposition of a new federal tax that has the effect of reducing the judicial compensation of judges already in office is unconstitutional.

→But see *O'Malley v. Woodrough*, 307 U.S. 277 (1939): an income tax levied against the judicial salary of judges who took office after the levy is in effect is constitutional, when the taxing measure is of general, non-discriminatory application to all earners of income.

[20] To provide for situations such as those that occurred in Ontario when the entire court structure was reorganized.

[21] For a discussion of this issue, see Shetreet, *Judicial Independence: The Contemporary Debate*, at 616.

[22] In order to try to prevent situations such as those that occurred in Ecuador in April 2007 when Congress removed all nine judges of the Constitutional Court in a retaliatory measure, contrary to the Ecuadorian constitution which provides that judges of the Constitutional Court can only be removed by impeachment: Human Rights Watch, *Ecuador: Removal of Judges Undermines Judicial Independence* (May 11, 2007).

[23] Montréal Declaration.

[24] See Shetreet, Judicial Independence :New Conceptual Dimensions and Contemporary Challenges , in Shetreet and Descenes *Judicial Independence: The Contemporary Debate*, at 607 (1985) reporting that in Bangladesh, in 1977 an ordinance was passed bringing down the retirement age from 65 to 62 years with immediate effect. This resulted in

4.4. Promotion of judges shall[25] be based on objective factors, in particular merit,[26] integrity and experience.[27]

4.5. Judicial appointments and promotions shall be based on transparency of the procedures and standards and shall be based on professional qualifications, integrity, ability and efficiency.

4.6. Judges should not be appointed for probationary periods except in legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of appointment, and provided that permanent appointment will be granted on merit.[28]

4.7. The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

4.8. Part-time judges should be appointed only with proper safeguards secured by law.

4.9. The number of the members of the highest court should be fixed, with the exception of courts modeled after the courts of cassion, and in the case of all courts, should not be altered for improper motives.

5. JUDICIAL REMOVAL AND DISCIPLINE

5.1. The proceedings for discipline and removal of judges[29] shall be processed expeditiously and fairly[30] and shall ensure fairness to the judge including adequate opportunity for hearing.

5.2. With the exception of proceedings before the Legislature[31], the procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public[32] and such request should be respected, subject to expeditious, final and reasoned disposition of this request by the disciplinary tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.[33]

5.3. All of the grounds for the discipline, suspension and removal of judges shall be entrenched constitutionally or fixed by law and shall be clearly defined.

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the retirement of two distinguished judges. This was in fact a legislative removal of these two judges though it was in theory a general statute.

[25] In order to make this mandatory.

[26] "Merit" is broader than "ability".

[27] UN Basic Principles.

→Montréal Declaration provides: "Promotion of a judge shall be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law."

[28] Scottish temporary judges cases Starrs and Chalmers v .D. F. Linlithgow 2000 S. L. 2 ; Clancy v. Caird 2000 Scottish Law Times ,The Bailiff Judicial Appointments (Scotland) Act 2000

[29] The UN Basic Principles adds "in his/her judicial and professional capacity." This wording was not added here to prevent personal suits being lodged against judges as a back-door method of interfering with their independence.

[30] UN Basic Principles.

[31] Montréal Declaration section 2.36.

[32] Montréal Declaration section 2.36.

[33] Montréal Declaration section 2.36.

5.4. All disciplinary, suspension and removal[34] actions shall be based upon established standards of judicial conduct.[35]

5.5. A judge shall not be subject to removal, unless by reason of a criminal act or through gross or repeated neglect or serious infringements of disciplinary rules or physical or mental incapacity he has shown himself manifestly unfit to hold the position of judge. The grounds for removal shall be limited to reasons of medical incapacity or behaviour that renders the judge unfit to discharge their duties.[36]

5.6. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent, and be composed predominantly of members of the Judiciary.

5.7. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

6. THE MEDIA AND THE JUDICIARY

6.1. It should be recognized that judicial independence does not render judges free from public accountability, however, the media and other institutions should show respect for judicial independence and exercise restrain in criticism of judicial decisions.[37]

6.2. While recognising the general right of freedom of expression of all citizens, a judge should not interview directly with the general media. If a judge needs to respond to the media in regard to a media report or inquiry, it shall be done via a spokesperson assigned by the court or a judge specifically assigned by the court for this purpose. In exceptional circumstances a judge may respond directly to the media if that judge's direct response will prevent an irreparable damage.

6.3. The media should show responsibility and restraint in publications on pending cases where such publication may influence the outcome of the case.

6.4. A judge shall not knowingly, while a proceeding is, or could come before the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue. [38]

7. STANDARDS OF CONDUCT[39]

[34] Inclusive.
[35] Montréal Declaration section 2.34. Broad.
[36] UN Basic Principles.
[37] See discussion by Julie Debeljak, *Judicial Conference of Australia, Uluru, April 2001: Judicial Independence: A Collection of Material for the Judicial Conference of Australia* regarding the consequences of inappropriate public criticism (it leaves judges having to choose between being silent leading to a potential decrease in public confidence in the judiciary, or else inappropriately being drawn into public criticism).
[38] Bangalore Principles
[39] Human Rights Watch, *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela*, Volume 16, No. 3(B) (June 2004) reporting some of allegations of judicial bias in Venezuela. For instance, Attorney General Isaías Rodríguez in May 2004 allegedly described how the country's top administrative court in the past established set fees for resolving different kinds of cases.

7.1. Judges may not serve in Executive or Legislative functions, including as:

7.1.1. Ministers of the government; or as

7.1.2. Members of the Legislature or of municipal councils.

7.2. Judges shall not hold positions in political parties.

7.3. A judge, other than a temporary or part-time judge, may not practice law.

7.4. A judge should refrain from business activities and should avoid from engaging in other remunerative activity,[40] that can affect the exercise of judicial functions or the image of the judge, except in respect of that judge's personal investments, ownership of property, the business activities or ownership of property of family members[41], or that judge's teaching at a university or a college.

7.5. A judge should always behave in such a manner as to preserve the dignity of the office and the impartiality, integrity and independence of the Judiciary.

7.6. Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.

7.7. Judges may take appropriate action to protect their judicial independence.[42]

7.8. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

7.9. Such proceedings include, but are not limited to, instances where

a) the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

b) the judge previously served as a lawyer or was a material witness in the matter in controversy; or

c) the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice [43]

7.10. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a

[40] ABA Model Code of Judicial Conduct (February 2007), Canon 4, Article D(2).
[41] ABA Model Code of Judicial Conduct (February 2007), Canon 4, Article D(2) discusses family.
[42] This is how the section appears in the Montréal Declaration, section 2.09.
[43] Bangalore Principles

judge should be taken by an authority which enjoys the same judicial independence as judges.[44]

7.11. Judges shall discourage *ex parte* communications from parties and except as provided by the rules of the court such communications shall be disclosed to the court and to the other party.

8. SECURING IMPARTIALITY AND INDEPENDENCE[45]

8.1. A judge[46] shall enjoy immunity from legal actions in the exercise of ~~his~~ official functions.[47]

8.2. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.[48]

8.3. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

8.4. The state shall ensure that in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats[49] or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary [50]

9. THE INTERNAL INDEPENDENCE OF THE JUDICIARY

9.1 In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors.

9.2 Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of judges to pronounce their judgments freely.[51]

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[44] Recommendation No.R(94)12). of the committee of Ministers of the Council of Europe to Memner States

[45] See Cyrus Das and K. Chandra, Editors, *Judges and Judicial Accountability*, Universal Law Publishing Company Ltd., Delhi.

[46] This does not exclude the possibility that the state may be liable for the gross negligence of a judicial officer.

[47] Consider a 1988 Italian law which was designed to, within certain limit, render judges accountable for damages caused by serious fault in the exercise of their functions: see Giovanni E. Longo, "The Human Right to an Independent Judiciary: International Norms and Denied application before a Domestic Jurisdiction," *St. John's Law Review* (Winter 1996).

[48] "It is most important that the judiciary be independent and be so perceived by the public. The judges must not have cause to fear that they will be prejudiced by their decisions or that the public would reasonably apprehend this to be the case": Howland, CJ, *R. v. Valente* 2 C.C.C. (3d) 417, at 423 (1983).

[49] Including physical threats to injure or to kill .

[50] Recommendation No.R(94)12 of the committee of Ministers of the Council of Europe to Memner States

[51] Montréal Declaration section 2.03.

B. INTERNATIONAL JUDGES

The following text on minimum standards for the independence of the international judiciary is based, with minor amendments, on the Burgh House Principles on the Independence of the International Judiciary which were formulated by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals

10. INDEPENDENCE

10.1 The international courts and the judges shall exercise their functions free from direct or indirect interference or influence by any person or entity.

10.2 This freedom of the judges and courts shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

10.3 The court shall be free to determine the conditions for its international administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.

10.4 Deliberations of the court shall remain confidential.

10.5 All Judges of international courts and tribunals shall adhere to the principle that a judges who are nationals of a member state of the organisation establishing the court or tribunal when exercising judicial discretion and function shall engage in fair and independent adjudication of the case and by no means in representation of the member state.

11 NOMINATION, ELECTION AND APPOINTMENT

11.1 In accordance with the governing instruments, judges shall be chosen from among persons of high moral character, integrity and conscientiousness who possess the appropriate professional qualifications, competence and experience required for the court concerned.

11.2 While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.

11.3 Procedures for the nomination, election, and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations.

11.4 Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organisation or other body responsible for the nomination, election and appointment process.

11.5 For the promotion of the independence of judges it is preferable that appointment of judges to the international courts and tribunals shall be for one long term and shall not be open for re-election.

12 SECURITY OF TENURE

12.1 Judges shall have security of tenure in relations to their term of office. They may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance.

12.2 The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner.

13 SERVICE AND REMUNERATION

13.1 Judges' essential conditions of service shall be enumerated in legally binding instruments.

13.2 No adverse changes shall be introduced with regard to judges' remuneration and other essential conditions of service during their terms of office.

13.3 Judges should receive adequate remuneration which should be periodically adjusted in line with any increases in the cost of living at the seat of the court.

13.4 Conditions of service should include adequate pension arrangements.

14 PRIVILEGES AND IMMUNITIES

14.1 Judges shall enjoy immunities equivalent to full diplomatic immunities, and in particular shall enjoy immunities from all claims arising from the exercise of their judicial functions.

14.2 The court alone shall be competent to waive the immunity of judges; it should waive immunity in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the exercise of the judicial function.

14.3 Documents and papers of the courts, judges and registry, in so far as they relate to the business of the court, shall be inviolable.

14.4 The state in which an international court has its seat shall take the necessary measures to protect the security of the judges and their families, and to protect them from adverse measures related to the exercise of their judicial function.

15 BUDGET

15.1 States, parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.

16 FREEDOM OF EXPRESSION AND ASSOCIATION

16.1 Judges shall enjoy freedom of expression and association. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.

16.2 Judges shall maintain the confidentiality of deliberations, and shall not comment extra-judicially upon pending cases.

16.3 Judges shall exercise appropriate restrain in commenting extra-judicially upon judgements and procedures of their own and other courts and may upon any legislation, drafts, proposals or subject-matter likely to come before their court.

17 EXTRA-JUDICIAL ACTIVITY

17.1 Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality.

17.2 Judges shall not exercise any political function.

17.3 Each court should establish an appropriate mechanism to give guidance to judges in relation to extra-judicial activities, and to ensure that appropriate means exist for parties to proceedings to raise any concerns.

18 PAST LINKS TO A CASE

18.1 Judges shall not serve in a case in which they have previously served as agent, counsel, advisor, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute or in a case where they had previously commented or expressed an opinion concerning the subject matter in a manner that is likely to affect or may reasonably appear to affect their independence or impartiality.

18.2 Judges shall not serve in a case with the subject matter of which they had other forms of association that may affect or may reasonably appear to affect their independence or impartiality.

19 PAST LINKS TO A PARTY

19.1 Judges shall not sit in any case involving a party for whom they have served as agent, counsel, advisor, advocate or expert within the previous three years or such other period as the court may establish within its rules; or with whom they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.

20 INTEREST IN THE OUTCOME OF A CASE

20.1 Judges shall not sit in any case in the outcome of which they hold any material personal, professional or financial interest.

20.2 Judges shall not sit in any case in the outcome of which other persons or entities closely related to them hold a material, personal, professional or financial interest.

20.3 Judges must not accept any undisclosed payment from a party to the proceedings or any payment whatsoever on account of a judge's participation in the proceedings.

21 CONTACT WITH A PARTY

21.1 Judges shall exercise appropriate caution in their personal contacts with parties, agents, counsel, advocates, advisors, and other persons and entities associated with a pending case. Any such contacts should be conducted in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect the judge's independence and impartiality.

21.2 Judges shall discourage *ex parte* communications from parties and except as provided by the rules of the court such communications shall be disclosed to the court and to the other party.

22 POST-SERVICE LIMITATIONS

22.1 Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.

22.2 Judges shall not seek or accept, while they are in office, any future employment, appointment or benefit, from a party to a case on which they sat or from any entity related to such a party that may affect or may reasonably appear to affect their independence or impartiality.

22.3 Former judges shall not, except as permitted by rules of the court, act in any capacity in relations to any case on which they sat during their judicial term of office.

22.4 Former judges shall not act as agent, counsel, advisor or advocate in any proceedings before the court on which they previously served for a period of three years after they have left office or such other period as the court may establish and publish.

22.5 Former judges should exercise appropriate caution as regards the acceptance of any employment, appointment or benefit, in particular from a party to a case on which they sat or from any entity related to such a party.

23 DISCLOSURE

23.1 Judges shall disclose to the court and, as appropriate, to the parties of the proceedings any circumstances which come to their notice at any time by virtue of which any of Principles 16 to 22 apply.

23.2 Each court shall establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relations to any particular case.

24 WAIVER

24.1 Notwithstanding Principles 16 to 22, judges shall not be prevented from sitting in a case where they have made appropriate disclosure of any facts bringing any of those Principles into operation, where the court expresses no objections and the parties give their express and informed consent to the judge acting.

25 WITHDRAWAL OR DISQUALIFICATION

25.1 Each court shall establish rules of procedure to enable the determination whether judges are prevented from sitting in a particular case as a result of the application of these Principles or for reasons of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.

26 MISCONDUCT

26.1 Each court shall establish rules of procedure to address a specific complaint of misconduct or breach of duty on the party of a judge that may affect independence or impartiality.

26.2 Such a complaint may, if clearly unfounded, be resolved on a summary basis. IN any case where the court determines that more detailed investigation is required, the rules shall establish adequate safeguards to protect the judges' rights and interests and to ensure appropriate confidentiality of the proceedings.

26.3 The governing instruments of the court shall provide for appropriate measures, including the removal from office of a judge.

26.4 The outcome of any complaint shall be communicated to the complainant.

27 AD HOC JUDGES

27.1 An *ad hoc* judge in an international court or tribunal must act conscientiously and independently in the adjudication of the case to which that judge was assigned to sit.

27.2 The restrictions and provisions applicable to full-time international judges regarding past links, extra-judicial activities, post-service limitations, and security of tenure shall not apply to *ad hoc* judges.

Appendix 1

Officers and Conferences of the International project on judicial independence

I General Coordinator, International Project on Judicial Independence

Professor Shimon Shetreet ,Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law . Hebrew University of Jerusalem,

II Co Chairs of the international conference on Judicial Independence in International Law Jerusalem 26-27 June 2007

Professor Shimon Shetreet , Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law , Hebrew University of Jerusalem,
Professor James R. Crawford , Faculty of Law, University of Cambridge

III Officers of the international conference on Judicial Independence for the Drafting of the International Standards of Judicial Independence Zurich Area Conference 30 November -1st of December 2007

Professor Shimon Shetreet , Co Chair of the Conference .Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law , Hebrew University of Jerusalem,
Professor Christopher F Forsyth, Co Chair of the Conference Director Centre of Public Law, Faculty of Law, University of Cambridge
Professor Marcel Storme , Emeritus Professor , Ghent University, Past President of the World Association of Procedural Law , Leader of the Discussions
HE Markus Buechel ,Chair of the Local Organising Committee

IV Co Chairs of the international conference on Judicial Independence and the Constitutional Position of the Judiciary Jerusalem 18-20 2008

Professor Shimon Shetreet , Co Chair of the Conference .Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law , Hebrew University of Jerusalem,
Professor Christopher F Forsyth, Co Chair of the Conference Director Centre of Public Law, Faculty of Law
University of Cambridge

V. Co Chairs of the international conference on Judicial Independence and the Constitutional Position of the Judiciary Krakow November 2008

Professor Shimon Shetreet , Co Chair of the Conference .Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law , Hebrew University of Jerusalem,
Prof. Dr. Fryderyk Zoll, Faculty of Law ,Jagelonian University ,Krakow

VI. Co Chairs of the international conference on the Challenges of the Standards of Judicial Independence , Switzerland August 2009

Professor Shimon Shetreet , Co Chair of the Conference .Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law , Hebrew University of Jerusalem,
Professor Bernhard Ehrenzeller , Co Chair of the Conference ,Universität St.Gallen,
Professor Daniel Thurer, Co Chair of the Conference ,Universität Zürich

VII. Members of the Consultation Group of the International Project of Judicial Independence

Dr Cyrus Das, Former President of the Bar of Malaysia
Dr. Anat Scolnicov, Deputy Director, Centere of Public Law, University of Cambridge
Prof. Dr. Fryderyk Zoll, Faculty of Law ,Jagelonian University ,Krakow
Prof. Yuval Shany, Faculty of Law, Hebrew University of Jerusalem
H.E. Advocate Markus Buechel, Senior Lawyer, Liechtenstein
Justice Tassaduq Hussain Jillani, Judge of the Supreme Court of Pakistan
Prof. Yitzhak Hadari, Tel Aviv University, Natanya College Law
Professor Maimon Schwarzschild, Faculty of Law, University of San Diego
Professor Ada Pellegrini Grinover, Brazil
Professor Albert Chen, Professor of Law ,Hong Kong University
Professor Andreyj J. Zoll, Former President of Constitutional Court of Poland
Professor Anton Cooray, The School of Law, City University of Hong Kong
Professor Bernhard Ehrenzeller , Universität St.Gallen
Professor Bryant G. Garth, American Bar Foundation
Professor Chandra R De Silva, Dean, College of Arts and Letters at Old Dominion University
Professor Christopher F Forsyth, Director Centre of Public Law, Faculty of Law
University of Cambridge
Professor Daniel Thurer, Universität Zürich
Professor David Feldman, Chairman of the Faculty Board of Law, Faculty of Law
University of Cambridge
Professor Asher Maoz, Tel-Aviv University, Faculty of Law
Professor Dr. Burkhardt Hess , University of Heidelberg
Prof Yoav Dotan , Dean Faculty of Law Hebrew University
Dr. Tomer Braude, Faculty of Law Hebrew University
Professor Dr. Francisco Ramos Mendez , Univ of Barcelona
Professor Dr. Paul Oberhammer , Universität Zürich
Professor Dr. Winfried Brugger , Universitat Heidelberg
Professor Frank Bates, School of Law, University of Newcastle Australia
Paul Morris, Barrister York UK
Prof. Sir Louis Blom Cooper, UK
Professor Federico Carpi , President of the World -Association of Procedural Law
Professor Garry D. Watson, Osgoode Hall Law School, York University
Professor Gary J Simson, Dean, Case Western Reserve University
Prof Joseph Weiler , New York University
Professor Walter Habscheid, Prof Emeritus, University of Zurich
Professor Hans Walter Fasching , Austria

Professor Hiram Chodosh, Dean, S.J. College of Law, the University of Utah
Professor Hoong Phun ('HP') LEE, Deputy Dean, Faculty of Law, Monash University
Professor James Nemeth, Eotvos Lorand University , Hungary
Professor James R Crawford, Faculty of Law, University of Cambridge
Professor John Anthony Jolowicz, Trinity College, University of Cambridge
Professor John Bell, Faculty of Law, University of Cambridge
Professor Jonathan Entin, Case Western Reserve University School of Law
Professor Keith Uff, Executive Secretary General, International Association of Procedural Law, Professor, Faculty of Law, University of Birmingham
Professor KK Venogopal, Senior Advocate of the Supreme Court India
Professor Konstantinos D. Kerameus, University of Athens Greece
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Professor Neil James Williams, University of Melbourne,
Professor Nikolas Klamaris, University of Athens
Professor Oscar G. Chase, New York University School of Law
Professor Pelayia Yessiou-Faltsi, Faculty of Law, Aristotle University of Thessaloniki
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Professor Peter Gilles , Institut fur Rechtsvergleichung Johann Wolfgang Goethe Universitat
Professor Peter Gottwald , Universitat Regensburg, Secretary General World association of procedural Law
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Professor Roger Perrot , Université de Paris
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Professor Stephen Goldstein, Emeritus Professor, Hebrew University of Jerusalem
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Professor Vernon Bogdanor, Oxford University
Professor Walter H. Rechberger, University of Vienna
Professor Walther J. Habscheid ,Emeritus Professor ,University of Geneva and University of Zurich
Professor Yasuhei Taniguchi Tokyo Japan
Professor Yoav Dotan, Dean Faculty of Law Hebrew University of Jerusalem
Professor Zhivko Stalev, Bulgaria

Appendix 2

International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals on the Independence of International Judges

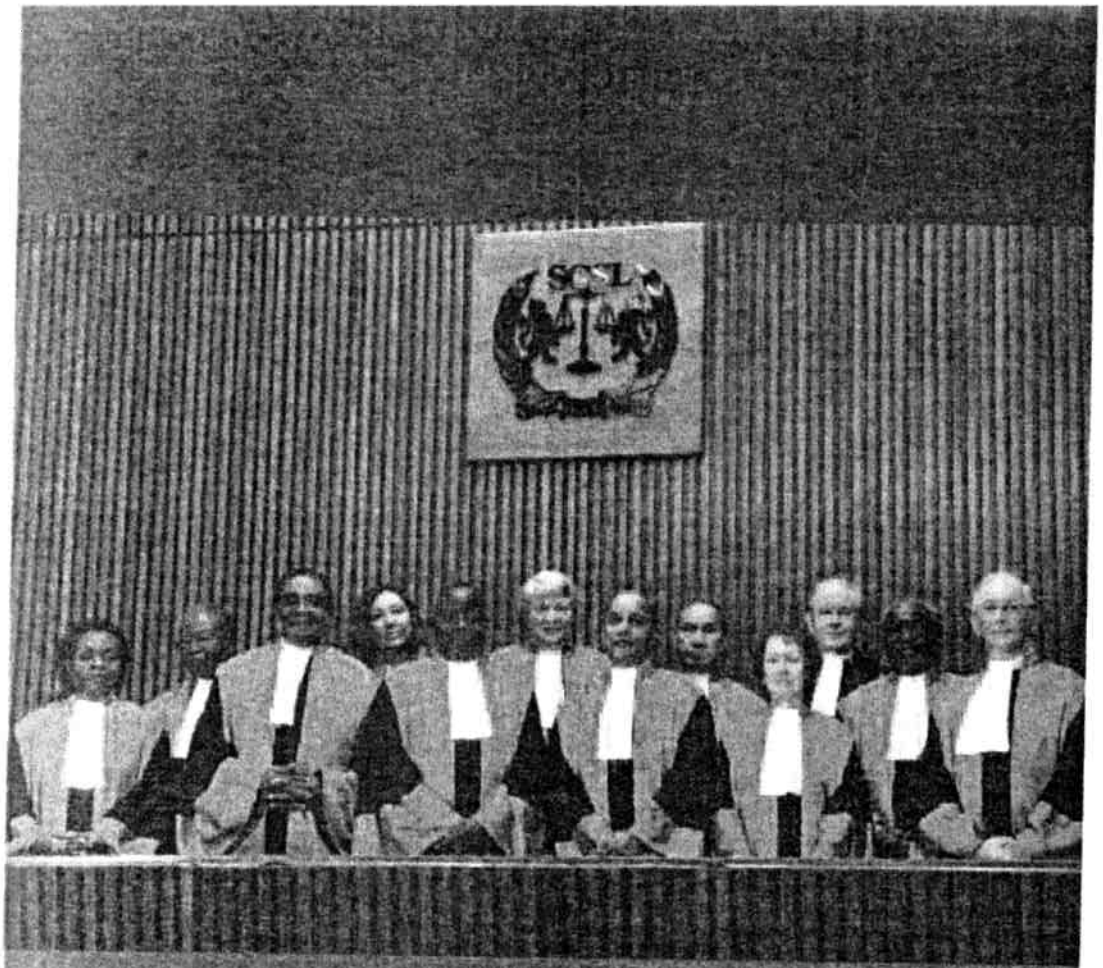
Co-Chairs

Philippe Sands, Professor of Law, University College London; Co-Director, Project on International Courts and Tribunals

Campbell McLachlan, Professor, Deputy Dean, School of Law, Victoria University of Wellington

Members

Laurence Boisson de Chazournes, Professor of International Law, University of Geneva
Rodman Bundy, Frere Cholmeley Eversheds, Paris ,
James Crawford, Whewell Professor of International Law, Cambridge University,
Hans van Houtte, Professor of International Law, Katholieke Universiteit Leuven,
Mojtaba Kazazi, United Nations Compensation Commission ,
Francisco Orrego Vicuna, Professor of International Law, University of Chile ,
Alain Pellet, Professor of International Law, Université Paris X Nanterre
Davis Robinson, LeBoeuf, Lamb, Greene & MacRae,
Soli Sorabjee, Attorney General of India,
Margrete Stevens, Senior Counsel, International Centre for Settlement of Investment Disputes



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Second Annual Report of the President of the

SPECIAL COURT FOR SIERRA LEONE

FOR THE PERIOD 1 JANUARY 2004 - 17 JANUARY 2005

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INTRODUCTION

This is the second Annual Report of the Special Court for Sierra Leone, prepared pursuant to Article 25 of the Statute of the Special Court, which states "The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone".

This report covers the period from 2 December 2003 and the ensuing 12 months. However, following the approach adopted in the previous Annual Report, where it is sensible to include events that occurred up until the time of writing, such as the swearing in of the Special Court's Trial Chamber II on 17 January 2005, then such events will be included.

The report covers the activities of all Sections of the Court: Chambers, Registry (including the Office of the Principal Defender) and the Office of the Prosecutor. Drawing upon the first Annual Report, it will also reflect the significant steps forward taken by the Court during the period in respect of creating, defining and implementing policies to ensure a sustainable legacy. The Report will explain the Court's funding situation and illustrate the work undertaken by the Management Committee during the period in relation to its funding and administration duties.

The Special Court for Sierra Leone was set up jointly by the Government of Sierra Leone and the United Nations. It is mandated to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Currently, eleven persons alleged to be associated with all three of the country's former warring factions stand indicted by the Special Court. In accordance with the Special Court Statute, they are charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law. Some of the charges include murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force and attacks on UN peacekeepers and humanitarian workers. At the time of writing, there are nine individuals in custody in Freetown.

Mr Hans Corell (left) representing H.E. Kofi Annan, Secretary-General of the UN and H.E. President Alhaji Dr. Ahmad Tejan Kabbah

SUMMARY OF ACTIVITIES

The Special Court was created pursuant to Security Council Resolution No. 1315 (2000) of 14 August 2000 by an agreement between the United Nations and the Government of Sierra Leone dated 16 January 2002, to which is annexed the Statute of the Special Court for Sierra Leone ("Statute") thereby forming an integral part of the Agreement.

The period of this report saw significant growth on the foundations laid in the previous year, including the construction of the courthouse in Freetown.

The new courthouse was opened and dedicated on 10 March 2004. The ceremony was attended by members of the Cabinet of the Government of Sierra Leone, senior representatives of interested and donor states, as well as members of the international diplomatic community. The courthouse was officially inaugurated by His Excellency President Alhaji Dr. Ahmad Tejan Kabbah and Mr Hans Corell, the then Under Secretary-General for Legal Affairs for the United Nations, on behalf of H.E. Kofi Annan, Secretary-General.

"I would like to extend to the President of the Court, the judges and the Court's other members my best wishes for success in the difficult work ahead. Your efforts matter greatly not only to Sierra Leone, but to the international community as a whole. In your rulings and convictions for the capacity to advance the cause of international criminal justice. To uphold the principles of responsibility and accountability, and to build up a deterrent that could keep other military and political leaders from directing and committing atrocities in the future." A message by [illegible] delivered by the Hon'ble Corell, Legal Counsel of the UN on 10 March 2004.

The opening of the courthouse coincided with the fifth Plenary of the Judges of the Special Court and the swearing in of the fifth Appeals Chamber Judge, Justice Raja Fernando of Sri Lanka, who replaced Justice Hassan Jallow. During the Plenary, several amendments to the Rules of Procedure and Evidence were adopted, including Rule 18, which by a unanimous vote limited the mandate of the Presiding Judge of the Appeals Chamber (who is also the President of the Court) to a non-renewable term of one year. As a result, Justice Geoffrey Robertson completed his term as the first President and Vice President Justice Renate Winter became acting President.

In May, the fifth Plenary reconvened and the Appeals Chamber Judges also met. Justice Emmanuel Ayoola from Nigeria was elected as President. The Appeals Chamber issued five decisions which greatly contributed to the development of international jurisprudence. The decisions on head of state immunity and the recruitment of child soldiers are considered landmark decisions for international jurisprudence.

On 3 June, the first trial before the Special Court for Sierra Leone opened before Trial Chamber I. Prosecutor David Crane, assisted by Trial Attorney Joseph Kamara, delivered the opening statements in the trial of three alleged leaders of the CDF before Trial Chamber I, composed of Justice Benjamin Itoe (Cameroon, Presiding), Justice Pierre Boutet (Canada) and Justice Bankole Thompson (Sierra Leone). The second trial, of three alleged members of the Revolutionary United Front (RUF), began on 5 July before the same Chamber.

On 4 December, the first foreign head of state visited the Court. German President Horst Kohler was welcomed by the President of the Special Court, Justice Emmanuel Ayoola.

On 17 January 2005, Trial Chamber II was sworn in, Presiding Justice Teresa Doherty (Northern Ireland), Justice Richard Lussick (Samoa) and Justice Julia Sebutinde (Uganda) began hearing evidence in the third trial, that of three alleged former members of the Armed Forces Revolutionary Council (AFRC), shortly thereafter.

The year under review saw significant cooperation between the Court and the international community in a number of respects. In Freetown, both international and Sierra Leonean staff worked together to implement the many and varied functions of a hybrid court.

Interaction between the Special Court and governments and international organizations resulted in agreements on a number of issues, including detention of indictees and the relocation of witnesses. The Court also reached agreements with health care institutions within Sierra Leone.

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United Nations S/2012/348/Add.1

Security Council

Distr.: General
27 June 2012

Original: English

Letter dated 26 June 2012 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council

In connection with my letter dated 21 June 2012 addressed to you, by which I submitted the interim report of the Group of Experts on the Democratic Republic of the Congo and requested its issuance as a document of the Council (S/2012/348), I have the honour to submit herewith the addendum to the Group's interim report (see annex).

(*Signed*) Agshin **Mehdiyev**
Chair

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Annex

Addendum to the interim report of the Group of Experts on the Democratic Republic of the Congo (S/2012/348) concerning violations of the arms embargo and sanctions regime by the Government of Rwanda

I. Introduction

1. Pursuant to its oral briefing to the Sanctions Committee on 13 June 2012 and in fulfilment of its commitment to provide timely information on arms embargo and sanctions violations to the Committee, the Group of Experts on the Democratic Republic of the Congo submits the present addendum to its interim report (S/2012/348).[1]

2. Since the outset of its current mandate, the Group has gathered evidence of arms embargo and sanctions regime violations committed by the Rwandan Government. These violations consist of the provision of material and financial support to armed groups operating in the eastern Democratic Republic of the Congo, including the recently established M23, in contravention of paragraph 1 of Security Council resolution 1807 (2008).[2] The arms embargo and sanctions regimes violations include the following:

- Direct assistance in the creation of M23 through the transport of weapons and soldiers through Rwandan territory
- Recruitment of Rwandan youth and demobilized ex-combatants as well as Congolese refugees for M23
- Provision of weapons and ammunition to M23
- Mobilization and lobbying of Congolese political and financial leaders for the benefit of M23
- Direct Rwandan Defence Forces (RDF) interventions into Congolese territory to reinforce M23
- Support to several other armed groups as well as Forces armées de la République démocratique du Congo (FARDC) mutinies in the eastern Congo
- Violation of the assets freeze and travel ban through supporting sanctioned individuals.[3]

[1] The Group submitted its interim report to the Sanctions Committee on 18 May 2012, which in turn transmitted it to the Security Council on 21 June 2012.

[2] In paragraph 1 of its resolution 1807 (2008) the Security Council decided that "all States shall take the necessary measures to prevent the direct or indirect supply, sale or transfer, from their territories or by their nationals, or using their flag vessels or aircraft, of arms and any related materiel, and the provision of any assistance, advice or training related to military activities, including financing and financial assistance, to all non-governmental entities and individuals operating in the territory of the Democratic Republic of the Congo;".

[3] See official list of designated individuals and entities for Sanctions Committee 1533 (2004) available from www.un.org/sc/committees/1533/pdf/1533_list.pdf.

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3. Over the course of its investigation since late 2011, the Group has found substantial evidence attesting to support from Rwandan officials to armed groups operating in the eastern Democratic Republic of the Congo. Initially the RDF appeared to establish these alliances to facilitate a wave of targeted assassinations against key officers of the Forces démocratique pour la libération du Rwanda (FDLR) thus significantly weakening the rebel movement (see S/2012/348, paras. 37 and 38). However, these activities quickly extended to support for a series of post-electoral mutinies within the FARDC and eventually included the direct facilitation, through the use of Rwandan territory, of the creation of the M23 rebellion. The latter is comprised of ex-CNDP officers integrated into the Congolese army (FARDC) in January 2009. Since M23 established itself in strategic positions along the Rwandan border in May 2012, the Group has gathered overwhelming evidence demonstrating that senior RDF officers, in their official capacities, have been backstopping the rebels through providing weapons, military supplies, and new recruits.

4. In turn, M23 continues to solidify alliances with many other armed groups and mutineer movements, including those previously benefiting from RDF support. This has created enormous security challenges, extending from Ituri district in the north to Fizi territory in the south, for the already overstretched Congolese army (FARDC). Through such arms embargo violations, Rwandan officials have also been in contravention of the sanctions regime's travel ban and assets freeze measures, by including three designated individuals among their direct allies.

5. In an attempt to solve the crisis which this Rwandan support to armed groups had exacerbated, the Governments of the Democratic Republic of the Congo and Rwanda have held a series of high-level bilateral meetings since early in April 2012. During these discussions, Rwandan officials have insisted on impunity for their armed group and mutineer allies, including ex-CNDP General Bosco Ntaganda, and the deployment of additional RDF units to the Kivus to conduct large-scale joint operations against the FDLR. The latter request has been repeatedly made despite the fact that: (a) the RDF halted its unilateral initiatives to weaken the FDLR in late-February;[4] (b) RDF Special Forces have already been deployed officially in Rutshuru territory for over a year; (c) RDF operational units are periodically reinforcing the M23 on the battlefield against the Congolese army; (d) M23 is directly and indirectly allied with several FDLR splinter groups; and (e) the RDF is remobilizing previously repatriated FDLR to boost the ranks of M23.

Elevated standards of evidence

6. In the light of the serious nature of these findings, the Group has adopted elevated methodological standards. Since early in April 2012, the Group has interviewed over 80 deserters of FARDC mutinies and Congolese armed groups, including from M23. Among the latter, the Group has interviewed 31 Rwandan nationals. Furthermore, the Group has also photographed weapons and military equipment found in arms caches and on the battlefield, and has obtained official documents and intercepts of radio communications. The Group has also consulted dozens of senior Congolese military commanders and intelligence officials as well as political and community leaders with intricate knowledge of developments between the Democratic Republic of the Congo and Rwanda. Moreover, the Group

[4] The last FDLR officer to be assassinated was Captain Theophile, the S3 of the Military Police Battalion, in late-February 2012.

has communicated regularly with several active participants of the ex-CNDP mutiny, the M23 rebellion, and other armed groups. Finally, while the Group's standard methodology requires a minimum of three sources, assessed to be credible and independent of one another, it has raised this to five sources when naming specific individuals involved in these cases of arms embargo and sanctions regime violations.

II. Rwandan support to M23

7. Since the earliest stages of its inception, the Group documented a systematic pattern of military and political support provided to the M23 rebellion by Rwandan authorities. Upon taking control over the strategic position of Runyoni, along the Rwandan border with the Democratic Republic of the Congo, M23 officers opened two supply routes going from Runyoni to Kinigi or Njerima in Rwanda, which RDF officers used to deliver such support as troops, recruits and weapons. The Group also found evidence that Rwandan officials mobilized ex-CNDP cadres and officers, North Kivu politicians, business leaders and youth in support of M23.

A. Direct assistance in the creation of M23 through Rwandan territory

8. Colonel Sultani Makenga deserted the FARDC in order to create the M23 rebellion using Rwandan territory and benefiting directly from RDF facilitation (see S/2012/348, para. 104). On 4 May, Makenga crossed the border from Goma into Gisenyi, Rwanda, and waited for his soldiers to join him from Goma and Bukavu. Intelligence sources, M23 collaborators and local politicians confirmed for the Group that RDF Western Division commander, General Emmanuel Ruvusha, welcomed Makenga upon his arrival to Gisenyi. The same sources indicated that Ruvusha subsequently held a series of coordination meetings with other RDF officers in Gisenyi and Ruhengeri over the following days with Makenga.

9. According to ex-CNDP and FARDC officers, also on 4 May, Col. Kazarama, Col. Munyakazi and Col. Masozera, and an estimated 30 of Makenga's loyal troops departed from Goma crossing into Rwanda through fields close to the Kanyamuyagha border. Several FARDC officers, civilian border officials, and intelligence officers stationed at Kanyamuyagha confirmed that they saw clear boot tracks of Makenga's troops crossing the border into Rwanda only a few metres away from an RDF position on the Rwandan side. These same sources also recovered several FARDC uniforms discarded by the deserters at that location the same night.

10. A second group of Makenga's loyal troops deserted the FARDC ranks in Bukavu, also via Rwanda. Three former M23 combatants who took part in the operation told the Group that ahead of his desertion, Makenga had gathered about 60 troops under the command of Maj. Imani Nzenze, his secretary, as well as Col. Seraphin Mirindi and Col. Jimmy Nzamuyein at his residence by Lake Kivu in the Nguba neighbourhood of Bukavu (see image 1). At 2030 hours on 4 May, the two large motorized boats transported the 60 troops and several tons of ammunitions and weapons 200 metres across the lake to the Rwandan town of Cyangugu (see S/2012/348, para. 118). The same sources indicated that upon arrival to Rwanda, the boats were sent back once again to Makenga's residence to recover the remainder of the weapons and ammunition (see image 2). According to one of the M23

combatants who later deserted the movement, and Congolese intelligence services, the evacuated weapons included such heavy weapons as Katyusha rocket launchers, RPG 7, and 14.5 mm machine guns, some of which were brought from Makenga's weapons caches at Nyamunyoni (see S/2012/348, para. 118).

Image 1

Colonel Makenga's home and private dock on Lake Kivu in Bukavu

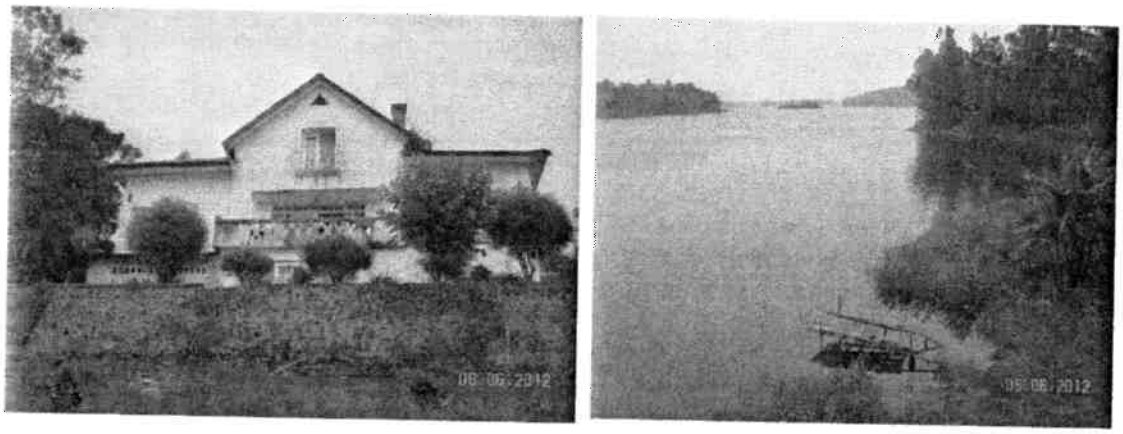
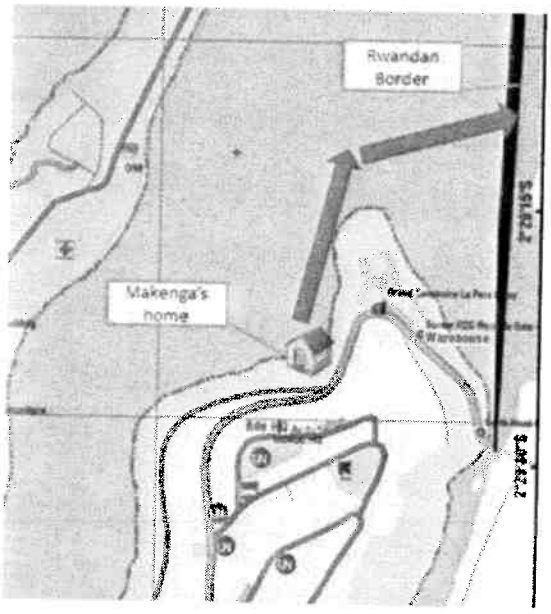


Image 2

Map of the transport of weapons and troops from Col. Makenga's home on 4 May 2012



11. The three former M23 combatants who participated in the operation also told the Group that upon arrival in Cyangugu, RDF and Rwandan police brought them to a military camp. The RDF subsequently provided them with full Rwandan army uniforms to be worn while travelling within Rwanda. The troops and the military

equipment were afterwards loaded onto three RDF trucks, and transported via the towns of Kamembe, Gikongoro, Butare, Ngororero, Nkamira and brought to the RDF position at Kabuhanga. This military position is situated on the Democratic Republic of the Congo-Rwanda border, near the village of Gasizi in Rwanda (roughly 27 km north of Goma). This ex-combatant testimony was corroborated by several sources interviewed by the Group, who all attested to the movement of troops from Rwanda into the DRC:

(a) Four local leaders interviewed separately in Kibumba personally witnessed Rwandan soldiers offloading equipment and soldiers from RDF trucks and jeeps at Gasizi on those same dates;

(b) Two Congolese border agents observed the RDF trucks which brought the troops and military equipment to Gasizi;

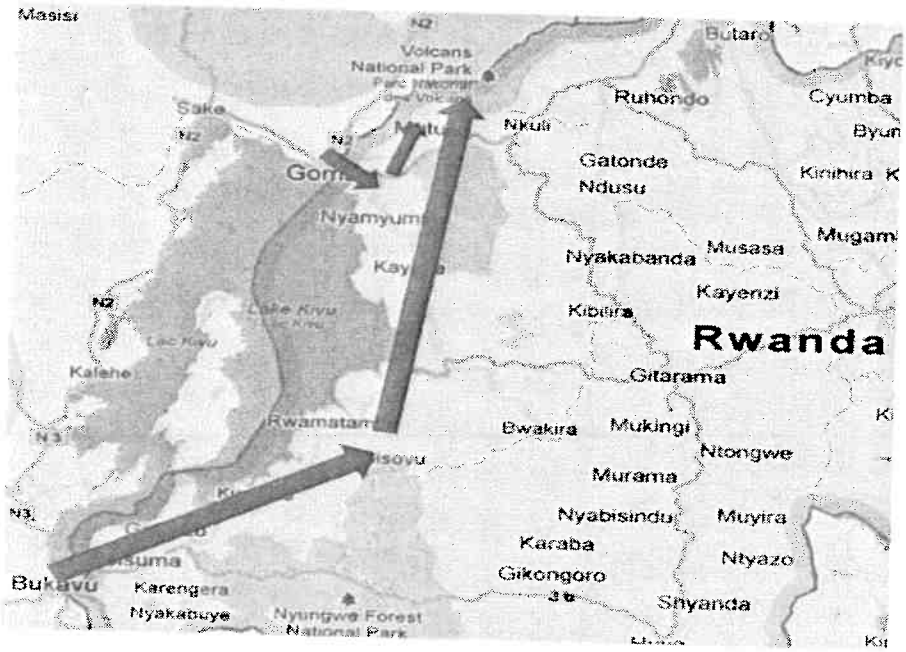
(c) A civilian intelligence officer reported that the troops had been brought to Gasizi in trucks;

(d) An FARDC internal intelligence report states that the troops were brought to join Makenga at Gasizi (see annex 1).

12. Several former M23 combatants also told the Group that General Ruvusha accompanied Makenga to meet with his troops in the RDF base at Kabuhanga (see image 3). RDF commanders ordered the Congolese soldiers to once again put on their FARDC uniforms and provided them with plastic sheets, food, soap and kitchen utensils. RDF officers also instructed the soldiers to remove any signs identifying Rwanda, such as labels on uniforms and water bottles.

Image 3

M23 travel through Rwanda facilitated by the RDF



13. That night, RDF officers ordered the FARDC deserters to offload and transport the weapons brought from Bukavu through the Virunga National Park, to Gasizi on the Democratic Republic of the Congo side,[5] between Karisimbi and Mikeno volcanoes. On 8 May, these soldiers joined up with the mutineers who came from Masisi territory to the assembly point at Gasizi. Military and police officers, as well as local authorities from Kibumba reported on the arrival of the mutineers from Masisi near the border, and the movement of Makenga's troops from Rwanda into the Democratic Republic of the Congo. A local authority gathered reports from Rwandan civilians who had been forced to carry the weapons from Gasizi, in Rwanda, to the Democratic Republic of the Congo border. After Ntaganda's and Makenga's groups merged, they advanced further through the park and took control of Runyoni on 10 May to officially launch military operations of the M23 rebellion (see S/2012/348, para. 104).[6]

B. RDF recruitment for M23

14. Once M23 established their positions near the Rwandan border at Runyoni,[7] the RDF began facilitating the arrival of new civilian recruits and demobilized former combatants of the FDLR to strengthen the ranks of the rebels.

Civilian new recruits

15. The Group interviewed 30 Rwandan nationals who had been recruited into M23 and managed to escape. Interviewed separately, each confirmed that they had been recruited in Rwanda. While some interacted with civilian "sensitizers", most stated that RDF officers directly participated in their recruitment process. M23 collaborators, ex-CNDP officers, politicians, ex-M23 combatants, and Congolese refugees in Rwanda, informed the Group that a wide network of mobilization had been established in the main Rwandan towns bordering the Democratic Republic of the Congo, as well as in refugee camps, targeting Rwandan nationals and Congolese refugees for recruitment. Recruitment focal points operating at Kinigi, Ruhengeri, Mudende, Gisenyi, Mukamira, and Bigogwe, are tasked with identifying and gathering young men for recruitment and handing them over to RDF soldiers. Two Congolese refugees, as well as a visitor of Nkamira refugee camp (situated 27 km from Gisenyi in Rwanda) told the Group that there had been a systematic campaign in the camp to encourage young men to join M23.

16. Former M23 combatants from Rwanda stated that the main transit point for recruitment is the RDF position at Kinigi, where recruits are regrouped and sent to the Democratic Republic of the Congo (see image 4). This pattern has also been independently confirmed by Congolese intelligence services and a former RDF officer. According to some of the recruits, they often receive a meal in Hotel Bishokoro, which belongs to General Bosco Ntaganda and his brother at Kinigi. Afterwards, RDF soldiers escort large groups of new recruits to the border and send them into the Democratic Republic of the Congo.

[5] The corresponding village along the border in the Democratic Republic of the Congo is also called Gasizi.

[6] CNDP issued an official communiqué announcing the creation of M23 on 6 May 2012, just after the desertion of Colonel Makenga.

[7] CNDP held a stronghold in Runyoni in 2008. See S/2008/773, para. 64 (b).

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OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS

General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14) : . 13/04/1984. CCPR General Comment No. 13. (General Comments)

Convention Abbreviation: CCPR

GENERAL COMMENT 13

Equality before the courts and the right to a fair and public hearing
by an independent court established by law

(Article 14)

(Twenty-first session, 1984)

1. The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Not all reports provided details on the legislative or other measures adopted specifically to implement each of the provisions of article 14.

2. In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of "criminal charge" and "rights and obligations in a suit at law" are interpreted in relation to their respective legal systems.

3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.

4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent

administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.

5. The second sentence of article 14, paragraph 1, provides that "everyone shall be entitled to a fair and public hearing". Paragraph 3 of the article elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.

6. The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.

7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

8. Among the minimum guarantees in criminal proceedings prescribed by paragraph 3, the first concerns the right of everyone to be informed in a language which he understands of the charge against him (subpara. (a)). The Committee notes that State reports often do not explain how this right is respected and ensured. Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.

9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel.

When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

10. Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.

11. Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.

12. Subparagraph 3 (e) states that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.

13. Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.

14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

15. In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.

16. Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these

special arrangements for juveniles take account of "the desirability of promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14.

17. Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.

18. Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many State reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.

19. In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of the meaning of ne bis in idem may encourage States parties to reconsider their reservations to article 14, paragraph 7.

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Office of the United Nations High Commissioner for Human Rights
Geneva, Switzerland

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Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries

2001

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.

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Commentary

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term "by the latter" in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.[273] Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph 5, of the Charter of the United Nations, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.[274] The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.[275] In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.[276]

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany

[273] See, e.g., the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (*f*) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

[274] *The New York Times*, 6 March 1984, p. A1.

[275] *Ibid.*, 5 March 1984, p. A3.

[276] *Ibid.*, 26 August 1998, p. A8.

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Draft Code of Crimes against the Peace and Security of Mankind

1996

Text adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 50). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1996*, vol. II (Part Two).

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Draft Code of Crimes against the Peace and Security of Mankind (1996)

PART ONE
GENERAL PROVISIONS

Article 1
Scope and application of the present Code

1. The present Code applies to the crimes against the peace and security of mankind set out in part two.

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

Article 2
Individual responsibility

1. A crime against the peace and security of mankind entails individual responsibility.

2. An individual shall be responsible for the crime of aggression in accordance with article 16.

3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:

(*a*) intentionally commits such a crime;

(*b*) orders the commission of such a crime which in fact occurs or is attempted;

(*c*) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;

(*d*) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;

(*e*) directly participates in planning or conspiring to commit such a crime which in fact occurs;

(*f*) directly and publicly incites another individual to commit such a crime which in fact occurs;

(*g*) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

Article 3
Punishment

An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.

Article 4

Responsibility of States

The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

Article 5

Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.

Article 6

Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

Article 7

Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Article 8

Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

Article 9

Obligation to extradite or prosecute

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual.

Article 10

Extradition of alleged offenders

1. To the extent that the crimes set out in articles 17, 18, 19 and 20 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such

therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

Article 11

Judicial guarantees

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(*a*) in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(*b*) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(*c*) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(*d*) to be tried without undue delay;

(*e*) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

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

(*g*) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*h*) not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law.

Article 12

Non bis in idem

1. No one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court.

2. An individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court except in the following cases:

(*a*) by an international criminal court, if:

(i) the act which was the subject of the judgement in the national court was characterized by that court as an ordinary crime and not as a crime against the peace and security of mankind; or

(ii) the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted;

(*b*) by a national court of another State, if:

(i) the act which was the subject of the previous judgement took place in the territory of that State; or

(ii) that State was the main victim of the crime.

3. In the case of a subsequent conviction under the present Code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 13
Non-retroactivity

1. No one shall be convicted under the present Code for acts committed before its entry into force.

2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

Article 14
Defences

The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.

Article 15
Extenuating circumstances

In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law.

PART TWO
CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 16
Crime of aggression

An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

Article 17
Crime of genocide

A crime of genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(*a*) killing members of the group;

(*b*) causing serious bodily or mental harm to members of the group;

(*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) imposing measures intended to prevent births within the group;

(*e*) forcibly transferring children of the group to another group.

Article 18
Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

(*a*) murder;

(*b*) extermination;

(*c*) torture;

(*d*) enslavement;

(*e*) persecution on political, racial, religious or ethnic grounds;

(*f*) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;

(*g*) arbitrary deportation or forcible transfer of population;

(*h*) arbitrary imprisonment;

(*i*) forced disappearance of persons;

(*j*) rape, enforced prostitution and other forms of sexual abuse;

(*k*) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

Article 19
Crimes against United Nations and associated personnel

1. The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate:

(*a*) murder, kidnapping or other attack upon the person or liberty of any such personnel;

(*b*) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

Article 20
War crimes

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale:

(*a*) any of the following acts committed in violation of international humanitarian law:

(i) wilful killing;

(ii) torture or inhuman treatment, including biological experiments;

(iii) wilfully causing great suffering or serious injury to body or health;

(iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) unlawful deportation or transfer of unlawful confinement of protected persons;

(viii) taking of hostages;

(*b*) any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health:

(i) making the civilian population or individual civilians the object of attack;

(ii) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iii) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iv) making a person the object of attack in the knowledge that he is hors de combat;

(v) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs;

(*c*) any of the following acts committed wilfully in violation of international humanitarian law:

(i) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

(ii) unjustifiable delay in the repatriation of prisoners of war or civilians;

(*d*) outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(*e*) any of the following acts committed in violation of the laws or customs of war:

(i) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(ii) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(iii) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings or of demilitarized zones;

(iv) seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(v) plunder of public or private property;

(*f*) any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character:

(i) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(ii) collective punishments;

(iii) taking of hostages;

(iv) acts of terrorism;

(v) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(vi) pillage;

(vii) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable;

(g) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

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General Assembly

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Human rights situations that require the Council's attention

Report of the independent international commission of inquiry on the Syrian Arab Republic*

Summary

The situation of human rights in the Syrian Arab Republic has deteriorated significantly since 15 February 2012. Armed violence increased in intensity and spread to new areas. Active hostilities raged between Government forces (and the *Shabbiha*) and anti-Government armed groups. Sporadic clashes between the armed actors evolved into continuous combat, involving more brutal tactics and new military capabilities on both sides. The level of armed violence varied throughout the country.

During the reporting period, the commission of inquiry determined that the intensity and duration of the conflict, combined with the increased organizational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict. The commission therefore applied both international humanitarian law and international human rights law in its assessment of the actions of the parties to the hostilities.

The commission found reasonable grounds to believe that Government forces and the *Shabbiha* had committed the crimes against humanity of murder and of torture, war crimes and gross violations of international human rights law and international humanitarian law, including unlawful killing, torture, arbitrary arrest and detention, sexual violence, indiscriminate attack, pillaging and destruction of property. The commission found that Government forces and *Shabbiha* members were responsible for the killings in Al-Houla.

The commission confirms its previous finding that violations were committed pursuant to State policy. Large-scale operations conducted in different governorates, their similar modus operandi, their complexity and integrated military-security apparatus indicate the involvement at the highest levels of the armed and security forces and the Government. The *Shabbiha* were identified as perpetrators of many of the crimes described in the present report. Although the nature, composition and hierarchy of the *Shabbiha*

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remains unclear, credible information led to the conclusion that they acted in concert with Government forces.

The commission found reasonable grounds to believe that war crimes, including murder, extrajudicial execution and torture, had been perpetrated by organized anti-Government armed groups. Although not a party to the Geneva Conventions, these groups must abide by the principles of international humanitarian law. The violations and abuses committed by anti-Government armed groups did not reach the gravity, frequency and scale of those committed by Government forces and the *Shabbiha*.

Both groups violated the rights of children.

The commission is unaware of efforts meeting international standards made by either the Government or anti-Government armed groups to prevent or punish the crimes documented in the present report.

The lack of access significantly hampered the commission's ability to fulfil its mandate. Its access to Government officials and to members of the armed and security forces was negligible. Importantly, victims and witnesses inside the country could not be interviewed in person.

A confidential list of individuals and units believed to be responsible for crimes against humanity, breaches of international humanitarian law and gross human rights violations will be submitted to the United Nations High Commissioner for Human Rights at the close of the commission's current mandate, in September 2012.

The commission reiterates that the best solution is a negotiated settlement involving an inclusive and meaningful dialogue among all parties, leading to a political transition that reflects the legitimate aspirations of all segments of Syrian society, including ethnic and religious minorities.

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Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice

Report of the Secretary-General

I. Introduction

1. The General Assembly, in section IV, paragraph 3, of its resolution 50/216 of 23 December 1995, requested the Secretary-General to address the issues raised by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) concerning the conditions of service of members of the International Court of Justice (ICJ) in the context of the next review, at the fifty-third session of the General Assembly, in the light of the recommendation contained in the report of the Advisory Committee.[1]

2. In order to facilitate consideration of the various issues regarding the compensation and conditions of service of members of the Court, the present report is divided into the following sections: remuneration, including adjustment for currency fluctuation and cost of living; other conditions of service; pensions; analysis of the practice of the Court with respect to Article 16, paragraph 1, of the Statute of the Court; residence and non-residence status of the members of the Court; financial implications; and the next comprehensive review.

II. Remuneration

3. Article 32 of the Statute of ICJ provides, *inter alia*, that each member of the Court shall receive an annual salary (para. 1), that these salaries and allowances "shall be fixed by the General Assembly" and that "they may not be decreased during the term of office" (para. 5).

4. Since 1976, the General Assembly has conducted periodic reviews of the emoluments of the members of the Court, with the last comprehensive review having been undertaken at the fiftieth session of the General Assembly (see A/C.5/50/18). By paragraph 1 of its resolution 45/250 A of 21 December 1990, the General Assembly decided that, with effect from 1 January 1991, the annual salary of the members of ICJ would be US$ 145,000. By paragraph 2 of its resolution 48/252 A of 26 May 1994, the Assembly maintained the annual salary of the members of ICJ at $145,000. On the occasion of the comprehensive review of the emoluments of the members of the Court undertaken in 1995, the Assembly, by paragraph 2 of part IV of its resolution 50/216, agreed with ACABQ's recommendation to maintain the salary of the members of the Court at $145,000 per annum.

5. The emoluments of the members of the Court are sui generis. However, on the occasion of the periodic

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comprehensive reviews of the emoluments and conditions of service of the members of the Court, information on the net remuneration of senior Secretariat officials, of the Chairman of the Advisory Committee on Administrative and Budgetary Questions, of the Chairman and Vice-Chairman of the International Civil Service Commission (ICSC) and of the members of the Joint Inspection Unit (JIU) as well as the gross emoluments of the president and members of the highest courts in national judiciaries of a number of States and of international courts have been provided as reference points for purposes of comparative assessment.

6. Tables 1 and 2 contain updated information concerning the evolution of emoluments from January 1995 to June 1998. Table 1 compares the movement of the judges' total emoluments with changes in the remuneration of senior Secretariat officials and that of full-time members of other subsidiary bodies of the United Nations; Table 2 provides information obtained, with the assistance of permanent missions to the United Nations, on the movement of gross emoluments of the president and members of the highest courts in a number of national judiciaries. The table also presents information on the movement in emoluments of the President and members of the Court of the European Communities in Luxembourg and of the Iran-United States Claims Tribunal in The Hague, as well as the emoluments of the President and members of the European Court of Human Rights in Strasbourg which, as of the last quarter of 1998, will be transformed into a full-time court.

Table 1

Changes in net remuneration of members of the Court, Secretariat officials and members of United Nations bodies, 1995–1998

(In United States dollars, dependency rate)

	January 1995	*January 1996*	*January 1997*	*January 1998*	*June 1998*
International Court of Justice					
President[a]	160 000	160 000	160 000	160 000	160 000
Index	100.0	100.0	100.0	100.0	100.0
Members of the Court	145 000	145 000	145 000	145 000	145 000
Index	100.0	100.0	100.0	100.0	100.0
Senior Secretariat officials					
The Hague					
ASG[b] (dep. rate)	121 098	140 383	134 558	119 022	122 993
Index (dep. rate)	100.0	115.9	111.1	98.2	101.5
ASG[b] (single rate)	109 851	127 265	122 091	108 027	111 656
Index (single rate)	100.0	115.9	111.1	98.3	101.6
Geneva					
USG[c]	173 461	198 406	172 995	161 207	159 238
Index	100.0	114.4	99.7	92.9	91.8
ASG[b]	158 427	181 306	157 999	147 187	145 380
Index	100.0	114.4	99.7	92.9	91.8
New York					
USG[c]	132 942	141 322	147 041	149 617	149 637
Index	100.0	106.3	110.6	112.5	112.6
ASG[b]	121 263	128 949	134 195	136 557	136 575
Index	100.0	106.3	110.7	112.6	112.6

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	January 1995	January 1996	January 1997	January 1998	June 1998
Full-time members of subsidiary bodies					
Chairman, ICSC/ ACABQ[d]	128 776	137 230	137 230	143 692	143 692
Index	100.0	106.6	106.6	111.6	111.6
Vice-Chairman, ICSC	120 776	129 230	129 230	135 692	135 692
Index	100.0	107.0	107.0	112.4	112.4
Members of JIU, Geneva	137 678	157 943	137 299	127 722	126 122
Index	100.00	114.7	99.7	92.8	91.6

[a] Includes special allowance of $15,000.
[b] Includes representation allowance of $3,000 a year.
[c] Includes representation allowance of $4,000 a year.
[d] Includes special allowance of $8,000 a year.

Table 2

Movement in gross emoluments of officers of national judiciaries, the Court of the European Communities and the Iran-United States Claims Tribunal 1995–1998

	1995	1996	1997	1998
1. United States Supreme Court				
Chief Justice (US$)	171 500	171 500	171 500	175 400
Index	100.0	100.0	100.0	102.3
Associate Justice (US$)	164 100	164 100	164 100	167 900
Index	100.0	100.0	100.0	102.3
2. Supreme Court of Canada				
Chief Justice (Can$)[a b]	199 900	199 900	204 000	208 200[d]
(US$)	142 786	146 985	152 239	147 660
Index	100.0	102.9	106.6	103.4
Puisne judge (Can$)[b c]	185 200	185 200	189 000	192 900[d]
(US$)	132 286	136 176	141 045	136 809
Index	100.0	102.9	106.6	103.4
3. United Kingdom				
Lord Chief Justice (£ stg.)	118 179	124 138	132 178	140 006
(US$)	184 655	190 982	222 522	233 347
Index	100.0	103.4	120.5	126.4
Master of the Rolls (£ stg.)	109 435	114 874	122 231	131 034
(US$)	170 992	176 729	205 776	218 390
Index	100.0	103.4	120.3	127.7
4. Australia				
Chief Justice ($A)[e]	211 871	—	—	253 348
(US$)	164 241	—	—	165 587
Index	100.0	—	—	100.8
Justice ($A)[e]	192 604	—	—	230 309
(US$)	149 305	—	—	150 529
Index	100.0	—	—	100.8
5. Japan				

	1995	1996	1997	1998
Chief Justice				
(¥)	44 268 943	44 665 263	44 883 240	44 883 240
(US$)	444 021	437 895	387 593	345 256
Index	100.0	98.6	87.3	77.8
Associate Judge				
(¥)	32 300 080	32 597 320	32 755 847	32 755 847
(US$)	323 972	319 582	282 866	251 968
Index	100.0	98.6	87.3	77.8
6. Court of the European Communities				
President				
(Bf)[f]	8 679 311	8 774 796	8 897 622	9 093 361
(US$)	271 228	297 451	278 051	246 433
Index	100.0	109.7	102.5	90.9
Member				
(BF)	7 075 526	7 153 367	7 253 496	7 413 066
(US$)	221 110	242 487	226 672	200 896
Index	100.0	109.7	102.5	90.9
7. European Court of Human Rights				
President				
(FF)[g]	—	—	—	1 100 000
(US$)[h]	—	—	—	193 000
Index	—	—	—	100.0
Member				
(FF)[i]	—	—	—	1 100 000
(US$)[h]	—	—	—	193 000
Index	—	—	—	100.0
8. Iran-United States Claims Tribunal				
President (US$)	245 000	—	—	252 000
Index	100.0	—	—	102.9
United States-Iranian Judge		—	—	
(US$)	210 000	—	—	217 500
Index	100.0	—	—	103.6
Third-country judge (US$)	235 000	—	—	242 500
Index	100.0	—	—	103.2

[a] Also entitled to a representation allowance of Can$ 10,000.
[b] Also entitled to an incidental allowance of Can$ 2,500.
[c] Also entitled to a representation allowance of Can$ 5,000.
[d] Salary effective as from 1 April 1998.
[e] Also entitled to an annual allowance of $A 20,000.
[f] Also entitled to a residential allowance of BF 70,661.
[g] Salary will become effective 1 November 1998. Also entitled to annual additional remuneration of FF 75,000, paid on *pro rata temporis* basis.
[h] Estimated United States dollar amount derived using exchange rate of FF 5.7 to US$ 1.00.
[i] Salary will become effective 1 November 1998. Also entitled to annual additional remuneration of FF 37,500, paid on *pro rata temporis* basis.

7. In April 1987, ICSC introduced the concept of a local currency floor and ceiling at a number of duty stations, including The Hague, to protect staff against the weakening of the dollar. The background and the functioning of the floor/ceiling system, as applied to the emoluments of the members of the Court, are discussed in paragraphs 11 to 15 of the Secretary-General's report to the General Assembly at its forty-eighth session (A/C.5/48/66).

8. In paragraph 4 of its resolution 48/252 A, the General Assembly decided to continue the system of floor/ceiling measures introduced for members of the Court pursuant to section VI of General Assembly resolution 43/217. In paragraph 8 of his report to the General Assembly, at its

fiftieth session (A/C.5/50/18), the Secretary-General indicated that the 1994 floor/ceiling exchange rates had been derived by applying the previous formula of 4 per cent above and 4 per cent below the average exchange rate to the year 1993. The average exchange rate in 1994 was 1.82 guilders to the dollar and yielded revised floor/ceiling exchange rates of 1.75 and 1.89 guilders, respectively. The floor exchange rate of 1.75 guilders to the dollar resulted in a revised currency floor of 21,145 guilders per month and the ceiling exchange rate of 1.89 guilders to the dollar resulted in a revised currency ceiling of 22,837 guilders per month.

9. In paragraph 12 of the same report, the Secretary-General expressed the opinion that the annual emoluments of members of the Court should be maintained at their current level of $145,000. He also noted that the mechanism used to regulate emoluments against the weakening/strengthening of the dollar had provided only limited protection for the judges over the period since the beginning of 1994. Although he proposed that the same mechanism continue to be applied, he drew the attention of ACABQ to the serious diminution in the real level of emoluments as a result of the use of the United States dollar as a reference currency. He inferred that action could be taken to restore the real 1991 value of those emoluments, in line with the spirit of Article 32 of the Statute of the Court.

10. In paragraph 6 of its report,[1] the Advisory Committee expressed its agreement with the Secretary-General's opinion that the annual emoluments of the members of the Court should be maintained at the current level of $145,000 and recommended that, "should the current mechanism used to regulate emoluments against the weakening/strengthening of the dollar be considered inadequate, the Secretary-General [should] make proposals in this regard, bearing in mind the various studies that have been carried out on this issue in the recent past."

11. In 1996, the Advisory Committee was advised that it had been found reasonable to continue to apply through 1996 the floor/ceiling mechanism that had been applied in 1995 in the light of the provisions of Article 32 of the Statute of the Court, which specify that the remuneration and allowances of the members of the Court "shall be fixed by the General Assembly, and may not be decreased during the term of office", and pending the next review of the conditions of service for the members of the Court.

12. Consequently, floor/ceiling exchange rates of 1.75 and 1.89 guilders, respectively, applied in 1995 for the purpose of effecting monthly payments in guilders to the members of the Court, were applied in 1996 and 1997.

13. The Advisory Committee was further advised that the movement in the exchange rate of the guilder to the dollar would continue to be monitored. If any significant strengthening of the dollar were to be noted vis-à-vis the guilder and if it was found that a revision in the floor/ceiling exchange rates was needed, the Committee would be informed accordingly.

14. The dollar strengthened significantly during 1997. In this light, for the year 1998, it was found reasonable to revise the floor/ceiling rates used for effecting monthly payments in guilders to the members of the Court. Based on the methodology proposed by the Secretary-General and, as recommended by ACABQ and approved by the General Assembly, the floor/ceiling rates were set at 4 per cent below and 4 per cent above the average exchange rate of the previous year. For the year 1997, the average exchange rate is 1.94 guilders to $1.00. On this basis, the floor/ceiling exchange rates were revised to 1.86 and 2.02 guilders, respectively. The floor exchange rate of 1.86 guilders to the dollar results in a currency floor of 22,474 guilders per month and the ceiling exchange rate of 2.02 guilders to the dollar results in a currency ceiling of 24,408 guilders per month.

15. Table 3 indicates the official exchange rate for the guilder against the dollar for the period from January 1994 to September 1998. Over the period, the floor amount has been payable for 26 months and the ceiling amount for 17 months.

Table 3
Exchange rate of the guilder to the dollar, January 1994–September 1998

	1994	1995	1996	1997	1998
January	1.92	1.74	1.61	1.75	2.02
February	1.95	1.70	1.67	1.85	2.06
March	1.92	1.64	1.63	1.90	2.02
April	1.88	1.57	1.65	1.89	2.08
May	1.88	1.54	1.70	1.95	2.02
June	1.85	1.54	1.71	1.91	2.00
July	1.78	1.56	1.71	1.94	2.04
August	1.76	1.56	1.67	2.07	2.04
September	1.74	1.65	1.67	2.02	2.03
October	1.76	1.59	1.71	2.02	
November	1.69	1.57	1.71	1.94	
December	1.75	1.61	1.72	1.99	

16. The floor/ceiling mechanism used to regulate emoluments against the weakening/strengthening of the dollar has served to limit the diminution of the emoluments of the members of ICJ expressed in guilders, particularly in 1995 and 1996, when the dollar weakened against the guilder, as well as restricting the increase in the judges' emoluments in 1997 and 1998, when the dollar strengthened against the guilder. Overall, the floor/ceiling mechanism has served to offset fluctuations in the value of the dollar against the guilder. Nevertheless, as a result of the increase in the cost of living in the Netherlands, the emoluments of the members of ICJ have experienced a diminution in real value since 1991. According to official statistics of the Netherlands provided by the Court, the consumer price index for the Netherlands for the period from 1 January 1990 to 31 December 1997 increased by 19 per cent.

17. The Court has noted that, if the emoluments of the members of the Court had been adjusted every year in relation to the consumer price index, the total sum of these emoluments would, over the period from 1 January 1990 to 31 December 1997, have reached a level of $1,101,275, or $157,325 per year. A comparison of the latter amount with the annual salary of $145,000 shows a difference, i.e, a loss, of $12,325 per year. When compared to the real value of the emoluments, while taking into account the floor/ceiling mechanism for the conversion of salary from United States dollars into guilders, the value of the annual salary over the seven-year period would show a difference of $1,035,125, or an annual salary of $147,732. On this basis it can be seen that, while the floor/ceiling mechanism provided a certain amount of protection in maintaining the value of the level of annual remuneration, it failed to keep pace with the increase in the cost of living in the Netherlands. The total loss in remuneration over the seven-year period was $66,150 or, on average, $9,450 per year.

18. In its earlier report on the subject,[2] the Advisory Committee had expressed its view that under the existing system of adjustment for currency fluctuations and cost of living, the strengthening of the United States dollar vis-à-vis the guilder had more than offset the increases in the local cost of living. While this may have been the case in some years, it has not been so in other years, and is not so currently. It is a fact that, over time, the cost of living in the Netherlands has continued to increase cumulatively. As at 1 January 1994, the rise in the cost of living in the Netherlands, compared to 1 January 1991, was 8.7 per cent. As at 1 January 1998, the cost of living in the Netherlands had increased by 19 per cent. Even when taking into account the floor/ceiling mechanism, the loss in purchasing power has been considerable. As at 1 January 1991, the floor/ceiling exchange rates were 1.77 and 1.91, respectively. With effect from 1 January 1998, the floor/ceiling exchange rates are 1.86 and 2.02, respectively. There has been a 5.4 per cent increase in the floor/ceiling exchange rates. In real terms, the loss in purchasing power between 1 January 1991 and 1 January 1998 was 13.57 per cent (18.97% – 5.4% = 13.57%). The members of the Court have made representations to the effect that, in order to restore the real level of the emoluments of the members of ICJ, the annual salary should be increased by $19,500, from $145,000 to $164,500, i.e., by 13.4 per cent.

19. Paragraph 5 of Article 32 of the Statute of the Court provides, *inter alia*, that the salaries of the members of the Court "may not be decreased during the term of office". Based on the above information and, in line with the spirit of Article 32 of the Statute of the Court, it would seem reasonable that measures should be taken to restore the purchasing power of the emoluments of the judges. In this regard, it is also noted that no retroactive adjustment is proposed to be made to the salaries of members of ICJ to offset fluctuations in the value of the United States dollar against the guilder. Consequently, it is recommended that action be taken to increase the level of annual remuneration of the members of the Court from the current level of $145,000 to $164,500. It is also noted that the mechanism used to regulate emoluments against the weakening/strengthening of the dollar has provided a measure of protection against the erosion in the level of salary of the judges. Therefore, it is also proposed that the same floor/ceiling mechanism continue to be applied to the emoluments of the judges.

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III. Other conditions of service

20. The background of other conditions of service of the members of ICJ is provided in the report of the Secretary-General to the General Assembly at its forty-eighth session (A/C.5/48/66), i.e., in section IV (paras. 16-21), concerning the special allowances of the President and of the Vice-President when acting as President; section V (in paras. 22 and 23), relating to compensation of ad hoc judges; and in section VI (paras. 24-31), pertaining to the costs of educating children.

21. Article 32 of the Statute of the Court provides that the President shall receive a special annual allowance (paragraph 2) and that the Vice-President shall receive a special allowance for each day on which he acts as President (paragraph 3). As is the case with remuneration, these allowances "shall be fixed by the General Assembly" and "may not be decreased during the term of office" (paragraph 5). General Assembly resolution 31/204 provides that the allowances "shall be reviewed concurrently with the periodic review of their annual salary" (paragraph 3).

22. The General Assembly, by its resolution 50/216, part IV, paragraph 2, decided that the President's special allowance should remain at $15,000 a year and that the special daily allowance paid to the Vice-President when acting as President should remain at $94 per day, subject to a maximum of $9,400 per year.

23. Accordingly, the Secretary-General recommends no change in the current level of the special allowances of the President of the Court and the Vice-President when acting as President.

24. Turning to the issue of compensation of ad hoc judges, under Article 31 of the Statute of the Court, persons whom parties to cases before the Court choose to "take part in the decision on terms of complete equality with their colleagues" (para. 6) are known as ad hoc judges. Further to Article 32, paragraph 4, of the Statute, they "shall receive compensation for each day on which they exercise their functions". The historical background to the determination of the amount of that compensation was presented in the report of the Secretary-General to the General Assembly at its fortieth session (A/C.5/40/32, paras. 35-41).

25. The General Assembly, in paragraph 3 of its resolution 48/252 A, decided that, with effect from 1 January 1994, the ad hoc judges referred to in Article 31 of the ICJ Statute should receive for each day they exercise their functions, one three-hundred-and-sixty-fifth of the annual salary payable at the time to a member of the Court. On the occasion of the 1995 review, the Secretary-General proposed that no change be made in these arrangements. The General Assembly, by part IV, paragraph 2, of its resolution 50/216, concurred with this proposal. On this occasion, the Secretary-General proposes that no change be effected in these arrangements.

26. The background to the issue of costs of educating children, as applied to the members of the Court, is provided in paragraphs 24 through 29 of document A/C.5/48/66. By paragraphs 1 and 2 of its resolution 48/252 C of 26 May 1994, the General Assembly decided that, with effect from 1 January 1994, the President and the members of the International Court of Justice who had taken up residence at The Hague should be reimbursed, up to a ceiling of $9,750, for the actual cost of educating their children, and $13,000 for the actual cost of educating their disabled children, in respect of each child each year up to the award of the first recognized degree and that provision should be made for one related return journey per year in respect of each child from the place of scholastic attendance, when outside the Netherlands, and The Hague.

27. In his report to the General Assembly at its fiftieth session, the Secretary-General proposed that, further to resolution 45/250 C, the increase in the level of the education grant (including that for disabled children) applicable to staff in the Professional and higher categories approved by the General Assembly in resolution 49/223 should be extended, under the same conditions, to the members of the Court, as from the school year in progress on 1 January 1995 (A/C.5/50/18, para. 21). In paragraph 8 of its report,[3] ACABQ agreed with the proposal of the Secretary-General, on the understanding that this benefit would be extended only to the members of the Court who had taken up residence at The Hague. The General Assembly, in part IV, paragraph 2, of its resolution 50/216, concurred with the recommendation of the Advisory Committee.

28. Subsequent to the 1996 review of the level of the education grant by the International Civil Service Commission, the General Assembly, by part IV of its resolution 51/216 of 18 December 1996, approved the increases in the maximum reimbursement levels in seven currency areas, as well as other adjustments to the management of the reimbursement of expenses under the education grant, recommended by ICSC in its report to the Assembly at its fifty-first session[4] (see table 4).

Table 4
Education grant

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Currency	Maximum admissible educational expenses (local currency)[a]	Maximum grant (local currency)	Ceiling for boarding costs (local currency)
Swiss franc	22 107	16 680	4 913
Italian lira	20 790 000	15 592 500	4 620 000
Norwegian krone	71 632	53 724	15 918
Netherlands guilder	28 836	21 627	6 408
Pound sterling	12 375	9 281	2 750
Swedish krona	91 575	68 681	20 350
United States dollar	18 675	14 006	4 166

[a] The amount of the special education grant for each disabled child is equal to 100 per cent of the revised amount of maximum admissible educational expenses for the regular education grant. In areas where education-related expenses are reimbursed in other currencies, the amounts remained unchanged.

29. The Secretary-General recalls that, in accordance with the recommendation of the Advisory Committee in its seventh report to the General Assembly at its forty-eighth session,[5] the next review of the costs of educating children of the members of ICJ will be conducted at the time of the next comprehensive review of conditions of service.

30. The Secretary-General would propose that, further to General Assembly resolution 45/250 C of 21 December 1990, the increase in the level of education grant (including that for disabled children) effective 1 January 1997, applicable to staff in the Professional and higher categories approved by the Assembly in part IV of resolution 51/216 of 18 December 1996, should be extended, under the same conditions, to the members of the Court, as from the school year in progress on 1 January 1998. The programme budget implications of the proposed change are discussed in paragraph 60 below.

31. ICSC has made recommendations to the General Assembly to update the current levels of the education grant. It is expected that a decision thereon will be taken by the Assembly at its fifty-third session. Any increase decided upon by the Assembly in the level of the grant or changes in the provisions regarding disabled children should be extended to the members of the Court.

32. No change is proposed with regard to other conditions of service of the members of the International Court of Justice.

IV. Pensions

33. The members of ICJ are entitled to retirement pensions in accordance with Article 32, paragraph 7, of the Statute of the Court, the specific conditions of which are governed by regulations adopted by the General Assembly. The General Assembly, in paragraph 1 of its resolution 48/252 B of 26 May 1994, invited the Secretary-General to undertake a study of the pension scheme for the members of ICJ and to report thereon to the Assembly at its forty-ninth session.

34. A review of the pension benefits and the corollary aspects of the current pension scheme were presented in the report of the Secretary-General to the forty-eighth and forty-ninth sessions of the Assembly (A/C.5/48/66, paras. 32-41 and A/C.5/49/8, paras. 6-16). In reviewing the latter report, the Advisory Committee reiterated its 1994 recommendation that it was not necessary to recommend a change in the pension benefits of the members of the Court. The Advisory Committee expressed its view that the request by the General Assembly for a study of the pension scheme for the members of the International Court of Justice had not been fully addressed. It recommended that the Secretary-General include a comprehensive review of the pension scheme for the members of the Court in his report to be submitted to the General Assembly at its fiftieth session. The report should include, on the advice of qualified actuaries, a review of benefit provisions, including those of retirement age, minimum period of service, rate of accumulation of pension benefits, early retirement benefits, contributory participation, cost-of-living adjustments and retroactive rights of pensioners.[6]

35. Pursuant to the request of the Advisory Committee, the Secretary-General sought the advice of a consulting actuary on the pension scheme of the members of ICJ. The text of the comprehensive actuarial review conducted by the consultant is contained in the annex to the Secretary-General's report (A/C.5/50/18) to the fiftieth session of the General Assembly. Based on the findings of the consultant's report, the Secretary-General concluded that the review corroborated most of the recommendations he had presented to the General Assembly at its forty-eighth session (A/C.5/48/66 paras. 32-41). On that basis, the Secretary-General recommended that:

(a) The pensionable remuneration of a judge should be defined as being equal to half the annual salary;

(b) The pension should constitute the pensionable remuneration of a judge who completes a nine-year term, with a proportional reduction for a judge who has not completed a full term. A judge who is re-elected should receive 1/300th of his pension benefit for each further month of service, up to a maximum pension of two thirds of annual salary;

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(c) The pension scheme should remain non-contributory;

(d) An actuarial reduction factor at a rate of one half of one per cent per month should be applied in a case of early retirement;

(e) Surviving spouses should receive a pension equal to 60 per cent of a judge's pension; alternatively, judges could opt to increase a spouse's pension up to a maximum of a further 50 per cent by means of an actuarial reduction in their pension;

(f) Upon remarriage, a surviving spouse should be granted a lump sum equal to twice the amount of the spouse's current annual benefit as a final settlement (A/C.5/50/18, para. 27).

36. However, in reviewing the Secretary-General's recommendations, ACABQ, expressed its belief "that the various recommendations and options discussed in the report of the consulting actuary should have been analysed in the main text of the report of the Secretary-General. In particular, the rationale for the recommendations of the Secretary-General, as mentioned in paragraphs 27 (a) to (f) of the report, should have been explained in the main text of the report and cross-referenced to the corresponding paragraphs in the report of the consulting actuary in the annex". Therefore, the Advisory Committee recommended, and the General Assembly agreed, "that the Secretary-General re-examine the pension scheme of the members of the Court in a report that takes full account of the request of the Advisory Committee".[7]

37. As described in paragraph 35 (a) and (b) above, the Secretary-General recommended that the pensionable remuneration of a judge should be defined as being equal to half the annual salary, and that the pension should constitute the pensionable remuneration of a judge who completes a nine-year term, with a proportional reduction for a judge who has not completed a full term. A judge who is re-elected should receive 1/300th of his pension benefit for each further month of service, up to a maximum pension of two-thirds of annual salary. Those recommendations were based on the findings of the consulting actuary as set out in part II of the annex to the Secretary-General's report (A/C.5/50/18).

38. In response to the request of the General Assembly, the following analysis of the actuary is as follows:

(a) *Design of pension scheme.* In regard to the designing of the pension scheme, the consulting actuary observed that "the modern view on pension scheme design is that an acceptable scheme should provide a reasonable replacement income, after allowing for social security and personal savings, following a full career with the employer. A 'reasonable replacement income' is generally held to be an income sufficient to maintain a standard of living after retirement equivalent to that enjoyed in the immediate years prior to retirement. A 'full career' is usually defined as a career assuming entry age for a typical new entrant at the start of his or her career and continued employment until normal retirement age" (para. 2.2). Reference to the practice of certain Member States is contained in para. 2.3 of the consultant's report;

The consulting actuary also noted the unusual nature of service in the Court. First, members were elected at a relatively advanced age, the average age at entry for all cohorts being around age 60. Second, the average service was about 10 years' duration, with an average retirement age in the range of 70 to 72. He also observed that, over the last 21 years, 8 out of the 36 deceased judges, or approximately 22 per cent, had died in the course of service and therefore prior to receipt of a pension payment. Finally, the consulting actuary noted that the average duration of pension for a retired member of the ICJ was about 12 years, (paras. 2.7, 2.9 and 2.10). In view of the foregoing, the consulting actuary concluded that a full career in the service of the Court could reasonably be taken to mean two full terms, i.e., 18 years. Moreover, based solely on general principles as applied to pension scheme construction, he further concluded that the overall design of the scheme in force prior to 1 January 1991 was "not unreasonable" (para. 2.12);

(b) *Pensionable remuneration – methodology for its determination.* Based on the analysis presented and the comparative data available, the consulting actuary indicated that a soundly designed pension scheme should relate pension benefits directly to pay at or near retirement by formula rather than by fixed amount, since this provided an automatic link between pre-retirement and post-retirement income (para. 2.24). In summary, the consulting actuary recommended that the pension formula relating to the accrual rate should revert to that in effect immediately prior to 1 January 1991, subject to a review of the definition of pensionable remuneration. Such a change would make clear the relationship between pre-retirement and post-retirement income and thus facilitate direct comparison with other schemes, as opposed to the current regime of fixed pensions which had the appearance of being arbitrary (para. 2.26);

Regarding pensionable remuneration, the consulting actuary concluded that pensionable remuneration could be defined as full annual salary or the portion of such salary that did not reflect the cost of living in The Hague (para. 2.43). In the former case, there would be less need for a local currency provision with attendant initial adjustment in

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pension for high-cost countries, and the principle of full retroactivity for pensioners would be maintained. In the latter case, retirees in high-cost countries would not achieve the levels of replacement income envisaged in the scheme design during periods when the United States dollar was weak; that would therefore suggest a need for a two-track pension adjustment system along the lines of that employed by the United Nations Joint Staff Pension Fund (UNJSPF). In practical terms, the choice would appear to be between simplicity with some inequity on the one hand and complexity with equity on the other hand. If the full annual salary were applied to the pension regime in force prior to 1 January 1991, simplicity would result but there would be some inequity as regards those who retire to particularly high-cost countries. If only a portion of the full annual salary were applied to pensionable remuneration with the introduction of a local currency pension adjustment system, there would be a larger degree of equity coupled with more complexity in administration. On balance, the consultant tended to favour the simple approach given the size of the group in question. It followed therefore that a return to the 1 January 1991 pension regime but with the application of the revised annual salary in force as of that date would be suitable;

(c) *Contributory participation.* On the issue of establishing a contribution requirement, the consulting actuary recommended against having the members of the Court contribute to their pensions in the light of the fact that, for the members of the Court, anticipated service was much shorter than for those participating in the UNJSPF, "which leads us to believe that meaningful cost-sharing could not occur without the members' contributions being set at inordinately high levels" (para. 2.36). In addition, in the more usual pension schemes, members' contributions were made on the expectation that they would be returned as part of the pension payments over many years of retirement. This was not the case for the members of the Court, who often served beyond the age when most employed persons retired and who had a more limited expectation of return. Moreover, those members who chose to serve longer would be treated inequitably in comparison with those who served the Court for a limited period, because they would be required to contribute over a longer period while expecting to receive pension payments over a shorter number of years. This issue did not arise in the more usual pension arrangements because the vast majority of members retired either before or at normal retirement age, with the result that the expected length of pension payments was relatively similar for all retirees. It did not seem appropriate to require contributions if the scheme was not funded;

(d) *Retirement benefits:*

(i) *Early retirement benefits.* As regards the question of early-retirement benefits, is was noted that the pension scheme provided that members of the Court retiring before age 60 might elect to receive an immediate pension of equivalent actuarial value to the pension which would have been paid at age 60. However, the actuarial basis for determining actuarial equivalence was not defined in the scheme rules. The consulting actuary expressed the view that the early retirement provisions as set forth in the scheme were reasonable and in keeping with sound, modern pension design. Therefore, the recommendation was made that actuarial reduction factors be adopted as part of the scheme rules as that would provide a readily available basis for determining early retirement pensions. As the calculations indicated that the actuarial equivalencies could be approximated very closely by a standard reduction of ½ per cent per month by which the pension commencement date preceded age 60, it was recommended that that factor be adopted as part of the scheme rules. (para. 2.28);

(ii) *Surviving spouse pension benefit.* On the issue of surviving spouse's pensions, the consulting actuary noted that pension schemes in several European countries, such as Germany and the Netherlands, commonly provided surviving spouses' pensions at the rate of 60 per cent rather than the rate of 50 per cent more commonly found in the United States and within the United States-based international organizations (para. 2.32). The consulting actuary therefore submitted that a rate of 60 per cent for surviving spouses pensions was not unreasonable and that a lump sum settlement of twice the annual pension upon the remarriage of the surviving spouse also was reasonable (para. 2.33).

V. Conclusions regarding the pension scheme for the judges of the International Court of Justice

39. Based on the analysis and findings of the consulting actuary's report, the Secretary-General believes that the pension scheme for the members of ICJ should provide adequate after-service benefits to judges having met the requisite eligibility criteria relating to retirement age and period of service based upon the premise that the pension benefit maintains a standard of living as replacement income.

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40. Based on the consulting actuary's recommendations vis-à-vis the pension scheme for the members of the Court, the Secretary-General recommends that:

(a) The pensionable remuneration, or retirement pension, of a judge should be defined as being equal to half the annual salary;

(b) The pension benefit should constitute the retirement pension of a judge who completes a nine-year term, with a proportional reduction for a judge who has not completed a full term. A judge who is re-elected should receive 1/300th of his pension benefit for each further month of service, up to a maximum pension of two thirds of annual salary;

(c) The pension scheme should be non-contributory;

(d) An actuarial reduction factor at a rate of one-half of one per cent per month should be applied in a case of early retirement;

(e) Surviving spouses should receive a pension equal to 60 per cent of a judge's pension; alternatively, judges could opt to increase a spouse's pension up to a maximum of a further 50 per cent by means of an actuarial reduction in their pension;

(f) Upon remarriage, a surviving spouse should be granted a lump sum equal to twice the amount of the spouse's current annual benefit as a final settlement.

41. However, in order to avoid a disproportionate increase in pension, the Secretary-General would propose that the recommendation to base the retirement pension at half the annual salary shall be implemented in two stages: half to come into force as of 1 January 1999 and half as of 1 January 2000. Therefore, he would recommend that, with effect from 1 January 1999, the pension benefit be increased from $50,000 to $66,125 and that, effective 1 January 2000, the retirement pension be set at 50 per cent of the annual salary.

Table 5
Percentage increase in level of pension benefits

Amount of annual pension (United States dollars)		
From	*To*	*Percentage increase*
50 000	66 125	32.25
50 000	82 250	64.50
66 125	82 250	24.40

42. Should the proposals above with regard to pensions be found acceptable, the Secretary-General would propose that the Registrar of the Court amend the pension scheme regulations accordingly.

VI. Analysis of the practice of the Court with respect to Article 16, paragraph 1, of the Statute of the Court

43. In paragraph 8 of its report,[8] the Advisory Committee expressed its view that the broader review of the conditions of service of the judges should include an analysis of the practice of the Court with respect to Article 16 of the Statute of the Court. That Article provides as follows:

> "1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.
>
> "2. Any doubt on this point shall be settled by the decision of the Court."

44. In keeping with Article 16, paragraph 2, of the Statute of ICJ, the Secretary-General requested the Court to provide clarification on the matters raised by the Advisory Committee. The response of the Court was presented in paragraphs 29 to 33 of his report (A/C.5/50/18), presented to the Assembly at its fiftieth session.

45. The Advisory Committee indicated in its report[9] that, despite the analysis presented, there were still a number of questions which remained unanswered. Consequently, it recommended, and the General Assembly agreed, to invite the Court to look again at this issue in the light of the observations and concerns of the Advisory Committee.

46. In response to the comments and concerns of the Advisory Committee regarding the application of Article 16, the Court has provided clarification of its practice as follows. The Court has interpreted the provisions of Article 16 as prohibiting judges of the Court from maintaining or exercising any political or administrative function, whether international, national, or local, whether commercial or otherwise; engaging in any other occupation of a professional nature, *inter alia*, holding a position in a commercial concern, engaging in the practice of law, maintaining membership in a law firm or rendering legal or expert opinions; or holding a permanent teaching or administrative position in a university or faculty of law.

47. Under the authority vested in the Court under Article 16, paragraph 2, ICJ has, in view of the judicial character of the activities involved, interpreted the bar to the members of

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the Court engaging in other occupations of a professional nature as not debarring a limited participation of judges in other judicial or quasi-judicial activities of an occasional nature, as well as scholarly pursuits in the sphere of international law as members of learned societies or as occasional lecturers. The judges accepting such occasional activities give the fullest precedence to their supervening duties as members of the Court. Based on a long-standing tradition of the Permanent Court of International Justice, founded in 1922, as well as the recorded intention of the Conference that adopted the text of Article 16 of the Statute, the Court further interpreted the Article as permitting acceptance of occasional appointments as arbitrators. In doing so, the Court referred to a similar practice existing in the courts of a number of Member States, such as France, Germany, the Netherlands, India, Canada, Australia, Sweden, Norway, Denmark, Tunisia and the Libyan Arab Jamahiriya, as well as some states of the United States of America.

48. The Court has consistently taken the position that contributions by its members to third-party settlement of disputes by legal processes in other forums, as occasional service as arbitrators, are compatible with the judges' functions as members of the Court. These activities are subject, however, to two conditions. The first is that the judges must give absolute precedence to their obligations as members of the Court. The second is that they should not accept appointment in an arbitral case, which, in another phase, is subject to being submitted to the Court.

49. As regards its practice, the possibilities of members of the Court engaging in such outside activities have varied in accordance with the intensity of the work of the Court. During times when the workload of the Court was reduced (as it was in the years 1967–1983), participation in outside activities was more feasible than when the work of the Court was as intense as it has been during the past decade. Thus at one time a judge could simultaneously sit on the Court and on the European Court of Human Rights, an arrangement which nowadays would not be conceivable.

50. At the present time, because of the Court's heavy caseload, the members of the Court have little possibility of engaging in activities other than those required by the Court. A certain number of members occasionally lecture or write articles in learned journals. Members of the Court participate in meetings of learned societies such as the Institute of International Law. These activities are largely without compensation, and the Court provides no kind of payment or travel or other expenses incidental to such activities. When on exceptional occasion a judge acts as arbitrator, the Court ensures that such service in no way detracts from the work of the Court and that the Court pays no expenditures arising out of such service.

51. In reply to questions of ACABQ as to whether the premises or resources of the Court, including staff, have been utilized for outside activities, the Court has affirmed that all judges, in accordance with guidelines circulated to them, are obligated to reimburse all telephone, facsimile and postage and other expenses relating to any of these activities. Court premises are not used for arbitral sessions; however, judges as well as Registry staff give lectures on the work of the Court to visiting groups on Court premises. Staff of the Court do not participate in arbitral activities.

52. In clarification of its practice under Article 16 of the Statute, and in response to its own concerns as well as those of ACABQ, the Court, in July 1996, adopted a new directive as follows:

> "In cases in which a member of the Court is invited to accept an arbitral commitment, membership in another tribunal, remunerated series of lectures or a contract for the publication of a book, or series of articles, he or she shall consult, before acceptance, the President of the Court, who, should the need arise, shall consult the Court; in cases where the President of the Court is invited, he or she shall, before acceptance, consult the Court. In view of the increased workload of the Court, members of the Court shall exercise restraint in accepting undertakings of this kind (whether remunerated or not)."

VII. Residence and non-residence status of the Members of the Court

53. In paragraph 6 of its report,[9] the Advisory Committee recommended that "the Secretary-General address the issue of residence and non-residence status of the members of the Court as it impacts on their salary and other conditions of service, as well as the need to issue rules and procedures that regulate the administration of the benefits of the members of the Court".

54. Article 22, paragraph 2, of the Statute of ICJ provides that the President and the Registrar shall reside at the seat of the Court. Article 23 provides that members of the Court shall hold themselves permanently at the disposal of the Court.

55. Article 3 of the Travel and Subsistence Regulations of ICJ provides that "the President of the Court, who by virtue of Article 22 of its Statute shall reside at the seat of the Court,

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and any other member of the Court who takes up residence at the seat of the Court in compliance with Article 23 of the Statute, shall be entitled ... to full removal costs of household goods and personal effects to the seat of the Court from his home at the time of appointment (or any country other than that where the Court has its seat if less expenditure is entailed) [and] to an amount corresponding to the installation grant provisions applicable to senior officials of the Secretariat of the United Nations".

56. Based on the above, bona fide residence status at The Hague could be defined as being applicable to any member for whom full removal and installation have been paid under the provisions of Article 3, paragraph 1, of the Travel and Subsistence Regulations of the International Court of Justice, adopted by the General Assembly in its resolution 37/240 of 21 December 1982.

57. As regards the impact of residence or non-residence of members of the Court on conditions of service, the Secretary-General recalls that the General Assembly has conditioned the eligibility of members of the Court for education, installation and repatriation allowances on their having taken up residence in The Hague, whereas travel entitlements of non-resident and resident members are governed by General Assembly resolution 37/240.

58. As far as the effect of the status of residence or non-residence on the salary of the members of the Court, the Secretary-General notes that the annual salary is expressed in United States dollars and paid in guilders and it is not affected by residential status.

59. The Court has communicated its view on residence status as follows:

> "As a consequence of its increased workload over the last dozen years, the Court meets throughout the year, except for mid-summer and the turn of the year. The presence of the judges at the seat of the Court is accordingly required throughout the year. This situation is not going to change soon. Under these circumstances, the appropriate definition of the residence status of judges is the establishment, through acquisition or long-term lease, of a permanent residence in The Hague, coupled with the option by the judge concerned for resident status."

VIII. Financial implications

60. Should the General Assembly approve the proposals contained in paragraphs 19, 25, 30, 31, 40 and 41 above, the programme budget implications of the increase in annual salary and the changes proposed in the pension scheme for members of the International Court of Justice and costs of educating children of its members are estimated at $726,400 for the biennium 1998–1999, as reflected in Table 6 below. No changes are proposed to the other conditions of service of the members of the Court.

Table 6
Programme budget implications 1998–1999
(In United States dollars)

Salary increase (para. 19)	292 500
Increase in emoluments of ad hoc judges (para. 25)	38 500
Education grant increase (paras. 30 and 31)	4 200
Pensions (paras. 40 and 41)	391 200
Total	**726 400**

61. The estimated requirements of $38,500 for the emoluments of ad hoc judges would fall under the provisions of paragraph 1 (b) (i) of General Assembly resolution 52/223 of 22 December 1997 on unforeseen and extraordinary expenses for the biennium 1998–1999.

62. In respect of the balance of the estimated requirements, i.e. $687,900, arising from the Secretary-General's proposals, relating to an increase in the annual salary and the costs of educating children of members of the Court, and additional pension payments in respect of former judges and the widows of judges, for the 1998–1999 biennium, the requirements are seen as relating to inflation and should be treated outside the procedure related to the contingency fund, as provided for in paragraph 11 of annex I to General Assembly resolution 41/213 of 23 December 1986. In accordance with the decision of the General Assembly contained in part III, paragraph 34, of its resolution 52/220 of 22 December 1997, any resource change resulting from decisions taken by the Assembly with regard to emoluments and other conditions of service for the members of the Court will be reported in the performance report on the programme budget for the biennium 1998–1999.

63. In accordance with their respective statutes, the terms and conditions of service of the judges of the International

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Tribunal for the Former Yugoslavia are those of the judges of the International Court of Justice, while the terms and conditions of service of the judges of the International Tribunal for Rwanda are those of judges of the International Tribunal for the Former Yugoslavia. In its review of the conditions of service for the judges of the two ad hoc Tribunals as contained in the report of the Secretary-General (A/52/520), the General Assembly, upon the recommendation of ACABQ, agreed in its resolutions 52/217 and 52/218 of 22 December 1998, respectively, to defer the consideration of the pension entitlement for members of the two Tribunals until the review of the report of the Secretary-General on the emoluments and pension scheme of members of the International Court of Justice to be submitted to the General Assembly at its fifty-third session.

64. Should the General Assembly approve the proposals contained in paragraphs 19, 25, 30, 31, 40 and 41 of the present report, the financial implications for the proposed resource requirements for 1999 for the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda to be submitted to the General Assembly at its fifty-third session will be as follows:

Table 7

	Former Yugoslavia Tribunal	*Rwanda Tribunal*
	(In United States dollars)	
Emoluments – salary increase	273 000	175 500
Relocation allowance	—	9 000
Pensions	49 600	8 800
Total	**322 600**	**193 300**

IX. Next comprehensive review

65. By its resolution 48/252 A, the General Assembly decided that the periodicity of review of the conditions of service of the members of ICJ should be determined at the fiftieth session of the Assembly.

66. By its resolution 50/216 of 23 December 1995, the General Assembly, decided that the next comprehensive review of the conditions of service of the judges would take place at its fifty-third session. Should the General Assembly decide to continue the three-year review cycle, the next comprehensive review by the Assembly would be undertaken at its fifty-sixth session in 2001.

Notes

[1] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 7A* (A/50/7/Add.1-16), document A/50/7/Add.11, para. 14.

[2] Ibid., *Forty-eighth Session, Supplement No. 7A* (A/48/7/Add.1-17), document A/48/7/Add.6, para. 4.

[3] Ibid., *Fiftieth Session, Supplement No. 7A* (A/50/7/Add.1-16), document A/50/7/Add.11.

[4] Ibid., *Fifty-first Session, Supplement No. 30*, (A/51/30), para. 230 (a)-(f).

[5] Ibid., *Forty-eighth Session, Supplement No. 7A* (A/48/7/Add.1-17), document A/48/7/Add.6, para. 7.

[6] Ibid., *Forty-ninth Session, Supplement No. 7* (A/49/7 and Add.1-14), document A/49/7/Add.11, paras. 6–8.

[7] Ibid., *Fiftieth Session, Supplement No. 7A* (A/50/7/Add.1-16), document A/50/7/Add.11, paras. 12 and 14.

[8] Ibid., *Forty-ninth Session, Supplement No. 7* (A/49/7 and Add.1-14), document A/49/7/Add.11.

[9] Ibid., *Fiftieth Session, Supplement No. 7A* (A/50/7/Add.1-16), document A/50/7/Add.11.

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United Nations S/RES/1315 (2000)

Security Council

Distr.: General
14 August 2000

Resolution 1315 (2000)

Adopted by the Security Council at its 4186th meeting, on 14 August 2000

The Security Council:

Deeply concerned at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity,

Commending the efforts of the Government of Sierra Leone and the Economic Community of West African States (ECOWAS) to bring lasting peace to Sierra Leone,

Noting that the Heads of State and Government of ECOWAS agreed at the 23rd Summit of the Organization in Abuja on 28 and 29 May 2000 to dispatch a regional investigation of the resumption of hostilities,

Noting also the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law,

Recalling that the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law,

Reaffirming the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,

Recognizing that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

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Taking note in this regard of the letter dated 12 June 2000 from the President of Sierra Leone to the Secretary-General and the Suggested Framework attached to it (S/2000/786, annex),

Recognizing further the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace,

Noting the report of the Secretary-General of 31 July 2000 (S/2000/751) and, in particular, *taking note* with appreciation of the steps already taken by the Secretary-General in response to the request of the Government of Sierra Leone to assist it in establishing a special court,

Noting further the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone,

Acknowledging the important contribution that can be made to this effort by qualified persons from West African States, the Commonwealth, other Member States of the United Nations and international organizations, to expedite the process of bringing justice and reconciliation to Sierra Leone and the region,

Reiterating that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,

1. *Requests* the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, and *expresses* its readiness to take further steps expeditiously upon receiving and reviewing the report of the Secretary-General referred to in paragraph 6 below;

2. *Recommends* that the subject matter jurisdiction of the special court should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone;

3. *Recommends further* that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone;

4. *Emphasizes* the importance of ensuring the impartiality, independence and credibility of the process, in particular with regard to the status of the judges and the prosecutors;

5. *Requests*, in this connection, that the Secretary-General, if necessary, send a team of experts to Sierra Leone as may be required to prepare the report referred to in paragraph 6 below;

6. *Requests* the Secretary-General to submit a report to the Security Council on the implementation of this resolution, in particular on his consultations and negotiations with the Government of Sierra Leone concerning the establishment of the special court, including recommendations, no later than 30 days from the date of this resolution;

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7. *Requests* the Secretary-General to address in his report the questions of the temporal jurisdiction of the special court, an appeals process including the advisability, feasibility, and appropriateness of an appeals chamber in the special court or of sharing the Appeals Chamber of the International Criminal Tribunals for the Former Yugoslavia and Rwanda or other effective options, and a possible alternative host State, should it be necessary to convene the special court outside the seat of the court in Sierra Leone, if circumstances so require;

8. *Requests* the Secretary-General to include recommendations on the following:

(a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the special court;

(b) the level of participation, support and technical assistance of qualified persons from Member States of the United Nations, including in particular, member States of ECOWAS and the Commonwealth, and from the United Nations Mission in Sierra Leone that will be necessary for the efficient, independent and impartial functioning of the special court;

(c) the amount of voluntary contributions, as appropriate, of funds, equipment and services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations;

(d) whether the special court could receive, as necessary and feasible, expertise and advice from the International Criminal Tribunals for the Former Yugoslavia and Rwanda;

9. *Decides* to remain actively seized of the matter.

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United Nations S/RES/1995 (2011)

Security Council

Distr.: General

6 July 2011

Resolution 1995 (2011)

Adopted by the Security Council at its 6573rd meeting, on 6 July 2011

The Security Council,

Taking note of the letter to the President of the Council from the Secretary-General dated 20 May 2011 (S/2011/329), attaching a letter from the President of the International Criminal Tribunal for Rwanda ("the International Tribunal") dated 5 May 2011,

Recalling its resolution 955 (1994) of 8 November 1994, 1503 (2003) of 28 August 2003 and 1534 (2004) of 26 March 2004, and its previous resolutions concerning the International Tribunal,

Recalling also its resolution 1966 (2010) of 22 December 2010, establishing the International Residual Mechanism for Criminal Tribunals ("the Mechanism") and requesting the International Tribunal to take all possible measures to expeditiously complete all its remaining work no later than 31 December 2014, prepare its closure and ensure a smooth transition to the Mechanism,

Recalling further that the branch of the Mechanism for the International Criminal Tribunal for Rwanda shall commence functioning on 1 July 2012,

Taking note of the assessments by the International Tribunal in its Completion Strategy Report (S/2011/317),

Noting that, upon the completion of the cases to which they are assigned, four permanent judges will be redeployed from the Trial Chambers to the Appeals Chamber and two permanent judges will leave the International Tribunal,

Noting the concerns expressed by the President and Prosecutor of the International Tribunal about staffing, and *reaffirming* that staff retention is essential for the timely completion of the International Tribunal's work,

Urging the International Tribunal to take all possible measures to complete its work expeditiously as requested in resolution 1966 (2010),

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that, notwithstanding article 13, paragraph 1, and article 12 *quater*, paragraph 2 (a), of the Statute of the International Tribunal, *ad litem* judges may be eligible for election as, and may vote in the election of, the President of the International Tribunal;

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2. *Decides* in this regard that, notwithstanding article 12 *quater*, paragraph 2, of the Statute of the International Tribunal, an *ad litem* judge elected as President of the International Tribunal may exercise the same powers as a permanent judge, which will not alter his or her status or give rise to any additional allowances or benefits other than those which already exist, and will effect no changes of the current terms and conditions of service as an *ad litem* judge;

3. *Decides* that, notwithstanding article 12 *quater*, paragraph 2, of the Statute of the International Tribunal, an *ad litem* judge elected as Vice President of the International Tribunal may act as President when required to do so by under the Statute or the Rules of Procedure and Evidence, which will not alter his or her status or give rise to any additional allowances or benefits other than those which already exist, and will effect no changes of the current terms and conditions of service as an *ad litem* judge;

4. Decides, in light of the exceptional circumstances, that notwithstanding article 12 *bis*, paragraph 3, of the Statute of the International Tribunal, Judge Dennis Byron may work part-time and engage in another judicial occupation from 1 September 2011 until the completion of the case to which he is assigned; *takes note* of the intention of the International Tribunal to complete the case by December 2011; and *underscores* that this exceptional authorization shall not be considered as establishing a precedent. The President of the International Tribunal shall have the responsibility to ensure that this arrangement is compatible with the independence and impartiality of the judge, does not give rise to conflicts of interest and does not delay the delivery of the judgment;

5. *Reaffirms* the necessity of trial of persons indicted by the International Tribunal and reiterates its call on all States, especially the States of the Great Lakes region, to intensify cooperation with and render all necessary assistance to the International Tribunal, and in particular *calls upon* relevant States to increase their efforts to bring Felicien Kabuga, Augustin Bizimana, Protais Mpiranya and other indictees of the International Tribunal to justice;

6. *Reiterates* the importance of the International Tribunal being adequately staffed to complete its work expeditiously and *calls upon* relevant United Nations bodies to intensify cooperation with the Secretariat and the Registrar of the International Tribunal and to take a flexible approach in order to find practicable solutions to address this issue as the International Tribunal approaches the completion of its work, and at the same time *calls upon* the International Tribunal to renew its efforts to focus on its core functions;

7. *Commends* States that have accepted the relocation of acquitted persons or convicted persons who have completed serving their sentences to their territories, and *calls upon* other States in a position to do so to cooperate with and render all necessary assistance to the International Tribunal in the relocation of acquitted persons and convicted persons who have completed serving their sentences;

8. *Decides* to remain seized of the matter.

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United Nations A/66/183–S/2011/453

General Assembly
Security Council

Distr.: General
26 July 2011

Original: English

General Assembly
Sixty-sixth session
Item 113 (c) of the provisional agenda*
Elections to fill vacancies in principal organs: election of five members of the International Court of Justice

Security Council
Sixty-sixth year

List of candidates nominated by national groups

Note by the Secretary-General**

1. By a communication dated 8 March 2011 addressed on behalf of the Secretary-General to States parties to the Statute of the International Court of Justice, attention was drawn to the fact that the terms of office of the following five members of the Court will expire on 5 February 2012:

Mr. Abdul G. Koroma (Sierra Leone)

Mr. Hisashi Owada (Japan)

Mr. Bruno Simma (Germany)

Mr. Peter Tomka (Slovakia)

Ms. Xue Hanqin (China)

2. In conformity with Article 4 and Article 13 of the Statute of the Court, the General Assembly and the Security Council, during the sixty-sixth session of the General Assembly, will elect five judges for a period of nine years, beginning on 6 February 2012. In accordance with Article 5, paragraph 1, of the Statute of the Court, national groups were thus invited to undertake the nomination of persons in a position to accept the duties of a member of the Court and to submit such nominations to the Secretary-General no later than 30 June 2011.

3. In accordance with Article 7 of the Statute of the Court, the Secretary-General has the honour to submit to the General Assembly and to the Security Council a list in alphabetical order of all the persons thus nominated (see annex).

* A/66/150.

** In accordance with the Statute of the Court, the Secretary-General requested States parties to the Statute to provide nominations to the Court from national groups by 30 June 2011. The present document could therefore not be prepared earlier.

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4. The composition of the Court and the voting procedure to be followed in the General Assembly and in the Security Council are set out in a memorandum by the Secretary-General (A/66/182-S/2011/452). The curricula vitae of the candidates appear in document A/66/184-S/2011/454.

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Annex

List of candidates nominated by national groups

Name and nationality	*Nominated by the national group of*
Gaja, Giorgio (Italy)	Argentina
	Australia
	Belgium
	Bulgaria
	Canada
	Chile
	China
	Colombia
	Denmark
	Finland
	France
	Germany
	Hungary
	Italy
	Japan
	Netherlands
	New Zealand
	Peru
	Spain
	Sweden
	United Kingdom of Great Britain and Northern Ireland
Kamenova, Tsvetana (Bulgaria)	Brazil
	Bulgaria
	Hungary
	Italy
	Lithuania
	Ukraine

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Name and nationality	*Nominated by the national group of*
Koroma, Abdul G. (Sierra Leone)	Finland
	Hungary
	Republic of Korea
	Russian Federation
	Sierra Leone
	Singapore
Owada, Hisashi (Japan)	Argentina
	Australia
	Austria
	Belgium
	Brazil
	Burkina Faso
	Canada
	Chile
	China
	Croatia
	Czech Republic
	Finland
	France
	Germany
	Hungary
	Italy
	Japan
	Lithuania
	Mexico
	Morocco
	Netherlands
	Peru
	Poland

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Name and nationality	*Nominated by the national group of*
	Republic of Korea
	Russian Federation
	Singapore
	Slovenia
	Spain
	Sweden
	Switzerland
	Thailand
	United Kingdom of Great Britain and Northern Ireland
	United States of America
Sebutinde, Julia (Uganda)	Croatia
	Denmark
	Uganda
Tall, El Hadji Mansour (Senegal)	Senegal
Tomka, Peter (Slovakia)	Australia
	Belgium
	Cameroon
	Canada
	Chile
	Colombia
	Czech Republic
	Denmark
	France
	Germany
	Lithuania
	Netherlands
	New Zealand
	Peru

Name and nationality	*Nominated by the national group of*
	Russian Federation
	Singapore
	Slovak Republic
	Spain
	Sweden
	Switzerland
	United Kingdom of Great Britain and Northern Ireland
Xue, Hanqin (China)	Australia
	Belgium
	Bulgaria
	Canada
	Chile
	China
	Colombia
	Denmark
	Finland
	France
	Germany
	Italy
	Japan
	Netherlands
	New Zealand
	Pakistan
	Peru
	Russian Federation
	Singapore
	Slovenia
	Spain

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Name and nationality	*Nominated by the national group of*
	Sweden
	Switzerland
	Thailand
	United Kingdom of Great Britain and Northern Ireland
	United States of America

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United Nations S/PV.6682

Security Council

Sixty-sixth year

Provisional

6682nd meeting

Tuesday, 13 December 2011, 3 p.m.

New York

President:	Mr. Pankin	(Russian Federation)
Members:	Bosnia and Herzegovina	Mr. Vukašinović
	Brazil	Mr. Fernandes
	China	Mr. Tian Lin
	Colombia	Mr. Alzate
	France	Mr. Briens
	Gabon	Mr. Moungara Moussotsi
	Germany	Mr. Eick
	India	Mr. Kumar
	Lebanon	Mr. Jaber
	Nigeria	Mrs. Ogwu
	Portugal	Mr. Moraes Cabral
	South Africa	Mr. Sangqu
	United Kingdom of Great Britain and Northern Ireland	Mr. Wilson
	United States of America	Mr. Simonoff

Agenda

Election of five members of the International Court of Justice (S/2011/452, S/2011/453 and S/2011/454)

This record contains the text of speeches delivered in English and of the interpretation of speeches delivered in the other languages. The final text will be printed in the *Official Records of the Security Council*. Corrections should be submitted to the original languages only. They should be incorporated in a copy of the record and sent under the signature of a member of the delegation concerned to the Chief of the Verbatim Reporting Service, room U-506.

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The meeting was called to order at 3.30 p.m.

Adoption of the agenda

The agenda was adopted.

Election of five members of the International Court of Justice (S/2011/452, S/2011/453 and S/2011/454)

The President (*spoke in Russian*): The Security Council will now proceed to the election of one remaining member of the International Court of Justice, in accordance with Article 13 of the Statute of the International Court of Justice, to fill the remaining seat that will become vacant on 5 February 2012.

Document S/2011/453 indicates, inter alia, the national groups by which each of the two remaining candidates was nominated.

On 10 and 22 November the Council conducted a total of eight ballots. Today the Council will conduct a ninth ballot.

The Security Council has before it a memorandum by the Secretary-General contained in document S/2011/452, describing the present composition of the Court and setting out the procedure to be followed in the conduct of the election.

I should like to remind the Council that, under Article 10, paragraph 1, of the Statute of the International Court of Justice,

> "Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected".

The required majority in the Security Council is eight votes.

The voting will be held by secret ballot. When we proceed to the vote, members of the Council will receive a ballot containing the names of the two remaining candidates. No candidacy withdrawal will be accepted once the ballot papers have been distributed. However, it will be possible to withdraw between ballots.

Members of the Council will be requested to place an "X" in the box next to the name of the candidate for whom they wish to vote. Only the two candidates whose names appear on the ballot are eligible for election.

I should like to remind members of paragraph 10 of the Secretary-General's memorandum, which specifies that "[e]ach elector may vote for not more than five candidates on the first ballot". Given that the Council will now vote to elect the one remaining member of the International Court of Justice, any ballot paper containing votes for more than one name will be considered invalid.

I should like to inform Council members that, in accordance with established practice, the ballot papers in the Security Council will not be counted until it has been verified that the ballot papers in the General Assembly have also been collected. The Council will remain in session pending the receipt of that information.

When one candidate has obtained the required majority of votes in the Security Council, I shall communicate the result to the President of the General Assembly. I will request the Council to remain in session pending receipt from the President of the General Assembly of the result of the voting in the Assembly.

At the 6551st meeting of the Council, the delegations of Gabon and Nigeria were selected to serve as tellers. The delegation of Gabon is unable to serve as a teller today. The delegations of Nigeria and South Africa have been invited to serve as tellers. I invite the tellers to be seated at the tables behind the Council table.

At the invitation of the President, Mrs. Aguwa (Nigeria) and Mr. Laher (South Africa) acted as tellers.

The President (*spoke in Russian*): May I take it that the Council is now ready to proceed with the election of the one remaining member of the International Court of Justice?

It is so decided.

The Council will now proceed to the ninth ballot. I request the Conference Officer to distribute the ballot papers.

Members of the Council should place an "X" in the box next to the name of the candidate for whom they wish to vote.

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The President (*spoke in Russian*): I take it that all the members of the Council have now voted and I ask the Conference Officer to collect the ballot papers.

* * *

The President (*spoke in Russian*): All the ballot papers have been collected. I should like to remind Council members that, in accordance with the established practice, the ballots will not be counted until it has been verified that the ballot papers in the General Assembly have also been collected. The Council will remain in session pending the receipt of that information.

* * *

The President (*spoke in Russian*): I have now been informed that the ballot papers have been collected in the General Assembly. The counting of the ballots in the Security Council will now begin. The tellers will now count the ballots. As agreed in our consultations, there will be two independent countings of the ballots, one by each teller. I should like to remind Council members that in accordance with established practice, I shall wait for the General Assembly to complete its count before I announce the results of the voting in the Security Council. The Council will remain in session.

* * *

The President (*spoke in Russian*): The result of the voting is as follows:

Number of ballot papers:	15
Number of invalid ballots:	0
Number of valid ballots:	15
Number of abstentions:	0
Required majority:	8
Number of votes obtained:	
Ms. Julia Sebutinde	9
Ms. Julia Sebutinde	6

I wish to inform members of the Council that I have received the following letter from the President of the General Assembly:

(*spoke in English*)

> "I have the honour to inform you that, at the 84th plenary meeting of the General Assembly, held today for the purpose of electing five members of the International Court of Justice, the following candidate obtained an absolute majority of votes in the General Assembly: Ms. Julia Sebutinde."

(*spoke in Russian*)

Accordingly, the same candidate has received the required absolute majority of votes in the Council and in the General Assembly. As both the Security Council and the General Assembly have agreed on the same candidate, the jurists Mr. Giorgio Gaja, Mr. Hisashi Owada, Ms. Julia Sebutinde, Mr. Peter Tomka and Ms. Xue Hanqin have been elected to the International Court of Justice for a period of nine years, beginning on 6 February 2012. I should like to congratulate them warmly and to wish them every success in the high office to which they have been elected.

On behalf of the Council, I would like to thank the tellers for their assistance in the conduct of the elections.

The Security Council has thus concluded its consideration of the item on its agenda.

The meeting rose at 4.10 p.m.

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United Nations S/2000/915

Security Council

Distr.: General
4 October 2000

Original: English

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

I. Introduction

1. The Security Council, by its resolution 1315 (2000) of 14 August 2000, requested me to negotiate an agreement with the Government of Sierra Leone to create an independent special court (hereinafter "the Special Court") to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.

2. The Security Council further requested that I submit a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Sierra Leone concerning the establishment of the Special Court. In the report I was requested, in particular, to address the questions of the temporal jurisdiction of the Court; an appeals process, including the advisability, feasibility and appropriateness of an appeals chamber in the Special Court, or of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda; and a possible alternative host State, should it be necessary to convene the Special Court outside the seat of the Court in Sierra Leone, if circumstances so require.

3. Specific recommendations were also requested by the Security Council on the following issues:

(a) Any additional agreements that might be required for the provision of the international assistance necessary for the establishment and functioning of the Special Court;

(b) The level of participation, support and technical assistance of qualified persons required from Member States, including, in particular, States members of the Economic Community of West African States (ECOWAS) and the Commonwealth, and from the United Nations Mission in Sierra Leone (UNAMSIL) that would be necessary for the efficient, independent and impartial functioning of the Special Court;

(c) The amount of voluntary contributions of funds, equipment and services, including expert personnel from States, intergovernmental organizations and non-governmental organizations;

(d) Whether the Special Court could receive, as necessary and feasible, expertise and advice from the International Tribunals for the Former Yugoslavia and for Rwanda.

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and specificity of the Special Court, its jurisdiction (subject-matter, temporal and personal), the organizational structure (the Chambers and the nature of the appeals process, the offices of the Prosecutor and the Registry), enforcement of sentences in third States and the choice of the alternative seat. The second part (chaps. VII and VIII) deals with the practical implementation of the resolution on the establishment of the Special Court. It describes the requirements of the Court in terms of personnel, equipment, services and funds that would be required of States, intergovernmental and non-governmental organizations, the type of advice and expertise that may be expected from the two International Tribunals, and the logistical support and

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security requirements for premises and personnel that could, under an appropriate mandate, be provided by UNAMSIL. The Court's requirements in all of these respects have been placed within the specific context of Sierra Leone, and represent the minimum necessary, in the words of resolution 1315 (2000), "for the efficient, independent and impartial functioning of the Special Court". An assessment of the viability and sustainability of the financial mechanism envisaged, together with an alternative solution for the consideration of the Security Council, concludes the second part of the report.

5. The negotiations with the Government of Sierra Leone, represented by the Attorney General and the Minister of Justice, were conducted in two stages. The first stage of the negotiations, held at United Nations Headquarters from 12 to 14 September 2000, focused on the legal framework and constitutive instruments establishing the Special Court: the Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court which is an integral part thereof. (For the texts of the Agreement and the Statute, see the annex to the present report.)

6. Following the Attorney General's visit to Headquarters, a small United Nations team led by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, visited Freetown from 18 to 20 September 2000. Mr. Zacklin was accompanied by Daphna Shraga, Senior Legal Officer, Office of the Legal Counsel, Office of Legal Affairs; Gerald Ganz, Security Coordination Officer, Office of the United Nations Security Coordinator; and Robert Kirkwood, Chief, Buildings Management, International Tribunal for the Former Yugoslavia. During its three-day visit, the team concluded the negotiations on the remaining legal issues, assessed the adequacy of possible premises for the seat of the Special Court, their operational state and security conditions, and had substantive discussions on all aspects of the Special Court with the President of Sierra Leone, senior government officials, members of the judiciary and the legal profession, the Ombudsman, members of civil society, national and international non-governmental organizations and institutions involved in child-care programmes and rehabilitation of child ex-combatants, as well as with senior officials of UNAMSIL.

7. In its many meetings with Sierra Leoneans of all segments of society, the team was made aware of the high level of expectations created in anticipation of the establishment of a special court. If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities. The purpose of such a campaign would be both to inform and to reassure the population that while a credible Special Court cannot be established overnight, everything possible will be done to expedite its functioning; that while the number of persons prosecuted before the Special Court will be limited, it would not be selective or otherwise discriminatory; and that although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims. For a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an "acquittal" of the accused, but an imposition of a more humane punishment. In this public information campaign, UNAMSIL, alongside the Government and non-governmental organizations, could play an important role.

8. Since the present report is limited to an analysis of the legal framework and the practical operation of the Special Court, it does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone, or between the Court and the National Truth and Reconciliation Commission. It is envisaged, however, that upon the establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.

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II. Nature and specificity of the Special Court

9. The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges,[1] prosecutors and administrative support staff.[2] As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., to be applied as the need arose.[3]

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defer to its jurisdiction (article 8, para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

11. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible. The moral dilemma that some of these choices represent has not been lost upon those who negotiated its constitutive instruments.

III. Competence of the Special Court

A. Subject-matter jurisdiction

12. The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

1. Crimes under international law

13. In its resolution 1315 (2000), the Security Council recommended that the subject-matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law. Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.

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14. The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter. Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused. Under the Statute of the International Criminal Court (ICC), though it is not yet in force, they are recognized as war crimes.

15. Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

(a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities;

(b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; and

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

16. The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established. Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection. The specification of the crime of attacks against peacekeepers, however, does not imply a more serious crime than attacks against civilians in similar circumstances and should not entail, therefore, a heavier penalty.

17. The prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 Additional Protocol II to the Geneva Conventions, article 4, paragraph 3 (c), of which provides that children shall be provided with the care and aid they require, and that in particular:

> "Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

A decade later, the prohibition on the recruitment of children below 15 into armed forces was established in article 38, paragraph 3, of the 1989 Convention on the Rights of the Child; and in 1998, the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.

18. Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or "voluntary", the crime which is included in article 4 (c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense — administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a "child-combatant".

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2. Crimes under Sierra Leonean law

19. The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.

20. The applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime. In that connection, article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable mutatis mutandis to proceedings before the Special Court, and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.

B. Temporal jurisdiction of the Special Court

21. In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.

1. The amnesty clause in the Lomé Peace Agreement

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict,[4] the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

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

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.

2. Beginning date of the temporal jurisdiction

25. It is generally accepted that the decade-long civil war in Sierra Leone dates back to 1991, when on 23 March of that year forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party military rule of the All People's Congress (APC). In determining a beginning date of the temporal jurisdiction of the Special Court within the period since

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23 March 1991, the Secretary-General has been guided by the following considerations: (a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded; (b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and (c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. A temporal jurisdiction limited in any of these respects would rightly be perceived as a selective or discriminatory justice.

26. Imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court. The following alternative dates were therefore considered as realistic options:

(a) *30 November 1996* — the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the Government of Sierra Leone and RUF. Soon after its signature the Peace Agreement had collapsed and large-scale hostilities had resumed;

(b) *25 May 1997* — the date of the coup d'état orchestrated by the Armed Forces Revolutionary Council (AFRC) against the Government that was democratically elected in early 1996. The period which ensued was characterized by serious violations of international humanitarian law, including, in particular, mass rape and abduction of women, forced recruitment of children and summary executions;

(c) *6 January 1999* — the date on which RUF/AFRC launched a military operation to take control of Freetown. The first three-week period of full control by these entities over Freetown marked the most intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population. During its retreat in February 1999, RUF abducted hundreds of young people, particularly young women used as forced labourers, fighting forces, human shields and sexual slaves.

27. In considering the three options for the beginning date of the temporal jurisdiction of the Court, the parties have concluded that the choice of 30 November 1996 would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction. The choice of 25 May 1997 would have all these advantages, with the disadvantage of having a political connotation, implying, wrongly, that the prosecution of those responsible for the most serious violations of international humanitarian law is aimed at punishment for their participation in the coup d'état. The last option marks in many ways the peak of the campaign of systematic and widespread crimes against the civilian population, as experienced mostly by the inhabitants of Freetown. If the temporal jurisdiction of the Court were to be limited to that period only, it would exclude all crimes committed before that period in the rural areas and the countryside. In view of the perceived advantages of the first option and the disadvantages associated with the other options, the date of 30 November 1996 was selected as the beginning date of the temporal jurisdiction of the Special Court, a decision in which the government negotiators have actively concurred.

28. As the armed conflict in various parts of the territory of Sierra Leone is still ongoing, it was decided that the temporal jurisdiction of the Special Court should be left open-ended. The lifespan of the Special Court, however, as distinguished from its temporal jurisdiction, will be determined by a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. In setting an end to the operation of the Court, the Agreement would also determine all matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Special Court.

C. Personal jurisdiction

1. Persons "most responsible"

29. In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", which is understood as an indication of a limitation on the number of accused by reference to

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their command authority and the gravity and scale of the crime. I propose, however, that the more general term "persons most responsible" should be used.

30. While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

31. Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.

2. Individual criminal responsibility at 15 years of age

32. The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.

33. The solution to this terrible dilemma with respect to the Special Court[5] could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

34. The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team: the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes.

35. The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved. While the extent to which this view represents the majority view of the people of Sierra Leone is debatable, it nevertheless underscores the importance of the child rehabilitation programme and the need to ensure that in the prosecution of children presumed responsible, the rehabilitation process of scores of other children is not endangered.

36. Given these highly diverging opinions, it is not easy to strike a balance between the interests at stake. I am mindful of the Security Council's recommendation that only those who bear "the greatest responsibility" should be prosecuted. However, in view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court. I therefore thought that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on

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prosecution of persons below the age of 18 — "children" within the definition of the Convention on the Rights of the Child — before an international jurisdiction could be formulated.[6] Therefore, in order to meet the concerns expressed by, in particular, those responsible for child care and rehabilitation programmes, article 15, paragraph 5, of the Statute contains the following provision:

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

37. Furthermore, the Statute of the Special Court, in article 7 and throughout the text, contains internationally recognized standards of juvenile justice and guarantees that juvenile offenders are treated in dignity and with a sense of worth. Accordingly, the overall composition of the judges should reflect their experiences in a variety of fields, including in juvenile justice (article 13, para. 1); the Office of the Prosecutor should be staffed with persons experienced in gender-related crimes and juvenile justice (article 15, para. 4). In a trial of a juvenile offender, the Special Court should, to the extent possible, order the immediate release of the accused, constitute a "Juvenile Chamber", order the separation of the trial of a juvenile from that of an adult, and provide all legal and other assistance and order protective measures to ensure the privacy of the juvenile. The penalty of imprisonment is excluded in the case of a juvenile offender, and a number of alternative options of correctional or educational nature are provided for instead.

38. Consequently, if the Council, also weighing in the moral-educational message to the present and next generation of children in Sierra Leone, comes to the conclusion that persons under the age of 18 should be eligible for prosecution, the statutory provisions elaborated will strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice. It should also be stressed that, ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case.

IV. Organizational structure of the Special Court

39. Organizationally, the Special Court has been conceived as a self-contained entity, consisting of three organs: the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor's Office and the Registry. In the establishment of ad hoc international tribunals or special courts operating as separate institutions, independently of the relevant national legal system, it has proved to be necessary to comprise within one and the same entity all three organs. Like the two International Tribunals, the Special Court for Sierra Leone is established outside the national court system, and the inclusion of the Appeals Chamber within the same Court was thus the obvious choice.

A. The Chambers

40. In its resolution 1315 (2000), the Security Council requested that the question of the advisability, feasibility and appropriateness of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda should be addressed. In analysing this option from the legal and practical viewpoints, I have concluded that the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound and practically not feasible, without incurring unacceptably high administrative and financial costs.

41. While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of a formal institutional link. Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable mutatis mutandis to the proceedings before the Special Court.

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42. The sharing of one Appeals chamber between all three jurisdictions would strain the capacity of the already heavily burdened Appeals Chamber of the two Tribunals in ways which could either bring about the collapse of the appeals system as a whole, or delay beyond acceptable human rights standards the detention of accused pending the hearing of appeals from either or all jurisdictions. On the assumption that all judgements and sentencing decisions of the Trial Chambers of the Special Court will be appealed, as they have been in the cases of the two International Tribunals, and that the number of accused will be roughly the same as in each of the International Tribunals, the Appeals Chamber would be required to add to its current workload a gradual increase of approximately one third.

43. Faced with an exponential growth in the number of appeals lodged on judgements and interlocutory appeals in relation to an increasing number of accused and decisions rendered, the existing workload of the Appeals Chamber sitting in appeals from six Trial Chambers of the two ad hoc Tribunals is constantly growing. Based on current and anticipated growth in workload, existing trends[7] and the projected pace of three to six appeals on judgements every year, the Appeals Chamber has requested additional resources in funds and personnel. With the addition of two Trial Chambers of the Special Court, making a total of eight Trial Chambers for one Appeals Chamber, the burden on the Yugoslav and Rwanda Appeals Chamber would be untenable, and the Special Court would be deprived of an effective and viable appeals process.

44. The financial costs which would be entailed for the Appeals Chamber when sitting on appeals from the Special Court will have to be borne by the regular budget, regardless of the financial mechanism established for the Special Court itself. These financial costs would include also costs of translation into French, which is one of the working languages of the Appeals Chamber of the International Tribunals; the working language of the Special Court will be English.

45. In his letter to the Legal Counsel in response to the request for comments on the eventuality of sharing the Appeals Chamber of the two international Tribunals with the Special Court, the President of the International Tribunal for the Former Yugoslavia wrote:

> "With regard to paragraph 7 of Security Council resolution 1315 (2000), while the sharing of the Appeals Chamber of [the two International Tribunals] with that of the Special Court would bear the significant advantage of ensuring a better standardization of international humanitarian law, it appeared that the disadvantages of this option — excessive increase of the Appeals Chambers' workload, problems arising from the mixing of sources of law, problems caused by the increase in travelling by the judges of the Appeals Chambers and difficulties caused by mixing the different judges of the three tribunals — outweigh its benefits."[8]

46. For these reasons, the parties came to the conclusion that the Special Court should have two Trial Chambers, each with three judges, and an Appeals Chamber with five judges. Article 12, paragraph 4, provides for extra judges to sit on the bench in cases where protracted proceedings can be foreseen and it is necessary to make certain that the proceedings do not have to be discontinued in case one of the ordinary judges is unable to continue hearing the case.

B. The Prosecutor

47. An international prosecutor will be appointed by the Secretary-General to lead the investigations and prosecutions, with a Sierra Leonean Deputy. The appointment of an international prosecutor will guarantee that the Prosecutor is, and is seen to be, independent, objective and impartial.

C. The Registrar

48. The Registrar will service the Chambers and the Office of the Prosecutor and will have the responsibility for the financial management and external relations of the Court. The Registrar will be appointed by the Secretary-General as a staff member of the United Nations.

V. Enforcement of sentences

49. The possibility of serving prison sentences in third States is provided for in article 22 of the Statute. While imprisonment shall normally be served in Sierra Leone, particular circumstances, such as the security

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risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third State.

50. Enforcement of sentences in third countries will be based on an agreement between the Special Court[9] and the State of enforcement. In seeking indications of the willingness of States to accept convicted persons, priority should be given to those which have already concluded similar agreements with either of the International Tribunals, as an indication that their prison facilities meet the minimum standards of conditions of detention. Although an agreement for the enforcement of sentences will be concluded between the Court and the State of enforcement, the wishes of the Government of Sierra Leone should be respected. In that connection, preference was expressed for such locations to be identified in an East African State.

VI. An alternative host country

51. In paragraph 7 of resolution 1315 (2000), the Security Council requested that the question of a possible alternative host State be addressed, should it be necessary to convene the Special Court outside its seat in Sierra Leone, if circumstances so required. As the efforts of the United Nations Secretariat, the Government of Sierra Leone and other interested Member States are currently focused on the establishment of the Special Court in Sierra Leone, it is proposed that the question of the alternative seat should be addressed in phases. An important element in proceeding with this issue is also the way in which the Security Council addresses the present report, that is, if a Chapter VII element is included.

52. In the first phase, criteria for the choice of the alternative seat should be determined and a range of potential host countries identified. An agreement, in principle, should be sought both from the Government of Sierra Leone for the transfer of the Special Court to the State of the alternative seat, and from the authorities of the latter, for the relocation of the seat to its territory.

53. In the second phase, a technical assessment team would be sent to identify adequate premises in the third State or States. Once identified, the three parties, namely, the United Nations, the Government of Sierra Leone and the Government of the alternative seat, would conclude a Framework Agreement, or "an agreement to agree" for the transfer of the seat when circumstances so required. The Agreement would stipulate the nature of the circumstances which would require the transfer of the seat and an undertaking to conclude in such an eventuality a Headquarters Agreement. Such a principled Agreement would facilitate the transfer of the seat on an emergency basis and enable the conclusion of a Headquarters Agreement soon thereafter.

54. In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused. Such proximity and easy access will greatly facilitate the work of the Prosecutor, who will continue to conduct his investigations in the territory of Sierra Leone.[10] During the negotiations, the Government expressed a preference for a West African alternative seat, in an English-speaking country sharing a common-law legal system.

VII. Practical arrangements for the operation of the Special Court

55. The Agreement and the Statute of the Special Court establish the legal and institutional framework of the Court and the mutual obligations of the parties with regard, in particular, to appointments to the Chambers, the Office of the Prosecutor and the Registry and, the provision of premises. However, the practical arrangements for the establishment and operation of the Special Court remain outside the scope of the Agreement in the sense that they depend on contributions of personnel, equipment, services and funds from Member States and intergovernmental and non-governmental organizations. It is somewhat anomalous, therefore, that the parties which establish the Special Court, in practice, are dependent for the implementation of their treaty obligations on States and international organizations which are not parties to the Agreement or otherwise bound by its provisions.

56. Proceeding from the premise that voluntary contributions would constitute the financial mechanism of the Special Court, the Security Council requested the Secretary-General to include in the report recommendations regarding the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, contributions in

personnel, the kind of advice and expertise expected of the two ad hoc Tribunals, and the type of support and technical assistance to be provided by UNAMSIL. In considering the estimated requirements of the Special Court in all of these respects, it must be borne in mind that at the current stage, the Government of Sierra Leone is unable to contribute in any significant way to the operational costs of the Special Court, other than in the provision of premises, which would require substantial refurbishment, and the appointment of personnel, some of whom may not even be Sierra Leonean nationals. The requirements set out below should therefore be understood for all practical purposes as requirements that have to be met through contributions from sources other than the Government of Sierra Leone.

A. Estimated requirements of the Special Court for the first operational phase

1. Personnel and equipment

57. The personnel requirements of the Special Court for the initial operational phase[11] are estimated to include:

(a) Eight Trial Chamber judges (3 sitting judges and 1 alternate judge in each Chamber) and 6 Appeals Chamber judges (5 sitting judges and 1 alternate judge), 1 law clerk, 2 support staff for each Chamber and 1 security guard detailed to each judge (14);

(b) A Prosecutor and a Deputy Prosecutor, 20 investigators, 20 prosecutors and 26 support staff;

(c) A Registrar, a Deputy Registrar, 27 administrative support staff and 40 security officers;

(d) Four staff in the Victims and Witnesses Unit;

(e) One correction officer and 12 security officers in the detention facilities.

58. Based on the United Nations scale of salaries for a one-year period, the personnel requirements along with the corresponding equipment and vehicles are estimated on a very preliminary basis to be US$ 22 million. The calculation of the personnel requirements is premised on the assumption that all persons appointed (whether by the United Nations or the Government of Sierra Leone) will be paid from United Nations sources.

59. In seeking qualified personnel from States Members of the United Nations, the importance of obtaining such personnel from members of the Commonwealth, sharing the same language and common-law legal system, has been recognized. The Office of Legal Affairs has therefore approached the Commonwealth Secretariat with a request to identify possible candidates for the positions of judges, prosecutors, Registrar, investigators and administrative support staff. How many of the Commonwealth countries would be in a position to voluntarily contribute such personnel with their salaries and emoluments is an open question. A request similar to that which has been made to the Commonwealth will also be made to the Economic Community of West African States (ECOWAS).

2. Premises

60. The second most significant component of the requirements of the Court for the first operational phase is the cost of premises. During its visit to Freetown, the United Nations team visited a number of facilities and buildings which the Government believes may accommodate the Special Court and its detention facilities: the High Court of Sierra Leone, the Miatta Conference Centre and an adjacent hotel, the Presidential Lodge, the Central Prison (Pademba Road Prison), and the New England Prison. In evaluating their state of operation, the team concluded that none of the facilities offered were suitable or could be made operational without substantial investment. The use of the existing High Court would incur the least expenditure (estimated at $1.5 million); but would considerably disrupt the ordinary schedule of the Court and eventually bring it to a halt. Since it is located in central Freetown, the use of the High Court would pose, in addition, serious security risks. The use of the Conference Centre, the most secure site visited, would require large-scale renovation, estimated at $5.8 million. The Presidential Lodge was ruled out on security grounds.

61. In the light of the above, the team has considered the option of constructing a prefabricated, self-contained compound on government land. This option would have the advantage of an easy expansion paced with the growth of the Special Court, a salvage value at the completion of the activities of the Court, the prospect of a donation in kind and construction at no

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rental costs. The estimated cost of this option is $2.9 million.

62. The two detention facilities visited by the team were found to be inadequate in their current state. The Central Prison (Pademba Road Prison) was ruled out for lack of space and security reasons. The New England Prison would be a possible option at an estimated renovation cost of $600,000.

63. The estimated cost requirements of personnel and premises set out in the present report cover the two most significant components of its prospective budget for the first operational stage. Not included in the present report are the general operational costs of the Special Court and of the detention facilities; costs of prosecutorial and investigative activities; conference services, including the employment of court translators from and into English, Krio and other tribal languages; and defence counsel, to name but a few.

B. Expertise and advice from the two International Tribunals

64. The kind of advice and expertise which the two International Tribunals may be expected to share with the Special Court for Sierra Leone could take the form of any or all of the following: consultations among judges of both jurisdictions on matters of mutual interest; training of prosecutors, investigators and administrative support staff of the Special Court in The Hague, Kigali and Arusha, and training of such personnel on the spot by a team of prosecutors, investigators and administrators from both Tribunals; advice on the requirements for a Court library and assistance in its establishment, and sharing of information, documents, judgements and other relevant legal material on a continuous basis.

65. Both International Tribunals have expressed willingness to share their experience in all of these respects with the Special Court. They have accordingly offered to convene regular meetings with the judges of the Special Court to assist in adopting and formulating Rules of Procedure based on experience acquired in the practice of both Tribunals; to train personnel of the Special Court in The Hague and Arusha to enable them to acquire practical knowledge of the operation of an international tribunal; and when necessary, to temporarily deploy experienced staff, including a librarian, to the Special Court. In addition, the International Tribunal for the Former Yugoslavia has offered to provide to the Special Court legal material in the form of CD-ROMs containing motions, decisions, judgements, court orders and the like. The transmission of such material to the Special Court in the period pending the establishment of a full-fledged library would be of great assistance.

C. Support and technical assistance from UNAMSIL

66. The support and technical assistance of UNAMSIL in providing security, logistics, administrative support and temporary accommodation would be necessary in the first operational phase of the Special Court. In the precarious security situation now prevailing in Sierra Leone and given the state of the national security forces, UNAMSIL represents the only credible force capable of providing adequate security to the personnel and the premises of the Special Court. The specificities of the security measures required would have to be elaborated by the United Nations, the Government of Sierra Leone and UNAMSIL, it being understood, however, that any such additional tasks entrusted to UNAMSIL would have to be approved by the Security Council and reflected in a revised mandate with a commensurate increase in financial, staff and other resources.

67. UNAMSIL's administrative support could be provided in the areas of finance, personnel and procurement. Utilizing the existing administrative support in UNAMSIL, including, when feasible, shared facilities and communication systems, would greatly facilitate the start-up phase of the Special Court and reduce the overall resource requirements. In that connection, limited space at the headquarters of UNAMSIL could be made available for the temporary accommodation of the Office of the Prosecutor, pending the establishment or refurbishment of a site for the duration of the Special Court.

VIII. Financial mechanism of the Special Court

68. In paragraph 8 (c) of resolution 1315 (2000), the Security Council requested the Secretary-General to include recommendations on "the amount of voluntary contributions, as appropriate, of funds, equipment and

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services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations". It would thus seem that the intention of the Council is that a Special Court for Sierra Leone would be financed from voluntary contributions. Implicit in the Security Council resolution, therefore, given the paucity of resources available to the Government of Sierra Leone, was the intention that most if not all operational costs of the Special Court would be borne by States Members of the Organization in the form of voluntary contributions.

69. The experience gained in the operation of the two ad hoc International Tribunals provides an indication of the scope, costs and long-term duration of the judicial activities of an international jurisdiction of this kind. While the Special Court differs from the two Tribunals in its nature and legal status, the similarity in the kind of crimes committed, the temporal, territorial and personal scope of jurisdiction, the number of accused, the organizational structure of the Court and the Rules of Procedure and Evidence suggest a similar scope and duration of operation and a similar need for a viable and sustainable financial mechanism.

70. A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. In entering into contractual commitments which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable.

71. In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding. It is understood, however, that the financing of the Special Court through assessed contributions of the Member States would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules.

72. The Security Council may wish to consider an alternative solution, based on the concept of a "national jurisdiction" with international assistance, which would rely on the existing — however inadequate — Sierra Leonean court system, both in terms of premises (for the Court and the detention facilities) and administrative support. The judges, prosecutors, investigators and administrative support staff would be contributed by interested States. The legal basis for the special "national" court would be a national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra Leonean common-law system). Since the mandate of the Secretary-General is to recommend measures consistent with resolution 1315 (2000), the present report does not elaborate further on this alternative other than to merely note its existence.

IX. Conclusion

73. At the request of the Security Council, the present report sets out the legal framework and practical arrangements for the establishment of a Special Court for Sierra Leone. It describes the requirements of the Special Court in terms of funds, personnel and services and underscores the acute need for a viable financial mechanism to sustain it for the duration of its lifespan. It concludes that assessed contributions is the only viable and sustainable financial mechanism of the Special Court.

74. As the Security Council itself has recognized, in the past circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.

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Notes

[1] At the request of the Government, reference in the Statute and the Agreement to "Sierra Leonean judges" was replaced by "judges appointed by the Government of Sierra Leone". This would allow the Government flexibility of choice between Sierra Leonean and non-Sierra Leonean nationals and broaden the range of potential candidates from within and outside Sierra Leone.

[2] In the case of the Tribunals for the Former Yugoslavia and for Rwanda, the non-inclusion in any position of nationals of the country most directly affected was considered a condition for the impartiality, objectivity and neutrality of the Tribunal.

[3] This method may not be advisable, since the Court would be manned by a substantial number of staff and financed through voluntary contributions in the amount of millions of dollars every year.

[4] Article 6, paragraph 5, of the 1977 Protocol II Additional to the Geneva Conventions and Relating to the Protection of Non-international Armed Conflicts provides that:

> "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[5] The jurisdiction of the national courts of Sierra Leone is not limited by the Statute, except in cases where they have to defer to the Special Court.

[6] While there is no international law standard for the minimum age for criminal responsibility, the ICC Statute excludes from the jurisdiction of the Court persons under the age of 18. In so doing, however, it was not the intention of its drafters to establish, in general, a minimum age for individual criminal responsibility. Premised on the notion of complementarity between national courts and ICC, it was intended that persons under 18 presumed responsible for the crimes for which the ICC had jurisdiction would be brought before their national courts, if the national law in question provides for such jurisdiction over minors.

[7] The Appeals Chamber of the International Tribunal for the Former Yugoslavia has so far disposed of a total of 5 appeals from judgements and 44 interlocutory appeals; and the Appeals Chamber of the Rwanda Tribunal of only 1 judgement on the merits with 28 interlocutory appeals.

[8] Letter addressed to Mr. Hans Corell, Under-Secretary-General, The Legal Counsel, from Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, dated 29 August 2000.

[9] Article 10 of the Agreement between the United Nations and the Government endows the Special Court with a treaty-making power "to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court".

[10] Criteria for the choice of the seat of the Rwanda Tribunal were drawn up by the Security Council in its resolution 955 (1994). The Security Council decided that the seat of the International Tribunal shall be determined by the Council "having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy".

[11] It is important to stress that this estimate should be regarded as an illustration of a possible scenario. Not until the Registrar and the Prosecutor are in place will it be possible to make detailed and precise estimates.

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Annex

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

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

Now therefore the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of two Trial Chambers and an Appeals Chamber.

2. The Chambers shall be composed of eleven independent judges who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by

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the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a four-year term and shall be eligible for reappointment.

5. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a four-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecution of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a four-year term and shall be eligible for reappointment.

Article 5
Premises

The Government shall provide the premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

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Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 8
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 9
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

[a] The formulation of this article is dependent on a decision on the financial mechanism of the Special Court.

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Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 11
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 12
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

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(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 13
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

Article 14
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions.

Article 15
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

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Article 16
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

The official working language of the Special Court shall be English.

Article 18
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

Article 19
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 20
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal instruments for entry into force have been complied with.

DONE at [place] on [day, month] 2000 in two copies in the English language.

For the United Nations

For the Government of Sierra Leone

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Enclosure

Statute of the Special Court for Sierra Leone

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

Article 1
Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2
Crimes against humanity

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

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

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

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

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

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(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

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

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

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

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

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

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

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

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

(i) Setting fire to dwelling-houses, any person being therein to section 2;

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

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

Article 6
Individual criminal responsibility

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

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

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

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

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

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.

2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.

3. In a trial of a juvenile offender, the Special Court shall:

(a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;

(b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

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(f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

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

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

Article 9
Non bis in idem

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

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

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

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

Article 10
Amnesty

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

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

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Article 12
Composition of the Chambers

1. The Chambers shall be composed of eleven independent judges, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General");

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

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

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

4. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General, to be present at each stage of the trial, and to replace a judge, if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

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

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

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

Article 14
Rules of Procedure and Evidence

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

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not

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adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

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

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

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

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

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

Article 16
The Registry

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

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

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

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance

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for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

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

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

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

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

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

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

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

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

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Article 19
Penalties

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

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

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

Article 20
Appellate proceedings

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

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

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

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

Article 21
Review proceedings

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

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

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

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Article 22
Enforcement of sentences

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

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

Article 23
Pardon or commutation of sentences

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

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual report

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

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UNITED NATIONS

Security Council

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3 May 1993

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REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993)

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II. COMPETENCE OF THE INTERNATIONAL TRIBUNAL

31. The competence of the International Tribunal derives from the mandate set out in paragraph 1 of resolution 808 (1993). This part of the report will examine and make proposals regarding these fundamental elements of its competence: ratione materiae (subject-matter jurisdiction), ratione personae (personal jurisdiction), ratione loci (territorial jurisdiction) and ratione temporis (temporal jurisdiction), as well as the question of the concurrent jurisdiction of the International Tribunal and national courts.

32. The statute should begin with a general article on the competence of the International Tribunal which would read as follows:

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

A. Competence ratione materiae (subject-matter jurisdiction)

33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

34. In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; 3/ the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; 4/ the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; 5/ and the Charter of the International Military Tribunal of 8 August 1945. 6/

36. Suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian

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ST/SGB/2012/1

Staff Regulations

United Nations • New York, 2012

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ST/SGB/2012/1
20 March 2012

Secretary-General's Bulletin

Staff Regulations

The Secretary-General promulgates the following with respect to the Staff Regulations of the United Nations, established by the General Assembly in accordance with Article 101 of the Charter of the United Nations:

Section 1
Revised edition of the Staff Regulations

1.1 By its resolution 66/234, the General Assembly decided to amend staff regulation 1.2 (m) to define a conflict of interest and require the disclosure of actual or possible conflicts.

1.2 The revised text of the Staff Regulations incorporating the amendments referred to above is attached to the present bulletin.

1.3 Provisions of the Charter relating to service of the staff are set out on page v. Earlier amendments to the Staff Regulations are set out on page vi.

Section 2
Final provisions

2.1 The revised Staff Regulations are effective from 1 January 2012.

2.2 The present bulletin abolishes Secretary-General's bulletin ST/SGB/2009/6.

(*Signed*) **BAN** Ki-moon

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Charter of the United Nations

Provisions relating to service of the staff

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 100

1. In the performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

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3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

Earlier amendments to the Staff Regulations

The General Assembly established the Staff Regulations of the United Nations according to Article 101 of the Charter by resolution 590 (VI) of 2 February 1952 and amended them thereafter by resolutions 781 (VIII) and 782 (VIII) of 9 December 1953, resolution 882 (IX) of 14 December 1954, resolution 887 (IX) of 17 December 1954, resolution 974 (X) of 15 December 1955, resolution 1095 (XI) of 27 February 1957, resolutions 1225 (XII) and 1234 (XII) of 14 December 1957, resolution 1295 (XIII) of 5 December 1958, resolution 1658 (XVI) of 28 November 1961, resolution 1730 (XVI) of 20 December 1961, resolution 1929 (XVIII) of 11 December 1963, resolution 2050 (XX) of 13 December 1965, resolution 2121 (XX) of 21 December 1965, resolution 2369 (XXII) of 19 December 1967, resolutions 2481 (XXIII) and 2485 (XXIII) of 21 December 1968, resolution 2742 (XXV) of 17 December 1970, resolution 2888 (XXVI) of 21 December 1971, resolution 2990 (XXVII) of 15 December 1972, resolution 3008 (XXVII) of 18 December 1972, resolution 3194 (XXVIII) of 18 December 1973, resolutions 3353 (XXIX) and 3358 B (XXIX) of 18 December 1974, resolution 31/141 B of 17 December 1976, resolution 32/200 and decision 32/450 B of 21 December 1977, resolution 33/119 of 19 December 1978, decision 33/433 of 20 December 1978, resolution 35/214 of 17 December 1980, decision 36/459 of 18 December 1981, resolution 37/126 of 17 December 1982, resolution 37/235 C of 21 December 1982, resolution 39/69 of 13 December 1984, resolutions 39/236 and 39/245 of 18 December 1984, decision 40/467 of 18 December 1985, resolutions 41/207 and 41/209 of 11 December 1986, resolutions 42/221 and 42/225 of 21 December 1987, resolution 43/226 of 21 December 1988, resolution 44/185 of 19 December 1989, resolution 44/198 of 21 December 1989, resolutions 45/241 and 45/251 of 21 December 1990, resolution 45/259 of 3 May 1991, resolution 46/191 of 20 December 1991, resolution 47/216 of 12 March 1993, resolution 47/226 of 30 April 1993, resolutions 48/224 and 48/225 of 23 December 1993, resolutions 49/222 and 49/223 of 23 December 1994, resolution 49/241 of 6 April 1995, resolution 51/216 of 18 December 1996, resolution 52/216 of 22 December 1997, resolution 52/225 of 4 February 1998, resolution 52/252 of 8 September 1998, resolution 54/238 and decision 54/460 of 23 December 1999, resolution 55/223 of 23 December 2000, resolution 55/258 of 14 June 2001, resolution 56/244 of 24 December 2001, resolution 57/285 of 20 December 2002, resolution 57/310 of 18 June 2003, resolution 58/265 of 23 December 2003, resolution 59/268 of 23 December 2004, resolutions 60/238 and 60/248 of 23 December 2005, resolution 61/239 of 22 December 2006, resolution 62/227 of 22 December 2007, resolution 63/271 of 7 April 2009 and resolution 66/234 of 24 December 2011.

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Staff Regulations of the United Nations

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Staff Regulations of the United Nations

Scope and purpose

The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat. For the purposes of these Regulations, the expressions "United Nations Secretariat", "staff members" or "staff" shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter. The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary.

Article I
Duties, obligations and privileges

Regulation 1.1
Status of staff

(a) Staff members are international civil servants. Their responsibilities as staff members are not national but exclusively international;

(b) Staff members shall make the following written declaration witnessed by the Secretary-General or his or her authorized representative:

> "I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization.
>
> "I also solemnly declare and promise to respect the obligations incumbent upon me as set out in the Staff Regulations and Rules."

(c) The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected;

(d) The Secretary-General shall seek to ensure that the paramount consideration in the determination of the conditions of service shall be the necessity of securing staff of the highest standards of efficiency, competence and integrity;

(e) The Staff Regulations apply to all staff at all levels, including staff of the separately funded organs, holding appointments under the Staff Rules;

(f) The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations of the State in which

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they are located, nor do they furnish an excuse for non-performance of their private obligations. In any case where an issue arises regarding the application of these privileges and immunities, the staff member shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived in accordance with the relevant instruments.

Regulation 1.2
Basic rights and obligations of staff

Core values

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

General rights and obligations

(c) Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them;

(d) In the performance of their duties staff members shall neither seek nor accept instructions from any Government or from any other source external to the Organization;

(e) By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants;

(f) While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status;

(g) Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of

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any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour;

(h) Staff members may exercise the right to vote but shall ensure that their participation in any political activity is consistent with, and does not reflect adversely upon, the independence and impartiality required by their status as international civil servants;

(i) Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service;

Honours, gifts or remuneration

(j) No staff member shall accept any honour, decoration, favour, gift or remuneration from any Government;

(k) If refusal of an unanticipated honour, decoration, favour or gift from a Government would cause embarrassment to the Organization, the staff member may receive it on behalf of the Organization and then report and entrust it to the Secretary-General, who will either retain it for the Organization or arrange for its disposal for the benefit of the Organization or for a charitable purpose;

(l) No staff member shall accept any honour, decoration, favour, gift or remuneration from any non-governmental source without first obtaining the approval of the Secretary-General;

Conflict of interest

(m) A conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization;

(n) All staff members at the D-1 level and above shall be required to file financial disclosure statements on appointment and at intervals thereafter as prescribed by the Secretary-General, in respect of themselves, their spouses and their dependent children, and to assist the Secretary-General in verifying the accuracy of the information submitted when so requested. The financial disclosure statements shall include certification that the assets and economic activities of the staff members, their spouses and their dependent children do not pose a conflict of interest with their official duties or the interests of the United Nations. The financial disclosure statements will remain confidential and will only be used, as prescribed by the Secretary-General, in making determinations pursuant to staff regulation 1.2 (m). The Secretary-General may require other staff to file financial disclosure statements as he or she deems necessary in the interest of the Organization;

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Outside employment and activities

(o) Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General;

(p) The Secretary-General may authorize staff members to engage in an outside occupation or employment, whether remunerated or not, if:

(i) The outside occupation or employment does not conflict with the staff member's official functions or the status of an international civil servant;

(ii) The outside occupation or employment is not against the interest of the United Nations; and

(iii) The outside occupation or employment is permitted by local law at the duty station or where the occupation or employment occurs;

Use of property and assets

(q) Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets;

(r) Staff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate the possible misuse of funds, waste or abuse.

Regulation 1.3
Performance of staff

(a) Staff members are accountable to the Secretary-General for the proper discharge of their functions. Staff members are required to uphold the highest standards of efficiency, competence and integrity in the discharge of their functions. Their performance will be appraised periodically to ensure that the required standards of performance are met;

(b) The whole time of staff members shall be at the disposal of the Secretary-General for the performance of official functions. The Secretary-General shall establish a normal working week and shall establish official holidays for each duty station. Exceptions may be made by the Secretary-General as the needs of the service may require, and staff members shall be required to work beyond the normal tour of duty when requested to do so.

Article II
Classification of posts and staff

Regulation 2.1

In conformity with principles laid down by the General Assembly, the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required.

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Article III
Salaries and related allowances

Regulation 3.1

Salaries of staff members shall be fixed by the Secretary-General in accordance with the provisions of annex I to the present Regulations.

Regulation 3.2

(a) The Secretary-General shall establish terms and conditions under which an education grant shall be available to a staff member residing and serving outside his or her recognized home country whose dependent child is in full-time attendance at a school, university or similar educational institution of a type that will, in the opinion of the Secretary-General, facilitate the child's reassimilation in the staff member's recognized home country. The grant shall be payable in respect of the child up to the end of the fourth year of post-secondary studies. The amount of the grant per scholastic year for each child shall be 75 per cent of the admissible educational expenses actually incurred, subject to a maximum grant as approved by the General Assembly. Travel costs of the child may also be paid for an outward and return journey once in each scholastic year between the educational institution and the duty station, except that in the case of staff members serving at designated duty stations where schools do not exist that provide schooling in the language or in the cultural tradition desired by staff members for their children, such travel costs may be paid twice in the year in which the staff member is not entitled to home leave. Such travel shall be by a route approved by the Secretary-General but not in an amount exceeding the cost of such a journey between the home country and the duty station;

(b) The Secretary-General shall also establish terms and conditions under which, at designated duty stations, an additional amount of 100 per cent of boarding costs subject to a maximum amount per year as approved by the General Assembly may be paid in respect of children in school attendance at the primary and secondary levels;

(c) The Secretary-General shall also establish terms and conditions under which an education grant shall be available to a staff member serving in a country whose language is different from his or her own and who is obliged to pay tuition for the teaching of the mother tongue to a dependent child attending a local school in which the instruction is given in a language other than his or her own;

(d) The Secretary-General shall also establish terms and conditions under which an education grant shall be available to a staff member whose child is unable, by reason of physical or mental disability, to attend a normal educational institution and therefore requires special teaching or training to prepare him or her for full integration into society or, while attending a normal educational institution, requires special teaching or training to assist him or her in overcoming the disability. The amount of this grant per year for each disabled child shall be equal to 100 per cent of the education expenses actually incurred, up to a maximum amount approved by the General Assembly;

(e) The Secretary-General may decide in each case whether the education grant shall extend to adopted children or stepchildren.

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Regulation 3.3

(a) An assessment at the rates and under the conditions specified below shall be applied to the salaries and such other emoluments of staff members as are computed on the basis of salary, excluding post adjustments, provided that the Secretary-General may, where he or she deems it advisable, exempt from the assessment the salaries and emoluments of staff members engaged at locality rates.

(b) (i) The assessment shall be calculated at the following rates for staff members whose salary rates are set forth in paragraphs 1 and 3 of annex I to the present Regulations:

Assessment

Total assessable payments (United States dollars)	*Staff assessment rates for purposes of pensionable remuneration and pensions (percentage)*
Up to 20,000 per year	11
20,001 to 40,000 per year	18
40,001 to 60,000 per year	25
60,001 and above per year	30

Staff assessment rates used in conjunction with gross base salaries (effective 1 January 2006)

A. *Staff assessment rates for staff member with dependants*

Assessable payments (United States dollars)	*Staff assessment rates for those with a dependent spouse or dependent child (percentage)*
First 50,000 per year	19
Next 50,000 per year	28
Next 50,000 per year	32
Remaining assessable payments	35

B. *Staff assessment for staff members without dependants*

Staff assessment amounts for those with neither a dependent spouse nor a dependent child would be equal to the differences between the gross salaries at different grades and steps and the corresponding net salaries at the single rate.

(ii) The assessment shall be calculated at the following rates for staff members whose salary rates are established under paragraph 6 of annex I to the present Regulations:

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Total assessable payments (United States dollars)	*Assessment (percentage)*
Up to 20,000 per year	19
20,001 to 40,000 per year	23
40,001 to 60,000 per year	26
60,001 and above per year	31

(iii) The Secretary-General shall determine which of the scales of assessment set out in subparagraphs (i) and (ii) above shall apply to each of the groups of personnel whose salary rates are established under paragraph 5 of annex I to the present Regulations;

(iv) In the case of staff members whose salary scales are established in currencies other than United States dollars, the relevant amounts to which the assessment applies shall be fixed at the local currency equivalent of the above-mentioned dollar amounts at the time the salary scales of the staff member concerned are approved;

(c) In the case of a person who is not employed by the United Nations for the whole of a calendar year or in cases where there is a change in the annual rate of payments made to a staff member, the rate of assessment shall be governed by the annual rate of each such payment made to him or her;

(d) The assessment computed under the foregoing provisions of the present regulation shall be collected by the United Nations by withholding it from payments. No part of the assessment so collected shall be refunded because of cessation of employment during the calendar year;

(e) Revenue derived from staff assessment not otherwise disposed of by specific resolution of the General Assembly shall be credited to the Tax Equalization Fund established by General Assembly resolution 973 A (X);

(f) Where a staff member is subject both to staff assessment under this plan and to national income taxation in respect of the salaries and emoluments paid to him or her by the United Nations, the Secretary-General is authorized to refund to him or her the amount of staff assessment collected from him or her provided that:

(i) The amount of such refund shall in no case exceed the amount of his or her income taxes paid and payable in respect of his or her United Nations income;

(ii) If the amount of such income taxes exceeds the amount of staff assessment, the Secretary-General may also pay to the staff member the amount of such excess;

(iii) Payments made in accordance with the provisions of the present regulation shall be charged to the Tax Equalization Fund;

(iv) A payment under the conditions prescribed in the three preceding subparagraphs is authorized in respect of dependency benefits and post adjustments, which are not subject to staff assessment but may be subject to national income taxation.

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Regulation 3.4

(a) Staff members whose salary rates are set forth in paragraphs 1 and 3 of annex I to the present Regulations shall be entitled to receive dependency allowances for a dependent child, for a disabled child and for a secondary dependant at rates approved by the General Assembly as follows:

(i) The staff member shall receive an allowance for each dependent child, except that the allowance shall not be paid in respect of the first dependent child if the staff member has no dependent spouse, in which case the staff member shall be entitled to the dependency rate of staff assessment under subparagraph (b) (i) of regulation 3.3;

(ii) The staff member shall receive a special allowance for each disabled child. However, if the staff member has no dependent spouse and is entitled to the dependency rate of staff assessment under subparagraph (b) (i) of regulation 3.3 in respect of a disabled child, the allowance shall be the same as the allowance for a dependent child in (i) above;

(iii) Where there is no dependent spouse, a single annual allowance shall be paid for a secondary dependant in respect of either a dependent parent, a dependent brother or a dependent sister;

(b) If both husband and wife are staff members, one may claim, for dependent children, under subparagraph (a) (i) and (ii) above, in which case the other may claim only under subparagraph (a) (iii) above, if otherwise entitled;

(c) With a view to avoiding duplication of benefits and in order to achieve equality between staff members who receive dependency benefits under applicable laws in the form of governmental grants and staff members who do not receive such dependency benefits, the Secretary-General shall prescribe conditions under which the dependency allowance for a child specified in subparagraph (a) (i) above shall be payable only to the extent that the dependency benefits enjoyed by the staff member or his or her spouse under applicable laws amount to less than such a dependency allowance;

(d) Staff members whose salary rates are set by the Secretary-General under paragraph 5 or paragraph 6 of annex I to the present Regulations shall be entitled to receive dependency allowances at rates and under conditions determined by the Secretary-General, due regard being given to the circumstances in the locality in which the office is located;

(e) Claims for dependency allowances shall be submitted in writing and supported by evidence satisfactory to the Secretary-General. A separate claim for dependency allowances shall be made each year.

Article IV
Appointment and promotion

Regulation 4.1

As stated in Article 101 of the Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment, each staff member, including a staff member on secondment from government service, shall receive a

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letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General.

Regulation 4.2

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Regulation 4.3

In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

Regulation 4.4

Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations. This consideration shall also apply, on a reciprocal basis, to the specialized agencies brought into relationship with the United Nations. The Secretary-General may limit eligibility to apply for vacant posts to internal candidates, as defined by the Secretary-General. If so, other candidates shall be allowed to apply, under conditions to be defined by the Secretary-General, when no internal candidate meets the requirements of Article 101, paragraph 3, of the Charter as well as the requirements of the post.

Regulation 4.5

(a) Appointment of Under-Secretaries-General and of Assistant Secretaries-General shall normally be for a period of up to five years, subject to prolongation or renewal. Other staff members shall be granted either a temporary, fixed-term or continuing appointment under such terms and conditions consistent with the present Regulations as the Secretary-General may prescribe;

(b) A temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment;

(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service;

(d) The Secretary-General shall prescribe which staff members are eligible for consideration for continuing appointments.

Regulation 4.6

The Secretary-General shall establish appropriate medical standards that staff members shall be required to meet before appointment.

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Article V
Annual and special leave

Regulation 5.1

Staff members shall be allowed appropriate annual leave.

Regulation 5.2

Special leave may be authorized by the Secretary-General in exceptional cases.

Regulation 5.3

Eligible staff members shall be granted home leave once in every twenty-four months. However, in the case of designated duty stations having very difficult conditions of life and work, eligible staff members shall be granted home leave once in every twelve months. A staff member whose home country is either the country of his or her official duty station or the country of his or her normal residence while in United Nations service shall not be eligible for home leave.

Article VI
Social security

Regulation 6.1

Provision shall be made for the participation of staff members in the United Nations Joint Staff Pension Fund in accordance with the regulations of that Fund.

Regulation 6.2

The Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave, maternity and paternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations.

Article VII
Travel and removal expenses

Regulation 7.1

Subject to conditions and definitions prescribed by the Secretary-General, the United Nations shall, in appropriate cases, pay the travel expenses of staff members, their spouses and dependent children.

Regulation 7.2

Subject to conditions and definitions prescribed by the Secretary-General, the United Nations shall, in appropriate cases, pay removal costs for staff members.

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Article VIII
Staff relations

Regulation 8.1

(a) The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies;

(b) Staff representative bodies shall be established and shall be entitled to initiate proposals to the Secretary-General for the purpose set forth in paragraph (a) above. They shall be organized in such a way as to afford equitable representation to all staff members, by means of elections that shall take place at least biennially under electoral regulations drawn up by the respective staff representative body and agreed to by the Secretary-General.

Regulation 8.2

The Secretary-General shall establish joint staff-management machinery at both local and Secretariat-wide levels to advise him or her regarding human resources policies and general questions of staff welfare as provided in regulation 8.1.

Article IX
Separation from service

Regulation 9.1

Staff members may resign from service upon giving the Secretary-General the notice required under the terms of their appointment.

Regulation 9.2

Staff members shall not be retained in active service beyond the age of sixty years or, if appointed on or after 1 January 1990, beyond the age of sixty-two years. The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases.

Regulation 9.3

(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

(i) If the necessities of service require abolition of the post or reduction of the staff;

(ii) If the services of the staff member prove unsatisfactory;

(iii) If the staff member is, for reasons of health, incapacitated for further service;

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(iv) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;

(vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned;

(b) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a change or termination of a mandate, and in accordance with the standards of the Charter;

(c) If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations;

(d) The Secretary-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member whose appointment has been terminated, provided that the termination is not contested, a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

Regulation 9.4

The Secretary-General shall establish a scheme for the payment of repatriation grants in accordance with the maximum rates and under the conditions specified in annex IV of these Regulations.

Article X
Disciplinary measures

Regulation 10.1

(a) The Secretary-General may impose disciplinary measures on staff members who engage in misconduct;

(b) Sexual exploitation and sexual abuse constitute serious misconduct.

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Article XI
Appeals

Regulation 11.1

There shall be a two-tier formal system of administration of justice:

(a) The United Nations Dispute Tribunal shall, under conditions prescribed in its statute and rules, hear and render judgement on an application from a staff member alleging non-compliance with his or her terms of appointment or the contract of employment, including all pertinent regulations and rules;

(b) The United Nations Appeals Tribunal shall, under conditions prescribed in its statute and rules, exercise appellate jurisdiction over an appeal of a judgement rendered by the United Nations Dispute Tribunal submitted by either party.

Article XII
General provisions

Regulation 12.1

The present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members.

Regulation 12.2

Such staff rules and amendments as the Secretary-General may make to implement the present Regulations shall be provisional until the requirements of regulations 12.3 and 12.4 below have been met.

Regulation 12.3

The full text of provisional staff rules and amendments shall be reported annually to the General Assembly. Should the Assembly find that a provisional rule and/or amendment is inconsistent with the intent and purpose of the Regulations, it may direct that the rule and/or amendment be withdrawn or modified.

Regulation 12.4

The provisional rules and amendments reported by the Secretary-General, taking into account such modifications and/or deletions as may be directed by the General Assembly, shall enter into full force and effect on 1 January following the year in which the report is made to the Assembly.

Regulation 12.5

Staff rules shall not give rise to acquired rights within the meaning of regulation 12.1 while they are provisional.

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Annex I

Salary scales and related provisions

1. The Secretary-General shall establish the salary of the Administrator of the United Nations Development Programme and the salaries of United Nations officials in the Director category and above, in accordance with amounts determined by the General Assembly, subject to the staff assessment plan provided in staff regulation 3.3 and to post adjustments wherever applied. If otherwise eligible, they shall receive the allowances that are available to staff members generally.

2. The Secretary-General is authorized, on the basis of appropriate justification and/or reporting, to make additional payments to United Nations officials in the Director category and above to compensate for such special costs as may be reasonably incurred, in the interests of the Organization, in the performance of duties assigned to them by the Secretary-General. Similar additional payments in similar circumstances may be made to heads of offices away from Headquarters. The maximum total amount of such payments is to be determined in the programme budget by the General Assembly.

3. Except as provided in paragraph 5 of the present annex, the salary scales and the scales of post adjustment for staff members in the Professional and higher categories shall be as shown in the present annex.

4. Subject to satisfactory service, salary increments within the levels set forth in paragraph 3 of the present annex shall be awarded annually, except that any increments above step XI of the Associate Officer level, step XIII of the Second Officer level, step XII of the First Officer level, step X of the Senior Officer level and step IV of the Principal Officer level shall be preceded by two years at the previous step. The Secretary-General is authorized to reduce the interval between salary increments to ten months and twenty months, respectively, in the case of staff subject to geographical distribution who have an adequate and confirmed knowledge of a second official language of the United Nations.

5. The Secretary-General shall determine the salary rates to be paid to personnel specifically engaged for short-term missions, conference and other short-term service, to consultants, to Field Service personnel and to technical assistance experts.

6. The Secretary-General shall fix the salary scales for staff members in the General Service and related categories, normally on the basis of the best prevailing conditions of employment in the locality of the United Nations Office concerned, provided that the Secretary-General may, where he or she deems it appropriate, establish rules and salary limits for payment of non-resident allowance to General Service staff members recruited from outside the local area. The gross pensionable remuneration of such staff shall be determined in accordance with the methodology specified in article 54 (a) of the Regulations of the United Nations Joint Staff Pension Fund and are shown in the salary scales applicable to such staff.

7. The Secretary-General shall establish rules under which a language allowance may be paid to staff members in the General Service category who pass an appropriate test and demonstrate continued proficiency in the use of two or more official languages.

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8. In order to preserve equivalent standards of living at different offices, the Secretary-General may adjust the basic salaries set forth in paragraphs 1 and 3 of the present annex by the application of non-pensionable post adjustments based on relative costs of living, standards of living and related factors at the office concerned as compared to New York. Such post adjustments shall not be subject to staff assessment.

9. No salary shall be paid to staff members in respect of periods of unauthorized absence from work unless such absence was caused by reasons beyond their control or duly certified medical reasons.

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Salary scale for staff in the Professional and higher categories showing annual gross salaries and net equivalents after application of staff assessment

Effective 1 January 2012

(United States dollars)

Level		STEPS I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII	XIII	XIV	XV
USG	Gross	189 349														
	Net D	146 044														
	Net S	131 432														
ASG	Gross	172 071														
	Net D	133 950														
	Net S	121 297														
			*	*	*	*	*									
D-2	Gross	141 227	144 223	147 221	150 227	153 351	156 476									
	Net D	112 096	114 283	116 471	118 659	120 846	123 033									
	Net S	102 981	104 827	106 666	108 500	110 329	112 147									
						*	*	*	*	*						
D-1	Gross	129 047	131 678	134 304	136 936	139 568	142 197	144 830	147 459	150 093						
	Net D	103 204	105 125	107 042	108 963	110 885	112 804	114 726	116 645	118 565						
	Net S	95 394	97 062	98 728	100 388	102 047	103 702	105 349	106 996	108 638						
												*	*	*		
P-5	Gross	106 718	108 955	111 195	113 430	115 670	117 905	120 147	122 384	124 622	126 860	129 099	131 336	133 575		
	Net D	86 904	88 537	90 172	91 804	93 439	95 071	96 707	98 340	99 974	101 608	103 242	104 875	106 510		
	Net S	80 734	82 186	83 633	85 079	86 524	87 963	89 402	90 838	92 272	93 703	95 132	96 556	97 981		
														*	*	*
P-4	Gross	87 933	89 929	91 924	93 919	95 916	97 910	99 908	102 059	104 219	106 377	108 540	110 696	112 856	115 018	117 178
	Net D	72 467	74 044	75 620	77 196	78 774	80 349	81 927	83 503	85 080	86 655	88 234	89 808	91 385	92 963	94 540
	Net S	67 483	68 918	70 354	71 784	73 215	74 645	76 074	77 500	78 924	80 349	81 770	83 191	84 612	86 030	87 447
															*	*
P-3	Gross	72 267	74 114	75 962	77 808	79 657	81 503	83 348	85 199	87 046	88 892	90 742	92 586	94 437	96 282	98 128
	Net D	60 091	61 550	63 010	64 468	65 929	67 387	68 845	70 307	71 766	73 225	74 686	76 143	77 605	79 063	80 521
	Net S	56 091	57 433	58 777	60 118	61 462	62 803	64 143	65 488	66 828	68 170	69 508	70 847	72 182	73 521	74 859
													*			
P-2	Gross	59 267	60 920	62 571	64 225	65 877	67 528	69 182	70 832	72 485	74 139	75 790	77 443			
	Net D	49 821	51 127	52 431	53 738	55 043	56 347	57 654	58 957	60 263	61 570	62 874	64 180			
	Net S	46 730	47 915	49 096	50 279	51 461	52 645	53 847	55 046	56 251	57 452	58 650	59 854			
P-1	Gross	46 399	47 878	49 348	50 891	52 476	54 063	55 653	57 243	58 827	60 415					
	Net D	39 439	40 696	41 946	43 204	44 456	45 710	46 966	48 222	49 473	50 728					
	Net S	37 202	38 359	39 516	40 671	41 827	42 982	44 138	45 280	46 416	47 553					

D = Rate applicable to staff members with a dependent spouse or child.
S = Rate applicable to staff members with no dependent spouse or child.
* = The normal qualifying period for in-grade movement between consecutive steps is one year, except at those steps marked with an asterisk, for which a two-year period at the preceding step is required.

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Annex II

Letters of appointment

(a) The letter of appointment shall state:

(i) That the appointment is subject to the provisions of the Staff Regulations and of the Staff Rules applicable to the category of appointment in question and to changes which may be duly made in such regulations and rules from time to time;

(ii) The nature of the appointment;

(iii) The date at which the staff member is required to enter upon his or her duties;

(iv) The period of appointment, the notice required to terminate it and the period of probation, if any;

(v) The category, level, commencing rate of salary and, if increments are allowable, the scale of increments, and the maximum attainable;

(vi) Any special conditions which may be applicable;

(vii) That a temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment;

(viii) That a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service;

(b) A copy of the Staff Regulations and the Staff Rules shall be transmitted to the staff member with the letter of appointment. In accepting appointment the staff member shall state that he or she has been acquainted with and accepts the conditions laid down in the Staff Regulations and in the Staff Rules;

(c) The letter of appointment of a staff member on secondment from government service signed by the staff member and by or on behalf of the Secretary-General, and relevant supporting documentation of the terms and conditions of secondment agreed to by the Member State and the staff member, shall be evidence of the existence and validity of secondment from government service to the Organization for the period stated in the letter of appointment.

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Annex III

Termination indemnity

Staff members whose appointments are terminated shall be paid an indemnity in accordance with the following provisions:

(a) Except as provided in paragraphs (b), (c), (d) and (e) below and in regulation 9.3, the termination indemnity shall be paid in accordance with the following schedule:

	Months of gross salary, less staff assessment, where applicable		
Completed years of service	*Temporary appointments exceeding six months*	*Fixed-term appointments*	*Continuing appointments*
Less than 1	One week for each month of uncompleted service subject to a minimum of six weeks' and a maximum of three months' indemnity pay	One week for each month of uncompleted service subject to a minimum of six weeks' and a maximum of three months' indemnity pay	Not applicable
1			Not applicable
2			3
3			3
4			4
5			5
6		3	6
7		5	7
8		7	8
9	Not applicable	9	9
10		9.5	9.5
11		10	10
12		10.5	10.5
13		11	11
14		11.5	11.5
15 or more		12	12

(b) A staff member whose appointment is terminated for reasons of health shall receive an indemnity equal to the indemnity provided under paragraph (a) of the present annex reduced by the amount of any disability benefit that the staff member may receive under the Regulations of the United Nations Joint Staff Pension Fund for the number of months to which the indemnity rate corresponds;

(c) A staff member whose appointment is terminated for unsatisfactory service or who for disciplinary reasons is separated from service for misconduct other than by dismissal may be paid, at the discretion of the Secretary-General, an indemnity not exceeding one half of the indemnity provided under paragraph (a) of the present annex;

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(d) No indemnity payments shall be made to:

(i) A staff member who resigns, except where termination notice has been given and the termination date agreed upon;

(ii) A staff member who has a temporary or a fixed-term appointment that is completed on the expiration date specified in the letter of appointment;

(iii) A staff member who is dismissed;

(iv) A staff member who abandons his or her post;

(v) A staff member who is retired under the Regulations of the United Nations Joint Staff Pension Fund;

(e) Personnel specifically engaged for conference and other short-term service, as consultants or as experts, and staff members who are locally recruited for service in established offices away from Headquarters may be paid termination indemnity if and as provided in their letters of appointment.

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Annex IV

Repatriation grant

In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate and who at the time of separation are residing, by virtue of their service with the United Nations, outside their country of nationality. The repatriation grant shall not, however, be paid to a staff member who is dismissed. Eligible staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station. Detailed conditions and definitions relating to eligibility and requisite evidence of relocation shall be determined by the Secretary-General.

Years of continuous service away from home country	*Staff member with a spouse or dependent child at time of separation*	*Staff member with neither a spouse nor dependent child at time of separation*	
		Professional and higher categories	*General Service category*
	Weeks of gross salary, less staff assessment, where applicable		
1	4	3	2
2	8	5	4
3	10	6	5
4	12	7	6
5	14	8	7
6	16	9	8
7	18	10	9
8	20	11	10
9	22	13	11
10	24	14	12
11	26	15	13
12 or more	28	16	14

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ST/SGB/2002/13
1 November 2002

UNITED NATIONS

Status, basic rights and duties of United Nations staff members

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Secretary-General's bulletin

Status, basic rights and duties of United Nations staff members

The Secretary-General, pursuant to the request of the General Assembly in paragraph 8 of its resolution 52/252 of 8 September 1998, and in order to assist staff members in understanding their status, basic rights and duties as set out in the text of article IX of the Staff Regulations adopted by the Assembly in resolution 52/252 and of chapter I of the 100 series of the Staff Rules, taken note of in the same resolution, promulgates the publication set out in the annex to the present bulletin:

Section 1
Purposes

1.1 The purpose of the present bulletin is to ensure that all United Nations staff are made aware of the "Standards of conduct for the international civil service" that were adopted by the International Civil Service Commission in 2001 and welcomed by the General Assembly in its resolution 56/244 of 24 December 2001 ("the 2001 standards of conduct"), to replace the 1954 report of the International Civil Service Advisory Board entitled *Standards of Conduct in the International Civil Service* ("the 1954 standards"). The full text of the 2001 standards of conduct is set out in part V of the annex to the present bulletin.

1.2 The present bulletin also updates the text of the commentary on article 1 of the Staff Regulations and chapter 1 of the 100 series of the Staff Rules previously contained in document ST/SGB/1998/19 by replacing all former references to the 1954 standards by references to the 2001 standards of conduct.

Section 2
General provisions

2.1 The present bulletin with its annex is issued to every staff member who is subject to the Staff Regulations and Rules, including staff members of separately administered organs and programmes.

2.2 The provisions in the annex from chapter I of the 100 series of the Staff Rules are applicable only to staff members appointed under the 100 series of the Rules. Similar provisions are contained in chapter 1 of the 200 and 300 series, applicable to staff members appointed under these rules.

2.3 The role and status of the commentary to the provisions of the Staff Regulations and Rules and of the standards of conduct set out in the annex to the present bulletin are explained in the introduction to the annex.

Section 3
Final provisions

3.1 The present bulletin shall enter into force on 1 December 2002.

3.2 ST/SGB/1998/19 of 1 January 1999 is hereby abolished.

(*Signed*) Kofi A. **Annan**
Secretary-General

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Annex

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I. Introduction

1. Article 101, paragraph 3, of the Charter of the United Nations establishes the universal standard for all staff members employed by the United Nations as the "highest standards of efficiency, competence and integrity". It is thus axiomatic that these standards apply to all staff whose employment relationship derives from the authority vested by the Charter in the Organization to employ individuals as staff members. These basic standards are common to all staff, including those of the separately funded and administered organs. The revised text of article I of the Staff Regulations, adopted by the General Assembly in its resolution 52/252 of 8 September 1998, and of chapter I of the 100 series of the Staff Rules, noted in that same resolution, express in concrete terms the basic rights and obligations of staff members.

2. The statutory provisions set out in the present annex are an integral part of the Staff Regulations and Rules, with regulations being adopted by the General Assembly pursuant to Article 101, paragraph 1, of the Charter and with rules being promulgated by the Secretary-General pursuant to the authority granted to him or her by the scope and purpose provision of the Staff Regulations.

3. As the Staff Regulations apply to all staff, including the separately funded organs, the Secretary-General has amended the 200 series (Project personnel) and the 300 series (Short-term appointments and appointments of limited duration) of the Staff Rules to bring them into line with the 100 series.

4. The provisions of article I of the Staff Regulations are in most parts very general as they must apply to all staff. Similarly, the provisions of chapter I of the 100 series of the Staff Rules contained in the present annex are, for the most part, very general as they must apply to all staff appointed under the 100 series of the Staff Rules. Pursuant to the request of the General Assembly in resolution 52/252, it is envisaged that additional rules for particular groups of staff such as finance officers, procurement officers and staff of separately funded organs will be prepared and promulgated by administrative issuances dealing with their status, rights and obligations. It is not appropriate to deal with such specialized matters in the Staff Regulations and Rules.

Role of the commentary

5. Each provision of the Staff Regulations and Rules set out in the present annex is followed by a commentary. The commentary is designed to explain individual provisions and to help staff members understand each provision by placing it into context. It is not part of the Staff Regulations and Rules and so is not a legal "norm" or imperative, nor does it have the legal force of a rule. It is, however, an official guide published by the Secretary-General for the use of management and staff on the scope and application of the rules contained in this annex. Staff may thus safely rely on the commentary to guide their actions since management will use it in interpreting and applying those rules. The commentary will be updated from time to time in consultation with representatives of the staff in the Staff-Management Coordination Committee established under chapter VIII of the Staff Rules in the light of experience in applying the rules to specific instances.

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6. In view of the importance of the revised text of article I of the Staff Regulations adopted by the General Assembly in resolution 52/252 and of chapter I of the 100 series of the Staff Rules noted in the same resolution, and in view of the need for staff to have a guide to their status, rights and duties conveniently at hand, the present annex contains extracts from the Charter and the Convention on the Privileges and Immunities of the United Nations, the text of article I of the Staff Regulations and the text of the related provisions of chapter I of the Staff Rules, together with the explanatory commentary, as well as the text of resolution 52/252 and of the "Standards of conduct for the international civil service" adopted by the International Civil Service Commission in 2001 and welcomed by the General Assembly in its resolution 56/244 (the 2001 standards of conduct).

Status of the "Standards of conduct for the international civil service"

7. The standards of conduct adopted in 2001 revised and updated the 1954 report of the International Civil Service Advisory Board entitled *Standards of Conduct in the International Civil Service* in order to assist staff members and executive heads of the organizations to understand better the obligations placed on staff conduct by the Charter and the Staff Regulations and Rules. The 1954 report has been continually cited by successive Secretaries-General and by the United Nations Administrative Tribunal when assessing conduct of staff. The revised text is reproduced in the present annex as an illustrative guide to expected standards of conduct. The standards of conduct do not have the force of law as they provide a discussion of expected standards to help staff understand their role as international civil servants rather than a set of binding rules. References to relevant paragraphs in the standards of conduct are made in the commentary.

II. General Assembly resolution 52/252 of 8 September 1998

Revisions to article I of the Staff Regulations and chapter I of the 100 series of the Staff Rules of the United Nations

The General Assembly,

Recalling Articles 97, 98, 100, 101 and 105 of the Charter of the United Nations,

Recalling also its resolution 52/12 B of 19 December 1997,

Noting with concern the limited time it had at its disposal to consider this matter,

Having considered the reports of the Secretary-General of 17 October 1997[a] and 28 July 1998[b] entitled "Proposed United Nations Code of Conduct",

Taking note with appreciation of the comments provided by the International Civil Service Commission on the revised text of article I of the Staff Regulations

[a] A/52/488.

[b] A/52/488/Add.1.

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and chapter I of the 100 series of the Staff Rules applicable to United Nations staff members,[c]

Taking note of the views expressed by Member States in the Fifth Committee on this question,[d]

Having heard the views expressed by staff representatives in the Fifth Committee[e] in accordance with General Assembly resolution 35/213 of 17 December 1980,

1. *Adopts* the revised text of article I of the Staff Regulations, and takes note of the revised text of chapter I of the 100 series of the Staff Rules applicable to United Nations staff members, as set out in annex I to the report of the Secretary-General of 17 October 1997,[a] and not to other organizations, subject to the following modifications:

(*a*) The provisions contained in new staff regulations 1.1 (*c*) and 1.2 (*g*), and in new staff rule 101.2 (*h*) of the original proposal as set out in the report of the Secretary-General of 17 October 1997, which deal with staff representatives, are deleted, as indicated in the report of the Secretary-General of 28 July 1998;[b]

(*b*) The phrase "and in the relevant resolutions and decisions of the General Assembly" is inserted after "Staff Regulations and Rules" in new staff regulation 1.1 (*c*);

(*c*) The phrase "in the employment of staff and" is deleted from new staff regulation 1.1 (*d*);

(*d*) Article 99 is deleted from annex I, section A;[a]

(*e*) At the end of new staff regulation 1.1 (*f*), the words "in accordance with the relevant instruments" are added;

(*f*) New staff regulation 1.2 (*o*) is replaced with the following:

"All staff members at the assistant secretary-general level and above shall be required to file financial disclosure statements upon appointment and at intervals as prescribed by the Secretary-General, in respect of themselves and their dependent children, including any substantial transfers of assets and property to spouses and dependent children from the staff member or from any other source that might constitute a conflict of interest, after knowledge of the appointment or during its tenure, to provide certification stating that there is no conflict of interest with regard to the economic activities of spouses and dependent children, and to assist the Secretary-General in verifying the above-mentioned certification on his special request. The financial disclosure statements will remain confidential and will only be used, as prescribed by the Secretary-General, in making determinations pursuant to staff regulation 1.2 (*n*);"

2. *Decides* to insert between the second and third sentences of the text of the "Scope and purpose" provision of the Staff Regulations, the following sentence:

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[c] See A/52/30/Add.1.

[d] See *Official Records of the General Assembly, Fifty-second Session, Fifth Committee*, 53rd, 56th, 58th and 67th to 69th meetings (A/C.5/52/SR.53, 56, 58 and 67-69), and corrigendum.

[e] Ibid., 53rd meeting (A/C.5/52/SR.53), and corrigendum.

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"For the purposes of these Regulations, the expressions 'United Nations Secretariat', 'staff members' or 'staff' shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter of the United Nations.";

3. *Decides also* that the amendments to the Staff Regulations adopted in the present resolution and the related amendments to the Staff Rules shall become effective on 1 January 1999;

4. *Emphasizes* that the implementation of new staff regulation 1.2 (*b*) should take into account also the definition of integrity provided in the 1954 report of the International Civil Service Advisory Board entitled *Standards of Conduct in the International Civil Service*, in accordance with paragraph 28 of the comments of the International Civil Service Commission;[c]

5. *Also emphasizes* that the implementation of new staff rule 101.2 (*d*) should be in accordance with the definition provided in administrative instruction ST/AI/379 of 29 October 1992;

6. *Further emphasizes* that managers, as staff members, are bound by the duties and obligations set out in new article I of the Staff Regulations and chapter I of the 100 series of the Staff Rules, and that their higher-level functions and responsibilities entail increased accountability for the proper performance of all their duties in managing the human and financial resources entrusted to them;

7. *Requests* the Secretary-General to emphasize in the commentary on new article I of the Staff Regulations and chapter I of the 100 series of the Staff Rules that the higher level of responsibilities associated with managerial functions entails a commensurate increase in the accountability of managers;

8. *Stresses* the importance of the provisions governing the status and the basic rights and duties of staff members, requests the Secretary-General to issue to every staff member in separate form the text of Articles 97, 98, 100, 101 and 105 of the Charter of the United Nations and relevant extracts from the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly in its resolution 22 A (I) of 13 February 1946, as well as the text of new article I of the Staff Regulations and chapter I of the 100 series of the Staff Rules, together with the explanatory commentary,[f] the text of the present resolution and the 1954 report of the International Civil Service Advisory Board entitled *Standards of Conduct in the International Civil Service*;

9. *Requests* the Secretary-General to expedite the submission to the General Assembly, by its fifty-fourth session, of appropriate regulations and rules governing the status, basic rights and duties of the Secretary-General, officials other than Secretariat officials and experts on mission;

10. *Also requests* the Secretary-General to prepare, as a matter of priority, additional rules for particular groups of staff such as finance officers, procurement officers and staff of separately funded organs, in accordance with paragraph 10 of his report;[a]

[f] See A/52/488, annex II and A/52/488/Add.1, sect. II.

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11. *Further requests* the Secretary-General to prepare for consideration by the General Assembly at its fifty-fourth session a text of the Staff Regulations drafted in gender-neutral terms;

12. *Notes* that the Secretary-General will prepare amendments to the 200 and 300 series of the Staff Rules to reflect the amendments to article I of the Staff Regulations, and notes also that such amendments to the Staff Rules are subject to the requirements of staff regulations 12.2, 12.3 and 12.4;

13. *Notes further* that the International Civil Service Commission has decided to include in its work programme the updating of the 1954 *Standards of Conduct in the International Civil Service* of the International Civil Service Advisory Board in consultation with the Consultative Committee on Administrative Questions, and looks forward to the results of this review.

92nd plenary meeting
8 September 1998

III. Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations

Provisions relating to the status, basic rights and duties of United Nations staff members, with commentary

A. Charter of the United Nations

Chapter III
Organs

Article 7

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

Chapter XV
The Secretariat

Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General

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Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Chapter XVI
Miscellaneous provisions

Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

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B. Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly by its resolution 22 (I) of 13 February 1946

Article V

Section 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves ...

Section 21. The United Nations shall cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations, and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities ...

Commentary

Staff members

1. The Charter requires that staff members be "appointed" by the Secretary-General (or by those to whom this power has been delegated, either by the Secretary-General alone or by the Secretary-General at the direction of the General Assembly). The hallmark of a staff relationship is "appointment", and this is done through a letter of appointment pursuant to staff regulation 4.1. The Staff Regulations, as revised by the General Assembly in its resolution 52/252, apply to all staff members of the Secretariat, within the meaning of Article 97 of the Charter, whose employment relationship and contractual link with the Organization are through a letter of appointment issued pursuant to regulations promulgated by the General Assembly.

2. To ensure that the revised Regulations apply to all staff members of the Organization, including all staff members of all its principal and subsidiary organs, even those with entirely separate administrations, the following sentence has been inserted between the second and third sentence of the "Scope and purpose" provision of the Staff Regulations:

> *"For the purposes of these Regulations, the expressions 'United Nations Secretariat', 'staff members' or 'staff' shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter."*

The entire text is shown in section IV of the present annex.

3. Article 105 of the Charter empowers the General Assembly to make provisions for the privileges and immunities of the "officials" of the Organization. The Assembly did so by adopting the Convention on the Privileges and Immunities of the United Nations on 13 February 1946 (hereafter the "General Convention"). Article V of the General Convention provides for privileges and immunities for officials and article VII provides for the issue of United Nations laissez-passers to officials. By its resolution 76 (I) of 7 December 1946, the Assembly approved that the provisions in articles V and VII of the General Convention apply to all staff members of the United Nations with the exception of those "recruited locally and assigned to hourly

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rates". Thus all staff members governed by the Staff Regulations are officials of the Organization.

IV. Scope and purpose of the Staff Regulations of the United Nations

Article I of the Staff Regulations of the United Nations and related rules from chapter I of the 100 series of the Staff Rules, with commentary

Staff Regulations of the United Nations
Scope and purpose

The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat. For the purposes of these Regulations, the expressions "United Nations Secretariat", "staff members" or "staff" shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter. The Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles as he or she considers necessary.

Article I
Duties, obligations and privileges

Staff regulation 1.1
Status of staff

Regulation 1.1 (a)

Staff members are international civil servants. Their responsibilities as staff members are not national but exclusively international.

Commentary

1. It should be noted that the commentary uses the word "former" to refer to the regulations and rules in force when General Assembly resolution 52/252 was adopted (ST/SGB/1998/8 and ST/SGB/Staff Rules/1/9 and Amend.1). The word "new" is used to indicate language that was not in the former Staff Regulations and Rules.

2. Staff regulation 1.1 (a) essentially reproduces the text of the first two sentences of former staff regulation 1.1 (see paras. 3-14, 29 and 30 of the 2001 standards of conduct), reproduced in section V of the present annex.

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Regulation 1.1 (b)

Staff members shall make the following written declaration witnessed by the Secretary-General or his or her authorized representative:

> "I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization."
>
> "I also solemnly declare and promise to respect the obligations incumbent upon me as set out in the Staff Regulations and Rules."

Commentary

1. Staff regulation 1.1 (b) contains the declaration of office of staff and its opening words incorporate the text of former staff regulation 1.9 insofar as it relates to staff members (see paras. 3-14 of the 2001 standards of conduct). The first part of staff regulation 1.1 (b) in substance reproduces the text of the declaration set out in former staff regulation 1.9, except that staff regulation 1.1 (b) codifies existing practice under which staff members subscribe to a written declaration but do not make a sworn statement, since the concept of a sworn statement depends upon the operation of local law.

2. The second paragraph of the declaration is new and refers specifically to the Staff Regulations and Rules.

3. A copy of the present bulletin and its annex will be distributed to all new and current staff members.

Regulation 1.1 (c)

The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected.

Commentary

1. Staff regulation 1.1 (c) is new.

2. The regulation codifies an implicit duty that falls on the Secretary-General, that is, to ensure that the rights and duties of staff members are respected.

Regulation 1.1 (d)

The Secretary-General shall seek to ensure that the paramount consideration in the determination of the conditions of service shall be the necessity of securing staff of the highest standards of efficiency, competence and integrity.

Commentary

1. Staff regulation 1.1 (d) places on the Secretary-General an affirmative duty to seek to ensure that the criteria set out in Article 101, paragraph 3, of the Charter for the determination of the conditions of service of the staff are implemented. This

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provision is not intended to affect the role of legislative bodies involved in the process of establishing conditions of service. It does, however, seek to formulate the responsibility of the Secretary-General to advocate, in the appropriate forums, the adoption of what he or she considers to be the appropriate conditions of service to secure the recruitment and retention of staff possessing the highest standards of efficiency, competence and integrity.

2. The salaries of staff in the Professional category and above are determined by reference to the best paying national civil service under what is known as the Noblemaire principle. The salaries of staff in the General Service and related categories are established by the Secretary-General on the basis of the best prevailing conditions of employment in the locality where the United Nations office concerned is located under what is commonly referred to as the Flemming principle. The determination of the conditions of service of staff in the Field Service category follows the same pattern as the Professional category.

Regulation 1.1 (e)

The Staff Regulations apply to all staff at all levels, including staff of the separately funded organs and staff holding appointments under the 100, 200 and 300 series of the Staff Rules.

Commentary

1. Regulation 1.1 (e) makes clear that the Staff Regulations apply to all staff members of the Secretariat within the meaning of Article 97 of the Charter whose contractual link with the Organization is through a letter of appointment issued pursuant to regulations promulgated by the General Assembly.

2. While the Staff Regulations apply to all staff, applicable Staff Rules differ depending on the type of appointment held by the staff member. The 100 series of the Staff Rules applies to all staff except those engaged on technical assistance projects (200 series) and staff engaged for short-term service or for appointments of limited duration (300 series). Similar amendments to the 200 series and 300 series rules have been promulgated as appear in the 100 series, with appropriate modifications required to address the different circumstances of such staff.

Regulation 1.1 (f)

The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who are covered by them to fail to observe laws and police regulations of the State in which they are located nor do they furnish an excuse for non-performance of their private obligations. In any case where an issue arises regarding the application of these privileges and immunities, the staff member shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived in accordance with the relevant instruments.

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Commentary

1. Staff regulation 1.1 (f) essentially reproduces the substance of former staff regulation 1.8 (see the 2001 standards of conduct, paras. 39 and 40). It is placed at the end of staff regulation 1.1 as it defines the scope and extent of the privileges and immunities of the United Nations that are enjoyed by staff in the interest of the Organization.

2. Staff rule 101.2 (c) deals with the obligations on staff to honour their private legal obligations.

Staff rule 101.1
Status of staff

The declaration made by a staff member on appointment shall be placed in his or her official status file. A new declaration shall be made after a break in service that exceeds three months.

Commentary

1. Staff rule 101.1 codifies the existing practice of placing written declarations in the official status file. The second sentence seeks to ensure that a new declaration is made after a break in service that exceeds three months unless the staff member is reinstated and the staff member's services are considered continuous under current staff rule 104.3 (b).

2. The Staff Regulations adopted by the General Assembly in its resolution 52/252 entered into force on 1 January 1999. They are binding on all staff in service on that date, as well as staff recruited on or after that date. The declaration previously made by staff already in service on 1 January 1999 at the time of their entry on duty remains in effect. Thus, it is not necessary that they sign the new declaration set out in staff regulation 1.1 (b).

Staff regulation 1.2
Basic rights and obligations of staff

Core values

Regulation 1.2 (a)

Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

Commentary

This provision describes the basic values expected of international civil servants because of their status. At the heart of those values are the principles set out in the preamble to the Charter. The first sentence is a quotation from those opening words and the second sentence is the obligation on staff flowing from a commitment to those values (see also the 2001 standards of conduct, paras. 2, 3, 6, 13, 14, 20 and 36).

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Regulation 1.2 (b)

Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

Commentary

1. This provision describes more basic values expected of international civil servants because of their status. It is derived from Article 101, paragraph 3, of the Charter and affirmatively places on staff the obligation to uphold the highest standards of efficiency, competence and integrity after appointment to the Secretariat.

2. At the heart of those values is integrity, allied with a dedication to the values and principles set out in the Charter. As discussed in paragraph 5 of the 2001 standards of conduct, the concept of integrity "embraces all aspects of behaviour of an international civil servant, including such qualities as honesty, truthfulness, impartiality and incorruptibility".

3. Various other provisions deal with particular manifestations of this set of basic values in different circumstances, for example, staff regulations 1.2 (d) to (i), (m) and (n).

General rights and obligations

Regulation 1.2 (c)

Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

Commentary

1. The opening sentence of staff regulation 1.2 (c) reproduces the first sentence of former staff regulation 1.2.

2. The obligations of Member States for the security of staff are set out in Article 105 of the Charter, which provides that the Organization and its officials shall enjoy such privileges and immunities as are necessary for the exercise of their functions.

3. The Secretary-General, as chief administrative officer, has an inherent responsibility to seek to ensure the safety of staff. This regulation recognizes that responsibility as a basic right of staff (see also the 2001 standards of conduct, para. 37).

4. In exercising his or her authority to assign staff to any of the activities of the Organization, the Secretary-General shall seek to ensure that, while assigned to hardship areas, staff are afforded reasonable conditions of life and work having regard to the existing conditions.

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5. Furthermore, since staff are subject to assignment, measures should be taken to ensure that staff are properly advised, before departure, of conditions prevailing at the duty station to which they are assigned.

Regulation 1.2 (d)

In the performance of their duties staff members shall neither seek nor accept instructions from any Government or from any other source external to the Organization.

Commentary

1. Staff regulation 1.2 (d) reproduces the essence of former staff regulation 1.3 and flows from the first sentence of Article 100, paragraph 1, of the Charter (see the 2001 standards of conduct, paras. 8, 12 and 30).

2. The new regulation makes clear that directions or instructions to staff come from the Secretary-General, who must fulfil the legislative mandates of the Organization. This is true in all areas, including, for example, decisions relating to the appointment and promotion of staff, which are for the Secretary-General to make as chief administrative officer of the Organization.

Regulation 1.2 (e)

By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants.

Commentary

1. The first sentence of staff regulation 1.2 (e) sets out an idea that is in former staff regulation 1.1 and former staff regulation 1.9, which contains the oath or declaration of office, that is, that staff must regulate their conduct with only the interests of the Organization in view (see the 2001 standards of conduct, paras. 4 and 5). The second sentence of staff regulation 1.2 (e) is new and focuses on the concept of loyalty to the aims, principles and purposes of the Organization as set out in the Charter (which is alluded to in the declaration contained in staff regulation 1.1 (b)) (ibid., paras. 4, 7 and 30). It was considered important to highlight those obligations which arise from the very status of a staff member and which, at present, are set out only in the declaration subscribed to by staff upon their entry on duty.

2. The Secretary-General, and those to whom he or she has delegated decision-making authority, has the responsibility to make decisions as to whether the staff have complied with the provisions of the Staff Regulations and Rules. Since no set of rules, no matter how long or complex, can cover all situations, it is clear that there must be discretion in the application of the rules. This is common to all systems of administrative law. However, the discretionary authority of the Secretary-General is not unlimited and it has consistently been held by the Administrative Tribunal that decisions cannot be tainted by prejudice, improper motive or mistake of fact. The

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Administrative Tribunal adjudicates claims by staff that decisions have not been properly taken.

Regulation 1.2 (f)

While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

Commentary

1. Staff regulation 1.2 (f) generally reproduces the essence of former staff regulation 1.4. The core idea of conduct befitting an international civil servant was considered by the International Civil Service Commission in 2001. The Commission indicated that:

> *"... international civil servants have a special calling: to serve the ideals of peace, of respect for fundamental rights, of economic and social progress, and of international cooperation. It is therefore incumbent on international civil servants to adhere to the highest standards of conduct; for ultimately, it is the international civil service that will enable the United Nations system to bring about a just and peaceful world."*[g]

(See the 2001 standards of conduct, para. 2; see also para. 5 on the integrity expected of international civil servants; paras. 4, 7, 21 and 33 on loyalty; para. 6 on tolerance and understanding; paras. 8-10 on impartiality; paras. 11 and 12 on independence; paras. 13 and 36 on international outlook; and para. 14 on freedom from discrimination.)

2. The first sentence of regulation 1.2 (f) is a revision of the second sentence in former staff regulation 1.4, which provided that:

> *"While they are not expected to give up their national sentiments, or their political and religious convictions, they shall at all times comport themselves with the reserve and tact incumbent upon them by reason of their international status."*

The revision recasts this obligation in a more positive tone. In the 2001 standards of conduct, the Commission noted that:

> *"Impartiality implies tolerance and restraint, particularly in dealing with political or religious convictions. While their personal views remain inviolate, international civil servants do not have the freedom of private persons to take sides or to express their convictions publicly on controversial matters, either*

[g] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 30* (A/56/30), annex II, para. 2.

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individually or as members of a group. This can mean that, in certain situations, personal views should only be expressed with tact and discretion."[h]

3. As noted in the commentary to regulation 1.2 (e), it is for the Secretary-General to decide whether a staff member has met the standards set out in this provision. The Administrative Tribunal has consistently maintained that, while the Secretary-General has the responsibility and discretion to assess a staff member's conduct, such discretion must be exercised reasonably, without improper motives and in accordance with the requirements of due process.

Regulation 1.2 (g)

Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour.

Commentary

1. Staff regulation 1.2 (g) builds on ideas in former staff regulation 1.5 and codifies principles set out in the 2001 standards of conduct (see paras. 21, 22, 25 and 34). The use of one's office for personal gain is clearly unacceptable. This includes not only conducting business from a United Nations office, but also such things as using the United Nations facilities for a business, using the United Nations name, logo or address for a business or approving a contract for a family business without disclosure. It also reflects the principle set out in former staff regulation 1.5 that staff members shall not use information that has not been made public for the private advantage of the staff member or any third party.

2. Staff regulation 1.2 (g), for the sake of clarity, makes specific reference to the prohibition on a staff member favouring a third party, including family or friends, from profiting from a staff member's position or the exercise of his or her functions. The term "friends" is broad and seeks to encompass not only friends as normally understood but also relationships that are not recognized by the Staff Regulations and Rules as creating a dependency.

3. The regulation also prohibits the use of office or knowledge gained from that office for personal reasons to prejudice or harm the careers of individual staff members or harm third parties.

Regulation 1.2 (h)

Staff members may exercise the right to vote but shall ensure that their participation in any political activity is consistent with, and does not reflect adversely upon, the independence and impartiality required by their status as international civil servants.

[h] Ibid., para. 9.

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Commentary

1. Staff regulation 1.2 (h) reproduces the essence of the text of former staff regulation 1.7 (see the 2001 standards of conduct, paras. 9, 10, 29, 44 and 45), but the provision is cast in a more positive form to ensure that the emphasis is on the need to ensure that political activities do not have an impact on the independence and impartiality of staff rather than suggesting that there is some problem with staff having political views.

2. The notion of consistency with the status of an international civil servant is to be determined by the Secretary-General in view of the necessity of staff being, and appearing to be, independent and impartial. Thus, it is clear that staff members cannot be candidates for political office. In case of doubt, inquiries could be made by staff pursuant to staff rule 101.2 (r).

3. Staff members, of course, have the right to form staff representative bodies in accordance with staff regulations 8.1 and 8.2 in order to ensure, in the words of staff regulation 8.1, "the effective participation of staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other personnel policies".

Regulation 1.2 (i)

Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service.

Commentary

1. Staff regulation 1.2 (i) generally reproduces the text of former staff regulation 1.5. The text reflects the fact that official information cannot be used for private purposes, except with authorization. This flows from the idea that staff members should place the interests of the Organization above their own (see the 2001 standards of conduct, para. 4). It follows that permission must be obtained for disclosure to third parties of information that has not been made public, unless such disclosure is in the normal course of the staff member's duties, that is, that the staff member is either generally authorized to release information (for example, a press officer) or by a staff member specifically authorized to so do (see staff regulation 1.2 (r) for the duty of staff to cooperate with United Nations investigations).

2. The last sentence of the regulation provides that the obligations contained in the provision do not cease upon separation from service. It may be difficult to enforce such a provision but, at the very least, if a former staff member ignores the regulation, a note could be placed in his or her official status file to prevent re-employment.

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Honours, gifts or remuneration

Regulation 1.2 (j)

No staff member shall accept any honour, decoration, favour, gift or remuneration from any Government.

Commentary

1. Staff regulations 1.2 (j), (k), and (l) provide the basic provisions regulating the issue of acceptance by staff members of any honour, decoration, favour, gift or remuneration from outside sources (see the 2001 standards of conduct, paras. 46[i] and 47).

2. Former staff regulation 1.6 dealt with this issue in one provision, which prohibited the acceptance of any benefits from a Government, and severely restricted the acceptance of benefits from non-governmental sources. In proposing the language of staff regulation 1.2 (j), the Secretary-General believed that it would be appropriate for the General Assembly to stress the importance of the appearance of strict independence and impartiality of staff and thus to reaffirm the absolute prohibition on acceptance of benefits from Governments. The Secretary-General also believed that the prior exception in former staff regulation 1.6 and former staff rule 101.9 (b), which enabled a staff member to accept honours for war service prior to appointment with the United Nations, should be abolished. By General Assembly resolution 52/252, the Assembly abolished that exception.

3. Staff regulation 1.2 (j) contains the basic rule that staff may not accept any honour, decoration, gift or remuneration from any Government (ibid., paras. 46 and 47).[j] This rule applies whatever the reason for the award, even if the award is unrelated to the staff member's service with the Organization, since it is imperative that an international civil servant be perceived as independent from any national Government.

Regulation 1.2 (k)

If refusal of an unanticipated honour, decoration, favour or gift from a Government would cause embarrassment to the Organization, the staff member may receive it on behalf of the Organization and then report and entrust it to the Secretary-General, who will either retain it for the Organization or arrange for its disposal for the benefit of the Organization or for a charitable purpose.

Commentary

1. Staff regulation 1.2 (k) is new and seeks to regulate a recurrent problem, namely, when a staff member is given an unanticipated honour, decoration, favour or gift, perhaps in public, by a minister or even a head of State. In such cases, a

[i] Even though paragraph 46 envisages the possibility of authorization by the executive head of an organization of an honour, decoration, gift, favour or remuneration from a Government, this is precluded by staff regulation 1.2 (j), as explained in paras. 2 and 3 of the commentary.

[j] Staff regulation 3.4 (c) envisages that staff members may accept child benefits from their Governments but that, in such a case, United Nations dependency benefits will be reduced. The United Nations has also accepted housing from Governments and when staff are assigned to such housing, rental deductions from emoluments are applicable.

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public refusal could cause a needlessly unpleasant incident. In such cases, the new regulation states that the unanticipated honour, decoration, favour or gift may be received by the staff member, but on behalf of the United Nations. The honour, decoration, favour or gift must then be given to the Secretary-General for retention or disposal by the Organization. Remuneration from a Government must always be refused and such refusal, as staff are paid by the Organization, could hardly cause embarrassment.

2. The Secretary-General will write to all Member States to inform them of the Organization's policy on acceptance of honours, decorations, favours, gifts or remuneration so that incidents of this nature can be avoided to the largest extent possible.

Regulation 1.2 (l)

No staff member shall accept any honour, decoration, favour, gift or remuneration from any non-governmental source without first obtaining the approval of the Secretary-General.

Commentary

1. Staff regulation 1.2 (l) requires that a staff member not accept any honour, decoration, favour, gift or remuneration from a non-governmental source without first obtaining the approval of the Secretary-General (see also the 2001 standards of conduct, paras. 46 and 47). This provision is based on former staff regulation 1.6.

2. A non-governmental source means any intergovernmental organization, non-governmental organization or any private source.

Conflict of interest

Regulation 1.2 (m)

Staff members shall not be actively associated with the management of, or hold a financial interest in, any profit-making, business or other concern, if it were possible for the staff member or the profit-making, business or other concern to benefit from such association or financial interest by reason of his or her position with the United Nations.

Commentary

1. Staff regulation 1.2 (m) reproduces the essence of former staff rule 101.6 (b) and clarifies its scope. The provision was made a staff regulation because of its importance. Its purpose is to put staff on notice that they cannot be actively associated with a profit-making, business or other concern, if either the concern or the staff member is to profit by the association with the Organization. For example, a staff member working in the Office of Legal Affairs cannot act for outside clients (see also the 2001 standards of conduct, paras. 21 and 22). It will be for the Secretary-General to judge whether a particular act raises a conflict of interest situation.

2. This provision does not seek to affect the efforts of staff associations to raise funds for their activities from staff.

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Regulation 1.2 (n)

All staff members at the Assistant Secretary-General level and above shall be required to file financial disclosure statements upon appointment and at intervals as prescribed by the Secretary-General, in respect of themselves and their dependent children, including any substantial transfers of assets and property to spouses and dependent children from the staff member or from any other source that might constitute a conflict of interest, after knowledge of the appointment or during its tenure, to provide certification stating that there is no conflict of interest with regard to the economic activities of spouses and dependent children, and to assist the Secretary-General in verifying the above-mentioned certification on his or her special request. The financial disclosure statements will remain confidential and will only be used, as prescribed by the Secretary-General, in making determinations pursuant to staff regulation 1.2 (m).

Commentary

1. Staff regulation 1.2 (n) requires all staff at the assistant secretary-general level and above to submit financial disclosure statements on appointment and at intervals as prescribed by the Secretary-General (see also the 2001 standards of conduct, para. 22). This requirement is designed to minimize the risk of officials being perceived as using their position for personal gain. The regulation makes it clear that these financial disclosure statements will remain confidential and will only be used by the Secretary-General in assessing whether a conflict of interest situation exists.

2. Staff regulation 1.2 (n) also gives to the Secretary-General the authority to prescribe the form of such disclosure statements and the periodicity of their filing and authorizes him or her to establish procedures to ensure that the statements remain confidential.

Outside employment and activities

Regulation 1.2 (o)

Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General.

Commentary

1. Staff regulation 1.2 (o), which is based on former staff rule 101.6 (e), reflects the Organization's long-standing policy on outside occupation or employment, whether during or outside the work week (see also the 2001 standards of conduct, paras. 41-45).

2. The notion of occupation includes the practice of a profession (whether as an employee or an independent contractor). Employment is a legal relationship pursuant to which one person is providing work and skill at the control and direction of another.

Regulation 1.2 (p)

The Secretary-General may authorize staff members to engage in an outside occupation or employment, whether remunerated or not, if:

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(i) The outside occupation or employment does not conflict with the staff member's official functions or the status of an international civil servant;

(ii) The outside occupation or employment is not against the interest of the United Nations; and

(iii) The outside occupation or employment is permitted by local law at the duty station or where the occupation or employment occurs.

Commentary

1. Staff regulation 1.2 (p) is new and sets out in specific terms the Organization's long-standing requirements that have to be met before a staff member may be given permission to engage in an outside occupation or employment. The key factors in determining whether permission should be granted relate to the compatibility of that occupation or employment with the status and functions being discharged by the staff member and with the interest of the United Nations (see also the 2001 standards of conduct, para. 41). In addition, the occupation or employment must be permitted by local law. If the Secretary-General decides that permission for such occupation or employment should be denied, a reason will be given.

2. The first requirement is that there be no conflict with the staff member's official functions or with the staff member's status as an international civil servant. For example, it would not be appropriate for a member of the Office of Legal Affairs to be working part-time in an outside law firm.

3. The second requirement is that such occupation or employment not be against the interest of the United Nations, that is, that the occupation or employment does not reflect adversely upon the United Nations. For example, permission would not be granted for a staff member to work with an organization the goals of which are incompatible with those of the United Nations or to work in a capacity that could call into question the impartiality and independence of the staff member.

4. The third requirement is that the occupation or employment be permitted under the law of the duty station concerned. For example, in the United States of America, staff holding G-4 visas are not permitted under local law to accept outside employment, or to earn money from an occupation, so no permission would be granted.

5. It should be remarked that private non-remunerated activities that have nothing to do with a staff member's official functions would be at the discretion of the staff member (for example, the secretary of a stamp club) (see the 2001 standards of conduct, para 38).

6. Private activities that relate to the United Nations are regulated by staff rule 101.2 (p).

Use of property and assets

Regulation 1.2 (q)

Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets.

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Commentary

1. Staff regulation 1.2 (q) is new and makes explicit the duty to use reasonable care when utilizing the property and assets of the Organization, which duty is behind several provisions in the Financial Rules and the Staff Rules.

2. Management accountability for the way in which staff resources are utilized is discussed in the commentary to staff rule 101.3 (a).

Regulation 1.2 (r)

Staff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate the possible misuse of funds, waste or abuse.

Commentary

1. Staff regulation 1.2 (r) builds on the obligation to supply information set out in current staff rule 104.4. This provision seeks to ensure that staff members clearly understand that they must cooperate with official investigations by the Organization and must supply information on their official actions to, for example, the internal or external auditors. Such requests are not in the nature of criminal inquiries where an individual may refuse to answer on the basis of self-incrimination. The issue in the employment relationship between a staff member and the Organization is whether the highest standards of competence, efficiency and integrity have been met.

2. The Secretary-General has the authority to request staff to supply information and the staff have a duty to respond. This is without prejudice to the rights of staff under chapter X of the Staff Regulations and Rules. It should be noted that, although the Secretary-General obviously has control of United Nations premises, any investigations that involve the staff member's home would require the consent of the staff member or would have to be conducted by the appropriate authorities in accordance with national law.

3. If, after investigation, a staff member is charged with misconduct, the staff member is entitled to all the due process protections set out in the Staff Regulations and Rules and administrative issuances promulgated thereunder. This includes the freedom to decide whether the staff member wishes to make any statements or submissions in response to the charge.

Staff rule 101.2
Basic rights and obligations of staff

General

Rule 101.2 (a)

Disciplinary procedures set out in article X of the Staff Regulations and chapter X of the Staff Rules may be instituted against a staff member who fails to comply with his or her obligations and the standards of conduct set out in the Charter of the United Nations, the Staff Regulations and Rules, the Financial Regulations and Rules and all administrative issuances.

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Commentary

Staff rule 101.2 (a) is new. It will ensure that staff are held accountable through disciplinary procedures for failure to comply with their obligations and the standards of conduct, set out in the Charter of the United Nations, the Staff Regulations and Rules, the Financial Regulations and Rules and all related issuances. Administrative issuances refer to issuances promulgated by the Secretary-General, or by those who are delegated authority by the Secretary-General, in furtherance of the Staff Regulations and Rules and the Financial Regulations and Rules (see ST/SGB/1997/1).

Rule 101.2 (b)

Staff members shall follow the directions and instructions properly issued by the Secretary-General and their supervisors.

Commentary

1. Staff rule 101.2 (b) deals with the obligation of staff to follow directions properly given by supervising officials (see the 2001 standards of conduct, paras. 17 and 18). The use of the word "properly" means that a supervisor who gives improper instructions will be held accountable since staff regulation 1.1 (c) introduces an affirmative duty on the Secretary-General to ensure that the rights and duties of staff are respected.

2. In the 2001 standards of conduct, the International Civil Service Commission noted that staff members have to follow the instructions they receive in connection with their official functions but also have a right to ask for written instructions if they have doubts as to the consistency of the instruction with the Charter or any other constitutional instrument, decisions of the governing bodies or administrative rules and regulations (ibid. para. 18). Although it is clear that staff must follow instructions, it should also be noted that staff have a right to appeal instructions that they consider infringe their rights pursuant to chapter XI of the Staff Rules.

3. Obviously, staff do not have to follow instructions that are manifestly inconsistent with their official functions or threaten their safety or have nothing to do with their official activities since such instructions are not proper. Such cases are rare and can usually be handled by seeking a review from the next level supervisor or by consulting the Office of Human Resources Management.

Rule 101.2 (c)

Staff members must comply with local laws and honour their private legal obligations, including, but not limited to, the obligation to honour orders of competent courts.

Commentary

1. Staff rule 101.2 (c) is really an amplification of staff regulation 1.1 (f) (formerly staff regulation 1.8), which provides that the privileges and immunities of the Organization afford no excuse to staff for non-performance of their private obligations (see the 2001 standards of conduct, paras. 39 and 40). The Secretary-General shall determine in any particular case whether such privileges and immunities exist and, if so, whether they shall be waived.

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2. Staff rule 101.2 (c) makes clear to staff that they have an obligation to honour such private obligations. This provision will assist the Organization effectively to ensure that staff respect court orders relating to their private obligations. In the event that a plaintiff forwards to the Organization a court order against a staff member, the Administration will seek the views of the staff member before taking any action on the basis of that order. It is the responsibility of staff who have an order against them that they contest to avail themselves of all existing means under the applicable national law to appeal the order and/or obtain relief from the obligation to comply with the order pending its appeal.

3. Failure to honour such private obligations may be treated as a disciplinary matter under article X of the Staff Regulations and chapter X of the Staff Rules. In cases of non-compliance with family support court orders, deductions from staff members' salaries, wages and other emoluments may be made in accordance with the procedures set out in Secretary-General's bulletin ST/SGB/1999/4 as may be amended or replaced by another issuance on the subject.

Specific instances of prohibited conduct

Rule 101.2 (d)

Any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work, is prohibited.

Commentary

1. Staff rules 101.2 (d) to (i) deal with specific instances of prohibited conduct.

2. Staff rule 101.2 (d) reproduces the core of the Secretary-General's bulletin of 29 October 1992 (ST/SGB/253), as may be amended or replaced by another issuance on the subject, which sets out United Nations policy on equal treatment of men and women in the Secretariat, and which also prohibits all forms of discrimination or harassment (see also the 2001 standards of conduct, paras. 14 and 20).

Rule 101.2 (e)

Staff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization, nor shall staff members threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official duties.

Commentary

1. Staff rule 101.2 (e) prohibits actions that threaten, intimidate or interfere with official functions and activities.

2. The rule is not intended to prevent permitted activities such as the right of staff to peaceful assembly, the right of representatives of staff representative bodies to address the Fifth Committee or other organs that have authorized such procedures or for staff to meet in authorized meeting rooms. What is prohibited are actions that prevent Member States, departments, offices, staff and other authorized persons from holding a meeting or carrying out an official activity. Ultimately the

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application of the rule will be judgemental but the test is reasonably clear in that conduct which prevents others from performing official functions is not permitted.

3. It is noted that at times staff representatives have for certain periods suspended participation in joint bodies. Withdrawal by staff representatives from joint bodies does not constitute interference with official functions since the Administrative Tribunal has ruled that, in such cases, the Administration may proceed without the consultation normally needed pursuant to article VIII of the Staff Regulations and chapter VIII of the Staff Rules.

Rule 101.2 (f)

Staff members shall not intentionally misrepresent their functions, official title or the nature of their duties to Member States or to any entities or persons external to the United Nations.

Commentary

Staff rule 101.2 (f) prohibits the intentional misrepresentation of official title or duties to outside parties, for example, by placing misleading titles on business cards, usually for private advantage. The use of the word "intentional" makes clear that this is not a careless or accidental act.

Rule 101.2 (g)

Staff members shall not intentionally alter, destroy, misplace or render useless any official document, record or file entrusted to them by virtue of their functions, which document, record or file is intended to be kept as part of the records of the Organization.

Commentary

Staff rule 101.2 (g) puts staff on notice that the intentional unauthorized destruction, alteration or misplacement of records, which were intended to form part of the official files of the Organization, department or office, is prohibited. This has been a problem from time to time in disciplinary cases when key documents are found to be missing from official files of the Organization. The use of the word "intentional" makes clear that this is not a careless or accidental act.

Rule 101.2 (h)

Staff members shall not seek to influence Member States, principal or subsidiary organs of the United Nations or expert groups in order to obtain a change from a position or decision taken by the Secretary-General, including decisions relating to the financing of Secretariat programmes or units or in order to secure support for improving their personal situation or the personal situation of other staff members or for blocking or reversing unfavourable decisions regarding their status or their colleagues' status.

Commentary

Staff rule 101.2 (h) reproduces provisions from the information circular of 2 February 1996 (ST/IC/1996/10) concerning conduct of staff members in relation to Member States (see the 2001 standards of conduct, paras. 23-25 and 27). The new

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rule seeks to make clear that lobbying Member States by individual staff members against positions taken by the Secretary-General is not permitted.

Rule 101.2 (i)

Staff members shall neither offer nor promise any favour, gift, remuneration or any other personal benefit to another staff member or to any third party with a view to causing him or her to perform, fail to perform or delay the performance of any official act. Similarly, staff members shall neither seek nor accept any favour, gift, remuneration or any other personal benefit from another staff member or from any third party in exchange for performing, failing to perform or delaying the performance of any official act.

Commentary

The prohibition in staff rule 101.2 (i) applies to the staff member's relations with other staff members and to the staff member's relations with third parties. While the general proposition is that the practices described in the rule violate the highest standards of integrity required of staff members (see the 2001 standards of conduct, paras. 16, 46 and 47), the purpose of the new rule is specifically to deal with "détournement de pouvoir", "trafic d'influence" and other improper or even corrupt practices.

Honours, gifts or remuneration

Rule 101.2 (j)

Acceptance by staff members of any honour, decoration, favour, gift or remuneration from non-governmental sources requires the prior approval of the Secretary-General. Approval shall be granted only in exceptional cases and where such acceptance is not incompatible with the interests of the Organization and with the staff member's status as an international civil servant. However, staff members may occasionally accept, without prior approval, minor gifts of essentially nominal value having regard to the duty station concerned, provided that all such gifts are promptly disclosed to the head of the office, who may direct that the gift be entrusted to the Organization or returned to the donor.

Commentary

1. Staff rule 101.2 (j) implements staff regulation 1.2 (l). It provides guidance on what honours, decorations, favours, gifts or remuneration may be accepted from non-governmental sources (see the 2001 standards of conduct, paras. 46 and 47). In essence, advance approval is required unless the gifts are of essentially nominal value, having regard to the duty station concerned. Acceptance of such items of essentially nominal value would not seem to present any significant risk of undermining the integrity or independence of staff members. The rule thus permits the staff member to accept gifts of essentially nominal value in view of the significant cost and effort that would be involved if staff members were required to seek prior approval.

2. The assessment of what is of "essentially nominal value" must be left to the best judgement of the staff member and the head of the office in the light of circumstances at the duty station concerned, since what is considered a minor gift at

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a Headquarters duty station may take on a different significance in a small field office. The problem is regulated through a requirement for staff either to obtain permission in advance or to disclose what they have received to the head of the office. It will be up to the head of the office to determine what is acceptable and, if he or she is in doubt, higher authorities may be consulted. As a safeguard against possible abuse, all gifts received in this manner are to be disclosed to the head of the office, who will have authority to direct that gifts already received be returned.

Rule 101.2 (k)

The Secretary-General may authorize staff members to accept from a non-governmental source or a university academic awards, distinctions and tokens of a commemorative or honorary character, such as scrolls, certificates, trophies or other items of essentially nominal monetary value.

Commentary

Staff rule 101.2 (k) is based on former staff rule 101.9 (d) and permits the Secretary-General to authorize staff members to accept certain awards, distinctions and tokens from a non-governmental source or from a university. The rule provides that, for the purpose of the rule, universities are not considered government sources since, in many countries, they are not so considered and it would be incongruous for a staff member to be authorized to accept an honorary degree or certification from universities in some, but not all, countries. An honorary degree or certificate may therefore be accepted from universities in all countries.

Rule 101.2 (l)

Staff members, as part of their official functions, will be expected from time to time to attend governmental or other functions such as meals and diplomatic receptions. Such attendance is not considered receipt of a favour, gift or remuneration within the meaning of the Staff Regulations and Rules.

Commentary

Staff rule 101.2 (l) is new and deals with the issue of attendance at various official functions. It is clear that international officials are required, from time to time, to attend luncheons, dinners and diplomatic receptions. Such attendance will not be considered by the Secretary-General a favour or gift within the meaning of staff regulations 1.2 (j) to (l).

Rule 101.2 (m)

The Secretary-General may, in exceptional cases, provided that this is in the interest of the United Nations and not incompatible with the staff member's status, authorize a staff member to receive from a non-governmental source an honour, decoration, favour, gift or remuneration other than those referred to in staff rules 101.2 (j) to (l) above.

Commentary

Staff rule 101.2 (m) enables the Secretary-General, on an exceptional basis, to authorize a staff member to accept an honour, decoration, favour, gift or

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remuneration from a non-governmental source that falls outside staff rules 101.2 (j) to (l) as long as such acceptance is in the interests of the United Nations and not inconsistent with the staff member's status. This provision flows from former staff rule 101.9 (c) since it is not possible to define in advance what may be accepted from a non-governmental source.

Conflict of interest

Rule 101.2 (n)

A staff member who has occasion to deal in his or her official capacity with any matter involving a profit-making business or other concern in which he or she holds a financial interest, directly or indirectly, shall disclose the measure of that interest to the Secretary-General and, except as otherwise authorized by the Secretary-General, either dispose of that financial interest or formally excuse himself or herself from participating with regard to any involvement in that matter which gives rise to the conflict of interest situation.

Commentary

1. Staff rule 101.2 (n) is based on former staff rule 101.6 (c). However, the second part is new and deals with the consequences of a staff member disclosing to the Secretary-General that he or she has an interest, direct or indirect, in a profit-making business or other concern (whether profit-making or not-for-profit) with which the United Nations is dealing. In such cases, unless the Secretary-General has authorized the staff member to deal with a particular matter despite the disclosed interest, the staff member will be directed to dispose of the interest or will be excused from dealing with the matter (see also the 2001 standards of conduct, paras. 21 and 22).

2. This provision departs from former staff rule 101.6 (d), which provided that the mere holding of shares in a company did not constitute a financial interest that would require disclosure. That provision has been deleted in the interest of transparency and the need to avoid any appearance of conflict of interest. Staff rule 101.2 (n) requires that a staff member, with shares in a corporation with which he or she is to deal, would disclose that interest to his or her supervisor. Obviously whether there was a conflict would depend on the extent of the holding and on the nature of the staff member's duties. The object of the provision is to compel disclosure so that the Secretary-General can decide if there is a conflict situation before a problem arises.

3. If informal procedures are not sufficient to deal with questions that arise under this rule, under confidential clarification procedures established in administrative instruction ST/AI/2000/13 on outside activities, as may be amended or replaced by another issuance on the subject, staff can obtain advice on whether a planned outside occupation, employment or activity would conflict with their status. However, the common sense approach of excusing oneself from any dealings with an entity with which one has a financial interest would normally be appropriate.

Rule 101.2 (o)

The Secretary-General shall establish procedures for the filing and utilization of financial disclosure statements.

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Commentary

Staff rule 101.2 (o) provides that the Secretary-General will establish procedures to implement the filing and access to financial disclosure statements. These procedures will ensure that the confidentiality of such forms is respected.

Outside activities

Rule 101.2 (p)

Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, engage in any of the following acts, if such act relates to the purpose, activities or interests of the United Nations:

(i) Issue statements to the press, radio or other agencies of public information;

(ii) Accept speaking engagements;

(iii) Take part in film, theatre, radio or television productions;

(iv) Submit articles, books or other material for publication.

Commentary

1. Staff rule 101.2 (p) is based on former staff rule 101.6 (e) (see also the 2001 standards of conduct, paras. 34 and 41).

2. The rule only requires that a staff member seek permission if the outside activities relate to the purpose, activities or interests of the United Nations. If a request is denied, a reason for that refusal will be given. No permission is needed for social or charitable activities or for activities that have no relation to the Organization.

3. Outside activities that are of benefit to the Organization or the achievement of its goals and contribute to the development of professional skills of staff members are usually not only permitted but also encouraged, for example, the publication of scholarly articles, participation in symposiums and limited teaching activities.

Rule 101.2 (q)

Membership in a political party is permitted, provided that such membership does not entail action, or an obligation to take action, by the staff member contrary to staff regulation 1.2 (h). The payment of normal financial contributions to a political party shall not be construed as an activity inconsistent with the principles set out in staff regulation 1.2 (h).

Commentary

Staff rule 101.2 (q) reproduces the essence of former staff rule 101.8 (a) (see also the 2001 standards of conduct, paras. 44 and 45).

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Rule 101.2 (r)

The Secretary-General shall establish procedures whereby staff may seek in confidence clarification as to whether proposed outside activities would conflict with their status as international civil servants.

Commentary

Staff rule 101.2 (r) is new and seeks to assist staff to determine if there are conflict situations by requiring the establishment of procedures to enable the staff to seek confidential guidance on these issues (see the 2001 standards of conduct, para. 44).

Travel and per diem for outside activities

Rule 101.2 (s)

Staff members who are authorized by the Secretary-General to participate in activities organized by a Government, intergovernmental organization, non-governmental organization or other private source may receive from the Government, intergovernmental organization, non-governmental organization or private source accommodation and travel and subsistence allowance generally in line with those payable by the United Nations. In such cases the travel subsistence allowance that may otherwise be payable by the United Nations shall be reduced as envisaged in staff rule 107.15 (a).

Commentary

Staff rule 101.2 (s) is new and distinguishes the notion of gifts and so on from invitations routinely extended by Governments, intergovernmental organizations, non-governmental institutions or other private sources to the Secretary-General and staff members to attend conferences or meetings dealing with United Nations-related matters hosted by them. This is currently routinely authorized by the Secretary-General and the rule reflects that current practice. It also provides an opportunity for the Organization to save on allowances that may be payable by the Organization by having the accommodation or travel and subsistence allowance provided by the Government, intergovernmental organization, non-governmental organizations or private source and by reducing the travel subsistence allowance that may otherwise be payable to the staff member.

Staff regulation 1.3
Performance of staff

Regulation 1.3 (a)

Staff members are accountable to the Secretary-General for the proper discharge of their functions. Staff members are required to uphold the highest standards of efficiency, competence and integrity in the discharge of their functions and their performance will be appraised periodically to ensure that the required standards of performance are met.

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Commentary

1. Much of staff regulation 1.3 deals with the standards of performance required of staff members and provides that they will be evaluated and held accountable to meet the required standards established by the Charter. Since the separately funded organs have systems of assessing performance that are adapted to meet their special needs, the provisions in staff regulation 1.3 (a) must remain very general. The regulation now explicitly places on managers the duty to make proper appraisals of performance, which reinforces the solid legislative basis for such procedures and practices.

2. Staff regulation 1.3 (a) makes it clear that staff members are required to uphold the highest standards of efficiency, competence and integrity in the discharge of their functions (see Article 101 of the Charter and the 2001 standards of conduct, paras. 3-14 and 48-50). The regulation introduces the concept of accountability for performance as a fundamental condition of service.

3. The relationship of integrity to performance is discussed in the commentary to staff rule 101.3 (a).

4. An integral part of the performance of managers is to manage properly the human, financial and other resources entrusted to them. It should be emphasized that the higher level of responsibilities associated with managerial functions of managers entails a commensurate increase in their accountability for the proper performance of all their duties in managing the human and financial resources entrusted to them.

Regulation 1.3 (b)

The whole time of staff members shall be at the disposal of the Secretary-General for the performance of official functions; however, the Secretary-General shall establish a normal working week and shall establish official holidays for each duty station. Exceptions may be made by the Secretary-General as the needs of the service may require and staff members shall be required to work beyond the normal tour of duty when requested to do so.

Commentary

Staff regulation 1.3 (b) combines the last two sentences of former staff regulation 1.2 into one sentence to make it clear that, although staff normally work an ordinary working week, they must work in excess of that working week when directed (see the 2001 standards of conduct, para. 41). It is, of course, clear that any requests to work additional hours must be reasonable and must be related to the needs of the service. Appropriate compensation arrangements are included in appendix B to the Staff Rules. The new regulation abolishes the requirement that those working hours must be reflected in an appendix to the Staff Rules as opposed to being issued in a local instruction.

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Staff rule 101.3
Performance of staff members

Rule 101.3 (a)

Staff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms that shall assess the staff member's compliance with the standards set out in the Staff Regulations and Rules for purposes of accountability.

Commentary

1. Staff rule 101.3 (a) makes explicit that the efficiency, competence and integrity required of staff by the Charter and staff regulation 1.3 (a) will be evaluated and that they will be held accountable to maintain the required standards.

2. Generally speaking an appraisal relates primarily to efficiency and competence, but integrity is part of the essential characteristic of an international civil servant and may have an impact on the performance of official duties. For example, abusive conduct by a staff member to his or her colleagues is not excused even though the staff member is efficient. On the other hand, the staff member's personal life is generally of no concern to a supervisor unless there is an impact on the discharge of his or her functions or on the role of that person as an international civil servant. As noted in the 2001 standards of conduct:

> *"4. International civil servants should share the vision of their organizations. It is loyalty to this vision that ensures the integrity and international outlook of international civil servants; it guarantees that they will place the interests of their organization above their own and use its resources in a responsible manner.*
>
> *"5. The concept of integrity enshrined in the Charter of the United Nations embraces all aspects of behaviour of an international civil servant, including such qualities as honesty, truthfulness, impartiality and incorruptibility. These qualities are as basic as those of competence and efficiency, also enshrined in the Charter."*

3. It is important to note that competence and efficiency of staff include not only the way in which they perform their tasks but the way in which they interact with others. As noted in the 2001 standards of conduct, the obligations of staff to their supervisors, and of supervisors to their staff, is of crucial importance. Those duties and obligations bear repeating in this commentary:

> *"15. Managers and supervisors are in positions of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect; they should be open to all views and opinions and make sure that the merits of staff are properly recognized. They need to provide support to them; this is particularly important when they are subject to criticism arising from the carrying out of their duties. Managers are also responsible for guiding and motivating their staff and promoting their development.*
>
> *"16. It is natural for managers to be seen as role models and they have therefore a special obligation to uphold the highest standards of conduct. It would be quite improper for them to solicit favours, gifts or loans from their*

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staff; they must act impartially, without intimidation and favouritism. In matters relating to the appointment or career of others, no international civil servant should try to influence colleagues for personal reasons.

"17. It is naturally incumbent on managers and supervisors to communicate effectively with their staff and share information with them. International civil servants have a reciprocal responsibility to provide all pertinent facts and information to their supervisors and to abide by and defend decisions taken, even when these do not accord with their personal views.

"18. International civil servants have to follow the instructions they receive in connection with their official functions and if they have doubts as to whether an instruction is consistent with the Charter or any other constitutional instrument, decisions of the governing bodies or administrative rules and regulations, they should first consult their supervisors. If they cannot agree, the international civil servant may ask for written instructions. These may be challenged through the proper institutional mechanisms, but any challenge should not delay carrying out the instruction. International civil servants may also record their views in official files. They should not follow verbal or written instructions that are manifestly inconsistent with their official functions or that threaten their safety or that of others.

"19. It must be the duty of international civil servants to report any breach of the organization's rules and regulations to a higher level official, whose responsibility it is to take appropriate action. An international civil servant who makes such a report in good faith has a right to be protected against reprisals or sanctions."

4. It should be emphasized that supervisors will be assessed not only on their technical competence but also on the way in which they utilize the staff placed under their direction.

Rule 101.3 (b)

The Secretary-General shall seek to ensure that appropriate learning and development programmes are available for the benefit of staff.

Commentary

As staff are required to uphold the highest standards of efficiency and competence and integrity, it follows that during their careers the Secretary-General must seek to ensure that staff are provided with appropriate learning and development opportunities to assist them in meeting the challenges of responding effectively to the changing mandates of the Organization.

Rule 101.3 (c)

Performance reports shall be prepared regularly for all staff members, including at the assistant secretary-general level and above, in accordance with procedures promulgated by the Secretary-General.

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Commentary

Staff rule 101.3 (c) replaces staff rule 112.6 and provides that appraisal will be pursuant to procedures promulgated by the Secretary-General.

V. Standards of conduct for the international civil service, 2001[k]

1. The United Nations and the specialized agencies embody the highest aspirations of the peoples of the world. Their aim is to save succeeding generations from the scourge of war and to enable every man, woman and child to live in dignity and freedom.

2. The international civil service bears responsibility for translating these ideals into reality. It relies on the great traditions of public administration that have grown up in member States: competence, integrity, impartiality, independence and discretion. But over and above this, international civil servants have a special calling: to serve the ideals of peace, of respect for fundamental rights, of economic and social progress, and of international cooperation. It is therefore incumbent on international civil servants to adhere to the highest standards of conduct; for, ultimately, it is the international civil service that will enable the United Nations system to bring about a just and peaceful world.

Guiding principles

3. The values that are enshrined in the United Nations organizations must also be those that guide international civil servants in all their actions: fundamental human rights, social justice, the dignity and worth of the human person and respect for the equal rights of men and women and of nations great and small.

4. International civil servants should share the vision of their organizations. It is loyalty to this vision that ensures the integrity and international outlook of international civil servants; it guarantees that they will place the interests of their organization above their own and use its resources in a responsible manner.

5. The concept of integrity enshrined in the Charter of the United Nations embraces all aspects of behaviour of an international civil servant, including such qualities as honesty, truthfulness, impartiality and incorruptibility. These qualities are as basic as those of competence and efficiency, also enshrined in the Charter.

6. Tolerance and understanding are basic human values. They are essential for international civil servants, who must respect all persons equally, without any distinction whatsoever. This respect fosters a climate and a working environment sensitive to the needs of all. To achieve this in a multicultural setting calls for a positive affirmation going well beyond passive acceptance.

7. International loyalty means loyalty to the whole United Nations system and not only to the organization for which one works; international civil servants have an obligation to understand and exemplify this wider loyalty. The need for a

[k] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 30* (A/56/30), annex II.

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cooperative and understanding attitude towards international civil servants of other United Nations organizations is obviously most important where international civil servants of several organizations are serving in the same country or region.

8. If the impartiality of the international civil service is to be maintained, international civil servants must remain independent of any authority outside their organization; their conduct must reflect that independence. In keeping with their oath of office, they should not seek nor should they accept instructions from any Government, person or entity external to the organization. It cannot be too strongly stressed that international civil servants are not, in any sense, representatives of Governments or other entities, nor are they proponents of their policies. This applies equally to those on secondment from Governments and to those whose services have been made available from elsewhere. International civil servants should be constantly aware that through their allegiance to the Charter and the corresponding instruments of each organization, member States and their representatives are committed to respect this independent status.

9. Impartiality implies tolerance and restraint, particularly in dealing with political or religious convictions. While their personal views remain inviolate, international civil servants do not have the freedom of private persons to take sides or to express their convictions publicly on controversial matters, either individually or as members of a group. This can mean that, in certain situations, personal views should only be expressed with tact and discretion.

10. This does not mean that international civil servants have to give up their personal political views or national perspectives. It does mean, however, that they must at all times maintain a broad international outlook and an understanding of the international community as a whole.

11. The independence of the international civil service does not conflict with, or obscure, the fact that it is the member States that collectively make up (in some cases with other constituents) the organization. Conduct that furthers good relations with individual member States and that contributes to their trust and confidence in the secretariat strengthens the organization and promotes its interest.

12. International civil servants who are responsible for projects in particular countries or regions may be called upon to exercise special care in maintaining their independence. At times they might receive instructions from the host country but this should not compromise their independence. If at any time they consider that such instructions threaten their independence, they must consult their supervisors.

13. An international outlook stems from an understanding of and loyalty to the objectives and purposes of the international organization itself as set forth in its legal instruments. It implies, inter alia, respect for the right of others to hold different points of view and follow different cultural patterns. It requires a willingness to work without bias with persons of all nationalities, religions and cultures; it calls for constant sensitivity to how proposals, events and statements may look to others. It requires punctilious avoidance of any expressions that could be interpreted as biased or intolerant. Working methods can be different in different cultures. International civil servants should not be wedded to the attitudes, working methods or work habits of their own country or region.

14. Freedom from discrimination is a basic human right. International civil servants are expected to respect the dignity, worth and equality of all people without

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any distinction whatsoever. Assumptions based on stereotypes must be assiduously avoided. One of the main tenets of the Charter is the equality of men and women, and organizations should therefore do their utmost to promote gender equality.

Working relations

15. Managers and supervisors are in positions of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect; they should be open to all views and opinions and make sure that the merits of staff are properly recognized. They need to provide support to them; this is particularly important when they are subject to criticism arising from the carrying out of their duties. Managers are also responsible for guiding and motivating their staff and promoting their development.

16. It is natural for managers to be seen as role models and they have therefore a special obligation to uphold the highest standards of conduct. It would be quite improper for them to solicit favours, gifts or loans from their staff; they must act impartially, without intimidation and favouritism. In matters relating to the appointment or career of others, no international civil servant should try to influence colleagues for personal reasons.

17. It is naturally incumbent on managers and supervisors to communicate effectively with their staff and share information with them. International civil servants have a reciprocal responsibility to provide all pertinent facts and information to their supervisors and to abide by and defend any decisions taken, even when these do not accord with their personal views.

18. International civil servants have to follow the instructions they receive in connection with their official functions and if they have doubts as to whether an instruction is consistent with the Charter or any other constitutional instrument, decisions of the governing bodies or administrative rules and regulations, they should first consult their supervisors. If they cannot agree, the international civil servant may ask for written instructions. These may be challenged through the proper institutional mechanisms, but any challenge should not delay carrying out the instruction. International civil servants may also record their views in official files. They should not follow verbal or written instructions that are manifestly inconsistent with their official functions or that threaten their safety or that of others.

19. It must be the duty of international civil servants to report any breach of the organization's rules and regulations to a higher level official, whose responsibility it is to take appropriate action. An international civil servant who makes such a report in good faith has the right to be protected against reprisals or sanctions.

Harassment

20. Harassment in any shape or form is an affront to human dignity and international civil servants must avoid it. They should not engage in any form of harassment and must be above any suspicion of it. International civil servants have the right to an environment free of harassment. It is the responsibility of

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organizations to explain their interpretation of the term and to establish rules and provide guidance on what constitutes harassment and how it will be dealt with.

Conflict of interest

21. It can happen that international civil servants are confronted with a question entailing a conflict of interest; such questions can be very sensitive and need to be treated with care. Conflict of interest includes circumstances in which international civil servants, directly or indirectly, would appear to benefit improperly, or allow a third party to benefit improperly, from their association in the management or the holding of a financial interest in an enterprise that engages in any business or transaction with the organization.

22. There can be no question but that international civil servants should avoid assisting private bodies or persons in their dealings with their organization where this might lead to actual or perceived preferential treatment. This is particularly important in procurement matters or when negotiating prospective employment. At times, international civil servants may be required to disclose certain personal assets if this is necessary to enable their organizations to make sure that there is no conflict. They should also voluntarily disclose in advance possible conflicts of interest that arise in the course of carrying out their duties. They should perform their official duties and conduct their private affairs in a manner that preserves and enhances public confidence in their own integrity and that of their organization.

Role of the secretariat

23. International organizations are constituted by member States, and their secretariats have the responsibility for providing services to them. The main function of the secretariat is to assist legislative bodies in their work and to carry out their decisions. The executive head is responsible for directing and controlling the work of the secretariat. Accordingly, when submitting proposals or advocating positions before a legislative body or committee, international civil servants are presenting the position of the executive head, not that of an individual or unit.

24. In providing services to a legislative or representative body, it goes without saying that international civil servants should serve only the interests of the organization. It would not be appropriate for international civil servants to prepare for government or other international civil service representatives any speeches, arguments or proposals on questions under discussion. It could, however, be quite appropriate to provide factual information, technical advice or assistance with such tasks as the preparation of draft resolutions.

25. It is entirely improper for international civil servants to lobby or seek support from government representatives or members of legislative organs to obtain advancement either for themselves or for others or to block or reverse unfavourable decisions regarding their status. By adhering to the Charter and the constitutions of the organizations of the United Nations system, Governments have undertaken to safeguard the independence of the international civil service; it is therefore understood that government representatives and members of legislative bodies will neither accede to such requests nor intervene in such matters. The proper method for

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an international civil servant to address such matters is through administrative channels; each organization is responsible for providing these.

Staff management relations

26. Relations between management and staff should be guided by mutual respect. Elected staff representatives have a cardinal role to play in the consideration of conditions of employment and work, as well as in all matters of staff welfare. Freedom of association is a fundamental human right and international civil servants have the right to form and join associations, unions or other groupings to promote and defend their interests. Continuing dialogue between staff and management is indispensable. Management should facilitate this dialogue.

27. Elected staff representatives enjoy rights that derive from their status; this may include the opportunity to address legislative organs of their organization. These rights should be exercised in a manner that is consistent with the Charter, the Universal Declaration of Human Rights and the international covenants on human rights and does not undermine the independence and integrity of the international civil service. In using the broad freedom of expression they enjoy, staff representatives must exercise a sense of responsibility and avoid undue criticism of the organization.

28. Staff representatives must be protected against discriminatory or prejudicial treatment based on their status or activities as staff representatives, both during their term of office and after it has ended.

Relations with member States and legislative bodies

29. It is the clear duty of all international civil servants to maintain the best possible relations with Governments and avoid any action which might impair this; they should certainly not interfere in the policies or affairs of Governments. It is unacceptable for them, either individually or collectively, to criticize or try to discredit a Government. At the same time, it is understood that international civil servants may speak freely in support of their organizations' policies. Any activity, direct or indirect, to undermine or overthrow a Government constitutes serious misconduct.

30. International civil servants are not representatives of their countries, nor do they have authority to act as liaison agents between international organizations and their Governments. The executive head may, however, request an international civil servant to undertake such duties, a unique role for which international loyalty and integrity are essential. For their part, neither Governments nor organizations should place international civil servants in a position where their international and national loyalties may conflict.

Relations with the public

31. For an international organization to function successfully, it must have the support of the public. All international civil servants therefore have a continuing responsibility to promote a better understanding of the objectives and work of their

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organizations. This requires them to be well informed of the achievements not only of their own organizations but of the United Nations system as a whole. The opportunity to provide information to the public can arise at any time.

32. There is a risk that on occasion international civil servants may be subject to criticism from outside their organizations; in keeping with their responsibility as international civil servants, they should respond with tact and restraint. They have the right to be defended by their organizations against criticism for actions taken in fulfilment of their duties and they should be confident that this will be done.

33. It would not be proper for international civil servants to air personal grievances or criticize their organizations in public. International civil servants should endeavour at all times to promote a positive image of the international civil service, in conformity with their oath of loyalty.

Relations with the media

34. Openness and transparency in relations with the media are effective means of communicating the organizations' messages, and the organizations should have guidelines and procedures for this purpose. Within that context, the following principles should apply: international civil servants should regard themselves as speaking in the name of their organizations and avoid personal references and views; in no circumstances should they use the media to further their own interests, to air their own grievances, to reveal unauthorized information or to attempt to influence policy decisions facing their organizations.

Use and protection of information

35. The disclosure of confidential information may seriously jeopardize the efficiency and credibility of an organization. International civil servants are responsible for exercising discretion in all matters of official business. They must not divulge confidential information without authorization. Nor should international civil servants use information that has not been made public and is known to them by virtue of their official position to private advantage. These are obligations that do not cease upon separation from service. It is necessary for organizations to maintain guidelines for the use and protection of confidential information, and it is equally necessary for such guidelines to keep pace with developments in communications technology. It is understood that these provisions do not affect established practices governing the exchange of information between the secretariats and member States, which ensure the fullest participation of member States in the life and work of the organizations.

Respect for different customs and culture

36. The world is home to a myriad of different peoples, languages, cultures, customs and traditions. It is self-evident that a genuine respect for them all is fundamental for an international civil servant. Any behaviour that is not acceptable in a particular cultural context must be avoided. However, if a tradition is directly contrary to any human rights instrument adopted by the United Nations system, the

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international civil servant must be guided by it. International civil servants should avoid an ostentatious lifestyle and any display of an inflated sense of personal importance.

Security and safety

37. While an executive head must remain free to assign staff in accordance with the exigencies of the service, it is the responsibility of organizations to make sure that the health, well-being and lives of their staff, without any discrimination whatsoever, will not be subject to undue risk. The organizations should take measures to protect their safety and that of their family members. On the other hand, it goes without saying that it is incumbent on international civil servants to comply with all instructions designed to protect their safety.

Personal conduct

38. The private life of international civil servants is their own concern and organizations should not intrude upon it. There can be situations, however, in which the behaviour of an international civil servant can reflect on the organization. International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organization. This can also result from the conduct of members of international civil servants' households and it is the responsibility of international civil servants to make sure that their households are fully aware of this.

39. The privileges and immunities that international civil servants enjoy are conferred upon them solely in the interests of the organizations. They do not exempt international civil servants from observing local laws, nor do they provide an excuse for ignoring private legal or financial obligations. It should be remembered that only the executive head is competent to waive the immunity accorded to international civil servants or to determine its scope.

40. Violations of law can range from serious criminal activities to trivial offences, and organizations may be called upon to exercise judgement in the light of the nature and circumstances of individual cases. A conviction by a national court will usually, although not always, be persuasive evidence of the act for which an international civil servant was prosecuted, and acts that are generally recognized as offences by national criminal laws will normally also be violations of the standards of conduct for the international civil service.

Outside employment and activities

41. The primary obligation of international civil servants is to devote their energies to the work of their organizations. It is therefore improper for international civil servants to engage, without prior authorization, in any outside activity, whether remunerated or not, that interferes with that obligation or is incompatible with their status or conflicts with the interests of the organization. Any questions about this should be referred to the executive head.

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42. Subject to the above, outside activities may, of course, be beneficial both to staff members and to their organizations. Organizations should allow, encourage and facilitate the participation of international civil servants in professional activities that foster contacts with private and public bodies and thus serve to maintain and enhance their professional and technical competencies.

43. International civil servants on leave, whether with or without pay, should bear in mind that they remain international civil servants in the employ of their organization and are still subject to its rules. They may, therefore, only accept employment, paid or unpaid, during their leave with proper authorization.

44. In view of the independence and impartiality that they must maintain, international civil servants, while retaining the right to vote, should not participate in political activities, such as standing for or holding local or national political office. This does not, however, preclude participation in local community or civic activities, provided that such participation is consistent with the oath of service in the United Nations system. It is necessary for international civil servants to exercise discretion in their support for a political party or campaign, and they should not accept or solicit funds, write articles or make public speeches or make statements to the press. These cases require the exercise of judgement and, where there is any doubt, should be referred to the executive head.

45. The significance of membership in a political party varies from country to country and it is difficult to formulate standards that will apply in all cases. In general, international civil servants may be members of a political party provided its prevailing views and the obligations imposed on its members are consistent with the oath of service in the United Nations system.

Gifts, honours and remuneration from outside sources

46. To protect the international civil service from any appearance of impropriety, international civil servants must not accept, without authorization from the executive head, any honour, decoration, gift, remuneration, favour or economic benefit of more than nominal value from any source external to their organizations; it is understood that this includes Governments as well as commercial firms and other entities.

47. It is not proper for international civil servants to accept supplementary payments or other subsidies from a Government or any other source prior to, during or after their assignment with an international organization if the payment is related to that assignment. Balancing this requirement, it is understood that Governments or other entities should not make or offer such payments, recognizing that they are at variance with the spirit of the Charter and the constitutions of the organizations of the United Nations system.

Conclusion

48. The attainment of the standards of conduct for the international civil service requires the highest commitment of all parties. International civil servants must be committed to the values, principles and standards set forth here. They are expected to take a positive and active approach in upholding them. They should feel

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responsible for contributing to the broad ideals to which they dedicated themselves in joining the United Nations system. International organizations have a particular responsibility to ensure that the necessary guidance or rules are adopted to implement these standards. For their part, member States are expected, through their allegiance to the Charter and other constituent instruments, to preserve the independence and impartiality of the international civil service.

49. For these standards to be effectively applied, it is essential that they be widely disseminated, and that measures be taken to ensure that their scope and importance are understood throughout the international civil service, the member States and the organizations of the United Nations system.

50. Respect for these standards assures that the international civil service will continue to be an effective instrument in fulfilling its responsibilities and in meeting the aspirations of the peoples of the world.

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Otto Triffterer

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-Observers' Notes, Article by Article-

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Article 25
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

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β) "For the purpose of facilitating"

This concept introduces a subjective threshold which goes beyond the ordinary *mens rea* requirement within the meaning of article 30[113]. The expression "for the purpose of facilitating" is borrowed from the Model Penal Code. While the necessity of this requirement was controversial within the American Law Institute, it is clear that purpose generally implies a specific subjective requirement stricter than mere knowledge[114]. The formula, therefore, ignores the – above quoted – jurisprudence of the ICTY and ICTR, since this jurisprudence holds that the aider and abetter must only know that his or her acts will assist the principal in the commission of an offence[115]. Additionally, knowledge may be inferred from all relevant circumstances[116], *i.e.*, it may be proven by circumstantial evidence[117]. 23

On the other hand, the word "facilitating" confirms that a direct and substantial assistance is not necessary and that the act of assistance need not be a *conditio sine qua non* of the crime[118].

In conclusion, the formulation confirms the general assessment that subparagraph (c) provides for a relatively low objective but relatively high subjective threshold (in any case higher than the ordinary *mens rea* requirement according to article 30)[119].

(d) "In any other way contributes" to the (attempted) commission ... "by a group ... acting with a common purpose"

The whole subparagraph (d) is an almost literal copy of a 1998 Anti-terrorism convention[120] and presents a compromise with earlier "conspiracy" provisions[121], which since Nuremberg have been controversial[122]. The 1991 ILC Draft Code held punishable an individual who "conspires 24

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113 See D. K. Piragoff, *article 30*, margin Nos. 9 *et seq.* and 17 *et seq.*; generally about the mental element in international criminal law, *c. f.* A. Eser, *Mental Elements – Mistake of Fact and Law*, in: A. Cassese *et al.* (eds.), THE ROME STATUTE OF THE ICC: A COMMENTARY 889 (2002); K. Ambos, *Some Preliminary Reflections on the Mens Rea Requirements of the Crimes of the ICC-Statute and of the Elements of Crimes*, in: L. C. Vohrah et al. (eds.), MAN'S INHUMANITY TO MAN – ESSAYS IN HONOUR OF A. CASSESE 12 *et seq.* (2003); *supra* note 2, *id.*, DER ALLGEMEINE TEIL 757 *et seq.*; *supra* note 2, O. Triffterer, *Bestandsaufnahme* 22 f.–4.

114 *Supra* note 17, Model Penal Code, § 2.06. Conc. *supra* note 6, A. Eser, *Responsibility* 801.

115 *Supra* note 81, *Prosecutor v. Tadic*, para. 692; *supra* note 72, *Prosecutor v. Delalic et al.*, paras. 326, 328; *supra* note 88, *Prosecutor v. Furundzija*, paras. 236–249 (236, 245–6, 249); *supra* note 19, *Prosecutor v. Krnojelac*, para. 90; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement, Appeals Chamber, 25 Feb. 2004, para. 102; *supra* note 98, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, para. 49; *supra* note 71, *Prosecutor v. Akayesu*, paras. 476–9; *supra* note 103, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, para. 388; *supra* note 103, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, para. 599.

116 *Supra* note 81, *Prosecutor v. Tadic*, para. 676; *supra* note 72, *Prosecutor v. Delalic et al.*, para. 328; *supra* note 71, *Prosecutor v. Akayesu*, para. 478; *supra* note 103, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, para. 600.

117 *C. f. supra* note 81, *Prosecutor v. Tadic*, para. 689: "if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing ..."; *supra* note 72, *Prosecutor v. Delalic et al.*, para. 386 with regard to command responsibility: "... such knowledge cannot be presumed but must be established by way of circumstantial evidence".

118 *Supra* note 88, *Prosecutor v. Furundzija*, para. 231.

119 Conc. *supra* note 6, A. Eser, *Responsibility* 801 with fn. 145.

120 International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164 (1998), Annex (37 I.L.M. 249 (1998)), article 2 para. 3 (c).

121 For example: Preparatory Committee Draft, article 23 para. 7 (c) (ii).

122 See, for example, V. Pella, *Mémorandum*, 2 Y.B.I.L.C. 278–362, 357 (1950); J. Graven, *Les Crimes contre l'Humanité*, RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 433–605, 502–503 (1950); H.-H. Jescheck, *Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Völkerstrafrecht*, 66 ZStW 193–217, 213 (1954); R. Rayfuse, *The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L.F. 52 (1997); *supra* note 27, A. Cassese, INTERNATIONAL CRIMINAL LAW 196 *et seq.* See also the statement of the German delegate O. Katholnigg at the Diplomatic Conference for the Adoption of the 1988 Drug Convention (United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988, Official Records, Vol. II, para. 52: "common law concept unknown in civil law systems"). The concept was, however, in principle recognized by the ILC Special Rapporteur D. Thiam (2 Y.B.I.L.C., Part 1, 16, para. 66 (1990)) and also exists today in civil law jurisdictions in a similar

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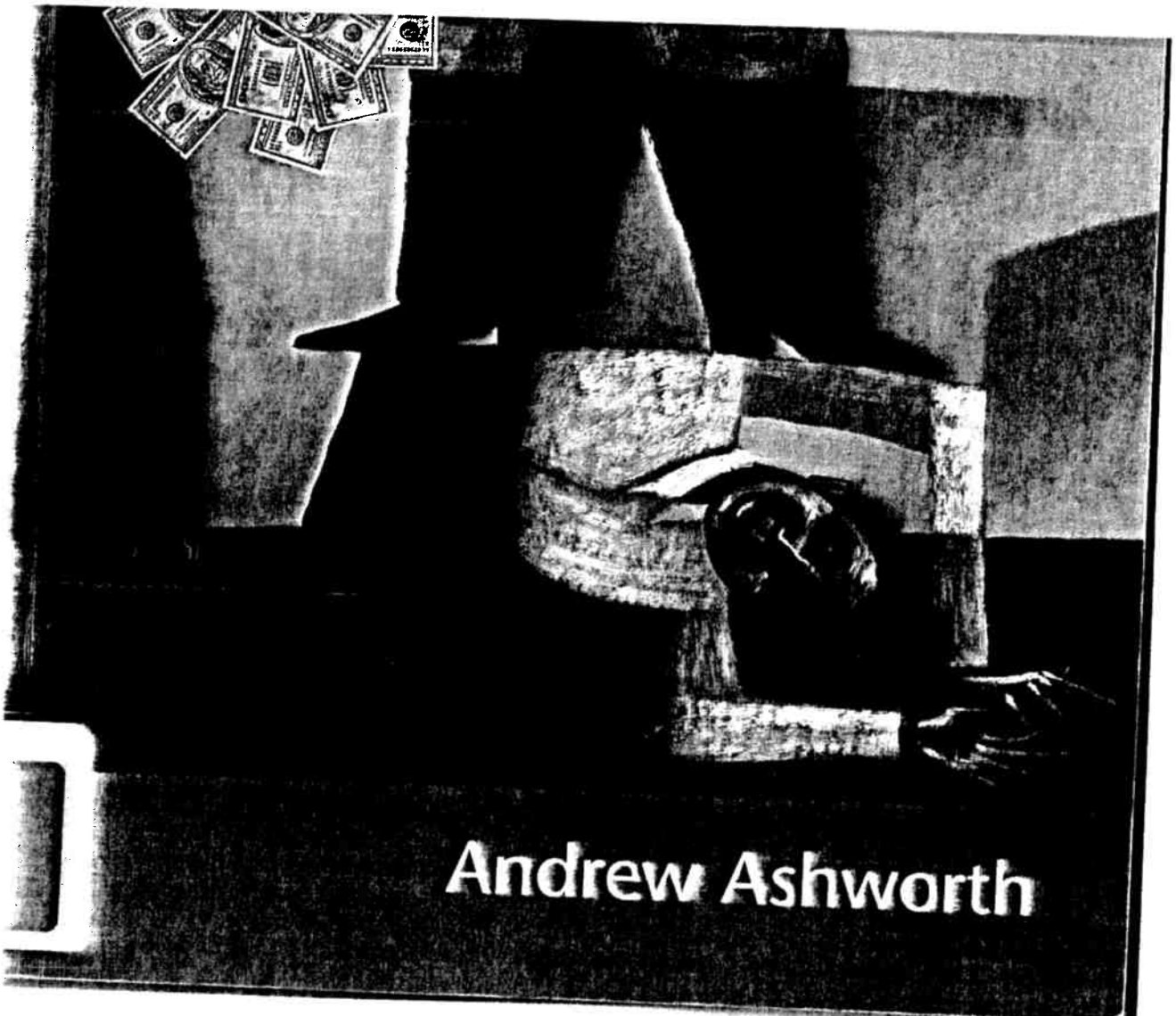

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10.3 THE CONDUCT ELEMENT IN COMPLICITY

We have seen that the 1861 Act refers to those who 'aid, abet, counsel or procure' a crime. As a matter of history, it seems that this Act was intended only to declare the procedure whereby accomplices could be convicted and sentenced as principals, and not to provide a definition of complicity. Earlier statutes had used a wide range of terms—contriving, helping, maintaining, directing—and the wording of the 1861 Act was probably intended merely as a general reference to the existing common law on accomplices. However, the words have taken on an authority of their own. In 1976 the Court of Appeal declared that each of the four verbs should be given its ordinary meaning,[18] but, as we shall see, there are several decisions on the scope of the four terms. One factor that formerly had considerable importance was presence during the commission of the crime. So long as the other conditions for liability were fulfilled, presence turned the accomplice into an aider or abettor, absence into a counsellor or counsellor, or procurer seems to depend partly on ordinary language and partly on specific judicial decisions.

(a) AIDING AND ABETTING

It has been traditional to consider the modes of complicity in terms of the two time-honoured pairings: 'aid or abet', and 'counsel or procure'. In fact, the concept of abetment seems to play no independent role now. Abetting involves some encouragement of the principal to commit the offence and this usually accompanies, or is implicit in, an act of aiding. Aid may be given by supplying an instrument to the principal, keeping a look-out, doing preparatory acts, and many other forms of assistance given before or at the time of the offence. The disappearance of the old requirement of presence may be illustrated by two cases. In *Bainbridge* (1959)[21] a man who provided equipment for use in a burglary was treated as a counsellor and procurer, because the burglary was to take place some days hence, whereas it would now be more natural to refer to him as an aider since he gave assistance by supplying the equipment. In *Attorney General* v *Able* (1984)[22] the discussion of D's criminal liability for supplying a booklet explaining various ways of committing suicide was conducted on the basis that this would be aiding and abetting, whereas in former times this would have been regarded as counselling, since the author of the book was not present at the suicides.

[18] *Attorney-General's Reference (No. 1 of 1975)* [1975] QB 773.
[19] See e.g. Lord Goddard CJ in *Ferguson* v *Weaving* [1951] 1 KB 814, and generally J. C. Smith, 'Aid, Abet, Counsel or Procure', in P. R. Glazebrook (ed.) *Reshaping the Criminal Law* (1978).
[20] *Howe* [1987] AC 417, overruling *Richards* [1974] QB 776.
[21] [1960] 1 QB 129.
[22] [1984] 1 QB 795.

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Once it has been shown that the accomplice's conduct helped or might have helped the principal in some way, it does not have to be established that the accomplice caused the principal's offence. Causation requirements often function so as to fix the threshold of legal liability. However, one cannot, in general, trace causal responsibility through the voluntary act of another person[24]—so it will not usually be possible to hold that an accomplice *caused* the principal to act, save in a rather diluted form of 'causing'.[25] Sanford Kadish has argued that the law does require a form of causation: the courts must be satisfied that the accomplice's help *might* have made a difference to whether the principal's offence was actually committed, in the sense that one could not be sure that it would have been committed but for the accomplice's assistance.[26] However, it is not easy to reconcile all decisions with this approach. Thus in *Wilcox* v *Jeffery* (1951) a jazz enthusiast attended a concert, applauding the decision of an American jazz musician to give an illegal performance. No point was taken in court about whether the musician was actually encouraged by the defendant's acts.[27] Indeed, in cases where several people applaud or encourage

Giannetto[24] the Court of Appeal stated that 'any involvement from mere encouragement upwards would suffice', and did not dissent from the trial judge's suggestion that, if another man had said to D that he was about to kill D's wife, 'as little as patting him on the back, nodding, saying "Oh goody" ' would be sufficient to turn D into an aider and abettor. Since this example involves a principal who has already decided to commit the offence, the accomplice's contribution can hardly be said to make a causal difference.

Another type of situation occurs where the principal is unaware of the help given by the secondary party. In the famous American case of *State* v *Tally* (1894),[28] Judge Tally, knowing that his brothers-in-law had set out to kill the deceased, and knowing that someone else had sent a telegram to warn the victim, sent a telegram to the telegraph operator telling him not to deliver the warning telegram. The telegraph operator complied, and the brothers-in-law committed the offence. The judge was convicted of aiding and abetting murder, even though the brothers-in-law were unaware of the judge's assistance when they killed the victim. It could be said that there was a causal connection in this case, but surely it should have been enough that the judge's act was more than minimal and he intended to aid. The law might deal more satisfactorily with these cases if it included a general offence of assisting or encouraging crime, discussed in section 10.8 below.

[24] See above, Ch 4.6(a) and (b).
[25] Cf. H. L. A. Hart and T. Honoré, *Causation in the Law* (2nd edn., 1985), 388.
[26] S. Kadish, *Blame and Punishment* (1987), 162. [27] [1951] 1 All ER 464.
[24] [1997] 1 Cr App R 1, at 13. [28] *State* v *Tally* (1894) 15 So 722.

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(b) ACCOMPLICE LIABILITY AND SOCIAL DUTIES

We saw in Chapter 4.4 how accomplice liability has been used in English law to establish criminal liability for certain omissions, and the relevant authorities must now be considered in the context of complicity. The cases raise issues of constitutional and social importance, but the key question in accessorial liability is simple to state: can a person be convicted as an accomplice merely for standing by and doing nothing while an offence is being committed?

If mere presence at the scene during the principal's offence were sufficient for accomplice liability, this would amount to recognizing a citizen's duty either to leave straight away or to take reasonable steps to prevent or frustrate any offence which is witnessed. The courts have held that non-accidental presence, such as attending a fight or an unlawful theatrical performance, is not conclusive evidence of aiding and abetting.[29] At a minimum there must be an act of encouragement (accompanied by an intention to encourage, discussed in section 10.4 below). Some judgments suggest

the jury or magistrates. The finding of an act of encouragement may require more than going to the place where the performance is taking place, but payment and applause may suffice;[31] however, in one case it was held that remaining in a vehicle that was being used to obstruct the police, in circumstances showing that D supported the actions of the driver, might amount to aiding.[32] The position of spectators who happen upon an illegal fight or event and stay to watch it is similar: simply sitting or standing nearby is unlikely to be sufficient for liability, but any cheering or applause would probably tip the balance in favour of conviction. The problems are particularly acute in cases of public disorder. To impose duties on bystanders, even the duty to move away, might be regarded as an incursion on a citizen's right to freedom of assembly (declared in Article 11 of the European Convention). What must be proved, to amount to aiding and abetting one of the offences in the Public Order Act, is that D was present, was giving encouragement, and was intending to encourage others to commit the specified offence.[33] Mere presence should not be sufficient, particularly in view of Article 11.

Are there arguments in favour of the law going further and imposing a duty to take steps to prevent crime? The public disorder example may be complicated by the impotence of individuals to do anything to stop the disturbance and, indeed, the imprudence of their trying to do so. But is it not arguable that there should be at least a duty to alert the police? If so, should failure to do so constitute a distinct

[29] *Coney* (1882) 8 QBD 534. [30] Hawkins J in ibid., and *Clarkson* [1971] 1 WLR 1402.
[31] *Wilcox* v *Jeffery* [1951] 1 All ER 464.
[32] *Smith* v *Reynolds et al.* [1986] Crim LR 559; for another decision based on voluntary presence, see *O'Flaherty* [2004] Crim LR 751.
[33] *Jefferson et al.* (1994) 99 Cr App R 13, at 22; for a summary of the main public order offences, see Ch 8.3(h) above.

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offence (as in French law[34]) or complicity in the public disorder? Another example, which does not involve public disorder, occurs where a woman is living with a man who she discovers is dealing in drugs. If the police raid the dwelling and find drugs on the premises, should the law treat her as an accomplice even if there is no evidence of active assistance or encouragement of the drug-dealing? In the case of *Bland* (1988)[35] the Court of Appeal quashed the woman's conviction as an accomplice. Cases such as this demonstrate a vivid conflict between individuals' rights of privacy in their personal relationships and the social interest in suppressing serious crime. Would it be right for the law to co-opt husbands against wives, parents against children, house-sharing friends against friends in order to increase public protection?[36]

Probably the only way to answer this question is to balance the relative centrality of the right against the seriousness of the offence involved—not a simple exercise, but an inevitable one if the true nature of the problem is to be confronted. The same applies to the situation in *Clarkson* (1971):[37] two soldiers happened to enter a room where other soldiers were raping a woman. It was not found that they did anything other

because the judge had not made it clear that there should be proof of both an intent to encourage and actual encouragement. Nothing was said about a duty to alert the authorities immediately in the hope of preventing the crime's continuance. What if three persons came upon one man raping a woman? If it was within their power to put a stop to the offence and to apprehend the offender, should they have a duty to do so—or at least a duty to inform the police? The practical possibilities will vary from case to case, but the real issue is whether there is to be a principle that citizens ought to take reasonable steps to inform the police when they witness an offence. The decision in *Allan* (1965)[38] is against this, emphasizing the requirement of encouragement and adding that, even if D would have joined in if necessary, it would be unacceptable 'to convict a man on his thoughts, unaccompanied by any physical act other than the facts of mere presence'. However, variations in the facts of cases could be accommodated by requiring the citizen only to take 'reasonable steps',[39] and no law should require a person to place his or her own safety in jeopardy. Even if this were accepted, there would remain the question whether it is fairer to convict the defaulting citizen of a new offence of failing to inform the police rather than making the citizen into an accomplice to the principal crime. The former is surely more appropriate in terms of fair labelling.

[34] Art. 223(1) of the French Penal Code, discussed by A. Ashworth and E. Steiner, 'Criminal Omissions and Public Duties: the French Experience' (1990) 10 Legal Studies 153.

[35] [1988] Crim LR 41; cf. also *Bradbury* [1996] Crim LR 808.

[36] Cf. s. 80 of the Police and Criminal Evidence Act 1984, which makes a husband or wife (but not a non-spouse) compellable as a witness on a charge of violence towards a child under 16 in the household.

[37] [1971] 1 WLR 1402.

[38] [1965] 1 QB 130; see further G. Williams, 'Criminal Omissions—the Conventional View' (1990) 107 LQR 86.

[39] See n 34 above.

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Can a person be said to aid an offence by an omission?[40] There would surely be no awkwardness in describing the cleaner of a bank who, in pursuance of an agreed plan, purposely omits to lock the doors when leaving as 'aiding' a burglary of the bank. In such a case, there is a clear duty and a failure to perform it, and the causation question is answered (in so far as it is relevant to aiding) in the same way as for omissions generally.[41] Another example would be the driving instructor who is supervising a learner driver and who realizes that the learner is about to undertake a manœuvre which is dangerous to other road-users: if, as in *Rubie* v *Faulkner* (1940),[42] the instructor fails to intervene, either by telling the learner not to do it or by physically acting to prevent it, then this failure in the duty of supervision is rightly held to be sufficient to support liability for aiding and abetting the learner driver's offence.

From these cases of duty we turn to cases of legal power, and the so-called 'control principle'. The owner of a car who is a passenger when the car is being driven by another has the legal power to direct this other person not to drive in certain ways;[43] the licensee of a public house has the legal power to require customers to

the courts have held the car owner and the licensee liable as accomplices to the crime of the offender who drives carelessly or remains drinking after hours. What is unusual about these cases is that they rest on the legal *power* of control of, respectively, the car owner and the licensee and not, like *Rubie* v *Faulkner* above, on the existence of a legal *duty* to ensure compliance with the law. A similar analysis is found in *J.F. Alford Transport Ltd* (1997),[45] where the company's convictions for aiding and abetting drivers to falsify their tachograph records were quashed. If the prosecution had proved the power of control, knowledge, and encouragement by non-intervention, that would have been sufficient. But this case, unlike the previous two, did not involve D's presence during the commission of the offences; and knowledge, or wilful blindness, was held not to have been established. However, the control principle was reasserted, and that principle departs from the usual approach of not imposing liability for an omission unless a clear duty exists.[46] What the courts have done, in effect, is to assimilate these cases of 'power of control' to cases of duty, thereby creating a new class of public duty.[47] Even though English law does not impose liability for failing to take reasonable steps to prevent an offence which occurs in the street, these cases hold that a property owner will be liable for failing to take

[40] K. J. M. Smith, *Modern Treatise on Complicity*, 39–47. [41] See above, Ch 4.6(c).

[42] [1940] 1 KB 571, discussed by M. Wasik, 'A Learner's Careless Driving' [1982] Crim LR 411, and D. J. Lanham, 'Drivers, Control and Accomplices' [1982] Crim LR 419.

[43] *Du Cros* v *Lambourne* [1907] 1 KB 40. [44] *Tuck* v *Robson* [1970] 1 WLR 741.

[45] [1997] 2 Cr App R 326.

[46] The Law Commission's view was that the breach of duty must also have actually amounted to assistance or encouragement (Law Commission Consultation Paper No. 131, *Assisting and Encouraging Crime* (1993), para. 2.29), but the decisions seem to regard this requirement as easily fulfilled.

[47] Cf. the debate between G. Williams, 'Which of You Did It?' (1989) 52 MLR 179 and D. J. Lanham, 'Three Cases of Accessorial Absurdity' (1990) 53 MLR 75.

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reasonable steps to prevent an offence which occurs on or with that property (and with the owner's knowledge). The law has, in effect, co-opted property owners as law-enforcement agents in respect of their own property, and *J.E. Alford Transport* provides for employers to be co-opted in respect of their employees' conduct at work.

Does it amount to aiding if a shopkeeper sells an item to P knowing that P intends to use it in a crime, or if a borrower returns an article to its owner knowing that the owner intends to use it in crime? These could be said to be acts of assistance, in the sense that the physical conduct of selling or returning goods helps an offender: should they, if accompanied by the required mental element, amount to aiding the principal? The problem is that both acts are 'normal': the shopkeeper is simply selling goods in the normal course of business, and the borrower is merely fulfilling a duty to restore the goods to their owner. If the law were to regard either of these acts as 'aiding', it would be requiring the defendants to do something abnormal in the circumstances, and—in effect—punishing them for the omission to do the abnormal thing.

another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider or abettor'.[48] This view criminalizes the shopkeeper as an accomplice in every case where the customer's intention to commit that kind of offence is known. Criminal liability might be justified by arguing that a small sacrifice is properly required of shopkeepers in order to benefit the potential victims of crime. Surely, where an offence against the person is a possibility, it is right to place the potential victim's right not to be subjected to assault or injury above the shopkeeper's liberty to sell to all-comers. After all, the shopkeeper is not being required to intervene or even to notify the police of the customer's intentions. The requirement is not to sell goods when the customer is known to be bent on crime.

Despite the decision in *Gillick* v *West Norfolk and Wisbech Area Health Authority* (1986),[49] the statement in *NCB* v *Gamble* that selling goods in the ordinary course of business can satisfy the conduct element of 'aiding' remains good law. But, as we will see in section 10.4 below, there is also support for a second approach, long upheld in many American jurisdictions, namely, that a shopkeeper should be liable as an accomplice only where it was his or her *purpose* to further the customer's offence.[50] This stresses the notions of free trade and individual autonomy, treating the shopkeeper as a mere trader rather than as a fellow citizen's keeper. A third approach would not involve the law of complicity, but would treat the shopkeeper's liability as a matter of general criminal law—either by creating a special offence of selling goods

[48] *NCB* v *Gamble* [1959] 1 QB 11.

[49] *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112, criticized in Ch 4.9(b) and Ch 5.2(b)(ii) above, and discussed in detail at pp. 424–5 below.

[50] Model Penal Code, s. 2.06(3); see also the reasoning of Glanville Williams, *Criminal Law: the General Part* (2nd edn., 1961), sect. 124.

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which are likely to be used in the commission of crime (of which there are some examples now, such as the sale of knives) or through a general offence of facilitating crime.

Is there a material difference where someone who has borrowed goods is asked by the owner to return them so that they may be used for a crime? In *NCB* v *Gamble* it was held by Devlin J that returning goods in these circumstances is a 'negative act' rather than a 'positive act': 'a man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detinue'.[51] To invent a distinction between 'positive' and 'negative' acts in order to exempt a borrower who returns goods is unconvincing. In one sense the case is weaker than that of the shopkeeper, since the borrower has a duty to return goods to their owner, whereas a shopkeeper has no duty to sell; but in another sense it is just as strong, since a court would be reluctant to find the borrower liable in tort for failing to return goods in such circumstances, and would be more likely to recognize a defence based on the prevention of crime. Devlin J's analysis, despite the fragility of

gun which is then to be used for killing someone. The potential victim's rights must count for more than the borrower's duty to return goods to their owner. Rather than concealing these conflicts behind Devlin J's unconvincing analysis, a preferable course would be either to allow a defence of 'balance of evils' to any apparently criminal complicity,[52] or to state that D should not be liable for returning property to its owner unless D shares the owner's criminal purpose or unless a crime of violence is known to be in contemplation.[53]

(c) COUNSELLING AND PROCURING

The characteristic contribution of the counsellor or procurer is to incite, instigate, or advise on the commission of the substantive offence by the principal. One way of expressing this is to describe the role as 'encouraging' the perpetrator. Some European legal systems provide a higher maximum penalty for an accomplice who incites or instigates than for a mere helper, and a general justification for this can readily be found. No offence might have taken place at all but for the instigation, and this is surely more reprehensible than assisting someone who has already decided to commit a crime. In practice, however, there are many shades of culpability between helpers and instigators, a point which strikes the English lawyer more forcefully because of the uncertain limits of the terms 'counselling' and 'procuring'. The ordinary meaning of 'counselling' may fall well short of inciting or instigating an offence, and covers such

[51] [1959] 1 QB 11, at 20, discussing *Lomas* (1913) 9 Cr App R 220. [52] See above, Ch 4.8.
[53] G. Williams, 'Obedience to Law as a Crime' (1990) 53 MLR 445; an alternative advanced by G. R. Sullivan, 'The Law Commission Consultation Paper on Complicity: Fault Elements and Joint Enterprise' [1994] Crim LR 252, is to exempt crimes triable only on indictment.

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INTERNATIONAL AND COMPARATIVE CRIMINAL LAW SERIES

VOLUME 2

THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: An Article-by-Article Evolution of the Statute

M. CHERIF BASSIOUNI

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[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.][166]

ZUTPHEN DRAFT

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Article 16[A *bis*][167]

Non-retroactivity

1. Provided that this Statute is applicable in accordance with article 15[A], a person shall not be criminally responsible under this Statute for conduct committed prior to its entry into force.

[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.][168]

~~*Other proposals that may also relate to, inter alia, issues concerning trigger mechanism and other jurisdictional questions respectively, and which will be debated by the Preparatory Committee at a later session*~~

~~[When a State becomes a party to this Statute after its entry into force, the Court has jurisdiction only in respect of acts committed by its nationals or on its territory or against its nationals after the deposit by that State of its instrument of ratification or accession. A non-party State may, however, by an express declaration deposited with the Registrar of the Court, agree that the Court has jurisdiction in respect of the acts that it specifies in the declaration.~~

~~The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]~~

~~[The present Statute shall apply only to acts committed in the territory of a State party to the present Statute or by the nationals of a State party to the present Statute or against the nationals of a State party to the present Statute.]~~

N.B.: Other proposals under paragraph 2 could be deleted because the issues with which they dealt are covered under articles 7[21 bis] (Preconditions to the exercise of jurisdiction), 8[21 ter] (Temporal jurisdiction) and 9[22] (Acceptance of the jurisdiction of the Court).

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[166] This provision raises issues relating to non-retroactivity, amendment of the Statute and penalties. Accordingly, further consideration of this issue is required.

[167] Ibid., pp. 19-20.

[168] This provision raises issues relating to non-retroactivity, amendment of the statute and penalties. Accordingly, further consideration of this issue is required.

DECISIONS TAKEN BY THE PREPARATORY COMMITTEE AT ITS SESSION HELD 11 TO 21 FEBRUARY 1997

Article A *bis*

Non-retroactivity

1. Provided that this Statute is applicable in accordance with article A, a person shall not be criminally responsible under this Statute for conduct committed prior to its entry into force.

[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.]

Other proposals that may also relate to, inter alia, issues concerning trigger mechanism and other jurisdictional questions respectively, and which will be debated by the Preparatory Committee at a later session

[When a State becomes a party to this Statute after its entry into force, the Court has jurisdiction only in respect of acts committed by its nationals or on its territory or against its nationals after the deposit by that State of its instrument of ratification or accession. A non-party State may, however, by an express declaration deposited with the Registrar of the Court, agree that the Court has jurisdiction in respect of the acts that it specifies in the declaration.

The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]

[The present Statute shall apply only to acts committed in the territory of a State party to the present Statute or by the nationals of a State party to the present Statute or against the nationals of a State party to the present Statute.]

AD HOC COMMITTEE

28. Some delegations favoured the inclusion of a provision on the non-retroactivity of the statute, bearing in mind article 28 of the 1969 Vienna Convention on the Law of Treaties.

ARTICLE 25
INDIVIDUAL CRIMINAL RESPONSIBILITY

ROME STATUTE

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

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2. A person who comtnits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Text Transmitted by Drafting Committee to Committee of the Whole

Article 23

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.
Such contribution shall be intentional and shall either:

(i.) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii.) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

1998 Preparatory Committee

Article 23

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.
2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.][169]

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

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[169] This proposal deals mainly with the limits of civil liability and should be further discussed in connection with penalties, forfeiture and compensation to victims of crimes.

[5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.][172]

NB: In the context of paragraphs 5 and 6, see also articles 76 (Penalties applicable to legal persons) and 99 (Enforcement of fines and forfeiture measures).

7. [Subject to the provisions of articles 25, 28 and 29,] a person is criminally responsible and liable for punishment for a crime defined [in article 5] [in this Statute] if that person:

(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 25;]

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;[173]

(e) either:

(i) [Intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) Agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of

[172] There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.

[173] It was pointed out that the commentary to the ILC Draft Code of Crimes against the Peace and Security of Mankind (Official Records of the General Assembly Fifty-first Session, Supplement No. 10 and corrigendum (A/51/10 and Corr.1, p. 24, para. (12))) implicitly also includes aiding, abetting or assisting ex post facto. This presumption was questioned in the context of the International Criminal Court if aiding, etc., ex post facto were deemed necessary to be criminalized, an explicit provision would be needed.

these persons that manifests their intent [and such a crime in fact occurs or is attempted];][172] [173]

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g)[174] [with the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions.[175]

*NB: This article should be re-examined as to the references to the mental element in view of article 29 (*Mens rea *(mental elements)).*

[Article 28

Actus reus (act and/or omission)

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

(a) the omission is specified in the definition of the crime under this Statute; or

(b) in the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.]]

[172] In addition to the two types of conduct described in paragraph (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who "participates in an organization which aints at the realization of such a crime by engaging in an activity that furthers or promotes that realization".

[173] The inclusion of this subparagraph gave rise to divergent views.

[174] Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.

[175] A view was expressed that it would be preferable that issues connected with attempt betaken up in a separate article rather than in the framework of individual responsibility. In that view, the article on individual responsibility should only refer to the way in which the person takes part in the commission of a crime, regardless of whether it deals with a completed crime or an attempted crime.

ZUTPHEN DRAFT

Article 17[B a.to d.][176]

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.][177]

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.][178]

N.B.: In the context of paragraphs 5 and 6, see also articles 69[47 bis] (Penalties applicable to legal persons) and 88[59 ter] (Enforcement of fines and forfeiture measures)

7. [Subject to the provisions of articles 19[C], 22[G] and 23[H],] a person is criminally responsible and liable for punishment for a crime defined [in article 5[20]] [in this Statute] if that person:

(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 19[C];]

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[176] A/AC.249/1997/L.5, pp. 20-22.

[177] This proposal deals mainly with the limits of civil liability and should be further discussed in connection with penalties, forfeiture and compensation to victims of crimes.

[178] There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;[179]

(e) either:

(i) [intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];[180]][181]

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g)[182] [with the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions.[183]

N.B.: This article should be reexamined as to the references to the mental element in view of article 23[H] (Mens rea (mental elements)).

DECISIONS TAKEN BY THE PREPARATORY COMMITTEE AT ITS SESSION HELD 11 TO 21 FEBRUARY 1997

Article B a.

Individual criminal responsibility

a. *Personal jurisdiction*

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.

---

[179] It was pointed out that the commentary to the ILC Draft Code of Crimes (A/51/10, p. 24, para. (12)) implicitly also includes aiding, abetting or assisting *ex post facto*. This presumption was questioned in the context of the ICC. If aiding, etc., *ex post facto* were deemed necessary to be criminalized, an explicit provision would be needed.

[180] In addition to the two types of conduct described in para. (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization".

[181] The inclusion of this subparagraph gave rise to divergent views.

[182] Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.

[183] Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.]

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5. The Court shall also have jurisdiction over juridical persons, with the exception of States, when the crimes committed were committed on behalf of such juridical persons or by their agencies or representatives.

6. The criminal responsibility of juridical persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.]

Article B b., c. and d.

Individual criminal responsibility

[Subject to the provisions of articles C, G and H,] a person is criminally responsible and liable for punishment for a crime defined [in article 20] [in this Statute] if that person:

[(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article __ [referring to command/superior responsibility];]

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;

[(e) either:

(i) [intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];]

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g) [with the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions.

Article G

Actus reus (act and/or omission)

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

(a) The omission is specified in the definition of the crime under this Statute; or

(b) In the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute[184] to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].[185]

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.][186][187]

1996 Preparatory Committee

Article B

Individual criminal responsibility

a. *Personal jurisdiction*

Proposal 1

1. The International Tribunal shall have jurisdiction over [natural] persons pursuant to the provisions of the present statute.

2. A person who commits a crime under this statute is individually responsible and liable for punishment.

[2 *bis*. Criminal responsibility is individual and cannot go beyond the person and his/her possessions.]

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[184] Some delegations questioned whether the source of this obligation is wider than the Statute.

[185] Some delegations had concerns about including this clause which referred to the creation of a risk. Other delegations thought that, in the context of the offences of the Statute, breach of an obligation under the Statute to avoid the result of a crime was sufficient.

[186] Some delegations thought that a provision on causation was not necessary.

[187] These brackets reflect the view expressed that, although much progress has been made on thedefinition of omission, the question of whether omission should be inserted in the Statute depends upon the final drafting of this article.

3. The fact that the present Statute provides criminal responsibility for individuals does not [prejudice] [affect] the responsibility of States under international law.

Proposal 2

Physical persons and juridical persons

1. The Court shall be competent to take cognizance of the criminal responsibility of:

(a) Physical persons;

(b) Juridical persons, with the exception of States, when the crimes committed were committed on behalf of such juridical persons or by their agencies or representatives.

2. The criminal responsibility of juridical persons shall not exclude the criminal responsibility of physical persons who are perpetrators of or accomplices in the same crimes.

3. These provisions shall be without prejudice to the responsibility of States with respect to international law.

Note

Some delegations indicated that the expression "juridical persons" should extend to organizations lacking a legal status.

Some delegations expressed doubts about including the criminal responsibility of juridical persons into the Statute.

It was proposed as an alternative the possibility of referring to the "responsibility" of the juridical persons without including the word "criminal".

b. *Principle of criminal responsibility Criminal responsibility of principals*

1. A person is criminally responsible as a principal and is liable for punishment for a crime under this Statute if the person, with the mental element required for the crime:

(a) Commits the conduct specified in the description (definition) of the crime;

(b) Causes the consequences, if any, specified in that description (definition); and

(c) Does so in the circumstances, if any, specified in that description (definition).

2. Where two or more persons jointly commit a crime under this Statute with a common intent to commit such crime, each person shall be criminally responsible and liable to be punished as a principal.

[3. A person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of fact or otherwise acting without *mens rea*.]

[*Note*. This article establishes the general principle regarding the liability of principal perpetrators of a crime. Further elaboration of the elements of this general principle, such as "mental element", "conduct" and causation, are elaborated in articles G and H

Other persons who participate in the commission of a crime under this Statute would be criminally responsible and liable for punishment in the manner provided in articles B (c), I and J [and C] of this draft general part.

A question was raised whether this article is required, and whether it would be sufficient merely to state that a person who commits a crime under the Statute is criminally responsible and liable for punishment? On the other hand, it was noted that specificity of the essential elements of the principle of criminal responsibility was important; it serves as a foundation for *many* of the other subsequent principles and avoids the need to elaborate defences within the Statute that merely constitute negations of the existence of essential mental or physical elements.

It was noted that the choice of using the word "description" or "definition" was dependent upon answering the question whether the definition of crimes would be solely within the Statute (in which case the term "definition" would be appropriate) or whether further elaboration of the elements of the definition of a crime in the Statute might be contained in an annex (in which case the term "description" might be appropriate given that this term could encompass both the statutory definition and the annexed elaboration of elements)].

c. *Participation/Complicity*

Proposal 1

Responsibility of other persons in the completed crimes of principals

[1. A person who [plans,] aids, abets or solicits the commission of a crime under this Statute is criminally responsible and liable for punishment in accordance with that person's own individual responsibility apart from the responsibility of other participants.]

[2. A person who plans the commission of a crime under this Statute, which is committed by that person or another person, is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a person who commits such crime as a principal].]

[3. A person may only be criminally responsible for planning the commission of a crime where so provided in this Statute.]

[4. A person solicits the commission of a crime if, with the purpose of encouraging another person [making another person decide] to commit [or participate in the commission of] a specific crime, the person commands, [orders], requests, counsels or incites the *other* person to engage [or participate] in the commission of such crime, and the other person commits a crime [or is otherwise criminally responsible for such crime] as a result of such solicitation.

5. A person who solicits the commission of a crime is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a *person* who commits such crime as a principal].

6. A person aids or abets the commission of a crime if the person does anything for the purpose of facilitating the commission of such crime by another person.

7. A person who aids or abets the commission of a crime is criminally responsible and liable for punishment {shall be liable to [a reduced punishment] [to the same punishment as provided in this Statute for a person who commits such crime as a principal]}.

[*Note.* The importance of being able to punish the planners was recognized. Under this article, planners are punishable only if a principal actually committed a crime as a result of such planning or soliciting. An alternative way of addressing the situation of planners is through the concept of "conspiracy"; see article J and notes relating to "conspiracy", below.

It was questioned whether paragraph 1 was redundant and should be deleted in light of the specific paragraphs that followed, which describe in greater detail the forms of participation, responsibility and liability for punishment.

A question was raised whether a person who solicits another person to commit a crime should be responsible and liable not only if the other person commits the crime that was solicited but also for any other crime that the other person committed which the solicitor foresaw (or reasonably could foresee) would be committed as a result of the solicitation.

A question raised by the draft proposals is whether a person should be liable as a solicitor only if the person solicits another to be a principal perpetrator or whether the person should also be liable for soliciting another person to participate in its commission as an aider and abettor (i.e. "otherwise criminally responsible").

It was questioned whether the Statute (in a new and separate article?) should also criminalize and punish a person in the situation where that person solicits another person to commit or criminally participate in a crime, but the other person does not commit the crime.

It was also questioned whether the Statute (in a new and separate article?) should also criminalize and punish persons who aid and abet another person after the commission of a crime; (e.g. aiding a person to escape detection or arrest, or destroying or concealing evidence).

It was suggested that provisions concerning the quantum of sentence should not be included in the General Part, but be located elsewhere in the Statute.]

Proposal 2

Criminal solicitation

1. A person is guilty of criminal solicitation, if, with the purpose of making another person decide to commit an offence, he/she commands, encourages or requests another person to engage in specific criminal conduct, when such person did criminal conduct according to such solicitation.

2. The punishment of criminal solicitation shall be the same as that of principals which is provided for in this Statute.

Accessories

1. A person is guilty of accessories if he/she did a conduct that facilitates the commission of an offence.

2. The punishment of accessories shall be reduced.

Proposal 3

Perpetrator and accomplice

1. An accomplice in a crime shall be punished as the perpetrator.

2. An accomplice is a person who knowingly, through aid or assistance, facilitates the preparation or commission of a crime.

3. An accomplice is also a person who knowingly, by whatever means, plans, incites the commission, orders or assists and encourages the planning, preparation or commission of a crime.

d. *Combined proposal covering both: (b) principle of criminal responsibility and (c) participation/complicity*

1. The following shall be considered perpetrators or participants of the crimes defined in the present Statute:

(a) Those who agree or prepare its perpetration;
(b) Those who commit such crimes;
(c) Those who jointly commit such crimes;
(d) Those who commit such crimes by means of a third person;
(e) Those who order intentionally a third person to perpetrate such crimes;
(f) Those who assist intentionally others in the perpetration of such crimes;
(g) Those who intervene without prior agreement with other persons in the perpetration of such crimes, when it is not possible to determine the result that each one produced.

2. The persons mentioned above will be liable in proportion to their responsibility.

ARTICLE 26
EXCLUSION OF JURISDICTION OVER PERSONS UNDER EIGHTEEN

ROME STATUTE

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

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PERPETRATION AND OTHER MODALITIES OF CRIMINAL CONDUCT

9.1 GENERAL

As in any national legal system, also in international criminal law responsibility arises not only when a person materially commits a crime but also when he or she engages in other forms or modalities of criminal conduct. In the following paragraphs I shall set out these different modalities of participation.

Before I do so, it may however prove fitting briefly to discuss the position in national legal systems. They converge in holding that, where a crime involves more than one person, all performing the same act, all are equally liable as co-perpetrators, or principals. In contrast, national legal orders differ when it comes to the punishment of two or more persons participating in a crime, where these persons do not perform the same act but in one way or another contribute to the realization of a criminal design. Many systems (for instance those of the United States, France, Austria, Italy, Uruguay, Australia) do not provide for different categories of participants, and consequently do not attach different penalties to each of the classes (principals or accessories) under which a person may eventually fall. They provide that each participant, whatever his degree of participation, must be considered as a principal; consequently the same penalty may be meted out to each of them. As the California Penal Code provides at §31, all those 'concerned in the commission of a crime' including those who aid and abet the crime, are to be held liable as principals. Nonetheless, a distinction is often drawn between three categories of participation: perpetration, on the one side, and two categories of accomplice liability, on the other, namely instigation (*complicité par instigation*) and aiding and abetting (*complicité par aide et assistance*). This distinction is based on the difference in *actus reus* and *mens rea* for each class (see below). In spite of the difference in such objective and subjective elements, the law does not however attach to each of these categories *different consequences* as far as penalties are concerned; or, at least, under the general sentencing tariff no distinction is made. It is only provided that for accomplices or accessories extenuating circumstances may be taken into account if their participation in the offence is less serious than that of the principal or principals. In fact, for the purposes

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of sentencing, judges often draw a distinction between principals, instigators, and aiders and abettors.

In other national legal systems (for instance, Germany and Russia) the law draws instead a *normative* distinction between two categories, principals, and accomplices or accessories, and provides in terms that the persons falling under the latter category must be punished less severely. Thus, for instance, in German law, the scale of penalties for accomplices (at least in the case of aiders and abettors, *Gehilfe*) is less harsh than for the perpetrator (*Täter*).[1]

We will see that in international law neither treaties nor case law (as indicative of customary rules) make any legal distinction between the various categories, at least as far as the consequent penalties are concerned. This lack of distinction follows both from: (i) the absence of any agreed scale of penalties in international criminal law and from (ii) the general character of this body of law, that is, its still rudimentary nature and the ensuing lack of formalism (see *supra*, 2.2).

Consequently, the differentiation between the various classes of participation in crimes, which I shall set out below, is merely based on the intrinsic features of each modality of participation. It serves a *descriptive and classificatory purpose* only. It is devoid of any relevance as far as sentencing is concerned. It is for judges to decide in each case on the *degree of culpability* of a participant in an international crime and assign the penalty accordingly, whatever the modality of participation of the offender in the crime.

9.2 PERPETRATION

Whoever physically commits a crime, either alone or jointly with other persons, is criminally liable. For instance, the soldier who kills a war prisoner or an innocent civilian is liable to punishment for a war crime. Similarly, the serviceman who rapes an enemy civilian as part of a widespread or systematic sexual attack on civilians is accountable for a crime against humanity.

Perpetration is thus the physical carrying out of the prohibited conduct, accompanied by the requisite psychological element.[2]

[1] In two cases, the Extraordinary Court Martial established in the Ottoman Empire to try persons accused of participating in massacring Armenians in 1915 and plundering their possessions, applied the 'Imperial Penal Code for Officers', which drew a normative distinction between principals and accessories. The Court therefore made a point of distinguishing between the 'principal perpetrators' and the 'accessories', and assigning a different sentence to each category of defendant. In *Kemâl and Tevfik* it sentenced the principal perpetrator to death and the accessory to 15 years of hard labour (at 5–6); in *Bahâeldin Şâkir* the majority of judges held that two defendants were accessories, while three dissenting judges held that they 'were equally guilty of having been principal co-perpetrators' (at 4 and 8).

[2] In some cases courts have minimized the role of perpetrators executing illegal orders. This for instance holds true for *Alfons Gätzfrid*, which concerns mistreatment at the Majdanek camp. The Stuttgart Court (*Landgericht*) held in a decision of 20 May 1999 that 'According to established case-law (cf. Federal Supreme Court, Part 18, 87 et seq.), the offender or accomplice is defined as one whose thoughts and actions coincide

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9.3 CO-PERPETRATION

Crimes are often committed by a *plurality of persons*. If all of them materially take part in the actual perpetration of the same crime and perform *the same act* (for instance, they are all members of an execution squad shooting innocent civilians), we can speak of co-perpetration. All participants in the crime partake of the same criminal conduct and the attendant *mens rea*.

9.4 PARTICIPATION IN A COMMON PURPOSE OR DESIGN

9.4.1 PARTICIPATION ENTAILING RESPONSIBILITY FOR ALL THE ACTS FLOWING FROM THE CRIMINAL PLAN

When the crime results from the *action of a multitude of persons*, it may happen that *not all participants perform the same act*. In the case of torture one person may order the crime, another may physically execute it, yet another may watch to check whether the victim discloses any significant information, a medical doctor may be in attendance to verify whether the measures for inflicting pain or suffering are likely to cause death so as to stop the torture just before the measures become lethal, another person may carry medicine, or food for the executioners, and so on. The question arises of whether all these participants are equally responsible for the same crime, torture. Similarly, in the case of deportation of civilians or prisoners of war to an extermination camp, a commander may issue the order, several officers may organize the transport, others may take care of food and drinking water, others may carry out surveillance over the inmates so as to prevent their escape, others may search the detainees for valuables or other things before deportation, and so on.

As in most national legal systems, also in international criminal law all participants in a common criminal action are equally responsible if they (i) participate in the action, *whatever their position and the extent of their contribution*, and in addition (ii)

with those of the author of the crime, who willingly gives in to incitement to political murder, silences his conscience and makes another person's criminal aims the basis of his own conviction and his own action or who sees to it that orders of that kind are ruthlessly carried out, or who in so doing otherwise displays consenting enthusiasm or who exploits State terror for his own purposes. Accordingly, the accused could only be shown to have an attitude denoting guilt if, over and above the activity he was instructed to carry out, he had performed some contributory act on his own initiative beyond the call of duty, shown particular enthusiasm, had acted with particular ruthlessness in the extermination operation or had shown a personal interest in the killings. These conditions cannot be shown to exist in the case of the accused. He was at the end of the chain of command, had no power of decision himself and no authority to act . . . Similarly, there is no evidence that the accused had any personal interest in the killings. He merely wanted to carry out the order which had been issued to him.'

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intend to engage in the common criminal action. Therefore they are all to be treated as *principals*,[3] although of course the varying degree of culpability may be taken into account at the sentencing stage.[4]

It is important to add that the common plan or purpose need not be formally set out. As the ICTY Appeals Chamber rightly noted in *Tadić (Appeal)*,

there is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. (§227.)

As in national legal systems, the rationale behind this legal regulation is clear: if all those who take part in a common criminal action are aware of the purpose and character of the criminal action and share the requisite criminal intent, they must perforce share criminal liability, whatever the role and position they may have played in the commission of the crime. This is the case because: (i) each of them is indispens-

[3] However, some courts of common law countries have taken the view that participants in a common criminal design may play the role of, and be regarded as, accessories. Thus, for instance, in *Einsatzgruppen*, with regard to common design, the Prosecutor T. Taylor, in his closing statement noted that 'the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility' (at 372).

[4] In this connection one may mention, by way of example, a decision of the Supreme Court of Bosnia and Herzegovina in *Tepež*, delivered on 1 October 1999: 'The appeal by the defence counsel argues that the contested judgment has not individualised the criminal responsibility of the accused and his personal involvement in actions characteristic of a war crime against the civilian population. For this crime to exist it is necessary to "commit murder, torture, inhumane acts, inflict severe suffering, physical and mental injuries on civilians, destroying their health and physical integrity". The disposition does not include these essential elements of this criminal act and therefore represents a major violation of the provisions of criminal procedure. This Court finds these allegations groundless.

'The appeal fails to note that the contested judgment states that the accused carried out these actions with three other named individuals (as well as others), which means that he perpetrated the crime for which he has been pronounced guilty in complicity with others. It further means that in cases of this kind where it is not possible to isolate individual actions and their consequences or to distinguish the degree to which each person was involved in their execution, it suffices that these actions complement each other and together form a single entity, which the accused [Tepe] wishes to achieve by being involved. Therefore it was neither possible nor necessary for the court of first instance to separate only the actions of the accused. It suffices that the accused participated in executing these actions, even if it had only been one or two actions of personal involvement in the beating of civilians. However, the court of first instance has established that the accused personally beat up many individuals on many occasions' (at 2).

One may also mention the decision of a Canadian court in *Moreno*: 'In reaching this conclusion, I am influenced by one commentator's view that the closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach . . . of course, the further one is distanced from the decision makers, assuming that one is not a "principal", then it is less likely that the required degree of complicity necessary to attract criminal sanctions, or the application of the exclusion clause, will be met' (at 18). See also *Ramirez* (at 6–9).

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able for the achievement of the final result, and on the other hand (ii) it would be difficult to distinguish between the degree of criminal liability, except for sentencing purposes.

One may find a particularly clear and significant *illustration* of this category of criminality in *Alfons Klein and others* (the *Hadamar* trial), heard by a US Military Commission sitting at Wiesbaden. It may prove fitting to dwell on this case at some length, because it best shows how the category of criminality at hand works.

The accused were seven Germans. Between July 1944 and April 1945, they killed over 400 Polish and Russian nationals, who had been obliged to work in Germany for the German war effort and were suffering from tuberculosis or pneumonia. Brought to Hadamar, in Germany, where there was a hospital or institution originally designed to care for the mentally unsound, but with no medical facilities to treat persons sick with tuberculosis or pneumonia, they were told that they would be given medication. In fact they were killed by injections of poisonous drugs; afterwards the relevant medical records and death certificates were falsified. It would seem that the primary purpose of these killings was to make space in hospitals for German war victims. The accused comprised Klein, the administrative head of the hospital, a local Nazi Party leader who made all the arrangements leading to the perpetration of the atrocities; Wahlmann, a physician specializing in mental diseases, the Institution's only doctor (he participated in the conferences designed to plan the murders, knew what was going on at the hospital, and acquiesced in it); three nurses, Ruoff, Willig, and Huber, who administered the poisonous drugs; Merkle, the institution's book-keeper (who registered incoming patients for the purpose of recording dates and causes of death, actually falsifying these documents); and Blum, a doorman and telephone switchboard operator, who also served as caretaker of the cemetery, charged with burying the victims in mass graves (but he sometimes walked through the wards to inspect the victims before they were taken, dead, to his cellars a few hours later).

The charge for all of them was of 'violation of international law', namely, as the Prosecutor specified in his opening argument, breach of the laws of warfare (at 202). The specification stated that the seven accused 'acting jointly and in pursuance of a common intent' 'did . . . wilfully, deliberately and wrongfully aid, abet and participate in the killing of human beings of Polish and Russian nationality'. Thus, in addition to the notion of 'participation in killing based on common intent' also the notion of 'aiding and abetting' was used. However, in his Opening Argument the Prosecutor, when setting out the applicable law (there was no Judge Advocate), emphasized that all those who participate in a common criminal enterprise are equally guilty as 'co-principals' whatever the role played by each single participant. Referring to the case of murder committed by several persons, he pointed out that:

> Every single one of those who participated in any degree towards the accomplishment of that result [murder] is as much guilty of murder as the man who actually pulled the trigger . . . That is why under our [that is, US] Federal Law all distinctions between accomplices, between accessories before the fact and accessories after the fact, have been completely eliminated. Anyone who participates in the commission of any crime, whether formerly

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called as an accessory or not, are now co-principals and have been so for several years. (At 203.)

Moving then to the case at bar, the Prosecutor in fact offered an eloquent illustration of the rationale behind the legal notion he was invoking:

> At this Hadamar mill there was operated a production line of death. Not a single one of these accused could do all the things that were necessary in order to have the entire scheme of things in operation. For instance, the accused Klein, the administrative head, could not make the initial arrangements, receive those people, attend to undressing them, make arrangements for their death chamber, and at the same time go up there and use the needle that did the dirty work, and then also turn around and haul the bodies out and bury them, and falsify the records and the death certificates. No, when you do business on a wholesale production basis as they did at the Hadamar Institution, that murder factory, it means that you have to have several people doing different things of that illegal operation in order to produce the results, and you cannot draw a distinction between the man who may have initially conceived the idea of killing them and those who participated in the commission of those offences. Now, there is no question but that any person who participated in that matter, no matter to what extent, technically is guilty of the charge that has been brought . . . every single one of the accused has overtly and affirmatively participated in this entire network that brought about the illegal result. (At 205–7.)

The defence counsel did not dispute these concepts, but in their arguments preferred to rely upon the notions of necessity and superior orders, or argued that German law rather than US or international law should apply. The Court upheld the charge. The administrative head of the hospital and two nurses were sentenced to death; the physician (a 70-year-old man) to life imprisonment and hard labour; the book-keeper to 35 years and hard labour; the third nurse to 25 years and hard labour; the doorman and caretaker to 30 years and hard labour (at 247).

In international *case law* there are many other notable examples of this form of criminality. Some British and US courts, influenced by common law concepts, have utilized the notion of 'persons concerned' in, for instance, the killing of the victim, or the concept of 'common purpose' or 'common design'.[5] In contrast other courts, for instance Dutch, German, and Italian, holding to civil law terminology, have preferred

[5] See for instance *Josef Kramer and others* (the *Belsen* trial), at 638–40; *Heinz Heck and others* (the *Peleus* trial), at 122 as well as *Burgholz* (*No. 2*) at 82 and the *Loibl Pass* (*No. 1*) case, at 2. See also *Erich Killinger and others* (the *Dulag Luft* trial), at 224–5, 235. In the latter case the Prosecutor, in the absence of a Judge Advocate, submitted that each of the five accused 'was concerned, in his respective capacity on the staff of Dulag Luft, as a party to the ill-treatment of prisoners of war, and concerned with sufficient proximity to make him criminally responsible on the ordinary standards of criminal responsibility in English law, either by being an accessory before the fact, or a principal in the second degree, or a principal in the first degree, or an accessory after the fact'. He further submitted that the five accused 'were all there at times when that system was working, and . . . those incidents occurred in circumstances in which a reasonable man can only come to the firm judgment that each one of those five accused was criminally concerned in that ill-treatment borne out in the evidence before you' (at 235). However, the Court found that two of the accused were not guilty (at 236).

Falkenhorst also deserves to be mentioned. The Judge Advocate, addressing the third charge against the accused, General von Falkenhorst (that he, 'as Commander-in-Chief, with knowledge, with understanding and with the intention, was concerned in the killing of . . . fourteen British prisoners'), stated that '"Concerned in the killing" is a wide phrase, and we all agree it is not confined to the person who actually

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to rely upon the notion of 'concurrence of persons in a crime'. As the cases brought before the former courts are more numerous, it may prove useful to dwell on some of these cases.

does the killing; I think we all agree that it could only apply to somebody who has some power or authority to influence the result, and the case for the Prosecution on this is very straightforward, that is nothing more nor less than they allege you should find that these people, who should have been treated, according to the Prosecution, as prisoners of war, were shot, or murdered as the Prosecution put it, because of the specific order to which I have already referred emanating from the Commander-in-chief which was binding on the forces of the Wehrmacht who carried out these executions' (at 231); the Court found the accused guilty and sentenced him to 'death by being shot' (at 240–1).

Wolfgang Zeuss and others (the *Natzweiler* trial) is also interesting. Four women working for the Resistance movement were arrested by the Gestapo in France, sent to a detention camp in Struthof/Natzweiler, taken to the crematorium, and executed by injection. The accused included the commandant as well as the head of the political department of the concentration camp, the camp doctor, a prisoner employed in the crematorium, a camp medical orderly, a clerk in the political department, the camp dentist, and some military staff. The Judge Advocate, discussing the charge against the accused, that is, that all of them were concerned in a killing, noted that that charge did not make it necessary 'that any person should actually be present'. 'None of the accused is actually charged with killing any of the women concerned. They are charged with being concerned in a killing, and you can be concerned in a killing without being actually present at the time when the killing takes place. If two or more men set out on a murder and one perhaps stands half a mile away from where the actual murder is committed, perhaps to keep guard, although he is not actually present when the murder is done, if he is taking part with the other man with the knowledge that the other man is going to do the killing, then he is just as guilty as the person who fires the shot or delivers the blow, or however the murder is committed. Although much evidence in this case has been directed towards establishing who was actually present in the crematorium, you have got to cast your vision further afield and consider whether, in spite of anybody not having been proved to be present, they may nevertheless still be concerned in the killing' (at 200–1). The Court found three defendants not guilty and sentenced the camp doctor to death and the others to various terms of imprisonment (at 218 and 222).

It is also worth mentioning *Sumida Haruzo and others* (the '*Double Tenth*' trial). This case is relevant in two respects: the possible criminal responsibility of interpreters, and that of members of special units.

The accused, a Japanese military unit, were charged with ill-treatment and torture of British prisoners of war in Singapore. Among the accused were some interpreters. The defence argued that they had simply acted as a medium of communication (at 245–9). 'The responsibility of an interpreter . . .—argue defence counsel—is a non-commissive responsibility. An interpreter has neither the right nor the authority to stop an act of torture' (at 249). The Prosecution submitted instead that they had in some way participated in ill-treatment by actually taking part in the beating or torture of the prisoners (at 255, 264–5). The Court sentenced the interpreters either to imprisonment or to death (at 280–1).

On the question of criminal liability of members of a military unit committing crimes, the Prosecutor noted that 'where a branch of [a] unit of the Kempei Tai [Japanese military police force; the Singapore branch was charged with preserving public peace and military policing] has been proved beyond reasonable doubt to have been participating in a war crime, then every man who is proved to have been a member of that particular unit during the relevant period may, *prima facie*, be held responsible for that war crime, even though no concrete criminal act has been brought home to him specifically as an individual. And I would go further than that, and suggest respectfully, that in a case such as this, where the very closest privity and connection has been proved to have existed between all members of the Singapore Kempei Tai, *which was charged as a unit with the prosecution of this specific No. 1 Work*, then the Court should consider very carefully whether the mere presence of a man with such a unit does not constitute *prima facie* evidence of his complicity, but goes much further and establishes a strong presumption of guilt. I do not go so far as to suggest a shifting of the burden of proof, which does, and always must, remain with the Prosecution . . . The *degree* of complicity on the part of any particular individual is, of course, a matter to which you, gentlemen, would have to direct your minds much later in apportioning any sentence which might be necessary; but in the determination of the question of guilt or innocence of a crime such as this—the result of a deliberate policy carried out by a whole unit—such a consideration is, in my submission, totally irrelevant' (at 259; see also 271–2). The Court acquitted six defendants and condemned the others to varying sentences (at 275–82).

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In *Ponzano*, a case concerning the unlawful killing of four British prisoners of war by German troops, the Judge Advocate adopted the approach suggested by the Prosecutor, and stressed:

> the requirement that an accused, before he can be found guilty, must have been concerned in the offence . . . [T]o be concerned in the commission of a criminal offence . . . does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation . . . [I]n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means. (At 7.)

The Judge Advocate also underlined the necessity of knowledge on the part of the accused as to the intended purpose of the criminal enterprise.[6]

Courts also applied the notion of common purpose in cases where the crimes had allegedly been committed by members of military or administrative units running concentration camps; that is, by groups of persons acting pursuant to a concerted plan. In this respect one may mention such cases as *Dachau Concentration Camp*, brought before a US Tribunal under Control Council Law no. 10 (at 5, 14), *Nadler and others*, decided by a British Court of Appeal under Control Council Law no. 10 (at 132–4), *Auschwitz Concentration Camp*, decided by a German Court (at 882), as well as *Belsen*, decided by a British military court sitting in Germany (at 121). In these cases the accused held some position of authority within the hierarchy of the concentration camps. Normally, the accused were charged with having acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.[7]

The accused, when found guilty, were regarded as co-principals in the various crimes of ill-treatment, because of their objective 'position of authority' within the concentration camp system and because they had 'the power to look after the inmates

[6] *Georg Otto Sandrock et al.* (also known as the *Almelo Trial*) can also be cited. Three Germans had killed a British prisoner of war; it was clear that they all had had the intention of killing the British soldier, although each of them played a different role. The British Court found all of them guilty of murder under the doctrine of 'common enterprise' (at 35, 40–1). In *Hölzer and others*, brought before a Canadian military court, in his summing up the Judge Advocate emphasized that the three accused (Germans who had killed a Canadian prisoner of war) knew that the purpose of taking the Canadian to a particular area was to kill him. The Judge Advocate spoke of a 'common enterprise' with regard to that murder (at 341, 347, 349). In *Jepsen and others* a British court had to pronounce upon the responsibility of Jepsen and others for the death of inmates of a concentration camp in transit to another concentration camp. The Prosecutor argued that '[I]f Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act'. The Judge Advocate did not rebut the argument (at 241). In *Schonfeld* the Judge Advocate stated that: 'if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present . . . provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly' (at 68).

[7] In his summing up in the *Belsen* case, the Judge Advocate took up the three requirements set out by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organized system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided, and abetted or in any case participated in the realization of the common criminal design (at 637–41).

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and make their life satisfactory' but failed to do so. In these cases, as the ICTY Appeals Chamber pointed out in *Tadić (Appeal)*:

> the required *actus reus* was the active participation in the enforcement of a system of oppression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime. (§203.)

9.4.2 PARTICIPATION ENTAILING RESPONSIBILITY FOR THE FORESEEABLE CRIMES OF OTHER PARTICIPANTS

In other cases where a multitude of persons participates in the commission of a crime, it may happen that, although all participants share from the outset the common criminal design, *one or more perpetrators commit a crime that had not been (expressly or implicitly) agreed upon or envisaged at the beginning*, and therefore did not constitute part and parcel of the joint criminal enterprise. For instance, a group of soldiers, acting under superior orders, set out to detain, contrary to international law, a group of civilians; however, one of the servicemen, in the heat of military action, tortures or rapes one or more of those civilians. Are the other soldiers equally responsible for this additional crime, not envisaged in the joint criminal design?

The ICTY Appeals Chamber clarified this legal issue in *Tadić (Appeal)*. There it held that 'responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*' (§228). The Appeals Chamber showed that this proposition was based on case law, had a solid underpinning in many national legal systems, and in addition was consonant with the general principles on criminal responsibility laid down both in the ICTY Statute and in customary international law (§§224–9).

In the case at issue the Appeals Chamber held that Tadić, the appellant, was 'an armed member of an armed group' that attacked a village in Bosnia and Herzegovina, during the armed conflict raging in the Prijedor region; he took an active part in the attack, rounding up and severely beating some members of the non-Serb population living there. The armed group, in pursuance of its violent action against non-Serbs, killed five of them. According to the Appeals Chamber the only possible inference was that Tadić 'had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That

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... Serbs might be killed in the effecting of this common aim was, in the circumstances of the . . . case, foreseeable. The Appellant [Tadić] was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk'. The Chamber consequently found Tadić guilty of wilful killing as a grave breach as well as a war crime and a crime against humanity (§§230–7).[8]

9.4.3 AIDING AND ABETTING

A person may participate in a crime without sharing the criminal intent of the principal perpetrator, but simply by assisting him in the commission of the crime. In aiding and abetting the objective element is constituted by *practical assistance, encouragement, or moral support*, by the accessory to the principal (namely the author of the main crime); in addition, such assistance, support etc. *must have a substantial effect on the perpetration of the crime*. The subjective element resides in the accessory having *knowledge* that 'his actions assist the perpetrator in the commission of the crime'. (This, with convincing arguments, an ICTY Trial Chamber held in *Furundžija* (§§190–249); see also *Musema* (§126), *Aleksovski* (§63), *Kunarac and others* (§391).)

Thus, unlike the instances considered previously, aiding and abetting does not necessarily presuppose that the aider and abettor shares a common plan or purpose with the principal or his criminal intent or other form of *mens rea*; as stated by the ICTY Appeals Chamber in *Tadić*, 'the principal may not even know about the accomplice's contribution' (§229). What is required is that the person supporting or assisting in the crime be aware that his action furthers and helps the perpetrator or perpetrators in the commission of the crime.

Among the various cases where the notion was applied[9] *Akayesu* can be cited, not so much for outlining the legal contours of the notion (the Trial Chamber at one point stated that 'complicity' was to be defined in the light of the Rwandan Penal Code: §537), as for the legal findings on this matter. The Trial Chamber found that:

[8] The ICTY Appeals Chamber confirmed the decision in *Tadić (Appeal)* in *Aleksovski (Appeal)* (§§163–4). Also a Trial Chamber referred approvingly to that decision in *Kordić and Čerkez* (§§393–400).

[9] Such cases include *Schonfeld* and *Rohde*, both heard by British military courts (at 64 and 56 respectively), *Zyklon B*, also heard by a British court (at 93), *Einsatzgruppen*, brought before by a US Military Tribunal sitting at Nuremberg (at 569–85), *S. and others* (*Hechingen Deportation* case), brought before a German court in the French Occupied Zone (at 484–90). However, in most of these cases the notion of aiding and abetting was not clearly defined as distinct from that of 'participation in a common purpose'. Trial Chambers of the ICTR and the ICTY have made a better jurisprudential contribution to the outlining and enunciation of the concept in *Akayesu* (dealing with the notion of 'complicity in genocide': §§525–48), in *Tadić* (§§688–92), and in *Furundžija* (§§190–249).

One may also mention a Canadian case involving torture: in *Moreno* (decision of 14 September 1993) the Court held that 'Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement . . . While mere presence at the scene of a crime (torture) is not sufficient to invoke the exclusion clause [of the Refugee Convention], the act of keeping watch with a view to preventing the intended victim from escaping may well attract criminal liability' (at 16–17). See also *Ramirez* (at 5–9).

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Akayesu, in his capacity as *bourgmestre* [mayor], was responsible for maintaining law and public order in the commune of Taba and . . . had the effective authority over the communal police. Moreover, as 'leader' of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the Chamber that he had the power to assemble the population and that they obeyed his instructions. It has also been proved that a very large number of Tutsi were killed in Taba between 7 April and the end of June 1994, while Akayesu was bourgmestre of the Commune. Knowing of such killings, he opposed them and attempted to prevent them only until 18 April 1994, after which date he not only stopped trying to maintain law and order in his commune, but was also present during the acts of violence and killings, and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi . . . The Chamber holds that the fact that Akayesu, as a local authority, failed to oppose such killings and serious bodily or mental harm constituted a form of tacit encouragement, which was compounded by being present [during] such criminal acts. (§§704–5.)

The Chamber added that Akayesu was present during numerous incidents of rape and sexual violence against Tutsi women and, by his attitude and utterances, encouraged such acts, thus giving 'tacit encouragement' to the rapes being committed. The Court concluded that he was criminally responsible 'for having abetted in the preparation or execution of the killings of members of the Tutsi group and the infliction of serious bodily and mental harm on members of the said group' (§§706–7).

In *Furundžija* an ICTY Trial Chamber found that the accused, an officer of the Bosnian Croat armed forces, was present while the victim was being raped by another officer, and interrogated her. It held that in this way he had given assistance, encouragement, or moral support, having a substantial effect on the crime by the other officer, with the knowledge that these acts assisted the commission of the offence. The Trial Chamber therefore found the defendant guilty of aiding and abetting outrages upon personal dignity including rape (§§270–5).

9.5 INCITEMENT OR INSTIGATION AS A FORM OF PARTICIPATION IN INTERNATIONAL CRIMES

Incitement to commit a crime is some form of inducement, encouragement, or persuasion to perpetrate the crime. Incitement does not necessarily presuppose a hierarchical position. It simply means taking all those psychological or physical measures designed to prompt somebody else to commit a crime. It also requires the intent to have the crime perpetrated.

As held in *Blaškić*, 'both positive acts and omissions may constitute instigation' (§280). Furthermore, incitement is a crime only under certain conditions: (i) it must be *direct and explicit*; (ii) *commission of the crime* must follow it up. In other words, incitement is not punished per se, but only if it leads to the commission of a crime. As we shall see, international criminal law provides for an exception to this rule, in the case of genocide.

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An ICTY Trial Chamber held in *Kordić and Čerkez* that:

> although a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (i.e., that the contribution of the accused in fact had an effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused's involvement. (§387.)

The requisite subjective element may be set out as follows: (i) the person intended to induce the commission of the crime by another person, or in other words 'directly intended to provoke the commission of the crime' (*Kordić and Čerkez*, §387), or (ii) the person was at least aware of the likelihood that commission of the crime would be a consequence of his action; (iii) the person must possess the *mens rea* concerning the crime he is instigating.

In *Kurt Mayer*, tried by a Canadian Military Court sitting at Aurich in Germany, the accused, a Commander of the 25 SS Panzer Grenadier Regiment, was among other things charged with having incited and counselled troops under his command to deny quarter to Allied troops in 1943–4 in Belgium and France. The Judge Advocate stated:

> The first charge is quite clear and I advise the Court that the particulars in that charge allege or constitute a war crime. As it is an offence to deny quarter to prisoners I think an officer may be convicted of a war crime if he incites and counsels troops under his command to deny quarter, whether or not prisoners were killed as a result thereof. It would seem to be common sense to say that not only those members of the enemy who unlawfully kill prisoners may be charged as war criminals, but also any superior military commander who incites and counsels his troops to commit such offences. (At 840.)[10]

9.6 INCHOATE CRIMES: GENERAL

Many legal systems punish not only consummated criminal offences (for instance, murder, theft, etc.), but also 'inchoate', that is preliminary or 'just begun' criminal wrongdoings. These are acts that: (i) are *preparatory* to prohibited offences, (ii) have not been completed, therefore *have not yet caused any harm*, and (iii) are *punished on their own*, that is, in spite of the fact that they have not led to a completed offence.

The rationale behind criminalization of such offences is clear: the legal system intends to protect society as far as possible. Therefore, in addition to punishing offences already perpetrated, it endeavours to prevent the commission of potential transgressions. It consequently intervenes with its prohibitions at an early stage, before crimes are completed, that is, at the stage of their preparation, so as to forestall the consummation of the harmful consequences of actual crimes.

However, within this general category, one ought to distinguish three subcategories:

1. Criminal conduct that is preparatory to crimes proper, and is punished per se, that is, even if it does not lead to the actual perpetration of the crime, but, when this

[10] Cases where incitement to commit war crimes was punished include *Falkenhorst* (at 23 and 29–30).

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perpetration follows, it is no longer punishable per se, as it is 'absorbed' into the actual crime (although it may be taken into account as an aggravating circumstance). This subcategory includes planning and ordering.

2. Criminal conduct that is preparatory to a crime, but which by definition cannot be followed by the intended crime. This subcategory encompasses attempt, where, by definition, the subsequent offence is not consummated (because subjective or external circumstances prevent consummation).

3. Criminal conduct that is punished per se, whether or not it is followed by the consummation of a crime; where a crime does follow, this conduct, as well as the consummated crime is punished. This subcategory includes incitement to commit genocide and conspiracy to genocide.

In many national legal systems (particularly in common law countries) three categories of such crimes are envisaged: attempt, conspiracy, and incitement. In international law, while attempt is regarded as admissible as a *general class* of inchoate crimes, conspiracy and incitement are only prohibited as 'preliminary' (not consummated) offences when connected to the most serious crime, genocide. The very limited acceptance of conspiracy is probably due to the fact that this class of criminal offence is not accepted in most civil law countries; hence it has been considered admissible at the international level only with regard to the most heinous and dangerous crime. Indeed, genocide is a crime that by definition attacks individuals qua members of a group and with a view to destroying the group as such.

As for incitement, as we have seen above, in international criminal law it is prohibited only if it leads to the actual perpetration of the crime, that is, as a form of participation in a crime, probably because States and courts have felt that prohibiting incitement per se in connection with *any* international crime including war crimes and crimes against humanity would excessively broaden the range of criminal conduct, the more so because of the difficulty of clearly delineating the notion of incitement. Incitement as such has been exceptionally prohibited, subject however to some stringent conditions, in connection, again, with the most harmful and serious international crime, genocide.

As for planning and ordering, the rationale behind the tendency of international law to punish them as inchoate crimes lies primarily in this: the most serious and large-scale international crimes result from careful preparation and concerted action by many agents, or are the result of instructions and directives issued by military or political leaders. In consequence, international criminal rules aim to prevent or at least circumscribe such conduct by stigmatizing it as criminal and making it penally punishable.

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9.7 PLANNING

Planning consists of devising, agreeing upon with others, preparing, and arranging for the commission of a crime. Think, for instance, of planning an air attack on civilians or the use of such prohibited arms as chemical or bacteriological weapons, or the indiscriminate killing of civilians as part of a widespread or systematic attack on civilians. As an ICTR Trial Chamber held in *Akayesu* (§480) and ICTY Trial Chambers in *Blaskić* (§279), and in *Kordić and Čerkez* (§386) planning implies that 'one or several persons contemplate designing the commission of a crime at both the preparatory and executory phases'.

As far as international crimes are concerned, given the nature and features of such crimes, it is often the higher military or civilian authorities that carry out the planning of such crimes.

Whoever takes part in the planning of an international crime is liable to punishment for the relevant crime, whatever his rank in the hierarchy and the level of his participation. (Of course, the rank and role may be germane to punishment; it is evident that the higher the status of the planner and the intensity of his participation in the planning, the harsher should be his penalty.) The subjective element required is the intent to carry out the criminal conduct.

A difficult question is whether planning an international crime is punishable per se, regardless of whether or not it leads to the actual commission of the crime planned, or instead is only punishable if planning is followed up by perpetration of the crime. Trial Chambers of the ICTR opted for the latter solution in *Akayesu* (§475), *Rutaganda* (§34), and *Musema* (§115). They grounded this conclusion on the works of the International Law Commission and on the interpretation of the relevant rule of the ICTR Statute (Article 6(1)) laying down the principle of individual criminal responsibility, which 'implies that the planning or the preparation of a crime actually must lead to its commission' (*Musema*, §115).

It may be noted that prosecuting someone for planning, where the planning is not put into effect, comes close to prosecuting *conspiracy* (although with conspiracy there must be an agreement of two or more persons, whereas planning may be carried out by one person alone, and if done by more persons, no agreement is required). The ICTY and ICTR Statutes allow conspiracy for genocide, but not for crimes against humanity and war crimes. (This was also the position of the IMT at Nuremberg: conspiracy to commit crimes against peace was held admissible whereas conspiracy to commit crimes against humanity and war crimes were not.)

An ICTY Trial Chamber, ruling in *Kordić and Čerkez*, propounded a contrary view. It held that 'an accused may be held criminally responsible for planning alone' (§386). The reason for this conclusion is that 'planning constitutes a discrete form of responsibility under Article 7(1) of the Statute'. The Trial Chamber set forth, however, two caveats: first, 'a person found to have committed a crime will not be found responsible for planning the same crime'; secondly, 'an accused will only be held

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responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed' (§386).

Although there is no consistent case law on this matter, it would seem that the gravity of international crimes (or at least of the most serious among them) may warrant the conclusion that planning the commission of one or more of such crimes is punishable per se even if the crime is not actually perpetrated. The rationale is that international criminal law aims not only to punish persons found guilty of crimes, but also to prevent persons from engaging in serious criminal conduct. Consequently, in case of doubt criminal rules must be interpreted as being also designed as far as possible to prevent offences. It is warranted to infer that planning an international crime is also punishable per se as a distinct form of criminal liability, subject to a set of conditions that can be derived from the general system of international criminal law:

1. Only the planning of serious or large-scale international crimes constitutes a discrete offence: for instance, the planning of massive war crimes (such as the extermination of a large number of prisoners of war, or the large-scale deportation of civilians to extermination camps), or of crimes against humanity, or genocide. Since the rules on planning do not specify the legal ingredients of this crime, it seems warranted to maintain that, for international crimes of lesser gravity (for instance, ill-treatment of one prisoner of war, the taking by members of the Occupying Power of private property belonging to civilians), those rules must be construed in such a way as to favour the accused (*favor rei*). Consequently the mere planning of those crimes of lesser gravity may be held not to constitute a crime per se.

2. If planning is followed up by execution of the crime, planning is no longer punishable as a crime distinct from that resulting from its execution (in this respect planning is different from, hence may not be equated to, such 'inchoate crimes' as conspiracy to commit genocide and incitement to genocide, to be discussed below). As for the requisite *mens rea*, it is necessary for the author to intend that the planned crime be committed, or else he must be aware of the risk that the planned crime would be perpetrated by him or by someone else (recklessness or *dolus eventualis*).

9.8 ORDERING

Ordering presupposes that whoever issues the order is *de jure* or de facto *superior* (within a military or civilian hierarchy) to the one who executes it. However, as a Trial Chamber of the ICTY rightly held in *Kordić and Cerkez* (§388), 'no formal superior-subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the accused possessed the authority to order'. This proposition, albeit not supported by any legal reason in the judgment, is warranted because international criminal law is not a formalistic body of law geared to legal technicalities but aims at proscribing and punishing crimes whatever the modalities of their commission.

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As ICTY Trial Chambers rightly held in *Blaškić* (§281) and *Kordić and Cerkez* (§388), there is no need for the order to be given in writing or in any particular form. In addition, the existence of an order may be proved through circumstantial evidence.

It would seem that it is not necessary for the order to be executed. An officer or any other higher authority issuing a criminal order may be found guilty even if the order is not carried out by the subordinates, if the superior intended the order to be executed and knew that the order was illegal, or else the order was manifestly illegal. Thus, in *General Jacob H. Smith*, in 1902 a US Court Martial held that General Smith was guilty of ordering that no quarter should be given to the enemy in the Philippines, even though in fact his troops did not comply with this order (at 799–813). In many other cases courts have convicted officers for issuing criminal orders, even if they were not executed.[11]

If the internationally unlawful order is executed, the person issuing the order is criminally liable qua co-perpetrator of the crime carried out by the subordinate.

Also for this category of criminality the requisite mental element is the *intent* to have the crime committed,[12] at least, as long as the order is specific, that is, instructs to perform a specific crime. However, when the order is generic, recklessness or even gross negligence may be considered sufficient.[13]

9.9 ATTEMPT

Attempt as a distinct criminal offence occurs whenever a person intending to commit a crime tries to carry it out without, however, the normal outcome of his action

[11] See, for instance, *High Command* (at 118–23), *The Hostages Trial* (at 118–23), *Kurt Mayer* (at 98 and 108), *Falkenhorst* (at 18, 23, 29–30), *Hans Wickmann* (at 133). In *Tzofan and others* v. *IDF Advocate and others* (*Yehuda Meir* case), Judge D. Levin (concurring) held that 'the higher the rank of the commanding officer and the more comprehensive and more decisive his authority, the greater the responsibility incumbent upon him to examine and determine the justification and legality of the order' (at 745).

It should be noted that ordering is sometimes treated as a species of instigation, for instance ordering that no quarter be given may be regarded as the same thing as inciting troops to commit war crimes.

[12] In *Jung and Schumacher*, decided by a Canadian Military Court sitting at Aurich in Germany, the Judge Advocate, in discussing the position of the defendant Jung, who had ordered the other defendant to shoot and kill a Canadian war prisoner, noted the following: 'The Court may find that the accused uttered the words or some words to do harm to the prisoner, but it must be found that he uttered them with the expectation and intention that they should be acted upon by someone who heard them, including Schumacher. In this event he would have either incited, counselled or procured the acts to have been done, and so be concerned [in the crime]. Now, if you find that the accused Jung handed the prisoner over to Schumacher, knowing or expecting he would be killed, then again he would be concerned [in the killing of the Canadian POW]' (at 219–20).

[13] In one case a Canadian Court Martial held that the defendant was guilty of *negligence* for issuing unlawful orders (he had instructed his subordinates that prisoners 'could be abused'): see *Major A.G. Seward* (at 1079–81); on this case see also above, note 16 in Chapter 8.

Interestingly, the defendant was acquitted on another count, namely of having caused bodily harm to the Somali civilians beaten up, tortured, and killed by his subordinates. The Court Martial Appeal Court of Canada noted in this regard that by this acquittal the defendant 'must be taken to have been found neither to have intended nor to have been capable or reasonably foreseeing that any of his subordinates would mistreat unto death any Somalian [sic] prisoner' (at 1082).

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coming about. One should distinguish between two different possibilities: (i) the perpetrator takes the initial steps but is then *stopped by others*, or (ii) on account of circumstances independent of his will, his action does not produce the effects of his intention. In other words, he *performs all the necessary acts without, however, the intended result following*. An example of the first category is when a soldier starts to beat a prisoner of war savagely with the intention of killing him, and is only prevented from so doing by others who drag him off his intended victim. An example of the second category is when a soldier shoots at a prisoner of war, intending to execute him, but the intended victim is not fatally wounded and subsequently manages to escape.

Although in the case of attempt the intended harm is not caused to the victim, international law nevertheless makes attempt punishable, in order to prevent breaches of international rules as far as possible. Thus, this offence is punished in various national laws on war crimes,[14] or is regarded as a distinct offence in national case law on the same crimes.[15] Recently, customary law on the matter has been codified in Article 25(3)(f) of the ICC Statute, whereby a person is criminally responsible if he 'attempts to commit [a crime under the Court's jurisdiction] by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions'.

Clearly, what is required for the attempt to be punishable, is: (i) conduct consisting of a *significant commencement of the criminal action* (to hold to the example given above, it is not sufficient for the guard to take the prisoner out of his cell and possibly even shout at, or abuse, him; it is necessary for the guard to start beating him savagely); (ii) the *clear intention to commit a crime*; (iii) *failure of that intention to take effect owing to external circumstances.*

This last ingredient of the objective element may also occur when the victim of the attempted crime is already dead (unless, of course, the agent *knew* that the victim was dead). In *Charles W. Keenan* the accused had been ordered by his superior to 'finish off' a civilian woman at whom the superior had already shot. A US Court of Military Appeal held that in the case at issue attempted murder was to be ruled out only because the subordinate knew that she was no longer alive when he fired at her (at 114).[16] To support its ruling the Court cited an important case, unrelated to war crimes, where the same Court had extensively dealt with the notion at issue: *Rodger D. Thomas*, a case of attempted rape, which had offered the Court the opportunity to

[14] See, for instance, the laws cited in UN *Law Reports*, vol. XV, at 89 (Norway, Yugoslavia, the Netherlands).

[15] See the cases reported in UN *Law Reports*, vol. VI, 120, as well as in UN *Law Reports*, vol. VII, at 73.

[16] The Court stated that 'so far as attempted murder is concerned, military law "has tended toward the advanced and modern position" that holds one accountable for conduct which would constitute a crime if the facts were as he believed them to be (see *United States* v. *Thomas* 13 USCMA 278, 286, 32 CMR 278). Here the accused expressly testified that he believed the woman was dead; and the board of review specifically refused to find that she was still alive when the accused fired at her. Moore and Eakins also testified that they believed the victim was dead before the accused fired. The board of review could, therefore, reasonably conclude that the accused knew he was firing at a corpse. This conclusion necessarily absolves him of attempted murder' (at 113).

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discuss the requisite ingredients of the offence, with a reasoning that is along the same lines as the notion propounded above for international criminal law (at 287–92).[17]

The ICC Statute codifies international customary laws in another respect as well. Article 25(3)(f) duly takes account of the cessation of the attempter's criminal intention and leaves his initial steps unpunished:

> However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Thus, to continue with the aforementioned example, if the guard, after beating the prisoner for a while, suddenly decides not to carry through his initial purpose and takes the prisoner back to his cell, he is not guilty of attempted murder (although he may well be guilty of other crimes). Similarly, if an officer gives an order to shoot and kill a group of innocent civilians and then, just before the order is carried out, changes his mind and orders that their lives be spared, he is not considered criminally liable for murder (although he may be guilty of inhuman treatment or even torture, if he intended to carry out a mock execution).

As for the *mens rea* required for attempt, it may be noted that in common law systems, what is required is normally the *intention* to carry out the offence (recklessness is not enough). This makes it difficult to prosecute, because the question always arises: if the accused wanted, for example to kill his victim, then why did he not do so? (This is why the only cases where prosecutions are successful are where: (i) the would-be perpetrator is dragged off his victim, or (ii) the would-be perpetrator leaves his victim for dead.) It would seem that also in international criminal law the subjective element required is intent.

9.10 CONSPIRACY TO COMMIT GENOCIDE

It is common knowledge that conspiracy is a form of criminality punished in common law systems but either unknown to, or accepted to a very limited extent by, civil law countries. Conspiracy is a group offence, consisting of the *agreement of two or more persons to commit a crime.* It is punished *even if the crime is never perpetrated.* In addition, if the crime is carried out, the perpetrators are held *liable both for conspiracy and for the substantive crime* they commit. The *mens rea* element of conspiracy required for each and every participant is twofold: (i) *knowledge* of the facts or circumstances making up the crime the group intend to commit; (ii) *intent* to carry out the conspiracy and thereby perpetrate the substantive offence. Plainly, the basic rationale behind the prohibition of this crime is the need to prevent offences,

[17] The Court held that the elements of the offence of attempted rape were: '(1) an overt act; (2) specific intent, (3) more than mere preparation, (4) tending to effect the commission of the offense, and (5) failure to effect its commission' (at 286).

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especially when they involve several persons and are thus more dangerous to the community.

As noted above, in international law no customary rule has evolved on conspiracy on account of the lack of support from civil law countries for this category of crime. (In civil law systems, entering into agreement to commit a crime is not punishable per se, unless it leads to the perpetration of the crime; only exceptionally, and for such categories of serious offences as those aimed at undermining State security or at setting up associations or organizations systematically bent on criminal conduct in various areas, is conspiracy as such prohibited.)

The only international rules on conspiracy can be found in the London Agreement of 1945. In Article 6 it made punishable persons 'participating in a Common Plan or Conspiracy for the accomplishment' of any crime against peace and in addition made 'leaders, organizers, instigators or accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes [that is, crimes against peace, war crimes, and crimes against humanity] responsible for all acts performed by any persons in execution of such plan'. This provision laid down *ex post facto* law. However, as it referred to conspiracy to commit a crime against peace, it punished persons who had conspired to wage the war *that had just ended.* In addition, to the extent that it referred to other crimes, it also made conspiracy punishable for acts already accomplished. In other words, in the end conspiracy was held to be punishable to the extent that any plan or agreement to commit an international crime *had been actually carried out.* (Strikingly, Control Council Law no. 10 only referred to conspiracy to commit crimes against peace: see Article 2(1)(a).) Nevertheless, generally speaking, both the IMT at Nuremberg and the Military Tribunals sitting at Nuremberg took a restrictive view of conspiracy (see in particular *Göring and others* (at 224–6) and *Alstötter and others* (at 289–90). In the former case the influence of the French Judge Donnedieu de Vabres, and his insistence on the novel nature of conspiracy in international law, were indisputably decisive.[18]

Another international provision on the matter is Article 3(b) of the 1948 Genocide Convention, which, on the grounds and motivations set out above, makes 'conspiracy to commit genocide' punishable. It would seem that, like most other substantive provisions of the Convention, it has turned into customary law. Among other things it has been taken up in the Statutes of both the ICTY and the ICTR (but, strikingly, not in Article 6 of the ICC Statute, which consequently differs in this respect from international customary law).

In *Musema* an ICTR Trial Chamber held that conspiracy to commit genocide 'is to be defined as an agreement between two or more persons to commit the crime of genocide' (§191); as for *mens rea*, it 'rests on the concerted intent to commit genocide,

[18] Donnedieu de Vabres, *Procès*, 528–42. He among other things held the view that in the event Article 6 (in fine), of the Nuremberg Charter upheld the French notion of '*complicité*' (at 541). He also emphasized that, with regard to crimes against peace, the IMT ultimately avoided holding that there was a general conspiracy (at 541–2).

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that is, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Thus . . . the requisite intent for the crime of conspiracy to commit genocide is *ipso facto* the intent required for the crime of genocide, that is the *dolus specialis* of genocide' (§192).

The Chamber also emphasized that the crime of conspiracy to commit genocide is punishable even if it fails to lead to its result, that is, even if genocide is not perpetrated (§194).

9.11 INCITEMENT TO GENOCIDE

International law requires that incitement to genocide be not only *direct* but also *public*. At the same time incitement is punishable even if it is not followed by the commission of genocide.

In *Akayesu* a Trial Chamber of the ICTR held that direct and public incitement to commit genocide:

> must be defined for the purposes of interpreting Article 2(3)(c) [of the ICTR Statute], as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication. (§559.)

As for the subjective element of the crime, it held that:

> [it] lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. (§560.)

In the case at issue the Trial Chamber concluded that the accused was indeed guilty of the offence under discussion (§§672–5).

Another relevant case is *Ruggiu*, the journalist of 'Radio Mille Collines' accused by the ICTR's Prosecutor of 'direct and public incitement to commit genocide and crimes against humanity (persecution)'. He pleaded guilty. ICTR Trial Chamber I found that:

> when examining the acts of persecution which have been admitted by the accused, it is possible to discern a common element. Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself. (§22.)

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LEGAL GROUNDS OF JURISDICTION

15.1 INTRODUCTION

To bring the alleged authors of international crimes to book, States need to have not only laws, statutes, or some sort of judge-made legal regulation punishing those crimes, but also legal provisions authorizing courts to prosecute and punish the alleged perpetrators. These legal provisions normally empower State courts to take proceedings if the offence, its alleged author, or its victim have some sort of link with the State. Indeed, traditionally, States bring alleged perpetrators of international crimes to trial before their courts on the basis of one of three principles: *territoriality* (the offence has been perpetrated on the State's territory), *passive nationality* (the victim is a national of the prosecuting State), or *active nationality* (the perpetrator is a national of the prosecuting State). In contrast, the principle of *protection of national interests* whereby courts possess jurisdiction over crimes committed abroad by nationals or foreigners when the crimes jeopardize or imperil the State's national interests (for instance, counterfeiting the national currency, planning attacks on the State's security, etc.) is normally not used with respect to international crimes proper, on obvious grounds (States still tend to consider these crimes as not directly relevant to, or affecting, their national interests whenever a national or territorial link is lacking).

Recently the *universality principle* has emerged, whereby any State is empowered to bring to justice alleged authors of international crimes (in some cases, subject to their being present on the territory of the prosecuting State).

15.2 THE PRINCIPLE OF TERRITORIALITY

The basic principle is that a crime committed in a State's territory is justiciable in that State. In the celebrated *Lotus* case, the Permanent Court of International Justice stated in 1927 that 'in all systems of law the principle of the territorial character of criminal law is fundamental', although it also added that 'the territoriality of criminal law . . . is not an absolute principle of international law and by no means coincides with territorial sovereignty' (at 20). The Canadian Supreme Court held in *United States* v. *Burns*

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that 'individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedures and punishments which the foreign state applies to its own residents' (§72). Similarly a US court stated in *Rivard* v. *United States*, that '[a]ll the nations of the world recognize the principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done' (at 887).

The latter legal proposition is a corollary of the principle of territoriality: *even where a crime is committed outside the territory*, if its *effects* will be felt *in* the territory, then it is amenable to the State's jurisdiction (for example, if, standing outside the territory, I shoot a pistol which kills someone in the territory; or if I manufacture drugs outside the territory and then smuggle them into the territory of the State. In both cases, I can be judged in the State where the effects of the crimes were felt, even though I committed the prohibited acts outside the territory).

The principle is grounded on ideological and political reasons: the need to affirm territorial sovereignty, which evolved in the age of reason and was linked to the consolidation of modern States. This need led States to replace the previous principle of 'personality of laws' (everybody is governed by his national law, wherever he resides) with that of territoriality (what matters is the law of the place where an act is performed).

Montesquieu, Voltaire, Rousseau, and Beccaria insisted on the importance of territoriality in criminal law. The French Revolution confirmed it in the decree of 3–7 September 1792 ('foreigners charged with offences in their homeland may only be tried under the laws of their own country and by their own judges'; consequently, 'no foreigner will be retained on the galleys of France for crimes committed outside French territory'). In 1764 Beccaria, more than any other, developed the theory of territoriality. In his opinion, the adoption of this principle was warranted on two grounds. First of all, as State laws vary, one should only be punished in the place where one has infringed the law. Secondly, it is only just that a crime, which constitutes a violation of the social contract, be punished in the place where the contract was breached.[1]

The principle has numerous advantages. First, the *locus delicti commissi* (the place where the offence has allegedly been committed) is usually the place where it is easiest to collect evidence. It is therefore considered the *forum conveniens*, or the appropriate place of trial, as was restated in *Eichmann* (at 302–3). Secondly, it normally is the place where the rights of the accused are best safeguarded, for—if he is not a foreigner

[1] In his *Crimes and Punishments*, Beccaria wrote that 'There are those who think, that an act of cruelty committed, for example, at Constantinople, may be punished at Paris; for this abstracted reason, that he who offends humanity, should have enemies in all mankind, and be the object of universal execration; as if the judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men. The place of punishment can certainly be no other, than that where the crime was committed; for the necessity of punishing an individual for the general good subsists there, and there only.' C. Beccaria, *An Essay on Crimes and Punishments*, translated from the Italian, 4th edn (London: F. Newberry, 1775), repr. (Brooklyn Village: Branden Press Inc., 1983), at 64. (For the original text, which differs slightly, see C. Beccaria, *Dei delitti e delle pene*, edited by F. Venturi (Turin: G. Einaudi, 1965), at 71–2.)

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[illegible]ectingly residing there—he is expected to know the law of the territory, is more likely to know the criminal law in force there as well as his rights as a defendant in a criminal trial. In addition, unless he is a non-resident foreigner, he knows and speaks the language in which the trial unfolds. Thirdly—and this applies in particular to international crimes, whose gravity may have serious repercussions on the society within which the crime has been committed—if the prosecution and punishment occur on the territory where the crime was perpetrated, it is more likely for the cathartic process of criminal trials to have effect: the victims and their families relive their tragedies, the whole society becomes aware of what has happened and is thus put in a position of better coming to terms with, hence of psychologically overcoming, past crimes. Moreover, the judges, jury, and advocates, being members of the community where the crimes took place, are aware of local feelings about the crimes and conscious of the press and public's close scrutiny of their administration of justice; they are thus broadly accountable to the community for the manner in which they dispense justice. Finally, by administering justice over crimes perpetrated in the territory, the territorial State affirms its authority over attacks on peace and security within its bounds; by the same token it helps to deter the commission of future offences.[2]

However, in the case of international crimes, there may be a major obstacle to the territoriality principle: these crimes are often committed by State officials or with their complicity or acquiescence: for example, war crimes committed by servicemen, or torture perpetrated by police officers, or genocide carried out with the tacit approval of State authorities. It follows that State judicial authorities may be reluctant to prosecute State agents or to institute proceedings against private individuals that might eventually involve State organs.

Whenever the territoriality principle is applicable, two problems may arise. First, what should be meant by 'territory' subject to the sovereignty of a State? Here one must turn to the international rules delimiting State territory, with the consequence that offences perpetrated in a State's territorial waters or on its ships or aircraft on the high seas are considered committed on the territory of that State. Similarly, territory comprises space under the control or 'under the jurisdiction' of a State, such as for example territory occupied following an international armed conflict. By contrast, crimes perpetrated in a State's embassy abroad are not carried out on national territory but abroad (hence the contrary view of the Spanish *Audiencia nacional* in the case of the *Guatemalans* (at 130), whereby crimes committed in the Spanish embassy in Guatemala were regarded as perpetrated in Spain, was wrong).

[2] In *Sawonjuk* the British Court of Appeal (Criminal Division) stated that: 'The criminal jurisdiction of the English courts is, generally speaking, territorial. Until enactment of the War Crimes Act 1991 [under which, proceedings may be brought in the UK "against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence" for war crimes committed during the Second World War "in a place which at the time was part of Germany or under German occupation"] the appellant could not be tried here for an offence of murder or manslaughter committed in Byelorussia since he has never been a British subject and the exception made by Section 9 of the Offences against the Person Act 1861 to the ordinary rule of territoriality was confined to offences of murder or manslaughter committed outside the United Kingdom by British subjects (at 4).

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The second problem relates to the determination of the *locus commissi delicti* in the case of complex crimes: when the crime is planned in a country and committed in another country, or the crime is committed in a country but takes its effects in another, which is the territory where trial proceedings may be instituted? The tendency of national legal systems is to give priority to the place of commission or to the place where the effects of the crime materialize. Many States have jurisdiction if *one of the elements of the offence* is committed in the State's territory even if other elements occur abroad. It would seem that there are no international rules on this issue, nor may one infer from national legal systems a uniform regulation of the matter.

Problems specific to international criminal law may arise when the alleged perpetrator of a crime is a State official enjoying immunity from prosecution under national legislation (for instance, the Head of State, the head or a senior member of the government, or a member of parliament). Clearly, if this is the case, national courts are barred from instituting criminal proceedings against the accused, because the latter enjoys personal immunity (*ratione personae*). It may also be that the alleged perpetrator, whatever his official status, is covered by an amnesty law. In this case, again, the national authorities of the State where the amnesty was granted may be precluded from taking judicial action. By contrast, a foreign court, assuming it has jurisdiction over the crime, may consider that it does not have to recognize the amnesty, particularly if this law turns out to be in conflict with international rules of *jus cogens*, that is peremptory norms of international law.[3] Thus, whereas national jurisdiction based on the territoriality principle may sometimes fail, other grounds of jurisdiction invoked by foreign courts may prove workable and lead to the prosecution of the alleged culprit.

Among the international treaties providing for grounds of jurisdiction over international crimes, the Convention on Genocide of 1948 should be mentioned. In Article VI it stipulates that persons accused of genocide must be brought to trial before the competent courts of the State where the act has been performed (or before an International Criminal Court, if and when it is established and assuming it has jurisdiction over the crimes in question). This rule, however, has never been applied, except in Rwanda, where national courts prosecuted alleged authors of acts of genocide committed in 1994 alongside the international prosecutions brought before the ICTR. This was only possible due to the rare circumstance that the victims of the genocide, the Tutsi, had seized power in Rwanda (the Tutsi-led party having in 1994 deposed the Hutu-led government that planned and waged the genocide), and were therefore strongly intent on bringing prosecutions for genocide, not least since the fact of the genocide legitimized the minority Tutsis' hold on power.

[3] In England courts are under no obligation to recognize an amnesty granted by another State, irrespective of whether the alleged violation breaches peremptory norms. Since an amnesty is not a judgment, the principle of *autrefois acquit/autrefois convict*—the English equivalent of the *non bis in idem* principle—does not apply. This arose in *Pinochet*—he had been granted an amnesty—but the English courts considered that irrelevant.

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15.3 THE PRINCIPLE OF ACTIVE NATIONALITY

Normally the principle of active nationality is implemented in one of two forms. In some States, courts have jurisdiction over certain criminal offences committed by their nationals abroad. This is so, whether or not those offences are criminal under the law of the territorial State, that is, the State in which the conduct constituting the offences under the law of the State of nationality were committed. In this case the underlying motivation is the will of a State that its nationals comply with its law, whether at home or abroad, regardless of what is provided for in the foreign State when the crime is committed. In other countries jurisdiction over crimes committed by nationals abroad is subordinated to the crime being punishable under the law of the territorial State as well (this, for instance, holds true for Egypt). In this case the essential rationale behind the principle is the desire—or constitutional prohibition in many cases—of the State of nationality not to extradite its nationals to the State where the crime has been perpetrated. Hence the law of the State of active nationality must provide for the possibility of trying the accused in that State, so that he does not escape justice altogether. Indeed, it is striking that countries such as the UK, which have no constitutional or other prohibition on the extradition of their nationals, normally do not provide for active nationality as a basis for jurisdiction.[4]

All this holds true, generally speaking, for criminal offences. As for international crimes, States that uphold this ground of jurisdiction do so in order to bow to international dictates, that is to make international law effective by complying with its commands. Thus, they normally do not require that the offence be also punishable by the territorial State, as it is sufficient for the offence to be regarded as an international crime by international rules (be they customary or treaty provisions).

This principle is normally upheld with regard to war crimes, as well as such crimes as torture. Many States, particularly under the pressure arising from the conclusion of treaties setting out international crimes, have passed legislation providing for jurisdiction based on nationality. For instance, in the UK, as a result of the International Criminal Court Act 2001, designed to implement the Statute of the ICC, courts possess jurisdiction over all crimes envisaged in the Court's Statute and committed by British nationals either at home or abroad. The active nationality principle is also laid down in a number of international treaties, which include the 1984 Convention against Torture (Article 5(1)) and various treaties against terrorism.[5]

[4] Nonetheless, as stated above, the courts in England and Wales have jurisdiction over murder and manslaughter committed abroad on the basis of the active nationality principle. See Offences against the Person Act 1861, s. 9. The same is true of High Treason under the Treason Act 1351. These exceptions can be explained on the basis of the gravity of the crimes in question.

[5] See for instance the 1973 Convention on internationally protected persons (Article 6(1)(b)), the 1979 Convention on the taking of hostages (Article 6(2)(e)), the 1980 Convention on the protection of nuclear material (Article 8(1)(b)), the 1988 Convention and Protocol on the security of maritime navigation (Article 6(1)(c)), the 1994 Convention on the Safety of UN and Associated Personnel (Article 10(1)(b)), the 1998

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A problem that may arise where jurisdiction is exercised on the basis of the active nationality principle concerns the moment at which the alleged perpetrator must possess the nationality of the prosecuting State: is it when the crime is perpetrated, or when criminal proceedings are instituted? It would seem that most States tend to accept that the nationality may be possessed at either moment, thus broadening the jurisdiction of the State and better ensuring the punishment of international crimes. Other States (for instance, Egypt) require instead that the person be a national of the State at the time of commission of the crime.

One may also notice a tendency of States to broaden this ground by including residents (this applies for instance to the UK with regard to war crimes committed during the Second World War as well as the crimes envisaged in the Statute of the ICC; to Brazil with regard to genocide) or stateless persons residing on the territory of the prosecuting State (this for instance applies to Italy and the Russian Federation).

Some States have passed legislation concerning crimes perpetrated during the Second World War, for the purpose of punishing persons who, whatever their nationality at the time of commission of crimes, have subsequently acquired their nationality, possibly with the hope of sheltering behind their newly acquired nationality.[6]

15.4 THE PRINCIPLE OF PASSIVE NATIONALITY

By virtue of the principle of passive nationality States may exercise jurisdiction over crimes committed abroad against their own nationals. Plainly, the principle is grounded both on: (i) the *need to protect nationals living or residing abroad* and (ii) a substantial *mistrust* in the exercise of jurisdiction by the foreign territorial State.

Normally States invoking this ground of jurisdiction also provide that, whenever the accused is abroad, a 'double incrimination' is required for prosecuting a crime, namely that the offence be considered as such both in the territorial State and in the State of the victim. 'Double criminality' is usually considered a procedural requirement of extradition: to extradite from State X to State Y, the crimes in question must be a crime in both States. Normally, where passive nationality is exercised, the State will have to seek extradition of the perpetrator as he will be abroad. Of course, that is not always the case. If the perpetrator, for example a Chilean accused of murdering a Spaniard, is in the State exercising jurisdiction, e.g. Spain, then Spain will be able to

Convention on terrorist bombing (Article 6(1)(c)), the 1999 Convention on the financing of terrorism (Article 7(1)(c)). See also the 2000 Convention Against Transnational Organized Crime (Article 15(2)(b)).

[6] Thus, §§1091 and 2342 of the US Code so provide with regard to genocide and war crimes. In the UK a law was passed in 1991 (the War Crimes Act) whereby proceedings may be brought for war crimes committed during the Second World War against persons who, whatever their nationality at the time of the alleged offence, are British citizens or residents as from 8 March 1990. (This cut-off date was chosen to prevent persons evading the Act by changing their nationality or residence.) Other States such as Australia and Canada have passed similar laws.

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proceed against him without going through extradition proceedings and therefore without having to worry about 'double criminality'.

Outside extradition law the requirement at issue is intended to avoid prosecuting a person for an act that is not considered a criminal offence by the State where it has been performed; in other words, the rationale for this requirement may be found in the general principle of legality (*nullum crimen sine lege*) which is common to all national legal systems, in addition to being a general principle of international criminal law (see 7.3). However, as far as international crimes are concerned, this requirement is replaced by the requirement that the offence be considered as an international crime by international law, whatever the content of the legal regulation in the territorial State. In this connection, the decision of the Supreme Court of Argentina delivered in *Priebke* on 2 November 1995, concerning the extradition to Italy of a German national who had subsequently acquired Argentinian nationality, is pertinent: the Court explicitly held that as the offence of which the defendant stood accused, namely a war crime, was internationally regarded as an international crime, this sufficed for the purpose of the double incrimination principle.[7]

There has been frequent resort to this ground of jurisdiction to prosecute war crimes, particularly after the cessation of hostilities and by the victor State against the vanquished (former) enemies. (Notable departures based on the active nationality principle are the trials instituted in 1902 by US Courts Martial against American servicemen who had fought in the Philippines, the Leipzig trials against Germans, imposed upon Germany by the Allies, and the various trials before US Courts Martial for crimes committed in Vietnam.)

More recently courts have relied upon this jurisdictional ground with regard to crimes against humanity and torture. Significant in this respect are some cases tried *in absentia*: *Astiz*, a case brought before French courts (an Argentinian officer had tortured two French nuns in Argentina), as well as some cases brought before Italian courts against Argentinian officers for crimes allegedly perpetrated against Italians (or Argentinians also having Italian nationality) in Argentina.[8] Furthermore, this ground of jurisdiction has been laid down in national legislation with regard to terrorism, for instance in the United States (see §§2331 and 2332 of the Federal Criminal Code), in France (Articles 113–17 of the Criminal Code), and in Belgium. It is also stipulated in a number of international conventions against terrorism[9] and in the 1984 Convention against Torture (Article 5(1)).

Resort to the passive nationality principle is, however, particularly incongruous in the case of international crimes such as for instance those against humanity, and torture. By definition, these are crimes that injure humanity, that is, our sense of

[7] Fallos CSJN 318:2148, opinion of Judges Nazareno and O'Connor, §77; opinion of Judge Bossert, §91.

[8] See for instance *Suarez Mason and others*, at 8–15.

[9] For example, the 1973 Convention on internationally protected persons, the 1979 Convention on hostage-taking, the 1988 Convention and Protocol on maritime safety, the 1994 Convention on the protection of UN agents, the 1997 Convention on terrorist attacks, the 1999 Convention on the financing of terrorism, and the 2000 Convention on transnational organized crime.

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humanity, in other words our concept of respect for any human being, *regardless* of the nationality of the victims. As a consequence, their prosecution should not be based on the national link between the victim and the prosecuting State. This is indeed a narrow and nationalistic standard for bringing alleged criminals to justice, based on the interest of a State to prosecute those who have allegedly attacked one of its nationals. The prosecution of those crimes should instead reflect a universal concern for their punishment; it should consequently be based on such legal grounds as territoriality, universality, or active nationality.

It follows that, as far as such crimes as those against humanity, torture, and genocide are concerned, the passive nationality principle should only be relied upon as a *fall-back*, whenever no other State (neither the territorial State, nor the State of which the alleged criminal is a national, nor other States acting upon the universality principle) is willing or able to administer international criminal justice. Perhaps this is the reason why in international conventions such as that on torture this ground of jurisdiction, unlike those just mentioned, is envisaged not as an obligation of contracting States but simply as an *authorization* to prosecute (see Article 5(1)(c) of the 1984 Convention against torture).

Conversely, the ground of jurisdiction under discussion may prove appropriate for such offences as war crimes or terrorism as a discrete offence, where the need to protect national interests and concerns acquires greater relevance.

15.5 THE UNIVERSALITY PRINCIPLE

Under the principle of universality any State is empowered to bring to trial persons accused of international crimes, regardless of the place of commission of the crime, or the nationality of the author or of the victim.

The principle was first proclaimed in customary international law in the seventeenth century, with regard to piracy. Any State was authorized to arrest and bring to justice persons suspected of engaging in piracy, whatever their nationality and the place of commission of the crime. The rationale behind this exceptional authorization to States to depart from the classic principles of territoriality or nationality was the need to fight jointly against a form of criminality that affected all States. Universal jurisdiction was therefore based on a *joint concern of all States*. Each State knew that by bringing to justice suspected pirates it was acting to protect at the same time its own interests and those of other States.

Subsequently the same jurisdictional ground was included in the 1949 Geneva Conventions on war victims, the 1984 Convention against Torture, and a string of international treaties on terrorism. The rationale for universal jurisdiction in these cases differed, however, from that invoked for piracy. States were not empowered to exercise jurisdiction for the purpose of protecting a joint interest. They were authorized to prosecute and punish, on behalf of the whole international community, persons responsible for a special class of war crimes (grave breaches of the 1949 Geneva

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ventions), torture or terrorism, with a view to safeguarding *universal* values. For stance, contracting States were authorized by the 1984 Convention to bring to dice persons who had engaged in torture abroad, in particular in their own country inst their countrymen. The purpose was not to prevent those persons from equally rpetrating torture against nationals of the prosecuting State (in which case one ould have been faced with the protection of a joint interest). The purpose was rather ut of not leaving the crime of torture unpunished, were the territorial State to frain from putting the alleged torturer in the dock. Contracting States were thus uthorized to act as 'universal' guardians against attacks on human dignity taking the rm of torture.

In short, the crimes over which such jurisdiction may be exercised are of such a gravity and magnitude that they warrant their universal prosecution and repression, s the Supreme Court of Israel eloquently held in *Eichmann* as long ago as 1962. Subsequently the Spanish Constitutional Court, in a judgment of 10 February 1997,[10] and the Spanish national criminal court (*Audiencia nacional*) in an order of 4 November 1998[11] set out this view.) Thus, any State is authorized to substitute itself for the natural judicial forum, namely the territorial or national State, should neither of them bring proceedings against the alleged author of an international crime.

Under the strong influence and pressure of these international rules, States have begun to lay down the principle of universal jurisdiction in their national legislation: in this connection mention may be made of Spain and Belgium, as well as Germany and Austria.

15.5.1 TWO DIFFERENT VERSIONS OF UNIVERSALITY

The universality principle has been upheld in two different versions, both predicated on the notion that the judge asserting universal jurisdiction so acts in order to substitute for the defaulting territorial or national State: the narrow notion (conditional universal jurisdiction) and the broad notion (absolute universal durisdiction).

A. The narrow notion (conditional universal jurisdiction)

According to the more widespread version, the narrow notion, only the State where the accused is in custody may prosecute him or her (the so-called *forum deprehensionis*,

[10] See the Judgment of 10 February 1997, in the *Panamanian Ship* case, at 6, Legal Ground no. 3A. The Court held that the Spanish legislator had intended 'to attribute universal scope to the Spanish jurisdiction over those specific crimes [mentioned in Article 23 of the 1985 Law on Judicial Power], on account both of the gravity of these crimes and the need for international protection'.

[11] Order (*auto*) of 4 November 1998, in *don Adolfo Francisco (Scilingo)*, at 3, Legal Ground no. 2. The Court held that it was contrary to the spirit of the Genocide Convention to interpret Article 6 of this Convention (which provides that the accused may be tried either by a territorially competent court or by an international court) to the effect that such provision would limit the jurisdiction of States. This interpretation 'would run counter to the fact that genocide is "regarded as a crime of extreme gravity in the whole world and affects directly the international community, indeed all humanity, as is intended by the same Convention".

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or jurisdiction of the place where the accused is apprehended). Thus, the presence of the accused on the territory is a *condition for the existence of jurisdiction.*

This class of jurisdiction is accepted, at the level of customary international law, with regard to piracy.[12] At the level of treaty law it has been upheld with regard to *grave breaches* of the 1949 Geneva Conventions and the First Additional Protocol of 1977, *torture* (under Article 7 of the 1984 Torture Convention), as well as *terrorism* (see the various UN-sponsored treaties on this matter).[13] These treaties, however, do not confine themselves to granting the power to prosecute and try the accused. They also *oblige* States to do so, or alternatively to extradite the defendant to a State concerned (the principle of *aut prosequi aut dedere*).

This version of the universality principle is also applied in the national legislation of some States, such as Austria, Germany, and Switzerland.[14] In France, courts have applied Article 2 of the law of 2 January 1995 implementing the Statute of the ICTY to the effect that, for the application of the relevant provision of the Geneva Conventions on grave breaches, it was required that the offender be on French territory.[15]

B. The broad notion of universality (absolute universal jurisdiction)

Under a different version of the universality principle, a State may prosecute persons accused of international crimes regardless of their *nationality*, the place of commission of the crime, the nationality of the victim, and even of *whether or not the accused is in custody or at any rate present in the forum State.* However, as many legal systems do not permit trials *in absentia*, the presence of the accused on the territory is then a condition for the initiation of trial proceedings. Clearly, this conception of universality allows national authorities to commence criminal investigations of persons suspected

[12] See A. Cassese, 'When may Senior State Officials be Tried for International Crimes? Some comments on the *Congo* v. *Belgium* Case,' 13 EJIL (2002), at 857–8.

[13] See for instance Article 7 of the Hague Convention for the suppression of unlawful seizure of aircraft of 1970; Article 7 of the Montreal Convention on the suppression of unlawful acts against the safety of civil aviation (sabotage), of 1971; Article 8 of the 1979 Convention against the taking of hostages; Article 7 of the 1988 Convention for the suppression of unlawful acts against the safety of maritime navigation.

[14] Article 65.1.2 of the Austrian Penal Code provides that Austrian criminal law may apply in respect of offences committed abroad, so long as the acts are also punishable in the place where they were performed, and provided that the offender, if a foreigner, is in Austria and may not be extradited to another State (see to this effect *Cvjetković*, at 5–6). In Germany, Article 6.9 of the Penal Code provides that German criminal law shall apply to offences committed by non-nationals abroad if such offences are made punishable by an international treaty binding upon Germany. Article 7(2).2 of the same Penal Code allows for prosecution of foreigners apprehended in Germany for crimes perpetrated abroad, if they are not extradited (either because a request for extradition was never made, or was refused, or because extradition is not feasible). Articles 108 and 109 of the Swiss Military Penal Code provide for universal jurisdiction over violations of international humanitarian law and the laws and customs of war. Article 6 *bis* of the Swiss Criminal Code makes the Code applicable to crimes committed abroad, (i) whenever Switzerland is obliged to pursue such crimes under an international treaty, and provided that (ii) the act is also punishable in the State where it was committed, and (iii) the perpetrator is in Switzerland and is not extradited. See the *G.* case, at 7 and *Niyonteze*, at 35–41.

[15] See *Javor and others* Cass. Crim. 26 March 1996, in *Bull.* No. 132 at 380–3. See also *Munyeshyaka*, where the French Court of Cassation rightly reversed (at 6–7) a decision of the Nîmes Court of Appeal denying French jurisdiction in spite of the presence of the accused in France (1085–9).

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serious international crimes, and gather evidence about these alleged crimes, as soon as such authorities are seized with information concerning an alleged criminal offence. They may thus exercise criminal jurisdiction over such persons, without requiring that the person first be present, even temporarily, in the country. As stressed above, such exercise of jurisdiction is premised on the failure of the territorial or national State to take proceedings, and should therefore not be activated whenever one of those States initiates proceedings. (In this connection, it may be interesting to recall that in Spain, a ruling (*auto*) by the *Audiencia nacional* dated 13 December 2000 in the case of the *Guatemalan Generals* rejected a claim to the exercise of universal jurisdiction by Spanish courts on the basis that the complaints against the accused persons (Guatemalan Generals) could be investigated and tried in Guatemala (at 145), thus the *Audiencia* interpreted Spanish law to the effect that Spanish jurisdiction is subsidiary, and can only be exercised in case of failure by a State to try serious crimes.)[16]

This principle is laid down in such national legislation as that of Spain and Belgium.[17] It is notable that Regulation no. 2000/15 of the United Nations Transitional Administration in East Timor (UNTAET) also applies this principle in Articles 2.1 and 2.2 with regard to such crimes as genocide, war crimes, crimes against humanity, and torture.

One might also construe Article 7.5 of the Italian Criminal Code (whereby Italian nationals or foreigners who commit abroad any crime 'for which either special legislative provisions or international treaties establish that Italian criminal law shall apply, may be punished under Italian law') to the effect that alleged authors of international crimes may be prosecuted even if they do not find themselves on Italian territory,

[16] The subsidiary nature of universality may also follow from international rules. Interestingly, in its decision of 5 November 1998 in *Pinochet*, the Spanish *Audiencia nacional* held that universal jurisdiction may have to yield to territorial jurisdiction whenever this is imposed by an international treaty. It stated that, because of the prevalence in Spanish law of treaties over national legislation, Article 6 of the Genocide Convention of 1948 (whereby persons accused of genocide must be tried by courts of the territorial State or by an 'international penal tribunal') entails that in Spain the exercise of other grounds of jurisdiction (including universality) is '*subsidiary* in nature', 'so that courts of a State should refrain from exercising jurisdiction over acts of genocide that are being tried by courts of the State where they occurred, or by an international criminal court' (at 3, second legal ground; emphasis added).

[17] In Spain, Article 23 of the 1985 Law on Judicial Power provides that Spanish courts have jurisdiction over crimes committed outside Spain when such crimes constitute genocide, terrorism, or other crimes which Spain is obliged to prosecute under international treaties. However, in Spain trials by default or *in absentia* are not allowed.

In Belgium, under a Law of 16 June 1993 Belgian courts have jurisdiction over grave breaches of the 1949 Geneva Conventions and 1977 Protocols, no matter where such offences are committed, by whom or against whom they are committed, and whether or not the offender is on Belgian territory. A law of 3 February 1999 added genocide and crimes against humanity to the international crimes over which Belgian courts possess universal jurisdiction. See the order of the Brussels Investigating Judge in *Pinochet* (at 281–8), as well as the *Rwandan* case (where however the accused was already in custody in Belgium), at 2–3.

It should however be noted that in a decision of 6 March 2002 in *Sharon and others* the *Chambre des mises en accusation* of the Brussels Court of Appeal held that Belgian legislation must be construed to the effect that it provides only for *conditional* universal jurisdiction (at 7–20).

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provided that: (i) the crimes are envisaged in international treaties ratified by Italy and (ii) under these treaties Italian courts may exercise jurisdiction.[18]

Furthermore, the relevant Spanish case law is worthy of mention. (In addition to a judgment of the Constitutional Court,[19] the decisions of the *Audiencia nacional* in *Pinochet*,[20] *Scilingo*,[21] and *Fidel Castro*[22] should be recalled.) In addition, under the

[18] Recently some national judges attempted to place a broad interpretation on the notion of universal jurisdiction laid down in the Geneva Conventions and the First Additional Protocol of 1977. A French investigating judge unsuccessfully made this attempt on 9 May 1994 (Order of the *Juge d'instruction*, in *Javor and others*). (He intended to institute proceedings against Bosnian Serbs who were alleged to have committed grave breaches of the Geneva Conventions and who found themselves on the territory of Bosnia and Herzegovina.)

See the cases discussed in R. Maison, 'Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes', 6 EJIL (1995), 260 ff.

[19] See the judgment of 10 February 1997 (no. 1997/56) in the *Panamanian ship* case. The ship of the accused (flying Panama's flag) had been chased and seized on the high seas for drug trafficking; the accused had been prosecuted before Spanish courts for one of the crimes over which the Law of 1985 granted universal jurisdiction to those courts. In its lengthy decision, the Constitutional Court took the opportunity to state in an *obiter dictum* that Article 23, para. 4 of the 1985 Law, granting universal jurisdiction, was in keeping with the Constitution: the Spanish legislator had 'conferred a universal scope (*un alcance universal*) on the Spanish jurisdiction over those crimes, corresponding to their gravity and to the need for international protection' (Legal Ground no. 3A). Spanish text on CD-Rom of Spanish legislation and case law: EL DERECHO, 2002, Constitutional decisions.

[20] See, in particular, the Order (*auto*) of 5 November 1998 (no. 1998/22605). In this order the Spanish National High Court (*Audiencia nacional*) confirmed that national courts have jurisdiction over genocide and terrorism committed in Chile (see Legal Grounds nos 3 and 4; as for torture, where the Court held that Spanish jurisdiction was based on Article 23(4)(g), on the strength of the 1984 Torture Convention, see Legal Ground no. 7). It should be noted that the Court concluded that 'Spain has jurisdiction to judge the acts (*conocer de los hechos*), based on the principle of universal prosecution of certain crimes . . . enshrined in our domestic law. It also has a legitimate interest (*interés legítimo*) in exercising that jurisdiction as more than fifty Spaniards were killed or made to disappear in Chile, victims of the repression reported in the orders' (Legal Ground no. 9). In other words, as is apparent from both the words reported and the entire text of the decision, Spanish jurisdiction was not grounded on passive nationality; the presence of Spaniards among the victims of the alleged crimes only amounted to a 'legitimate interest' of Spain in the exercise of universal jurisdiction. This order was confirmed by the decision of the *Audiencia nacional* of 24 September 1999 (no. 1999/28720). There, the Court reiterated that the Spanish Court had jurisdiction over the crimes attributed to Pinochet, namely genocide, terrorism, and torture (Legal Grounds nos 1 and 10–12), and also stated that Pinochet could not invoke the immunities pertaining to Heads of State, for he no longer held this status (Legal Ground no. 3). For the (Spanish) text of the order and the subsequent decision, see the Spanish case law on CD-Rom, EL DERECHO, 2002, Criminal jurisprudence, as well as on-line: **www.derechos.org/nizkor/espana.**

[21] See the Order (*auto*) of 4 November 1998 (no. 1998/22604), very similar in its tenor to that of 5 November referred to *supra*.

[22] See Order (*auto*) of 4 March 1999 (no. 1999/2723). The *Audiencia nacional* held that the Spanish Court could not exercise its criminal jurisdiction, as provided for in Article 23 of the Law on the Judicial Power, for the crimes attributed to Fidel Castro. He was an incumbent head of state, and therefore the provisions of Article 23 could not be applied to him because they were not applicable to heads of state, ambassadors, etc. in office, who thus enjoyed immunity from prosecution on the strength of international rules to which Article 21(2) of the same Law referred (this provision envisages an exception to the exercise of Spanish jurisdiction in the case of 'immunity from jurisdiction or execution provided for in rules of public international law'). See Legal Grounds nos 1–4. The Court also stated that its legal finding was not inconsistent with its ruling in *Pinochet*, because Pinochet was a former head of state, and hence no longer enjoyed immunity from jurisdiction (see Legal Ground no. 5). For the (Spanish) text of the order, see the CD-Rom, EL DERECHO, 2002, Criminal case law.

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interpretation of the German Penal Code propounded by the German Supreme Court (*Bundesgerichtshof*) in a judgment of 21 February 2001 in *Sokolović*, the same principle should also apply in Germany, at least whenever the obligation to prosecute is provided for in an international treaty binding upon Germany.[23] One should also mention that in the course of the drafting of the Statute of the International Criminal Court, Germany forcefully expressed the view that international customary law at present authorizes universal jurisdiction over major international crimes.[24] In line with this view, Article 1 of the bill on international criminal law proposed by the German government and now pending before the German *Bundesrat* (Senate), namely the *Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches*, provides that German law applies to all criminal offences against international law envisaged in the law (namely genocide, crimes against humanity, war crimes), even when the criminal conduct occurs abroad and does not show any link with Germany.[25]

What are the merits and the flaws of asserting absolute universal jurisdiction? This is a matter that deserves some consideration.

No one will fail to understand the generous ideal underpinning this system. Nonetheless, in my opinion various reasons militate against such absolute universal jurisdiction, at least if resorted to with regard to political or military leaders.[26]

First of all, the existence in some States of national laws granting absolute universal jurisdiction may prompt victims of atrocities to engage in so-called forum-shopping.

[23] The Court noted that in its decision of 29 November 1999, the Court of Appeal (*Oberlandsgericht Düsseldorf*), following the traditional German case law, had held that a factual link was required by law (*legitimierender Anknüpfungspunkt*) for a German court to exercise jurisdiction over crimes committed abroad by foreigners. (In the case at issue the offender was a Bosnian Serb accused of complicity in genocide perpetrated in Bosnia.) The Court of Appeal had found this link in the fact that the accused had lived and worked in Germany from 1969 to 1989 and had thereafter regularly returned to Germany to collect his pension and also to seek work. After recalling these findings by the Court of Appeal, the Supreme Court added: 'The Court however inclines, in any case under Article 6 para 9 of the German Criminal Code, not to hold as necessary these additional factual links that would warrant the exercise of jurisdiction . . . Indeed, when, by virtue of an obligation laid down in an international treaty, Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non-intervention' (judgment of 21 February 2001, 3 StR 372/00, still unreported, at pp. 19–20 of the typescript).

[24] In a document submitted in 1998 to the Preparatory Committee drafting the Statute, Germany stated the following: 'Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial State, territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice' (UN Doc. A/AC.249/1998/DP.2, 23 March 1998).

[25] 'Dieses Gesetz gilt für alle in ihm bezeichneten Straftaten gegen das Völkerrecht, für die in ihm bezeichneten Verbrechen auch dann, wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist' (see Bundesrat, *Drucksache 29/02*, 18 January 2002, *Gesetzentwurf der Bundesregierung*, at 3; German text on-line at www.bmj.bund.de/images/10185.pdf). See the precisions made in the Commentary, at 29).

[26] See also the critical remarks by J. Verhoeven, 'Vers un ordre repressif universel? Quelques observations', 45 AFDI (1999), 62–3.

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In other words, it may attract such victims and induce them to file complaints against alleged perpetrators.[27]

Secondly, if the accused never enters the country where the court is located, or is not extradited to that country, a situation that appears most likely, the judge will end up investigating hundreds of complaints about which he can do nothing.

Thirdly, a judge who decides to go ahead with the trial regardless of the absence of the accused, conducting proceedings *in absentia*, is likely to be criticized for violating the fundamental rights of the accused. Moreover, the absence of the accused, normally linked to the fact that the State of nationality refuses to extradite, could worsen the problem of establishing the facts because neither the accused nor the State in question will co-operate in the search for evidence.

Fourthly, the power of national judges to issue arrest warrants against foreign State officials may lend itself to abuse if the power is not exercised with caution and is not predicated on two basic conditions: that (i) compelling evidence is available against the accused, and (ii) the person charged with international crimes does not enjoy, or no longer enjoys, personal immunities (this holds true for Heads of State, prime ministers, some senior members of cabinet, and diplomatic agents). Whenever the necessary prudence is not used, the exercise of universal jurisdiction may easily lead to international disputes. This for instance happened in the aforementioned case of the Congolese former foreign minister against whom a Belgian investigating judge had issued an arrest warrant. The Congo filed an application with the International Court of Justice, claiming that the arrest warrant ran counter to the principle of sovereign equality of States and the rules on diplomatic immunity attached to such a State official (see *infra*, 15.6). Thus, a case pertaining to the criminal responsibility of individuals became the subject of an interstate dispute. In other words, the case was moved from an inter-individual level to that of State-to-State relations. This is contrary to the very logic of international criminal justice.

A further possible criticism is that, if all countries put a system modelled on Belgian (or Spanish) law into practice, the risk of inconsistent rulings would be great and no one would know how to establish priorities between competing courts.

Finally, given the number of diplomatically and politically high-profile cases which would be brought before the courts, the judge would eventually become entangled in roles normally played by the political authorities,[28] with consequent danger of infringing the sound principle of separation of powers.[29]

[27] On this issue see in particular J. F. Flauss, 'Droit des immunités et protection internationale des droits de l'homme', *Revue suisse de droit international et de droit européen* (2000), at 304.

[28] Take the *Pinochet* case: it would seem difficult to prove that Pinochet committed *genocide* in Chile, whereas it would seem that he can be accused of gross violations of human rights including torture; the fact that he was accused of genocide in Spain shows the sort of charges that can be put together, primarily for the purpose of taking into account the Spanish legislation (which provides for universal jurisdiction in the absence of a treaty only for genocide and terrorism).

Arguably these political matters should be left to politicians, legislatures, etc., and not brought before judges.

[29] It is, however, a fact that US courts have for many years asserted universal jurisdiction by default,

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Should one conclude that unqualified universal jurisdiction should always be regarded? In fact, there are cases where it may prove fitting: when adopted for international crimes perpetrated by *minor defendants*. Often the person accused of international crimes does not hold a high position in government. Universal jurisdiction may be envisaged for cases involving *low-ranking* military officers or other minor State agents, or even *civilians*, culpable of alleged crimes such as torture, war crimes, crimes against humanity, and so on. With regard to such persons, one is at a loss to see why, if the national or territorial State fails to take proceedings, another State should not be entitled to prosecute and try them in the interests of the whole international community. With regard to these persons, the initiation of criminal proceedings in their absence, the gathering of evidence, and the issue of an arrest warrant would have the advantage of making their subsequent arrest and trial possible. Normally these persons are not well known, and their travels abroad do not make news, unlike those of foreign ministers or Heads of State or military leaders. Hence the only way of bringing them to trial is to issue arrest warrants so that at some stage they are apprehended and handed over to the competent State.

However, let us not be unmindful of the pitfalls of the universality principle. In essence, the search for and collection of evidence may prove extremely difficult, for most of the evidence may be found in the State where the crimes were committed, and the national authorities may not be forthcoming and co-operative, especially if the crimes were committed on behalf of or at the behest of those authorities. Admittedly, the same drawback also occurs with regard to the passive nationality principle: the State of nationality of the alleged perpetrator of the offence is often reluctant to hand over the relevant evidence to the State of nationality of the victim (whereas when the active nationality principle is resorted to the reverse is true, because the State of the victim is normally all too glad to co-operate in the prosecution of the perpetrator). It would seem however, that in the case of universal jurisdiction the danger or likelihood of lack of judicial co-operation by the foreign State is much greater. States tend to dislike the exercise of extraterritorial jurisdiction when even the link constituted by the presence in the forum State of the perpetrator or the victim is lacking. Hence, whenever faced with such a situation, they tend not to co-operate.

Admittedly in *civil* proceedings, over serious violations of international law perpetrated by foreigners abroad (see the Alien Tort Claims Statute and the *Filartiga-Peña Irala* case. See, e.g., L. F. Damrosch, 'Enforcing International Law through Non-Forcible Measures', 269 *HR* (1997), 161–7). Although civil jurisdiction is less intrusive than criminal jurisdiction, when it is exercised over foreigners who possess official status (for instance, high-ranking State officials), it nevertheless amounts to interference with the internal organization of foreign States. Whether or not this trend of US courts is objectionable as a matter of policy, or on legal grounds, it is a fact that it has not been challenged, or in other words has been acquiesced in, by other States. This implicit acceptance through non-contestation would seem to evidence the generally shared legal conviction that, where there are serious and blatant breaches of universal values, national courts are authorized to take action, subject to fulfilment of some fundamental requirements, such as ensuring a fair trial. (Admittedly there is a conspicuous difference between civil and criminal suits: in civil suits only money is at stake whereas in a criminal trial, the accused may be deprived of his liberty for a long time. So States may be prepared to tolerate civil suits of this nature, but shrink from allowing criminal trials.)

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15.6 OBJECTIONS TO UNIVERSALITY

The notion of universality has been subjected to two criticisms. The first is that State courts would interfere in the internal affairs of another State, in violation of a fundamental principle of international relations. For example, Chile put forward this argument in a memorandum to the UK on the possible extradition of General Pinochet to Spain.

It is clear that here we are witnessing a confrontation between two different conceptions of the international community. The first is an archaic conception, under which non-interference in the internal affairs of other States constitutes an essential pillar of international relations. The second is a modern view, based on the need to further universal values; it implies that national judges are authorized to circumvent, if not remove, the shield of sovereignty.

A Spanish court, the *Audiencia nacional*, in two recent cases (*don Alfonso Francisco (Scilingo)* (at Legal ground no. 10) and *don Augusto (Pinochet)* (at Legal ground no. 9)) as well as the German Federal High Court (in the *Sokolović* case) (at 20), have already rejected this objection, without however giving reasons. It would nevertheless appear that they considered that courts, when they stand in, under either international law or national legislation, for a defaulting foreign State and hand down decisions relating to crimes committed by foreigners against foreigners abroad, protect fundamental values recognized by the whole international community.

A second objection is that national courts would hinder international diplomatic relations, whenever the suspect or the accused is a State agent in office, all the more so when he is a high representative such as a Head of State or government, a foreign affairs minister, etc. In this connection, the case of *Fidel Castro*[31] is relevant, for in that case a Spanish court propounded a balanced and legally apposite solution to this intricate matter. The case dealt with charges laid against an incumbent Head of State, Fidel Castro; the Spanish court ruled that, as long as he was in office, Fidel Castro could not be prosecuted in Spain, not even for international crimes envisaged under the Spanish law of 1985.

The same objection against the exercise of universal jurisdiction was raised by the Congo against Belgium before the International Court of Justice, in the *Case*

[31] See Order (*auto*) of 4 March 1999 (no. 1999/2723). The *Audiencia nacional* held that the Spanish Court could not exercise its criminal jurisdiction, as provided for in Article 23 of the Law on the Judicial Power, over the crimes attributed to Fidel Castro. Since Castro was an incumbent Head of State, the provisions of Article 23 could not be applied to him. This was because they were not applicable to Heads of State, ambassadors, etc. in office, who thus enjoyed immunity from prosecution on the strength of international rules to which Article 21(2) of the same Law referred. (This provision envisages an exception to the exercise of Spanish jurisdiction in the case of 'immunity from jurisdiction or execution provided for in rules of public international law'.) See Legal Grounds nos 1–4. The Court also stated that its legal finding was not inconsistent with its ruling in *Pinochet*, because Pinochet was a *former* Head of State, and hence no longer enjoyed immunity from jurisdiction (see Legal Ground no. 5). For the (Spanish) text of the order, see the CD-Rom, EL DERECHO, 2002, Criminal case law.

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Concerning the Arrest Warrant of 11 April 2000. A Belgian investigating judge, at the Brussels Tribunal de Première Instance, had issued an international arrest warrant against the foreign minister of the Democratic Republic of Congo for grave breaches of the Geneva Conventions and crimes against humanity. The crimes of which the Congolese minister was accused, following complaints by Congolese and Belgian nationals, had allegedly been committed on Congolese territory against Congolese nationals. The accused was not on Belgian territory when the arrest warrant was issued: thus Belgium was not even the *forum deprehensionis.*[2] In its judgment of 14 February 2002, the Court made an important contribution to a clarification of the law of (what one ought correctly to term) *personal* immunities (including inviolability) of foreign ministers. This is an area where State practice and case law are lacking. To reach its legal findings, the Court did not, therefore, have to establish the possible content of customary law. Rather, it logically inferred from the rationale behind the rules on personal immunities of senior State officials, such as Heads of State or government (or diplomatic agents), that such immunities must perforce prevent any prejudice to the 'effective performance' of their functions. They therefore bar any possible interference with the official activity of foreign ministers. It follows that an incumbent foreign minister is immune from jurisdiction, even when on a private visit or when acting in a private capacity while holding office. Clearly, not only the arrest and prosecution of a foreign minister while on a private visit abroad, but also the mere issuance of an arrest warrant, may seriously hamper or jeopardize the conduct of international affairs of the State for which that person acts as a foreign minister.

15.7 IS THE EXERCISE OF UNIVERSAL JURISDICTION ALLOWED BY CUSTOMARY INTERNATIONAL LAW?

It would appear that the first case in which a person accused of crimes against humanity was tried in a State with which he had no formal links was *Eichmann* (although it could be argued that most of the surviving victims, and the relatives of victims, of Eichmann's offences were in Israel). It is extremely significant that no State concerned protested against that trial: neither the two German States nor the countries on whose territory the acts of genocide planned or organized by Eichmann had been perpetrated, nor the States of which the victims of genocide were nationals. Thus, States did not challenge the principle enunciated in 1962 by the Supreme Court of Israel whereby 'the peculiarly universal character of these crimes [against humanity] vests in every State the authority to try and punish anyone who participated in their commission' (at 287). The Court concluded as follows:

[2] See the relevant documents submitted by the parties in the case brought before the ICJ by Congo versus Belgium in *Case Concerning the Arrest Warrant of 11 April 2000.* (Those documents are summarized in the oral pleadings: see the verbatim records of the Court's sittings of 21 and 23 November 2000, www.icj-cij.org.)

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Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universality of jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. (At 304.)

This proposition was taken up by US courts in *Yunis* (at 903) and in two decisions in *Demjanuk* (at 27–43 and 23–7) and, in *Pinochet*, by Lords Browne-Wilkinson and Millet. Lord Browne-Wilkinson stated that 'the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed' (837–8). Lord Millet stated that 'crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order' (at 911–12). These propositions were taken up and restated by an Argentinian judge in *Simon Julio, Del Cerro Juan Antonio* (at 55–6).

As we shall see, some States have, at least recently, passed legislation applying the universality principle, and their courts have begun to apply this principle. The acceptance by States of the exercise of 'universal' jurisdiction by Israel, as well as the most recent practice of some States, and the authoritative opinions of some judges of the International Court of Justice in the aforementioned *Case Concerning the Arrest Warrant of 11 April 2000*[33] would seem to be in line with the *Lotus* principle (whereby

[33] In their Joint Separate Opinion, Judges Higgins, Kooijmans, and Buergenthal set out a series of conditions for the exercise of absolute universal jurisdiction. These conditions are as follows: (i) the State intending to prosecute a person must first 'offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned'; (ii) the charges may only be laid by a prosecutor or investigating judge who is fully independent of the government; (iii) the prosecution must be initiated at the request of the persons concerned, for instance at the behest of the victims or their relatives; (iv) criminal jurisdiction is exercised over offences that are regarded by the international community as the most heinous crimes; (v) jurisdiction is not exercised as long as the prospective accused is a foreign minister (Head of State, or diplomatic agent) in office; after he leaves office, it may be exercised over 'private acts' (see paras 59–60 and 79–85).

Some of the conditions may however give rise to objection. For instance, one fails to see why, in the first of the five conditions set out by the three judges, it is required that 'the national state of the prospective accused' be 'offered' the opportunity to act upon the charges. Why should one leave aside the territorial State (normally the *forum conveniens*) or the State of which the victim is a national? In addition, why should one envisage that the State exercising universal jurisdiction 'offer' to another State the chance to prosecute the suspect? To make such an offer would involve shifting the whole matter from the judiciary to foreign ministries and might imply making a bilateral agreement. It would be easier to require that the court intending to exercise jurisdiction should first establish whether courts of the territorial or national State have (deliberately) failed to prosecute the suspect at issue; only then should a court proceed to assert universal jurisdiction.

It is submitted that also the fifth condition should be couched differently, to take account of the existence of the customary rule referred to in the text above, and which is intended to remove functional immunity in the case of international crimes.

States are authorized to prosecute extraterritorial offences provided that by so doing they do not breach a prohibitive rule of international law).[1]

15.3 TRENDS IN THE EXERCISE OF NATIONAL CRIMINAL JURISDICTION

15.3.1 THE PROSECUTION AND PUNISHMENT OF WAR CRIMES

The merits and shortcomings of the penal repression of international crimes may be best assessed if considered in the light of the fundamental distinction drawn by Röling, with regard to war crimes, between 'individual' and 'system' criminality.[2] The former encompasses war crimes committed by combatants on their own initiative and for 'selfish' reasons (rape, looting, murder, and so on). The latter refers to war crimes perpetrated on a large scale, chiefly to advance the war effort or for ideological reasons, at the request or at least with the encouragement or toleration of the government authorities (killing civilians to spread terror, refusing quarter, using prohibited weapons, engaging in torture of captured enemies to obtain information, and so on). It also refers to other classes of international crimes, the perpetration of which by single individuals presupposes the complicity, participation, toleration, or acquiescence of State authorities, or which is even effected by State agents themselves. I am referring to crimes against humanity, genocide, or egregious forms of terrorism.

[1] The Lotus case (1927) is a milestone in the history of international criminal law. In that case a collision occurred between the French mail steamer Lotus and the Turkish collier Boz-Kourt on the high seas off Mytilene. Eight Turkish sailors and passengers on the collier died, while the Lotus, which was carrying French nationals, escaped with minor damage. The Turkish authorities arrested the officer of the watch on the Lotus, Lieutenant Demons, and the captain of the Boz-Kourt, Hassan Bey, who were subsequently tried by the Turkish courts. Both were convicted of manslaughter, Demons being sentenced to eight days' imprisonment and a fine of 22 Turkish pounds, and Hassan Bey to a month's imprisonment and a fine of 44 Turkish pounds. The French government protested against the exercise of jurisdiction by the Turkish courts, arguing that the case fell exclusively within the jurisdiction of France, the flag State of the Lotus. The Turkish government contended that the Turkish courts were entitled to exercise jurisdiction under the principle of passive personality, since the victims were Turkish nationals. The case was submitted to the Permanent Court of International Justice, which held that Turkey had not acted contrary to international law. The Court found that international law does not prohibit a State from exercising jurisdiction over foreigners in respect of offences committed outside its territory, merely because the offender is a foreigner and the offence was committed outside its territory. Thus, international law leaves States a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable (at 19). The Court then asked itself whether under international law there was a principle which would have prohibited Turkey, in the circumstances of the case at issue, from prosecuting the French officer (at 20) and answered in the negative (22–31).

[2] H. von A. Röling, 'The Significance of the Laws of War', in A. Cassese (ed.), *Current Problems of International Law* (Milan: Giuffrè, 1975), at 147–49.

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Normally 'individual criminality' is repressed by the culprit's national authorities. (Army commanders do not like this sort of misbehaviour, for it is bad for the morale of the troops and makes for a hostile enemy population.) By contrast, 'system criminality' as a rule is only repressed by international tribunals or by the courts of the adversary. There are, of course, exceptions, such as some cases of war crimes committed by US armed forces in the Philippines in 1900–1, the crimes against the Armenians repressed, in a few instances, by courts of the Ottoman Empire in 1919–20, or, in more recent times, the *Calley* case, 'a typical example of system criminality', in which the prosecution of Calley was urged upon the US authorities by American and foreign public opinion (but, revealingly, Calley received a very light sentence, which he served under house arrest, and was then pardoned by President Nixon; this seems to bear out that his acts were part of 'system criminality' as they were to a large extent tolerated or condoned by the US government).

By and large, repression of 'individual criminality' is a more frequent occurrence than that of 'system criminality', for the simple reason that the latter involves an appraisal and condemnation of a whole system of government, of misbehaviour involving the highest authorities of a country.

Apart from this distinction, one may however note that, in the case of *war crimes*, in time of war belligerents endeavour as far as possible to refrain from trying enemy combatants for fear of retaliation. Once the war is over, victor States tend to prosecute and punish crimes committed by the enemy forces against nationals of those victor States (on the passive nationality principle), whereas the contrary is not true. (There are however exceptions, such as the aforementioned criminal proceedings instituted in 1902 before US Courts Martial for crimes committed by American troops in the Philippines). Victor States often pass legislation granting amnesty to their own armed forces with regard to any war crime they may have perpetrated. After the First World War, once it proved impossible to set up an international tribunal for the punishment of German authors of war crimes, Germany was obliged to punish German military people accused by the Allies of war crimes. The Leipzig Supreme Court took upon itself the task of so doing, in 1921. In some cases Allied courts brought to trial Germans accused of war crimes, but no such court prosecuted and tried nationals of the Allies. Similarly, after the Second World War, in addition to establishing the two ad hoc International Tribunals (for the principal German and Japanese war criminals), the Allies passed Control Council Laws authorizing (in fact, obliging) German courts to try Germans. Various Allied courts also tried Germans. In Italy courts tried Germans and Italians who had collaborated with them, whereas partisans were granted amnesty. (Subsequently the amnesty was extended to Fascists and collaborators.) Similarly, in France in 1944 a law was passed granting amnesty to the French members of the Resistance, whereas trials were authorized for both the enemy and the French who had collaborated with Germans.

Recently war crimes have been tried under special national legislation, such as that enacted in the UK, Canada, or Australia, relating to a specific set of crimes, namely those committed by Nazis during the Second World War (see, for instance, the

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Sawoniuk case, brought before British courts:[36] the accused, a Polish-Byelorussian resident of the UK, was convicted of murder of unknown Jewish women in a village of Byelorussia occupied by the Germans; at 506–9).

It must be added that, strikingly, for about forty years the innovative and forward-looking repressive system instituted by the 1949 Geneva Conventions concerning the universal jurisdiction of any State party over grave breaches of the Conventions has remained unapplied. Only after the establishment of the ICTY and the ICTR have States commenced to resort to it. Thus, German, Danish, and Swiss courts have made use of universal jurisdiction by prosecuting and trying persons who allegedly perpetrated grave breaches in the former Yugoslavia.[37]

These cases, however, still constitute exceptions. As a rule States have confined themselves to taking criminal proceedings based on the more *traditional* grounds of jurisdiction. In practice they have instituted proceedings only against alleged authors of crimes committed on their *territory* or against their nationals (or persons living on their territory and having acquired their nationality).

It should be added that many States still tend to claim *exclusive* jurisdiction over their nationals when they commit war crimes at home or abroad. Thus for instance, in the USA the territoriality principle is widely accepted for criminal offences.[38] However, when it comes to prosecuting US military personnel, the USA refuses to accept foreign jurisdiction, either by entering into agreements with foreign States to the effect that the national jurisdiction of the accused prevails (this also applies to NATO agreements) or by refraining from participating in such international treaties as the Statute of the ICC.

15.8.2 THE PROSECUTION AND PUNISHMENT OF OTHER INTERNATIONAL CRIMES

As far as crimes against humanity and genocide are concerned, once trials of such crimes committed during the Second World War were over, in practice no or very little use has been made of the relevant international rules. In relatively recent times French courts tried Germans or French collaborators accused of having committed crimes against humanity during the Second World War (see the *Barbie*, *Papon*, and *Touvier* cases). In contrast, they have declined to exercise criminal jurisdiction over crimes against humanity committed by the French in Indochina in 1952–4, on legalistic grounds (chiefly a wrong interpretation of a resolution of the UN General

[36] [2000] *Crim. LR*, at 506–9.

[37] See the *Djajić* and *Jorgić* cases in Germany, the *Saric* case in Denmark, *Javor* and *Munyeshuyka* in France, and the *G.* case in Switzerland.

[38] In *Yapp* v. *Reno* and in *Extradition of Charles Philip Smith*, US courts pointed out that 'When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country prescribe for its own people, unless a different mode be provided by treaty stipulations between that country and the United States' (at 1565 and 965).

Assembly and of the French law that referred to it: see the *Boudarel* case). Genocide has been brought before Israeli courts in *Eichmann* (based on the principle of universal jurisdiction, which however *in fact* largely coincided with that of passive nationality). German courts have pronounced upon genocide in a few cases, all relating to crimes committed by Serbs in the former Yugoslavia (see *Djajić*, *Jorgić*, and *Sokolović*, already referred to above). Courts in Rwanda are now trying alleged perpetrators of genocide.[39]

Torture as a discrete crime has been the subject of important proceedings in *Pinochet*, based on various grounds of jurisdiction (that of the custodial State, for British courts; the principle of universality in conjunction with that of passive nationality, for Spanish courts). However, for all its theoretical and principled significance, this case has not led to a proper trial, not even in Chile. (See the decision of the Court of Appeal of Santiago of 5 June 2000 in *Pinochet*.)

15.8.3 CONCLUDING REMARKS

In sum, national courts are still loath to bring to justice persons accused of international crimes. The fact that very often such crimes are perpetrated by State agents, or with their support, tolerance, or acquiescence, accounts for the hesitation or reluctance of courts to bring to book nationals accused of such crimes. Furthermore, when it is foreigners who allegedly perpetrate those crimes, the fear of meddling in the domestic affairs of other States holds national courts back. Generally speaking, these courts are still dominated by nationalistic, short-term interests. They are still far from realizing community concerns. Few national judges share the sense that it is necessary to vindicate and judicially to enforce respect for fundamental values, wherever they may have been breached.

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[39] Some courts have dealt with genocide only tangentially. See for instance *Hipperson and others*, at 87–9, *Mugesera*, at 529–33, and *Niyonteze*, decision of 26 May 2000, at 28–32.

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TRENDS IN THE PROSECUTION OF INTERNATIONAL CRIMES:

(1) GENERAL

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International Criminal

CASES & COMMENTARY

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AIDING AND ABETTING

Although aiding and abetting as a mode of liability addresses the most marginal form of criminal participation, it can be a powerful weapon in the international prosecutor's arsenal. Considerable attention has been paid to the potentially broad reaches of joint criminal enterprise liability, or even co-perpetration, but aiding and abetting also has the particular ability to touch conduct at the edges of criminal activity. Because of the lower showing required (depending on the court) both for the *actus reus* and the *mens rea* of aiding and abetting, this mode of liability can capture the acts of perpetrators who play a more peripheral, but nonetheless important, role in the commission of atrocities.

Perhaps a better way to think about aiding and abetting, though, is not as a mode of liability that operates at the periphery, but rather as one that has the potential to fill gaps in the liability scheme. While other modes of liability directly address the conduct of those at the top of a criminal organization (who order, plan or organize criminal conduct) or that of direct perpetrators at the bottom of the group (who commit the acts), aiding and abetting can reach the participation of actors *in between*: those many individuals who contribute in small but cumulatively essential ways to the commission of mass crimes. In the excerpts below, the courts frequently show an acute understanding of how large-scale international crimes occur; they require not just planners and perpetrators, but numerous actors who participate – sometimes simply by doing their 'job' or because they want to get along or are unwilling to object to those more powerful – and who together make it possible for the crime to occur on a massive level. Thus, through the analysis of the most exiguous mode of liability, courts grapple with some of the hardest and most essential questions about the responsibility of small and ordinary actors in international crimes.

Aiding and abetting can fill other gaps as well. Sometimes senior leaders will participate in the commission of crimes simply by giving their tacit approval and encouragement, conduct that may best be characterized as aiding and abetting. Additionally, aiding and abetting can sometimes fill evidentiary gaps. Investigators and prosecutors of massive crimes often have limited access to evidence and few investigative tools (particularly as compared to domestic authorities). Accordingly, even with regard to more central participants, sometimes the *available* evidence will support no more than a charge of aiding and abetting.

The evolution of the concept of aiding and abetting has seen expansion followed by some arguable retrenchment, as one can note in the excerpts below. The World War II cases applied the concept of aiding and abetting as accessory liability, but did not fully articulate its contours and sometimes applied it unevenly. The modern ad hoc international tribunals fully fleshed out the concept, ultimately holding that an aider and abetter is one who makes a *substantial* contribution to the commission of a crime, with the *knowledge* that his or her acts will assist in the commission of the crime in question, but not necessarily with an *intent* to promote the crime. This articulation of the concept was particularly useful to prosecutors because it perfectly captured the conduct of actors who participated in crimes because doing so fitted in with their bureaucratic or organizational function, but without

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any actual desire or intent to further the crimes. Additionally, intent can often be the most difficult element to prove, since it usually must be inferred, and so the diminished intent requirement of aiding and abetting at the ad hoc tribunals allowed it to serve as a useful backup charge to charges of more direct and intentional participation in crimes.

The ICCSt., however, appears to have retreated somewhat from the broad concept developed at the ad hoc tribunals. Article 25(3)(c) assigns liability to a person who, '[f]or the purpose of facilitating the commission of [...] a crime [under the Statute], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'. On its face, this formulation does not include a requirement that the contribution be 'substantial', but it appears to require that an aider and abettor not simply have 'knowledge' of the main perpetrator's intent, but share it. While the ICC has yet to litigate the concept of aiding and abetting, it appears that this version may allow for a more minimal *actus reus* but require a higher *mens rea* than at the ad hoc tribunals. On the other hand, Article 25(3) further contains section (d) which, while not called 'aiding and abetting', might capture conduct (particularly in its subsection (ii)) that would fall under aiding and abetting liability at the ad hoc tribunals:

> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime.

These questions await the further elucidation by future decisions of the ICC.

Cases

Federal Republic of Germany, S. and others (Hechingen and Haigerloch Deportation case), *Tribunal (Landgericht) Hechingen, Judgment of 18 June 1947*[1]

Five accused in this case were charged with assisting the Gestapo with the deportation of Jews from two towns in Germany, Hechingen and Haigerloch, to concentration camps in 1941–42. One of the accused was acquitted while four were convicted. None of these four accused devised or ordered the deportations. The principal accused was S., who was a senior administrative and police official who transmitted orders that he received from the Gestapo on to those responsible in the villages, while the other three – H., Ho. and K – were women who held no official positions but who were required to search the deportees to determine if they were holding any valuables. The first excerpt is from the trial judgment. The second excerpt is from the Court of Appeal which reversed the convictions of the three women and granted a new trial to S. In the second trial, S. was acquitted.

[1] English translation in (2009) 7 JICJ 131.

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[. . .] On the basis of the trial and the hearing of the evidence, the following is established:

(1) The accused S., as then *Landrat* ['county president', senior administrative and police official of a County] of Hechingen, received the order of 14 August 1942 of the Stuttgart Head Office of the Gestapo [abbreviation of Geheime Staatspolizei, Secret State Police – the German text uses the full form throughout]. On 17 August 1942, he gave the mayors of Haigerloch and Hechingen the necessary instructions in writing for carrying out this order, in particular to have the Jews directed to 'deportation' and their luggage searched in the prescribed manner, and to ready these persons for transport on 19 August 1942. He further instructed persons officially subordinate to him to cooperate in the physical search of the persons to be deported; he gave this instruction to, among others, co-defendant Ms Ho., who carried it out on 19 August 1942 together with Mrs M., appointed for the purpose by the mayor of Haigerloch, in relation to the Jewish women concerned. These findings are based, to the extent that they relate to the accused Mr S., on his own statements; otherwise they result from the statements of co-defendant Ms Ho. The detail of how the physical search of the Jewish women by Ms Ho. occurred will be presented below in another context.

(b) A total of 138 people, 136 from Haigerloch and 2 from Hechingen, were affected by this fourth deportation. These 138 people were transported under police escort on 19 August 1942 from Haigerloch to Stuttgart, nine of the particularly infirm in road vehicles, the rest by rail. In Stuttgart they were brought to the Gestapo collecting point, and from there transported to Theresienstadt. Of the 138 people deported, only a single victim remained alive and returned to Haigerloch; all the others, it must be regarded as certain, either died or were killed during the deportation. Information on the circumstances in Theresienstadt has been provided by the testimony of Senior State Attorney Mr D. of Stuttgart. [. . .]

(2) The accused S., by executing himself in part the orders that reached him from the Gestapo and in part having them executed by people under him, participated in persecution on racial grounds and thus in a crime against humanity.

(a) Accused S. objectively, to be sure, acted neither as perpetrator (*Täter*) nor co-perpetrator (*Mittäter*) but as accessory (*Gehilfe*), since his participation was confined to executing the orders of the Gestapo in his capacity as *Landrat* of *Kreis* Hechingen, to the detriment of the Jews concerned, without departing from these orders on the basis of decisions of his own.

The consideration that the Gestapo orders would have been executed even if accused S. had not been involved in their execution, that is, the consideration that his participation was not causal for their success, does not exonerate the accused. The causality concept (*Ursachenbegriff*) in legal science is not – unlike that in natural science – mechanistically oriented, but teleologically, in the sense of the purpose of the legal system. Accordingly, no accessory can escape penal responsibility by showing that the main perpetrator (*Haupttäter*) could have carried out the act even without his assistance. In the great mechanism of the persecution of the Jews, every single cog was interchangeable at all times. Were one, given that fact, to seek to exclude the criminal responsibility of each interchangeable participant because of the absence of causality of his participation, then ultimately only the main perpetrators would be liable; all accessories would get off scot-free, even if they had acted on racial grounds, for even in the latter case their participation would, on a mechanistic view, not have been causal.

The accused S. has further appealed to the fact that it could not be within the intention of Control Council Law No. 10 to punish absolutely all participation in the carrying out of persecution of the Jews; for instance, a typist typing out the Gestapo deportation orders and posting them, or the driver of a locomotive pulling the train the deported Jews were to be transported by, could not be punishable. This consideration is just as wrong as the previous one, though in the opposite direction; while the previous consideration couched the concept of causality too narrowly, it is now too broad. From the impunity of participation by a typist

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or train driver, the impunity of the *Landrat*'s participation does not follow; to that extent, his argument does not prove what it is supposed to prove. The range of duties (*Pflichtenkreis*) of a typist or train driver is quite different from a *Landrat*'s. A typist's official duty is fulfilled in her accurately and punctually typing what she is asked to; a train driver's in bringing the rail transport punctually and safely to its destination; neither the one nor the other commits a breach of duty if their activity happened to be part of the persecution of the Jews. Things are quite different with a *Landrat*. As the senior administrative and police official of the *Kreis*, he is entrusted with the administrative and police protection of its population against unlawful interference with their liberty and property; he infringes his set of duties if he participates in interference with the very legal goods he is called on to protect.

(b) In subjective respects, the punishability of accused S. depends on his having acted intentionally as an accessory. Intent as an accessory (*Gehilfenvorsatz*) requires, first, that the accused knew what act he was furthering by his participation; he must have been aware that the actions ordered from him by the Gestapo served persecution on racial grounds. He had this awareness, as the Court hereby finds, as the outcome of the trial and taking of evidence, on the basis of the wording and content of the Gestapo orders he received, even if, as he has credibly assured, he did not reckon on the possibility that the deported Jews might be killed. The accused may also be believed to have assumed that the forced deportation of the Jews was in the interest of the defence of the Reich, and that he formed a too favourable conception of the fate awaiting the Jews after deportation ('resettlement') and was strengthened therein by hopes expressed by some of the Jews concerned themselves. The fact nonetheless remains that the forced deportation of the Jews as such, taken together with the confiscation and seizure of their assets, was seen by the accused as 'persecution on racial grounds'. The accused himself stated at the trial that he regarded the Gestapo measures as 'unjust' to the Jews, and struggled with himself whether to carry out the measures or not; these statements by the accused himself enable and support the finding made above.

Intent as an accessory (*Gehilfenvorsatz*) requires, second, that the accused knew that through his participation he was furthering the principal act. He had this awareness too, as the Court hereby finds, as an outcome of the trial and taking of evidence. This awareness is not excluded by the consideration brought up by the accused that if he himself had refused to execute the Gestapo measures someone else would have carried them out in his place, but on the contrary shown to be present; for this consideration shows that the accused took it upon himself, for reasons the scope of which is still to be discussed, to carry out the Gestapo orders himself instead of leaving it to someone else.

Intent as an accessory does not, by contrast, require the accused himself to have acted from racial considerations or from inhumane attitudes at all. Nor is it required that the accused had an awareness of the illegality of his action, since Control Council Law No. 10 declares persecution on racial grounds punishable irrespective of whether it infringes the national law of the country in which it was committed; it is thus immaterial what notion the person had as to the legality of his actions. That, finally, the fact that the accused was acting on orders does not exclude penal responsibility as an accessory is explicitly stated in Article II(4)(b) of Control Council Law No. 10.

(3) It remains to be discussed whether accused S. can appeal to grounds excluding guilt or punishment.

(a) Accused S. has asserted that he weighed against each other the facts that he could not prevent the carrying out of the Gestapo measures; that these measures would be carried out all the same even if he refused to do so; that his participation in these measures would accordingly not spare any of the Jews concerned the evils threatening them; and on the other hand facts that his participation in these measures enabled him to remain in his post as *Landrat* [illegible]

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s remaining in office was both in the interest of the Jewish population to the extent that he ould mitigate some things, and in the interest of the non-Jewish part of the population with negative attitude to National Socialism, in so far as he could uphold or procure facilitations or this part of the *Kreis* population too; from this weighing up, he had arrived at the conclu- on that preponderant interests justified his carrying out, in order to remain in office, the orders of the Gestapo; he was strengthened in this view by the fact that his remaining in office was desired both on the Jewish side and by respectable figures in the non-Jewish part of the *Kreis* population, and even explicitly asked for: if in this weighing up he had based himself on inaccurate expectations or if the weighing up as such was incorrect, this was at most a politi- al error, not a criminal fault.

That accused S., and with him the circles supporting him in his resolution, were making a severe political mistake in this consideration, even if the premises of the weighing up be sup- posed to be correct, is plain. During the rule of National Socialism, the temptation was – it may be admitted – indeed great to come to terms with the unbearable, whether out of fear of worse yet to come or in the hope of being able to maintain for oneself and others a 'party-free' reservation – however small. This fear and this hope, both of these elements in the think- ing of accused S., were very well recognized by National Socialism, which used them and abused them as a psychological and political factor. Inside the official apparatus, in general only the key positions were occupied by ideologically committed and reliable party comrades. That was quite enough. The rest of the officials could be left with the illusion of freedom in little things, indeed even a certain actual freedom; that was a cheap price to pay for their com- pliance in all important matters, and they were willing to pay it for they knew very well that all those who – like accused S. – pursued opportunist policies in order to maintain their freedom of action ultimately became prisoners of their own policies.

Thus it could not fail to happen, and, as this case showed actually did happen, that part of the civil service bowed to immoral and illegal impositions; what began as a political error ended as moral and criminal guilt. When politics comes into conflict with law and morality, this conflict can be solved only in the sense that law and morality must never be adjusted to politics, but politics must always be to law and morality. This principle applies to the State as a whole; it applies to every official as an individual. Each citizen has a right to have an official, from whom an immoral and illegal action is demanded, refrain from that action; each citizen must be protected against officials, irrespective of the considerations they base themselves on, committing such acts. An official who fails to see this is acting not simply unwisely politically because he is undermining trust in the lawfulness of the administration, but at the same time unlawfully. That is why accused S. must be refused the appeal to the balancing of interests he did; an error as to the admissibility of this balancing of interests counts against him. [...]

(2) The accused Ho., K. and B., by undertaking the search of the Jewish women for deport- ation, objectively took part, specifically as accessories (*Gehilfen*), in a persecution on racial grounds and thus in a crime against humanity within the meaning of Article II(1)(c), (2)(b) and (3) of Control Council Law No. 10. Their involvement was admittedly, considered in the con- text of the whole, only of a subordinate nature, and the three accused did not, by contrast with co-defendant S., infringe any special set of duties. What nonetheless makes their involve- ment punishable is the fact that the body search taken together with the removal of the valu- ables found thereby was particularly degrading for the Jewish women affected. In subjective respects, the punishability of the three accused depends on whether they deliberately (*vorsät- zlich*) acted as accessories (*Gehilfen*). This condition is met for all three of these accused. The accused recognized (accused K. and B. at the latest by the time they were at the station in Haigerloch and accused Ho. earlier, when she received the order given to her) that they were being called on to take part in a persecution on racial grounds; this finding is hereby made on the basis of the oral proceedings. That these three accused did not know the contents

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of the Gestapo decrees and could not therefore fully perceive what measures of persecution the Jews would individually be exposed to is irrelevant; what they did know, namely that Jews were being forcibly deported and in this connection searched and made to hand over jewelry, suffices to establish intention in their cases. This knowledge (*Wissen*) was also inevitably associated with the insight that through their actions the accused were furthering the principal offence. Intentionality as accessory (*Gehilfenvorsatz*) did not require that the accused acted from racial motives and further did not require that they had an awareness of the illegality (*Bewusstsein der Rechtswidrigkeit*) of their actions, as has already been explained in the judgment on accused S. It is similarly irrelevant that if an individual accused or all the accused had refused their participation, the search would still have been carried out by the remaining accused, or by other persons.

Federal Republic of Germany*, S. and others (Hechimgen and Haigerloch Deportation case), *Court of Appeal* (Oberlandesgericht) *Tübingen, Judgment of 20 January 1948

The Court of Appeal found that the Trial Court made inadequate findings with respect to the letter ordering S. to facilitate and implement the deportation, and therefore it ordered that S. be granted a new trial. It addressed therefore the scope of accessory liability, and in particular the required *mens rea*, in the context of the case against the three women.

Persecution on political, racial and religious grounds is listed in Article II(1)(c) of the Law as the last explanatory example of a crime against humanity. This crime too must accordingly be carried out inhumanely. The perpetrator must have acted out of an inhumane mindset, derived from a politically, racially or religiously determined ideology [. . .]

[Control Council] Law No. 10, in Article II(2)(a)–(e), equates all conceivable forms of commission or participation. It does not distinguish between perpetration (*Täterschaft*) and participation (*Teilnahme*). The accessory (*Gehilfe*) to a crime against humanity is 'regarded as guilty of a crime against humanity, without regard to the capacity in which he acted' (Clause 2 of the Introductory Act). From this complete equation with the perpetrator it follows that the accessory must have acted from the same mindset as the perpetrator himself, that is, from an inhumane mindset and in persecutions under politically, racially or religiously determined ideologies. The Criminal Division rightly took it that as regards the punishability of participation, Law No. 10 is of plain interpretation.

The trial court plainly struggles with the limits of accessory liability. While it eloquently articulates why 'cogs' in the machine of mass crime must be held to account, it also recognizes the potential breadth of this approach and seeks to find a line between the 'typist' and the 'senior administrative and police official' who both assist in the execution of a criminal scheme. With respect to S., the court seizes on the question of 'duty', finding that S.'s transmission of Gestapo orders amounted to accessory liability because he had a duty to protect the people of his village. This distinction falls away, however, when it comes to the responsibility of the three women who had no duty. Nonetheless the trial court finds that they are different from the 'typist', it seems, because of their physical and proximate (and degrading) participation in the deportation itself. For the Court of Appeal, though the line was elsewhere; only those who assisted the crime *and* shared the intent of the main perpetrators could be held liable. This question of where to draw the line of liability is a central theme in the ongoing debates on aiding and abetting.

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US Military Tribunal Sitting in Nuremberg, US *v.* Ernst von Weizsäcker et al., (Ministries case), *Judgment of 11–13 April 1949*

This case is primarily known for its holding on the crime of aggression, and is excerpted in the chapter (Part I(4)) dealing with aggression, but in addition all but 2 of the 21 defendants were convicted of war crimes and crimes against humanity. The following excerpt pertains to the responsibility of two officials in the German Foreign Office for the deportation of 6,000 Jews from France in March 1942: Ernst von Weizsaecker, the State Secretary of the Foreign Office, and Ernst Woermann, the Ministerial Director and Chief of the Political Division of the German Foreign Office. Both Accused were sentenced to a term of imprisonment of seven years.

On 9 March 1942 [Adolf] Eichmann of the SS wrote [to] the Foreign Office [saying] that it was intended to deport to Auschwitz 1,000 French and stateless Jews who had been arrested in France in 1941, asking if there was any objection.

On 11 March the SS again wrote [to] the Foreign Office [saying] that it was desired to include 5,000 more Jews from France. On the same day [Hans] Luther [Under Secretary in charge of Deutschland] wired the German Embassy in Paris, forwarding the request and asking for comment, and Paris replied, "No objection."

On 20 March [Franz] Rademacher [subordinate to Luther], by order, informed the SS that the Foreign Office had no objections to these 6,000 Jews being deported. This was initialed by Woermann and von Weizsaecker, and contains the latter's comment, "to be selected by the police."

There remains no shadow of doubt that both Woermann and von Weizsaecker were informed of this nefarious plan and that it received their official approval. There is nothing in the record to show that they questioned its propriety, objected to or protested against it, or availed themselves of the opportunity to suggest to von Ribbentrop that even from the viewpoint of German foreign policy its execution would be a catastrophic mistake in that it would not only alienate public sentiment in France, but would arouse a wave of horror and resentment throughout the world. Neither claims that there was any legal justification for this deportation or suggests it was other than a flagrant violation of international law and of the provisions of the Hague Convention.

Woermann's excuse is that he was not able to do anything and that his cosignature meant that he saw no valid political reason which could be urged against it and that the reason that the Foreign Office communication was signed by the State Secretary and by two other state secretaries, including himself, was that it was an important matter.

However, his own witness, Lehmann, an old civil servant in the Foreign Office, called as an expert on Foreign Office practice, does not bear him out. He testified, somewhat reluctantly, that when a Foreign Office official initialed a draft he thereby outwardly approved it, even though he may have had mental reservations as to its propriety.

The defendant Woermann knew that there were cogent reasons of a political nature why the measure should be disapproved; he knew that it was in violation of every principle of international law and in direct contradiction of the Hague Convention.

Von Weizsaecker asserts that this occurred at a time of repeated attempted attacks on members of the Wehrmacht and Hitler had ordered frequent shootings of hostages in France; that these Jews were already interned and were in danger, and one could very easily come to the conclusion that the deportations to the East might involve less danger to them than remaining where they were; that the name Auschwitz did not mean anything to anybody at

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that time. He does not state that this was, in fact, his reason for not objecting, but that it was probably his reason. He further asserts that the Foreign Office did not instigate or execute these measures and its point of view or opinion could not prevent them. The latter contention, however, is hardly tenable, in view of the fact that Eichmann of the SS made specific inquiries as to whether the Foreign Office had objections.

While we are ready and anxious to accord to every defendant the benefit of any reasonable doubt to which he may be entitled, it is difficult to find any such doubt here, even though we assume that neither defendant, at that time, had knowledge that Auschwitz was a death camp. Nevertheless they knew and were well informed of the fate of any Jew who came into the tender hands of the SS and Gestapo; they knew what had been the fate of the Jews of Poland, the Baltic states, and Russia; they knew what had been the horrible fate of German Jews.

While admitting that many things passed over his desk and received his initials of approval as to which he harbored mental reservations and objections, he states he remained in office for two reasons: first, that he might thereby continue to be at least a cohesive factor in the underground opposition to Hitler by occupying an important listening post, maintaining members of the opposition in strategic positions, distributing information between opposition groups in the Wehrmacht, the various governmental departments, and in civil life; and second, that he might be in a position to initiate or aid in attempts to negotiate peace. We believe him, but this, while it may and should be considered in mitigation, cannot constitute a defense to charges of war crimes or crimes against humanity. One cannot give consent to or implement the commission of murder because by so doing he hopes eventually to be able to rid society of the chief murderer. The first is a crime of imminent actuality while the second is but a future hope.

When the SS inquired whether the Foreign Office had any objections, it was the defendant's duty to point them out. That is the function of a political department and a state secretary of a foreign office. It is not performed by saying or doing nothing. Even the defendant's witness von Schlabrendorff, himself an active leader in the resistance movement, and a participant in the plot of 20 July 1944, testified that being a member of that movement did not justify one in becoming a party to the program of the murder of Jews. As to these and like instances, we find the defendants von Weizsaecker and Woermann guilty.

COMMENTARY

The court here finds that Woermann and von Weizsaecker had a legal and political duty to object to the deportation plan and that their failure to object, even if they were not aware of the ultimate fate of the deportees and did not instigate the plan or share its aims, amounted to aiding and abetting the crime of deportation. Although the accused in fact *approved* the plan, the court suggests that the result would have been the same had they simply done nothing in the face of the deportation proposal. The court, therefore, seems to embrace the notion of aiding and abetting through omission whereby an individual becomes liable if he fails to fulfil a duty that is his, acts with the requisite intent (either knowledge that his failure allows for the crime to occur or for the purpose of furthering the crime), and thereby allows for, or contributes to, the commission of a crime. The court's analysis – and the fact that it was carried out by US Judges – raises interesting questions about contemporary debates (for example in the United States) concerning the responsibility of government officials, and in particular legal advisers, to act affirmatively to stop the conduct of government actors that might amount to international crimes.

The court in the *Ministries* case was arguably not completely consistent, however, in its application of the notion of aiding and abetting. Another defendant was Karl Rasch, a member and later speaker of the *Vorstand* (management board) of the Dresdner bank

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issue was whether he could be held criminally liable for approving loans that he knew ould be used by the SS to finance enterprises that used slave labour:

Rasche's] participation in the loans made by the Dresdner Bank to various SS enterprises which ployed slave labor and to those engaged in the resettlement program presents a more difficult roblem.

The defendant is a banker and businessman of long experience and is possessed of a keen nd active mind. Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did.

The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary.

The defendant Rasche should be and is found not guilty under count five.

Although the court's approach seems different with respect to Rasche as compared to von Weizsaecker and Woermann, perhaps the distinction is that Rasche, acting in his capacity as a banker, owed no duty to any person to ensure that the funds he was responsible for loaning were not being used for any criminal purpose.

A French court had, however, a different approach in the *Röchling* case, in which five German industrialists were tried for their role in aggressive war, war crimes and crimes against humanity. It found the accused Hans Lothar von Gemmingen-Hornberg, the President of the Board of Directors of the Röchling steel plants and a plant manager, guilty of inhuman treatment because of the horrific conditions faced by the foreign workers and prisoners of war forced to work in the plants. The court found that although the Gestapo was principally responsible for the conditions and treatment of the workers, von Gemmingen-Hornberg's high position in the corporation and his close relationship to Röchling himself (von Gemmingen-Hornberg was Röchling's son-in-law) gave the accused 'sufficient authority to obtain an alleviation in the treatment of these workers'. The court concluded that there is 'cause under these circumstances to hold von Gemmingen-Hornberg responsible for the inhuman treatment of the foreign workers and prisoners of war in the firm of Röchling, which he aided by his negligence and his lack of courage towards the Gestapo'.[2]

Therefore, while the World War II courts embraced the concept of aiding and abetting liability (while not always identifying it in those terms), they did not necessarily reach a uniform definition of the concept. The modern tribunals took further steps to define the notion as demonstrated in the following excerpt.

[redacted]

[2] General Tribunal at Rastadt of the Military Government for the French Zone of Occupation of Germany, 16 June 1948, English summary in *Annual Digest 1948*, 398–404.

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ICTY*, Prosecutor *v.* Furundžija, *Trial Chamber, Judgment of 10 December 1998

Anto Furundžija was the commander of a special unit, known at the 'Jokers', of the Bosnian-Croat army (the HVO). He was tried and convicted of the war crimes of torture and outrages on personal dignity, including rape. Specifically, Furundžija was accused of interrogating a Muslim woman while a fellow officer first rubbed his knife all over her body and thigh, threatening to cut out her private parts if she did not cooperate, and then raped her. Furundžija was convicted of being a co-perpetrator of torture and aiding and abetting outrages on personal dignity and sentenced to 10 years. The excerpt below is from the trial judgment.

D. Aiding and Abetting

1. Introduction

190. The accused is charged with torture and outrages upon personal dignity, including rape. For the purposes of the present case however, it is necessary to define "aiding and abetting" as used in Article 7(1) of the Statute.

191. Since no treaty law on the subject exists, the Trial Chamber must examine customary international law in order to establish the content of this head of criminal responsibility. In particular, it must establish both whether the accused's alleged presence in the locations where Witness A was assaulted would be sufficient to constitute the *actus reus* of aiding and abetting, and also the relevant *mens rea* required to accompany this action for responsibility to ensue.

2. Actus Reus

192. With regard to the *actus reus*, the Trial Chamber must examine whether the assistance given by the aider and abettor need be tangible in nature or may consist only of encouragement or moral support. The Trial Chamber must also examine the proximity required between the assistance provided and the commission of the criminal act. In particular, it will have to consider whether the actions of the aider and abettor need to have a causal effect, so that without his contribution the offence would not be committed, or whether the acts of the aider and abettor need simply facilitate the commission of the offence in some way.

(a) International Case Law

(i) Introduction

193. Little light is shed on the definition of aiding and abetting by the international instruments providing for major war trials: the London Agreement, the Charter of the International Military Tribunal for the Far East, establishing the Tokyo Tribunal, and Control Council Law No. 10. It therefore becomes necessary to examine the case law.

194. For a correct appraisal of this case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied as these factors determine its authoritative value. In addition, one should constantly be mindful of the need for great caution in using national case law for the purpose of determining whether customary rules of international criminal law have evolved in a particular matter.

195. First of all, there are the cases stemming from US military commissions or, in territories occupied by US forces, by courts and tribunals set up by the military government. While

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...tary commissions operated under different directives within each theatre of US military ...rations, each applied a provision identical to that of the London Agreement with relation ...complicity. In occupied territories, the courts and tribunals operated under the terms of ...ntrol Council Law No. 10.

...5. The Trial Chamber will also rely on case law from the British military courts for the trials ...f war criminals, whose jurisdiction was based on the Royal Warrant of 14 June 1945, which ...rovided that the rules of procedure to be applied were those of domestic military courts, ...nless otherwise specified. In fact, unless otherwise provided, the law applied was domestic, ...hus rendering the pronouncements of the British courts less helpful in establishing rules of ...nternational law on this issue. However, there is sufficient similarity between the law applied ...n the British cases and under Control Council Law No. 10 for these cases to merit considera...tion. The British cases deal with forms of complicity analogous to that alleged in the present ...ase. The term used to describe those liable as accomplices (in killing) is that they were "con...cerned in the killing".

197. Cases heard under Control Council Law No. 10, either by the German Supreme Court in the British Occupied Zone, or by German courts in the French Occupied Zone are also material to the Trial Chamber's analysis.

198. Finally, the International Tribunal has on a previous occasion examined the question of complicity under its Statute, namely in the Opinion and Judgment of 7 May 1997 in the case of *Prosecutor v. Duško Tadić*, hereafter "*Tadić Judgement*".

(ii) Nature of Assistance

199. The Trial Chamber will first examine the nature of the assistance required to establish *actus reus*. The cases which follow indicate that in certain circumstances, aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in their commission of the crime.

200. In the British case of *Schonfeld*, four of the ten accused were found guilty of being "concerned in the killing of" three Allied airmen, who had been found hiding in the home of a member of the Dutch resistance. All four claimed that their purpose in visiting the scene had been the investigation and arrest of the Allied airmen. One admitted to shooting the three airmen but claimed it was in self-defence; he was found guilty and sentenced to death. The roles of the three others were less direct. One drove a car to the scene and was the first to enter the house. Another had obtained the original information, searched a different house for the airmen earlier and claimed to have stood guard at the back entrance to the house along with the fourth convicted person. All except one denied having fired any shots themselves.

201. The court did not make clear the grounds on which it found these three to have been "concerned in the killing". However, the Advocate General, citing the position in English law, outlined the role of an accessory who is not present at the scene but procures, counsels, commands or abets another to commit the offence, and that of an aider and abettor, either of which could have formed the basis of the court's decision. In doing so he gave an example of how an individual may participate without giving tangible assistance:

> if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting.

202. Again, in giving "additional confidence to his companions" the defendant facilitates the commission of the crime, and it is this which constitutes the *actus reus* of the offence.

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203. In the British case of *Rohde* six persons were found guilty of being "concerned in the killing" of four British women prisoners in German hands. The women were executed by lethal injection and their bodies disposed of in the prison camp crematorium. In defining the term "concerned in the killing", the Judge Advocate explained that actual presence at the crime scene was not necessary to be "concerned in the killing". He gave the example of a lookout who would be "concerned in the killing" by providing a service to the commission of the crime in the knowledge that the crime was going to be committed.

204. In the case of one of the accused, assistance *ex post facto* was found to be sufficient for criminal responsibility. As this was not the position under English law, the inference is warranted that the court applied a different law to these international crimes. The service provided by the cremator may be analogous to that of the lookout, in that the knowledge that the bodies will be disposed of, in the same way that the knowledge that they will be warned of impending discovery in the lookout scenario, reassures the killers and facilitates their commission of the crime in some significant way.

205. Guidance can also be derived from the following cases, which were heard under the terms of Control Council Law No. 10. In the *Synagogue* case, decided by the German Supreme Court in the British Occupied Zone, one of the accused was found guilty of a crime against humanity (the devastation of a synagogue) although he had not physically taken part in it, but planned or ordered it. His intermittent presence on the crime-scene, combined with his status as an "*alter Kämpfer*" (long-time militant of the Nazi party) and his knowledge of the criminal enterprise, were deemed sufficient to convict him.

206. The accused was convicted at first instance of a crime against humanity under the provision on co-perpetration of a crime ("*Mittäterschaft*") of the then German penal code (Art. 47 *Strafgesetzbuch*). The conviction was confirmed on appeal. The appellate decision noted that the accused was a militant Nazi. The court went on to find that he knew of the plan at least two hours before the commission of the crime.

207. It may be inferred from this case that an approving spectator who is held in such regard by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity.

208. The *Synagogue* case may be contrasted with the *Pig-cart parade* case, also from the German Supreme Court in the British Occupied Zone. The accused, P had attended, as a spectator in civilian dress, a SA (*Stürmabteilung*) "parade" in which two political opponents of the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*) were exposed to public humiliation. P had followed the "parade" without taking any active part. The court found that P,

> followed the parade only as a spectator in civilian clothes, although he was following a service order by the SA for a purpose yet unknown... His conduct cannot even with certainty be evaluated as objective or subjective approval. Furthermore, silent approval that does not contribute to causing the offence in no way meets the requirements for criminal liability.

P was found not guilty. He may have lacked the necessary *mens rea*. But in any event, his insignificant status brought the effect of his "silent approval" below the threshold necessary for the *actus reus*.

209. It appears from the *Synagogue* and *Pig-cart parade* cases that presence, when combined with authority, can constitute assistance in the form of moral support, that is, the *actus reus* of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility. This emphasis on the accused's authority was also affirmed in *Akayesu*. Jean Paul Akayesu was the *bourgmestre*, or mayor, of the Commune in which atrocities, including rape and sexual violence, occurred. That Trial Chamber considered this position of authority highly significant for his criminal liability for aiding and abetting: "The Tribunal finds

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...le 6(1) of its Statute, that the Accused, having had reason to know that sexual violence ...s occurring, aided and abetted the following acts of sexual violence, by allowing them to ...e place on or near the premises of the bureau communal and by facilitating the commission ...ch sexual violence through his words of encouragement in other acts of sexual violence ...ich, *by virtue of his authority*, sent a clear signal of official tolerance for sexual violence, ...thout which these acts would not have taken place: [...]". Furthermore, it can be inferred ...m this finding that assistance need not be tangible. In addition, assistance need not consti... an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.

...0. Mention should also be made of several cases which enable us to distinguish aiding and ...etting from the case of co-perpetration involving a group of persons pursuing a common ...esign to commit crimes.

...1. The *Dachau Concentration Camp* case was held before a US Tribunal under Control ...ouncil Law No. 10. All the accused held some position in the hierarchy running the Dachau ...ncentration camp. While allegations of direct participation in instances of ill-treatment were ...ade against certain accused, and allegations of command responsibility against others, ...e real basis of the charges was that all the accused had "acted in pursuance of a common ...esign" to kill and mistreat prisoners, and hence to commit war crimes.

...2. The organised and official nature of the system by which war crimes were perpetrated ...n this case adds a specific element to the "complicity" of the accused. The report of the case ...y the United Nations War Crimes Commission isolates three elements necessary to establish ...uilt in each case. The first was the existence of a system to ill- treat the prisoners and commit ...e various crimes alleged; the second was the accused's knowledge of the nature of this sys... and the third was that the accused "encouraged, aided and abetted or participated" in ...forcing the system. Once the existence of the system had been established, a given accused ...as potentially liable for his participation in this system. The roles of the accused ranged from ...amp commanders to guards and prisoner functionaries and all were found guilty, with the ...fference in the levels of participation reflected in the sentences. It would seem that the hold... of any role in the administration of the camps was sufficient to constitute encouraging, ...ding and abetting or participating in the enforcement of the system.

...3. The prosecution in the *Dachau Concentration Camp* case, did not base its case on the ...ect participation of the accused in the crime. Regardless of whether the accused themselves ...d beaten or murdered the concentration camp inmates, the assistance they afforded to ...ose who did, or the system, formed the basis of their guilt. The level of assistance required ...as low: any participation in the enterprise was sufficient, although as the accused were all ...embers of staff of the camps, their contribution to the commission of the crimes was tan... – the carrying out of their respective duties – so that none were convicted on the basis ...f having lent moral support or encouragement alone. [...]

(iii) *Effect of Assistance on the Act of the Principal*

...7. Back to aiding and abetting, in the *Einsatzgruppen* case, heard by a US Military Tribunal ...ting at Nuremberg, all of the accused except for one (Graf) were officers charged with war ...mes and crimes against humanity pursuant to Control Council Law No. 10. The Tribunal held ...at the acts of the accomplices had to have a substantial effect on those of the principals to ...onstitute the *actus reus* of the war crimes and crimes against humanity charged. This conclu...on is illustrated by the cases of four of the accused: Klingelhoefer, Fendler, Ruehl and Graf. ...lingelhoefer held a variety of positions, the least important of which was that of interpreter. ...he court said that even if this were his only function,

> ...would not exonerate him from guilt because in locating, evaluating and turning over lists ...of Communist party functionaries to the executive of his organisation he was aware that ...the people listed would be executed when found.

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218. Fendler served in one of the *Kommandos* of the *Einsatzgruppen* for a period of seven months. The prosecution case against him was not that he himself conducted an execution but rather "that he was part of an organisation committed to an extermination programme". The Court noted that:

> The defendant knew that executions were taking place. He admitted that the procedure which determined the so-called guilt of a person which resulted in him being condemned to death was "too summary". But, there is no evidence that he ever did anything about it. As the second highest ranking officer in the *Kommando*, his views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected.

Both of these defendants were found guilty.

219. The cases of Ruehl and Graf provide a contrast which helps delineate the *actus reus* of the offence. The Tribunal held that both had the requisite knowledge of the criminal activities of the organisations of which they were a part. Ruehl's position, however, was not such as to "control, prevent, or modify" those activities. His low rank failed to "place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation". He was found not guilty.

220. Graf was a non-commissioned officer. The court held that:

> Since there is no evidence in the record that Graf was at any time in a position to protest against the illegal actions of the others, he cannot be found guilty as an accessory under counts one and two [war crimes and crimes against humanity] of the indictment.

221. It is clear, then, that knowledge of the criminal activities of the organisation combined with a role in that organisation was not sufficient for complicity in this case and that the defendants' acts in carrying out their duties had to have a substantial effect on the commission of the offence for responsibility to ensue. This might be because their failure to protest made some difference to the course of events, or, in the case of Klingelhoefer, that his transmission of the lists of names led directly to the execution of the members of those lists.

222. In the British case of *Zyklon B*, the three accused were charged with supplying poison gas used for the extermination of allied nationals interned in concentration camps, in the knowledge that the gas was to be so used. The owner and second-in-command of the firm were found guilty; Drosihn, the firm's first gassing technician, was acquitted. The Judge Advocate set out the issue of Drosihn's complicity as turning on,

> whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was put could make him guilty.

223. This clearly requires that the act of the accomplice has at least a substantial effect on the principal act – the use of the gas to murder internees at Auschwitz – in order to constitute the *actus reus*. The functions performed by Drosihn in his employment as a gassing technician were an integral part of the supply and use of the poison gas, but this alone could not render him liable for its criminal use even if he was aware that his functions played such an important role in the transfer of gas. Without influence over this supply, he was not guilty. In other words, *mens rea* alone is insufficient to ground a criminal conviction.

224. In *S. et al.*, hereafter "*Hechingen Deportation*", heard by a German court in the French occupied zone, five accused were charged with complicity in the mass deportation of Jews in 1941 and 1942 as a crime against humanity under Control Council Law No. 10. The accused S, was the local administrative authority responsible for organising the execution of German orders. He had complied with a Gestapo decree concerning the deportations. The

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first instance found S guilty of aiding and abetting the Gestapo in its criminal activity. His objection that his conduct in no way contributed to the crimes, because others would have taken his place if he had refused to comply with the Gestapo decree, was dismissed. The court pointed out that the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another. [...]

The court reviewed relevant 'international instruments' and found that both the 1996 Draft Cod[e] of Crimes against Peace and Security of Mankind, drafted by the International Law Commission, and the Rome Statute supported the notion that aiding and abetting could include either physical or moral support and that the assistance need only be substantial or facilitating but not necessary or essential.

(c) Conclusion

232. On the issue of the nature of assistance rendered, the German cases suggest that the assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances. While any spectator can be said to be encouraging a spectacle – an audience being a necessary element of a spectacle – the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals. This is supported by the provisions of the International Law Commission Draft Code. In view of this, the Trial Chamber believes the use of the term "direct" in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime. This may explain why the word "direct" was not used in the Rome Statute's provision on aiding and abetting.

233. On the effect of the assistance given to the principal, none of the cases above suggests that the acts of the accomplice need bear a causal relationship to, or be a *conditio sine qua non* for, those of the principal. The suggestion made in the *Einsatzgruppen* and *Zyklon B* cases is that the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Having a role in a system without influence would not be enough to attract criminal responsibility, as demonstrated by the case of the defendant Ruehl in the *Einsatzgruppen* case. This interpretation is supported by the German cases cited.

234. The position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime. This is the position adopted by the Trial Chamber.

235. In sum, the Trial Chamber holds that the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.

3. Mens Rea

(a) International Case Law

236. With regard to *mens rea*, the Trial Chamber must determine whether it is necessary for the accomplice to share the *mens rea* of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime is sufficient to constitute *mens rea* in aiding and abetting the crime. The case law indicates that the latter will suffice.

237. For example in the *Einsatzgruppen* case, knowledge, rather than intent, was held to be the requisite mental element.

238. The same position was taken in *Zyklon B* where the prosecution did not attempt to prove that the accused acted with the intention of assisting the killing of the internees. It was

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accepted that their purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means). The charge as accepted by the court was that they knew what the buyer in fact intended to do with the product they were supplying.

239. Two of the not guilty verdicts in *Schonfeld* also provide an indication of the *mens rea* necessary to amount to being "concerned in the killing". Both concerned drivers who claimed to have followed instructions without knowing the purpose of the mission, and were therefore found not guilty. Despite having made a physical contribution to the commission of the offence, they had no knowledge that they were doing so.

240. In the *Hechingen Deportation* case, the court of first instance considered the *mens rea* required for aiding and abetting and concluded that this mental element encompassed both the knowledge of the crime being committed by the principals and the awareness of supporting, by aiding and abetting, the criminal conduct of the principals.

As mentioned above, the subsequent acquittal of the accused Ho., K., and B. on appeal was based on a different legal standard concerning the *mens rea* of those accused, requiring the aider and abettor to have acted out of the same cast of mind as the principal.

241. Finally, in the *Tadić Judgment* it was found that the test of *mens rea* which emerged from the post-Second World War trials is "awareness of the act of participation coupled with a conscious decision to participate". The requirement adopted by the Trial Chamber was that the mental element for aiding and abetting consists of a knowing participation in the commission of an offence.

(b) International Instruments

242. Article 2(3)(d) of the International Law Commission's Draft Code on Crimes and Offences Against Mankind, provides that the *mens rea* required is that the assistance be given "knowingly". The Commentary adds:

> Thus, an individual who provides some assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable under the present sub-paragraph.

243. Therefore, it is not necessary for an aider and abettor to meet all the requirements of *mens rea* for a principal perpetrator. In particular, it is not necessary that he shares and identifies with the principal's criminal will and purpose, provided that his own conduct was with knowledge. That conduct may in itself be perfectly lawful; it becomes criminal only when combined with the principal's unlawful conduct.

244. Reference should also be made to article 30 of the Rome Statute, which provides that, "[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and *knowledge*".

(c) Conclusions

245. The above analysis leads the Trial Chamber to the conclusion that it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime. This is particularly apparent from all the cases in which persons were convicted for having driven victims and perpetrators to the site of an execution. In those cases the prosecution did not prove that the driver drove for the purpose of assisting in the killing, that is, with an intention to kill: it was the knowledge of the criminal purpose of the executioners that rendered the driver liable as an aider and abettor. Consequently, if it were not proven that a driver would reasonably have known that the purpose of the trip was an unlawful execution, he would be acquitted.

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[illegible] Moreover, it is not necessary that the aider and abettor should know the precise crime [illegible] was intended and which in the event was committed. If he is aware that one of a number [illegible] crimes will probably be committed, and one of those crimes is in fact committed, he has [illegible]ended to facilitate the commission of that crime, and is guilty as an aider and abettor.

[illegible]7. Knowledge is also the requirement in the International Law Commission Draft Code, [illegible]ch may well reflect the requirement of *mens rea* in customary international law. This is the [illegible]ndard adopted by this Tribunal in the *Tadić Judgement*, although sometimes somewhat [illegible]sleadingly expressed as "intent".

[illegible]

[illegible]9. In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.

E. How to Distinguish Perpetration of Torture from Aiding and Abetting Torture

250. The definitions and propositions concerning aiding and abetting enunciated above apply equally to rape and to torture, and indeed to all crimes. Nevertheless, the Trial Chamber deems it useful to address the issue of who may be held responsible for torture as a perpetrator and who as an aider and abettor, since in modern times the infliction of torture typically involves a large number of people, each performing his or her individual function, and it is appropriate to elaborate the principles of individual criminal responsibility applicable thereto.

251. Under current international law, individuals must refrain from perpetrating torture or in any way participating in torture.

252. To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person). If he does not, but gives some sort of assistance and support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture. Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable (think for example of the soldier whom a superior has ordered to attend a torture session in order to determine whether that soldier can stomach the sight of torture and thus be trained as a torturer).

253. These legal propositions, which are based on a logical interpretation of the customary rules on torture, are supported by a teleological construction of these rules. To demonstrate this point, account must be taken of some modern trends in many States practicing torture: they tend to "compartmentalise" and "dilute" the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as

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to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution.

254. International law, were it to fail to take account of these modern trends, would prove unable to cope with this despicable practice. The rules of construction emphasising the importance of the object and purpose of international norms lead to the conclusion that international law renders all the aforementioned persons equally accountable, although some may be sentenced more severely than others, depending upon the circumstances. In other words, the nature of the crime and the forms that it takes, as well as the intensity of international condemnation of torture, suggest that in the case of torture all those who in some degree participate in the crime and in particular take part in the pursuance of one of its underlying purposes, are equally liable.

255. This, it deserves to be stressed, is to a large extent consistent with the provisions contained in the Torture Convention of 1984 and the Inter-American Convention of 1985, from which it can be inferred that they prohibit not only the physical infliction of torture but also any deliberate participation in this practice.

256. It follows, *inter alia*, that if an official interrogates a detainee while another person is inflicting severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically participate in such infliction. Here the criminal law maxim *quis per alium facit per se ipsum facere videtur* (he who acts through others is regarded as acting himself) fully applies.

257. Furthermore, it follows from the above that, at least in those instances where torture is practiced under the pattern described *supra*, that is, with more than one person acting as co-perpetrators of the crime, accomplice liability (that is, the criminal liability of those who, while not partaking of the purpose behind torture, may nevertheless be held responsible for encouraging or assisting in the commission of the crime) may only occur within very narrow confines. Thus, it would seem that aiding and abetting in the commission of torture may only exist in such very limited instances as, for example, driving the torturers to the place of torture in full knowledge of the acts they are going to perform there; or bringing food and drink to the perpetrators at the place of torture, again in full knowledge of the activity they are carrying out there. In these instances, those aiding and abetting in the commission of torture can be regarded as accessories to the crime. By contrast, at least in the case we are now discussing, all other varying forms of direct participation in torture should be regarded as instances of co-perpetration of the crime and those co-perpetrators should all be held to be principals. Nevertheless, the varying degree of direct participation as principals may still be a matter to consider for sentencing purposes.

Thus to summarise the above:

(i) to be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.

(ii) to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.

In a subsequent case, the Appeals Chamber in *Blaškić* endorsed the notion that aiding and abetting could occur through omission:

47. The Trial Chamber further stated that the actus reus of aiding and abetting may be perpetrated through an omission, "provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite mens rea." It considered:

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> In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.

The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the actus reus of aiding and abetting.

In relation to aiding and abetting by omission, the first clear-cut case of conviction by a contemporary international tribunal for failure to carry out a duty incumbent upon the accused on the basis of the laws of war came on 5 May 2009, with the *Mrkšić* Appeal Judgment. In that Judgment, the ICTY Appeals Chamber found (§102) that the accused Veselin Šljivančanin's 'failure to act pursuant to his duty [to protect prisoners of war] substantially contributed to the killing of the prisoners of war'.

USA*, Khulumani *v.* Barclay National Bank Ltd. et al., *US Court of Appeals for the Second Circuit, Judgment of 12 October 2007

Three groups of plaintiffs brought a civil action in United States federal court under the Alien Tort Claims Act (ATCA) against various international corporations that did business in South Africa alleging that the corporations aided and abetted the apartheid regime in South Africa in the commission of torture and extrajudicial killings. In order to prevail on their claim, the plaintiffs were required to demonstrate that the principle of aiding and abetting is established in customary international law. The case is still pending. The following is from the concurring opinion of Judge Katzmann.

[...] I conclude that the recognition of the individual responsibility of a defendant who aids and abets a violation of international law is one of those rules "that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." Recognized as part of the customary law which authorized and was applied by the war crimes trials following the Second World War, it has been frequently invoked in international law instruments as an accepted mode of liability. During the second half of the twentieth century and into this century, it has been repeatedly recognized in numerous international treaties, most notably the Rome Statute of the International Criminal Court, and in the statutes creating the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). Indeed, the United States concedes, and the defendants do not dispute, that the concept of criminal aiding and abetting liability is "well established" in international law.

Judge Katzmann engages in a comprehensive review of international criminal law sources to support this conclusion before turning to an examination of the *mens rea* requirement.

Still the Rome Statute's *mens rea* standard is entirely consistent with the application of accomplice liability under the sources of international law discussed above. For example, in the *Ministries Case* conducted under Control Council Law No. 10, the tribunal declined to impose criminal liability on a bank officer who was alleged to have "made a loan, knowing or having

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good reason to believe that the borrower would use the funds in financing enterprise conducted in violation of either national or international law," but was not proven to have made the loan with the purpose of facilitating the enterprise's illegal activities. Meanwhile, a person who assists in the commission of a crime with the purpose of facilitating that crime would be subject to aiding and abetting liability under the statutes governing the ICTY and ICTR. My research has revealed no source of international law that recognizes liability for aiding and abetting a violation of international law but would not authorize the imposition of such liability on a party who acts with the purpose of facilitating that violation (provided, of course, that the *actus reus* requirement is also satisfied).

With respect to the *actus reus* component of the aiding and abetting liability, the international legislation is less helpful in identifying a specific standard. However, in the course of its analysis of customary international law, the ICTY concluded that "the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement or moral support which has a *substantial effect* on the perpetration of the crime." *Furundzija* Trial Chamber Judgment, ¶ 235 (second emphasis added). My research has uncovered nothing to indicate that a standard other than "substantial assistance" should apply.

Accordingly, I conclude that a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime and (2) does so with the purpose of facilitating the commission of that crime. Further, based on this review of international law's treatment of aiding and abetting liability over the past sixty years, I conclude that aiding and abetting liability, as defined, is sufficiently "well-established [and] universally recognized" to be considered customary international law for the purposes of the ATCA.

QUESTIONS

1. Normatively where is the right place to draw the line between innocent and culpable contributions to mass crimes? Should the focus be on the *actus reus* or on the *mens rea*?
2. Aiding and abetting by omission requires, inter alia, the failure to fulfill a duty. What kinds of duties should give rise to the possibility of such liability?
3. Given the potentially broad scope of aiding and abetting liability, does it ultimately depend on the judicious exercise of prosecutorial discretion?

[12] These Tribunals would also extend liability to individuals who merely had "knowledge that acts assist the commission of the specific crime of the principal." Any individual who acts with the purpose to facilitate the commission of a crime would necessarily act with such knowledge. Thus, I do not see the articulation of a broader definition by the ICTY as detracting from my position that liability in accordance with the purposefulness standard is well-established and universally recognized under international law. The critical question is whether there is a discernable core definition that commands the same level of consensus as the 18th-century crimes identified by the Supreme Court in *United States v. Sosa*. I believe that the definition I adopt is such a definition.

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FURTHER READING

Cassese, *International Criminal Law*, 214–18.

A. Eser, 'Individual Criminal Responsibility', in A. Cassese *et al.* (eds), *International Criminal Court Commentary*, vol. 1 (Oxford: Oxford University Press, 2002), 798–801.

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Werle, *Principles*, 182–5.

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THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY

Introduction, Text and Commentaries

JAMES CRAWFORD

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CHAPTER IV
RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

(1) In accordance with the basic principles laid down in Chapter I, each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under Chapter II which is in breach of an international obligation of that State in accordance with Chapter III.[277] The principle that State responsibility is specific to the State concerned underlies the present Articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.[278] This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be that a number of States act through a common organ to commit a wrongful act.[279] Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can co-exist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In *Certain Phosphate Lands in Nauru* proceedings were commenced against Australia alone in respect of acts performed on the "joint behalf" of the three States.[280] The acts performed by Australia involved both "joint" conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely "placed at the disposal" of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State's conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations. For example in the *Soering* case the European Court of Human Rights held that the proposed

277 See especially article 2 and commentary.

278 See M. L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Oxford, Clarendon Press, 1983), pp. 189-192; J. Quigley, "Complicity in International Law: A New Direction in the Law of State Responsibility", *B.Y.I.L.*, vol. 57 (1986), p. 77; J. E. Noyes & B. D. Smith, "State Responsibility and the Principle of Joint and Several Liability", *Yale Journal of International Law*, vol. 13 (1988), p. 225; B. Graefrath, "Complicity in the Law of International Responsibility", *Revue belge de droit international*, vol. 29 (1996), p. 370.

279 In some cases the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present Articles. See article 57 and commentary.

280 *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, at p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, ibid., p. 284.

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extradition of a person to a State not party to the European Convention where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.[281] Alternatively a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct. Thus the basis of responsibility in the *Corfu Channel* case[282] was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in Chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for the coercion would be,[283] an internationally wrongful act on the part of the coerced State. In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is or, but for the coercion, would be a breach of that State's international obligations. The implication of the second State in that breach arises from the special circumstance of its willing assistance in, its direction and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a merely supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this Chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility.[284]

281 *Soering v. United Kingdom, E.C.H.R., Series A, No. 161* (1989), at pp. 33-36, paras. 85-91. See also *Cruz Varas v. Sweden, E.C.H.R., Series A, No. 201* (1991), at p. 28, paras. 69-70; *Vilvarajah v. United Kingdom, E.C.H.R., Series A, No. 215* (1991), at p. 37, paras. 115-116.

282 *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at p. 22.

283 If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

284 See above, Introduction to the Articles, paras. (1), (2), (4) for an explanation of the distinction.

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It is justified on the basis that responsibility under Chapter IV is in a sense derivative.[285] In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the "general part" of the law of obligations. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in Chapter II.

(8) On the other hand, the situations covered in Chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the Vienna Convention on the Law of Treaties, that a treaty "does not create either obligations or rights for a third State without its consent"; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this Chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful. Thus it is necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus the articles in this Part require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of "wrongful intent" in matters of State responsibility, on which the articles are neutral.[286]

(9) Similar considerations dictate the exclusion of certain situations of "derived responsibility" from Chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.[287] However, there can be specific treaty obligations prohibiting incitement under certain circumstances.[288] Another concerns the issue which is described in some systems of internal law as being an "accessory after the fact". It seems that there is no general obligation on the part of third States to cooperate in suppressing

285 Cf. the term "responsabilité dérivée" used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco, R.I.A.A.*, vol. II, p. 615 (1924), at p. 648.

286 See above, commentary to article 2, paras. (3) and (10).

287 See the statement of United States-French Commissioners relating to the *French Indemnity of 1831*, in Moore, *International Arbitrations*, vol. V, p. 4397, at pp. 4473-75. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14, at p. 129, para. 255, and the dissenting opinion of Judge Schwebel, ibid., p. 379, para. 259.

288 Cf., e.g., art. III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, *U.N.T.S.*, vol. 78, p. 277; art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, *U.N.T.S.*, vol. 660, p. 195.

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internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

ARTICLE 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

Commentary

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term "by the latter" in the chapeau to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.[289] Such provisions do not rely on any general principle

289 See, e.g., G.A. Res. 2625 (XXV) of 24 October 1970, first principle, para. 9; G.A. Res. 3314 (XXIX) of 14 December 1974, annex, art. 3 (f).

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of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2 (5) of the United Nations Charter, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State vis-à-vis third States. This basic principle is also embodied in articles 34 and 35 of the Vienna Convention on the Law of Treaties.[290] Correspondingly, a State is free to act for itself in a way which is inconsistent with obligations of another State vis-à-vis third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided vis-à-vis the injured State. Thus it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 Iran protested against the supply of financial and

290 Vienna Convention on the Law of Treaties, 23 May 1969, *U.N.T.S.*, vol. 1155, p. 331.

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military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.[291] The British government denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.[292] In 1998, a similar allegation surfaced that Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.[293]

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.[294] Another example arises from the Tripoli bombing incident in April 1986. Libya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of American fighter planes to attack Libyan targets.[295] Libya asserted that the United Kingdom "would be held partly responsible" for having "supported and contributed in a direct way" to the raid.[296] The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on American targets.[297] A proposed Security Council resolution concerning the attack was vetoed, but the United Nations General Assembly issued a resolution condemning the "military attack" as "a violation of the Charter of the United Nations and of international law", and calling upon all States "to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya."[298]

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the United Nations Security Council[299] or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United

291 See *New York Times*, 6 March 1984, p. A1, col. 1.
292 See *New York Times*, 5 March 1984, p. A3, col. 1.
293 See *New York Times*, 26 August 1998, p. A8, col. 1.
294 For the text of the note see *Z.a.ö.R.V.*, vol. 20 (1960), pp. 663-664.
295 See United States of America, *Department of State Bulletin*, No. 2111, June 1986, p. 8.
296 See the statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, *The Times*, 16 April 1986, p. 6, col. 7.
297 Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in *B.Y.I.L.*, vol. 57 (1986), p. 638.
298 See G.A. Res. 41/38 of 20 November 1986, paras. 1, 3.
299 See, e.g., Report by President Clinton, *A.J.I.L.*, vol. 91 (1997), p. 709.

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Nations General Assembly has called on member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[300] Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.[301] In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. The International Court has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness"[302] of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.[303] That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

300 *Report of the Economic and Social Council, Report of the Third Committee of the General Assembly*, Draft Resolution XVII, 14 December 1982, A/37/745, p. 50.
301 For the question of concurrent responsibility of several States for the same injury see article 47 and commentary.
302 *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, at p. 105, para. 35.
303 *Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, at p. 261, para. 55.

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ARTICLE 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

Commentary

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16 a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as "suzerainty" or "protectorate" warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States in Morocco*,[304] France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court's judgment would be binding both on France and on Morocco,[305] and the case proceeded on that basis.[306] The Court's judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the Application and by the United States counter-claim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international

304 *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, p. 176

305 See *I.C.J. Pleadings, Rights of Nationals of the United States of America in Morocco*, vol. I, p. 235; ibid., vol. II, pp.431-433; the United States thereupon withdrew its preliminary objection: ibid., p. 434.

306 See *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, p. 176, at p. 179.

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obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that "the responsibility of the protecting State . . . proceeds from the fact that the protecting State alone represents the protected territory in its international relations,"[307] and that the protecting State is answerable "in place of the protected State."[308] The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.[309] The justification for such an acceptance was not based on the relationship of "representation" as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories, fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State), the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other States: the normal principles specified in articles 4 to 9 of the draft articles apply, and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.[310]

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.[311] In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State

307 *British Claims in the Spanish Zone of Morocco, R.I.A.A.*, vol. II, p. 615 (1925), at p. 649.
308 Ibid., at p. 648. 309 Ibid.
310 See, e.g., *LaGrand (Germany v. United States of America), Provisional Measures, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28.
311 See R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", *Comunicazioni e Studi* (Milan, Giuffré, 1946), vol. II, pp. 167-168.

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merely because the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Robert E. Brown* case,[312] for example, the Arbitral Tribunal held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, "fell far short of what would be required to make her responsible for the wrong inflicted upon Brown."[313] It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence "that Great Britain ever did undertake to interfere in this way."[314] Accordingly the relation of suzerainty "did not operate to render Great Britain liable for the acts complained of."[315] In the *Heirs of the Duc de Guise* case,[316] the Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. Rather the majority pointed to the absence in fact of any "intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees".[317] The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.[318]

(7) In the formulation of article 17, the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, "*direction and control*", raised some problems in other languages, owing in particular to the ambiguity of the term "*direction*" which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

312 *Brown (United States) v. Great Britain, R.I.A.A.*, vol. VI, p. 120 (1923).
313 Ibid., at p. 130. 314 Ibid., at p. 131. 315 Ibid.
316 *Heirs of the Duc de Guise, R.I.A.A.*, vol. XIII, p. 150 (1951).
317 Ibid., p. 161. See also, in another context, *Drodz & Janousek v. France & Spain, E.C.H.R., Series A, No. 240* (1992); see also *Iribarne Pérez v. France, E.C.H.R., Series A, No. 325-C* (1995), at pp. 62-63, paras. 29-31.
318 It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, (1965) *I.L.R.*, vol. 44, p. 301, at pp. 340-342 (Kammergericht, Berlin).

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(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under Chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence of "superior orders" does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State's conduct may not be precluded under Chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

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ARTICLE 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) the coercing State does so with knowledge of the circumstances of the act.

Commentary

(1) The third case of derived responsibility dealt with by Chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State's obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State vis-à-vis the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State vis-à-vis a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.[319] As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g., because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, i.e. coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.[320] However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

319 P. Reuter, *Introduction au droit des traités* (3rd edn.) (Paris, Presse Universitaire de France, 1995), pp. 159-161, paras. 271-274.

320 See article 49 (2) and commentary.

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(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded vis-à-vis the injured third State. This is reflected in the phrase "but for the coercion" in paragraph (a) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded vis-à-vis the coerced State. Therefore the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded vis-à-vis the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in paragraph (b) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by an American company on the orders of the Romanian Government during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been "compelled" by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed "a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out in the territory of that Ally."[321] The British Government denied responsibility, asserting that its influence over the conduct of the Romanian authorities "did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause."[322] The point of disagreement between the governments of

321 Note from the United States Embassy in London, 16 February 1925, in Hackworth, *Digest*, vol. V, p. 702.

322 Note from the British Foreign Office dated 5 July 1928, ibid., p. 704.

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the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of "compulsion" in the particular circumstances of the case.[323]

323 For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice See C.L. Bouvé, "Russia's liability in tort for Persia's breach of contract", *A.J.I.L.*, vol. 6 (1912), p. 389.

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ARTICLE 19

Effect of this Chapter

This Chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Commentary

(1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognises that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.

(2) Second, the article makes clear that the provisions of Chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful. The phrase "under other provisions of these articles" is a reference, *inter alia*, to article 23 (*force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that Chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Third, article 19 preserves the responsibility "of any other State" to whom the internationally wrongful conduct might also be attributable under other provisions of the Articles.

(4) Thus article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance or from acts otherwise attributable to any State under Chapter II. The article covers both the implicated and the acting State. It makes it clear that Chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in Chapter II.

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THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY

Volume IB

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INDIVIDUAL CRIMINAL RESPONSIBILITY

Albin Eser

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national laws, that the instigator anticipates the crime in its essential elements and rough outlines.[125]

5. Excess of the Perpetrator

As the instigator's scope of intent at the same time limits his responsibility, he cannot be held liable for crimes which go beyond his intent. Consequently, an excess of the principal by committing a crime which was not covered by the intent of the instigator, cannot be attributed to him. This is clearly the case in which the principal commits another crime than he was instigated to (e.g. instead of supposedly torturing a man, he rapes a woman), but also in the case that the principal does more than he was instigated to (e.g. killing the victim instead of merely injuring him). It is still irrelevant, however, when the deviation of the actual from the proposed crime is inessential.

This provision covers the 'classical' field of complicity by assistance which falls short of instigation (subparagraph (b)), on the one side, and goes beyond other contributions (such as contributing to group activities according to subparagraph (d)) on the other. In contrast to the usual language of 'aiding and abetting', used in the ICTY and ICTR Statutes,[126] the Rome Statute speaks of a person who 'aids, abets or otherwise assists' in the attempt or accomplishment of a crime, including 'providing the means for its commission'. This wording indicates that, first, aiding and abetting are no more an indistinguishable unity but that each of them has its own meaning, secondly, that aiding and abetting are just two ways of other possible forms of 'assistance', the latter thus serving as a sort of umbrella term, and thirdly, that 'providing the means' for the commission of a crime is merely a special example of assistance.

1. Objective Requirements

(a) Like instigation, complicity by assistance is also a form of *accessorial* liability in relation to the principal crime; this means that it must assist the accomplishment (or at least the attempt) of a crime.[127] Therefore, preparatory contributions, though determined to enable the commission of a crime, remain unpunishable if the intended principal crime is not carried out.[128] If, however, the principal crime reaches at least the stage of an attempt, it does not matter at what time and place

[125] E.g. to the German law, cf. H.-H. Jescheck and Th. Weigend, *Strafrecht*, Allgemeiner Teil (5th edn., 1997) 688.

[126] In Arts. 7 and 6(1) of the ICTY and ICTR Statutes, respectively 'otherwise aiding and abetting' comes after 'planning, instigating, ordering and committing'; cf. *supra* V.B.3.

[127] Cf. *supra*, V.D.1.

[128] As to the question of attempted complicity, cf. *infra*, VI.E.

during the preparation and performance of the crime the assistance was rendered. Although in this respect the ICTY and ICTR Statutes are clearer by explicitly speaking of aiding and abetting 'in the planning, preparation and execution' of a crime,[129] there is no reason why the assistance in certain stages of a crime should be excluded from responsibility here either.[130]

(b) The *forms of contribution* for facilitating the commission of the main crime are, except for 'providing the means' for its being carried out, not specified, as even the 'classical' terms of 'aiding and abetting' are far from determined.[131] If the ICTR defines aiding as 'giving assistance to someone', whereas abetting would 'involve facilitating the commission of an act by being sympathetic thereto',[132] aiding, perhaps not surprisingly, is practically identical with assisting, while abetting comes close to, if not being almost completely identifiable with, instigation.[133] Instead of exchanging synonyms, which are in any case rather unclear, it appears preferable

(c) With such a broad understanding of assistance, however, some sort of other restriction appears necessary if not even very remote involvement in or connection with the planning or performing of a crime is to be made punishable. One way of keeping complicity within certain boundaries could be the requirement of a *causal connection* between the assistance and the principal crime. If this requirement in terms of a '*conditio sine qua non*' were taken seriously, however, complicity by assistance would not only come very close to, if not even be absorbed by, co-perpetration, but would exclude even most serious contributions in the preparation or performance of the crime from criminal responsibility if the aider were

[129] Arts. 7 and 6(1) of the ICTY and ICTR Statutes, respectively.

[130] The same view was taken by the ICTY Trial Chamber in the *Tadić* case when stating: 'not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporarily distanced', *supra* note 6, para. 687; cf. also paras. 691 f. As far as the ILC was dealing with aiding and abetting and related problems, it was merely occupied with the question of direct and/or substantial contribution, but obviously not concerned with the stage and place where it is rendered (cf. Report of the ILC, 48th Sess., *supra* note 5, 23 ff.). With regard to the national laws as well, even where the time of a contribution to the commission of a crime plays a role, this mainly concerns co-perpetration rather than complicity by aiding and abetting; cf., for instance, to the Spanish Código Penal which in its Art. 29 speaks of 'actos anteriores o simultáneos', Mir Puig, *supra* note 63, 406 ff., or to the German Strafgesetzbuch which in its § 27 simply speaks of '"Hilfeleistung" zu einer vorsätzlich begangenen rechtswidrigen Tat', cf. Cramer and Heine, in Schönke and Schröder (eds.), *supra* note 61, § 27 margin Nos. 13, 17.

[131] Cf., for instance, the endeavours for distinguishing between aiding and abetting and for demarcating a lower and a higher frontier by Fletcher, *supra* note 59, 640 ff.

[132] ICTR Trial Chamber *Akayesu* case, *supra* note 123, para. 484.

[133] This is even more evident with the common definition of abetting in terms of 'to command, procure, council, encourage, induce, or assist' in *Black's Law Dictionary*, *supra* note 116, 5. See also B. Huber, 'Alleinhandeln und Zusammenwirken aus englischer Sicht', in Eser, Huber, and Cornils, *supra* note 45, at 79, 84.

able to show that despite his contribution, the perpetrator would have been ready and able (as, for instance, by finding assistance by others) to perform the crime, thus negating the causality of his own contribution. Therefore, either a true causal connection between the assistance to and the commission of the crime cannot be required in principle, as seems to be the position of the ICTY when declaring as erroneous that the assistance should have a causal effect on the crime,[134] or the causal connection has to be construed in a less strict way, such as letting suffice that the aiding and abetting was at least furthering or facilitating the crime or running the risk of it being carried out.[135]

Whether one follows one or the other line of disregarding or softening the requirement of a causal connection, at some point one arrives at the question as to whether the assistance of the aider and abettor should have a certain quality in terms of a '*direct and/or substantial*' contribution to the commission of the crime.

even if this is given, the causal contribution may be so minor or remote that it appears unjustified to attribute it to the accomplice. This doubt may have caused the Drafters of the Code of Crimes of 1996 to require that the aider and abettor must have 'directly and substantially' assisted in the commission of a crime.[136] And although the formulations of aiding and abetting in the ICTY and ICTR Statutes did not contain this restriction,[137] both the ICTY and the ICTR were prepared to read it into the relevant Statutes.[138] Similarly the formulation of aiding and abetting in the Rome Statute might be interpreted in the same way. Still, hopes should not be raised too high. If, for instance, a contribution has to be considered to be substantial if 'the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed', and if, accordingly, 'all acts of assistance by words or acts that lend encouragement or support' are thereby covered,[139] then this is nothing more than a softening of the 'classical' causality requirement by letting suffice both physical and psychological assistance in furthering the crime.[140] These reservations must not mean that the

[134] ICTY Trial Chamber, *Prosecutor v. Furundžija*, IT-95-17/1-T, 10 December 1998, para. 232.

[135] Rich case law and intensive discussions on these approaches seem particularly present in Germany and Spain: cf., for instance, Cramer and Heine, in Schönke and Schröder (eds.), *supra* note 61, § 27 margin No. 7 ff., and Mir Puig, *supra* note 63, 410 respectively.

[136] Art. 2(3)(d) of Draft Code 1996; cf. *supra*, V.B.2 at note 75.

[137] Cf. *supra*, V.B.3.

[138] Cf. the ICTY Trial Chamber in the *Tadić* case, *supra* note 6, para. 691, confirmed in the *Čelebići* decision, *Prosecutor v. Delalić et al.*, IT-96-21-T, 16 November 1998, para. 329. Basically on the same lines the ICTY Trial Chamber in the *Furundžija* case, *supra* note 134, para. 232, as well as the ICTR Trial Chamber in the *Akayesu* case, *supra* note 123, para. 484, and in *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 199 f.

[139] ICTY Trial Chamber in the *Tadić* case, *supra* note 6, para. 689.

[140] For a closer analysis of the ICTY/ICTR judgments, see Ambos, in Triffterer, *supra* note 7, Art. 25 margin Nos. 15 ff.

requirement of a 'substantial' contribution is completely futile; for although not providing clear delineations, it can function as a sort of monitor by which, for instance, casual remarks, though perceived by the principal as encouragement, are obviously irrelevant, because easily exchangeable, and can thus be excluded. What this means in practice, however, is hardly definable in an abstract formula but has to be realized in a case-by-case method whereby certain modern theories of (positive and negative) imputation and attribution might be helpful when taken into consideration.[141]

2. Subjective Requirements

Unlike instigation, which is governed by the ordinary requirements of the mental element according to Article 30 of the ICC Statute,[142] complicity by way of aiding, abetting, or otherwise assisting requires two different forms of *mens rea*.

(a) With regard to *facilitating* the commission of the crime, the aider and abettor must act with *'purpose'* (Article 25(3)(c) of the ICC Statute). This means more than the mere knowledge that the accomplice aids the commission of the offence, as would suffice for complicity according to the ICTR and ICTY Statutes,[143] rather he must know as well as wish that his assistance shall facilitate the commission of the crime. Consequently, if a civilian, asked by a soldier to disclose the hiding place of the later victim, is doing so out of fear and with the hope that the victim may have fled, he will not be criminally responsible, even if he is aware that the soldier might find and kill the victim.

(b) With regard to all other elements as his own assistance as well as the principal's crime, the same mental elements are required and sufficient as with instigation. Correspondingly, the aider and abettor must have '*double intent*' both with regard to the intentional commission by the principal and the requisite elements of his assistance.[144] In sum, while the objective requirements of aiding, abetting, and assisting are relatively low, the criminal responsibility of aiders and abettors contains certain restrictions by means of higher subjective requirements.[145]

[141] To the same end, see Ambos, in Triffterer, *supra* note 7, margin No. 18 and A. Serini, 'Individual Criminal Responsibility', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 140. On the various theories of the foundation and exclusion of imputation and attribution, see most recently Th. Lenckner, in Schönke and Schröder (eds.), *supra* note 61, § 13 pre-notes 71–102 and, in particular on participation, Cramer and Heine, in Schönke and Schröder (eds.), *supra* note 61, § 27 margin No. 9a, 10a.

[142] Cf. *supra*, V.D.4.

[143] According to Arts. 7 and (1) of the ICTR and ICTY Statutes; cf. the judgments by the ICTY Trial Chamber in the *Furundžija* case, *supra* note 134, para. 249; cf. also ICTY Trial Chamber in the *Tadić* case, *supra* note 6, para. 692 and ICTR Trial Chamber in the *Akayesu* case, *supra* note 123, para. 479, and furthermore the critical analysis by Ambos, *supra* note 38, 789 ff.

[144] Cf. *supra*, V.D.4.

[145] This is also the conclusion by Ambos, in Triffterer, *supra* note 7, margin No. 19.

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de libera piscaria (dee **lib**-ər-ə pi-**skair**-ee-ə), *n.* [Law Latin "of free fishery"] *Hist.* A writ allowing an exclusive right to fish on public navigable water. • This was a form of *quod permittat*.

deliberate (di-**lib**-[ə]-rit), *adj.* (15c) **1.** Intentional; premeditated; fully considered. **2.** Unimpulsive; slow in deciding.

deliberate (di-**lib**-ə-rate), *vb.* (Of a court, jury, etc.) to weigh and analyze all the evidence after closing arguments <the jury deliberated for 12 hours before reaching a verdict>.

deliberate elicitation. (1966) *Criminal procedure.* The purposeful yet covert drawing forth of an incriminating response (usu. not during a formal interrogation) from a suspect whose Sixth Amendment right to counsel has attached but who has not waived that right. • Deliberate elicitation may occur, for example, when a police officer engages an arrested suspect in conversation on the way to the police station. Deliberate elicitation violates the Sixth Amendment. *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199 (1964). See MASSIAH RULE.

deliberate indifference. See INDIFFERENCE.

deliberate-indifference instruction. See JEWELL INSTRUCTION.

deliberate speed, with all. (1817) As quickly as the maintenance of law and order and the welfare of the people will allow, esp. with respect to the desegregation of public schools. *Brown v. Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686 (1954). [Cases: Schools ⇨13(9).]

deliberation, *n.* (14c) The act of carefully considering issues and options before making a decision or taking some action; esp., the process by which a jury reaches a verdict, as by analyzing, discussing, and weighing the evidence. See CONSIDERATION (3). [Cases: Criminal Law ⇨857(1); Federal Civil Procedure ⇨1974; Trial ⇨306.] — **deliberate** (di-**lib**-ə-rayt), *vb.*

deliberative assembly. See ASSEMBLY.

deliberative-process privilege. (1977) The principle that a decision-maker's thoughts and how they led to a decision are not subject to revelation or scrutiny. *See U.S. v. Morgan*, 313 U.S. 409, 61 S.Ct. 999 (1941). • An exception to the rule may be allowed if a party can clearly show that the decision resulted from bias, bad faith, misconduct, or illegal or unlawful action. The privilege is meant to encourage open and independent discussion among those who develop government policy. [Cases: Privileged Communications and Confidentiality ⇨361.] — Also termed *mental-process privilege*.

de libero homine exhibendo (dee **lib**-ər-oh **hom**-ə-nee ek-si-**ben**-doh). [Latin "for the production of a free man"] *Roman law.* An interdict requiring a free person to be produced before a magistrate.

de libero passagio (dee **lib**-ər-oh pə-**say**-jee-oh), *n.* [Law Latin "of free passage"] *Hist.* A writ allowing free passage over water. • This was a form of *quod permittat*.

de libertate probanda (dee lib-ər-**tay**-tee proh-**ban**-də), *n.* [Law Latin "for proving liberty"] *Hist.* A writ directing a sheriff to take security from a person accused of being a villein and to protect that person from harassment until the person's status was determined by the justices of assize.

de libertatibus allocandis (dee lib-ər-**tay**-tə-bəs al-ə-**kan**-dis), *n.* [Law Latin "for allowing liberties"] *Hist.* A writ allowing a person entitled to certain liberties to obtain them.

de licentia transfretandi (dee lī-**sen**-shee-ə trans-frə-**tan**-dī), *n.* [Law Latin "of permission to cross the sea"] *Hist.* A writ ordering wardens of seaports, on certain conditions, to permit any person named in the writ to cross the sea.

delict (di-**likt**), *n.* [Latin *delictum* "an offense"] (16c) *Roman & civil law.* A violation of the law; esp., a wrongful act or omission giving rise to a claim for compensation; TORT. — Also termed (in Roman law) *delictum*; (in French law) *délit*. [Cases: Torts ⇨107.]

> "A delict is a civil wrong. It is an infringement of another's interests that is wrongful irrespective of any prior contractual undertaking to refrain from it — though there may also be one. It entitles the injured party to claim compensation in civil proceedings — though criminal proceedings aimed at punishing the wrongdoer may also ensue." 1 P.Q.R. Boberg, *The Law of Delict* 1 (1984).

private delict. A wrong regarded primarily as a matter of compensation between individuals.

public delict. A wrong for which the community as a whole takes steps to punish the offender. Cf. *public tort* under TORT.

quasi-delict. **1.** *Roman law.* A residuary category of private wrongs, characterized by either vicarious or strict liability.

> "QUASI-DELICT . . . . Justinian enumerates four cases of obligations said to arise quasi ex delicto. The implication seems to be that in all of them the law creates a liability though the defendant may not in fact be to blame. The cases are the following: — (1) The judge who 'makes the case his own' . . . incurs a penalty fixed by the magistrate at discretion . . . . (2) If anything was thrown, or poured, from an upper room . . . the occupier was liable for double the damage . . . . (3) If a thing was kept placed or suspended over a way used by the public . . . there was a penalty . . . which might be recovered from the occupier . . . . (4) Shipowners, innkeepers and stable-keepers were liable for damage or theft committed by slaves or free persons in their employ . . . ." R.W. Lee, *The Elements of Roman Law* 401-02 (4th ed. 1956).

2. See *quasi-offense* under OFFENSE (2). **3.** *Scots law.* Tortious conduct that is negligent, as opposed to intentional.

delictal, See DELICTUAL.

deliction (di-**lik**-shən). (1966) The loss of land by gradual, natural changes, such as erosion resulting from a change in the course of a river or stream. Cf. ACCRETION (1); ALLUVION; AVULSION (2); EROSION. [Cases

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[130] CRIMINAL LAW
(1) THE NATURE OF CRIME
(ii) *Specific States of Mind(a) In General*

HLHK CRIMINAL LAW 55

[130.055] Secondary parties

A person who aids, abets, counsels or procures the commission of an offence by any other person is guilty of that offence and is liable to be tried and punished as a principal offender n1. In the language of the law appropriate when the distinction between felony and misdemeanour was relevant, such a person who aided and abetted would, in relation to a felony, be described as a principal in the second degree n2. The words aid, abet, counsel or procure are used in their ordinary meaning and are not terms of art n3. In order to determine whether an offence has been committed it is preferable to consider the phrase as a whole n4. As a general rule, any offence can be aided and abetted unless there is something in the legislation creating the offence which expressly or impliedly negatives the liability of secondary parties n5.

An aider and abettor must be present when the crime is committed either actually or constructively n6. However, mere presence is not enough and there must be a common purpose between the principal and the aider and abettor and an intention to aid or encourage the persons who commit the offence or, a readiness to aid and encourage them if required n7. Presence coupled with a secret intention to assist is insufficient and there must be some act of encouragement or assistance given to the principal either, before or at the time of the commission of the offence, with the intention of furthering its commission n8. The accused is liable as a secondary party even though he takes no part in the actual perpetration of the offence n9. A person may be guilty as an aider and abettor if, with the relevant mens rea, he fails to act when under a duty to do so n10.

Where it is alleged that the accused procured the offence, the prosecution must prove a causal connection between the act constituting the procurement and the crime although it is not necessary to establish that the offence was committed in the manner it was procured n11. In relation to counselling it must be proved that the offence counselled was in fact committed n12. However, it is not necessary to show that the counselling was the substantial cause of the commission of the offence but, in such a case it must be proved that the person counselled committed the offence and was at the time of the commission of the offence acting within the scope of his authority and that the crime was not accidental n13.

It is not necessary to establish that the principal committed the exact offence that was counselled and the accessory is liable as long as the offence is substantially that which he counselled n14. A person may be guilty as a counsellor or procurer if he simply sets the stage for the offence n15. Procuring means to produce by endeavour in the sense that the accused sets out to see that a thing happens and takes steps to produce that outcome n16. A person who counsels or procures a crime may escape liability as a secondary party if before the offence is committed he countermands or nullifies his orders n17. Mere repentance or withdrawal is insufficient n18. What is required to escape liability is an express, timely and actual countermand and revocation of the counselling or procuring previously given or undertaken n19.

n1 Criminal Procedure Ordinance (Cap 221) s 89. This provision is essentially procedural: *R v Wong Hoi* [1966] HKLR 386; see also [130.684] note 47.

n2 *R v Towle* (1816) 3 Price 145, 146 ER 217, Ex Ch. As to principals in the first degree see [130.054].

n3 *A-G's Reference (No 1 of 1975)* [1975] QB 773, [1975] 2 All ER 684, CA (Eng).

n4 *A-G v Able* [1984] QB 795, [1984] 1 All ER 277.

n5 See *Mok Wei-tak v R* [1986] HKLR 1054, CA; *R v Jefferson* (1994) 99 Cr App Rep 13, CA (Eng).

n6 *R v Towle* (1816) Russ & Ry 314; *R v Kwan Kwok-hing* [1977] HKLR 159.

n7 1 Hale PC 439; *R v Coney* (1882) 8 QBD 534, CCR; *Du Cros v Lambourne* [1907] 1 KB 40, DC (Eng); *R v Baldessare* (1930) 22 Cr App Rep 70, 144 LT 185, CCA; *Sayce v Coupe* [1953] 1 QB 1, [1952] 2 All ER 715, DC; *R v Wong Hoi* [1966] HKLR 386; *R v Clarkson* (1971) 55 Cr App Rep 445 (followed in) *R v Leung Tak-yin* [1987] 2 HKC 250; *R v Lam Kit* [1988] HKC 679; *R v Keung Hing- cheung* (unreported; Crim App 198/1990), CA. However, presence may be some evidence from which encouragement and the relevant mens rea might be inferred: *R v Baldessare* (1930) 22 Cr App Rep 70, 144 LT 185; *Wilcox v Jeffrey* [1951] 1 All ER 464, DC (Eng); *R v Chu Hak-kim* (unreported; Crim App 95/1985).

n8 *Du Cros v Lambourne* [1907] 1 KB 40, DC (Eng); *Rubie v Faulkner* [1940] 1 KB 571, DC (Eng); *R v Kwan Kwok-hing* [1977] HKLR 159; *Tuck v Robson* [1970] 1 All ER 1171, [1970] 1 WLR 741, DC (Eng); *R v Lau Chi-kin* [1988] 1 HKLR 282; *R v Giannetto* [1997] 1 Cr App Rep 1, CA (Eng).

n9 *R v Towle* (1816) Russ & Ry 314.

n10 *Rubie v Faulkner* [1940] 1 KB 571, [1940] 1 All ER 285, DC (Eng).

n11 A-G's Reference (No 1 of 1975) [1975] QB 773, [1975] 2 All ER 684, CA (Eng); *A-G v Able* [1984] QB 795, [1984] 1 All ER 277; *R v Szeto Kwok-hei* [1991] 2 HKLR 178, CA.

n12 *R v Gregory* (1867) LR 1 CCR 77.

n13 *R v Calhaem* [1985] QB 808, CA (Eng); *A-G v Able* [1984] QB 795, [1984] 1 All ER 277.

n14 *R v Bainbridge* [1960] 1 QB 129, [1959] 3 All ER 200, CA (Eng); *A-G v Able* [1984] QB 795, [1984] 1 All ER 277.

n15 *Thambiah v R* [1966] AC 37, [1965] 3 All ER 661, PC.

n16 A-G's Reference (No 1 of 1975) [1975] QB 773, [1975] 2 All ER 684, CA (Eng). See also *R v Broadfoot* [1977] 3 All ER 753, 64 Cr App Rep 71, CA (Eng).

n17 1 Hale PC 618; *R v Croft* [1944] KB 295, [1944] 2 All ER 483, CCA.

n18 *R v Fletcher* [1962] Crim LR 551, CCA.

n19 *R v Croft* [1944] KB 295, [1944] 2 All ER 483, CCA; *R v Beccera, R v Cooper* (1976) 62 Cr App Rep 212, CA (Eng); *R v Whitefield* (1983) 79 Cr App Rep 36, CA (Eng); *R v Rook* (1993) 97 Cr App Rep 327, CA (Eng).

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Customary International Humanitarian Law

Volume I: Rules

JEAN-MARIE HENCKAERTS
AND LOUISE DOSWALD-BECK

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Part I

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CHAPTER 34

THE WOUNDED, SICK AND SHIPWRECKED

Rule 109. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.

Practice

Volume II, Chapter 34, Section A.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International armed conflicts

The duty to collect wounded and sick combatants without distinction in international armed conflicts was first codified in the 1864 Geneva Convention.[1] This subject is dealt with in more detail in the 1949 Geneva Conventions.[2] This duty is now codified in Article 10 of Additional Protocol I,[3] albeit in more general terms of "protecting" the wounded, sick and shipwrecked, which means "coming to their defence, lending help and support".[4]

The numerous military manuals which contain this rule are phrased in general terms covering all wounded, sick and shipwrecked, whether military or civilian.[5] Sweden's IHL Manual, in particular, identifies Article 10 of

[1] 1864 Geneva Convention, Article 6 (cited in Vol. II, Ch. 34, § 1).
[2] First Geneva Convention, Article 15, first paragraph (*ibid.*, § 5); Second Geneva Convention, Article 18, first paragraph (*ibid.*, § 7); Fourth Geneva Convention, Article 16, second paragraph (*ibid.*, § 10).
[3] Additional Protocol I, Article 10 (adopted by consensus) (*ibid.*, § 199).
[4] Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 446.
[5] See, e.g., the military manuals of Argentina (cited in Vol. II, Ch. 34, §§ 21–22 and 127), Australia (*ibid.*, §§ 23 and 128–129), Belgium (*ibid.*, §§ 24–25 and 130), Benin (*ibid.*, §§ 26 and 131), Burkina Faso (*ibid.*, § 27), Cameroon (*ibid.*, §§ 28–29 and 134), Canada (*ibid.*, §§ 30–31 and 133), Colombia (*ibid.*, §§ 32–35), Congo (*ibid.*, § 36), Croatia (*ibid.*, §§ 37–40 and 135), Dominican Republic (*ibid.*, § 136), Ecuador (*ibid.*, §§ 41 and 137), France (*ibid.*, §§ 42–43 and 138), Germany

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Additional Protocol I as a codification of customary international law.[6] The legislation of many States provides for the punishment of persons who abandon the wounded, sick and shipwrecked.[7]

Non-international armed conflicts

In the context of non-international armed conflicts, this rule is based on common Article 3 of the Geneva Conventions, which provides that "the wounded and sick shall be collected".[8] It is codified in a more detailed manner in Additional Protocol II.[9] In addition, it is set forth in a number of other instruments pertaining also to non-international armed conflicts.[10]

The duty to search for, collect and evacuate the wounded, sick and shipwrecked is contained in a number of military manuals which are applicable in or have been applied in non-international armed conflicts.[11] It is an offence under the legislation of several States to abandon the wounded and sick.[12]

(*ibid.*, § 44), Hungary (*ibid.*, §§ 45 and 139), India (*ibid.*, § 140), Indonesia (*ibid.*, § 46), Italy (*ibid.*, §§ 47 and 141), Kenya (*ibid.*, §§ 48 and 142), Lebanon (*ibid.*, § 49), Madagascar (*ibid.*, §§ 50 and 143), Mali (*ibid.*, § 51), Morocco (*ibid.*, § 52), Netherlands (*ibid.*, §§ 53–55 and 144), New Zealand (*ibid.*, §§ 56 and 145), Nigeria (*ibid.*, §§ 58–60 and 146), Philippines (*ibid.*, §§ 61 and 147–149), Romania (*ibid.*, §§ 62 and 150), Rwanda (*ibid.*, § 151), Senegal (*ibid.*, § 64), Spain (*ibid.*, §§ 66 and 153), Switzerland (*ibid.*, §§ 68 and 154), Togo (*ibid.*, §§ 69 and 155), United Kingdom (*ibid.*, §§ 70–71 and 156–157), United States (*ibid.*, §§ 72–74 and 158–161) and Yugoslavia (*ibid.*, §§ 75 and 162).

6 Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

7 See, e.g., the legislation of China (cited in Vol. II, Ch. 34, § 80), Colombia (*ibid.*, § 81), Democratic Republic of the Congo (*ibid.*, § 82), Iraq (*ibid.*, § 84), Italy (*ibid.*, § 86), Nicaragua (*ibid.*, § 87), Spain (*ibid.*, § 90), Uruguay (*ibid.*, § 93), Venezuela (*ibid.*, § 94) and Vietnam (*ibid.*, § 95); see also the draft legislation of Argentina (*ibid.*, § 76), El Salvador (*ibid.*, § 83) and Nicaragua (*ibid.*, § 88).

8 Geneva Conventions, common Article 3 (*ibid.*, § 3).

9 Additional Protocol II, Article 8 (adopted by consensus) (*ibid.*, § 13).

10 See, e.g., Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, para. 1 (*ibid.*, § 16); Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.1 (*ibid.*, § 18); Hague Statement on Respect for Humanitarian Principles (*ibid.*, § 17); Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, Part IV, Article 4(2) and (9) (*ibid.*, § 19).

11 See, e.g., the military manuals of Argentina (*ibid.*, § 22), Australia (*ibid.*, §§ 23 and 128), Belgium (*ibid.*, § 24), Benin (*ibid.*, §§ 26 and 131), Cameroon (*ibid.*, § 29), Canada (*ibid.*, §§ 30–31 and 133), Colombia (*ibid.*, §§ 32–35), Croatia (*ibid.*, §§ 37–40 and 135), Ecuador (*ibid.*, §§ 41 and 137), Germany (*ibid.*, § 44), Hungary (*ibid.*, § 45), India (*ibid.*, § 140), Italy (*ibid.*, §§ 47 and 141), Kenya (*ibid.*, §§ 48 and 142), Lebanon (*ibid.*, § 49), Madagascar (*ibid.*, §§ 50 and 143), Netherlands (*ibid.*, §§ 53–54), New Zealand (*ibid.*, § 56), Nicaragua (*ibid.*, § 57), Nigeria (*ibid.*, §§ 58 and 60), Philippines (*ibid.*, §§ 61 and 147–149), Rwanda (*ibid.*, § 151), Senegal (*ibid.*, § 65), Spain (*ibid.*, § 66), Togo (*ibid.*, §§ 69 and 155), United Kingdom (*ibid.*, §§ 70–71), United States (*ibid.*, §§ 72–73) and Yugoslavia (*ibid.*, §§ 75 and 162).

12 See, e.g., the legislation of Colombia (*ibid.*, § 81), Democratic Republic of the Congo (*ibid.*, § 82), Nicaragua (*ibid.*, § 87), Venezuela (*ibid.*, § 94) and Vietnam (*ibid.*, § 95); see also the legislation of Italy (*ibid.*, § 86) and Uruguay (*ibid.*, § 93), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Argentina (*ibid.*, § 76), El Salvador (*ibid.*, § 83) and Nicaragua (*ibid.*, § 88).

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No official contrary practice was found with respect to either international or non-international armed conflicts. The ICRC has called on parties to both international and non-international armed conflicts to respect this rule.[13]

Interpretation

The obligation to search for, collect and evacuate the wounded, sick and shipwrecked is an obligation of means. Each party to the conflict has to take *all possible measures* to search for, collect and evacuate the wounded, sick and shipwrecked. This includes permitting humanitarian organisations to assist in their search and collection. Practice shows that the ICRC in particular has engaged in the evacuation of the wounded and sick.[14] It is clear that in practice humanitarian organisations will need permission from the party in control of a certain area to carry out such activities, but such permission must not be denied arbitrarily (see also commentary to Rule 55). The UN Security Council, UN General Assembly and UN Commission on Human Rights have called upon the parties to the conflicts in El Salvador and Lebanon to permit the ICRC to evacuate the wounded and sick.[15]

In addition, the possibility of calling upon the civilian population to assist in the search, collection and evacuation of the wounded, sick and shipwrecked is recognised in the Geneva Conventions and their Additional Protocols.[16] It is also provided for in several military manuals.[17] Article 18 of the First Geneva Convention provides that "no one may ever be molested or convicted for having nursed the wounded or sick".[18] This principle is also set forth in Article 17(1) of Additional Protocol I, to which no reservations have been made.[19]

The Geneva Conventions and other instruments, such as the UN Secretary-General's Bulletin on observance by United Nations forces of international

[13] See, e.g., ICRC, Conflict between Iraq and Iran: ICRC Appeal (*ibid.*, § 110), Memorandum on the Applicability of International Humanitarian Law (*ibid.*, § 111), Communication to the Press No. 93/17 (*ibid.*, § 112), Memorandum on Respect for International Humanitarian Law in Angola (*ibid.*, § 113), Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Operation Turquoise (*ibid.*, § 114) and Communication to the Press No. 00/42 (*ibid.*, § 115).

[14] See, e.g., the practice of the ICRC (*ibid.*, § 185) and Communication to the Press No. 96/25 (*ibid.*, § 189).

[15] UN Security Council, Res. 436 (*ibid.*, § 173); UN General Assembly, Res. 40/139 (*ibid.*, § 174); UN Commission on Human Rights, Res. 1986/39 (*ibid.*, § 175).

[16] First Geneva Convention, Article 18 (*ibid.*, § 6); Second Geneva Convention, Article 21, first paragraph (*ibid.*, § 8); Additional Protocol I, Article 17(2) (adopted by consensus) (*ibid.*, § 11); Additional Protocol II, Article 18(1) (adopted by consensus) (*ibid.*, § 14).

[17] See, e.g., the military manuals of Argentina (*ibid.*, § 21), Cameroon (*ibid.*, § 29), Canada (*ibid.*, §§ 30–31), Germany (*ibid.*, § 44), Kenya (*ibid.*, § 48), New Zealand (*ibid.*, § 56), Russia (*ibid.*, § 63), Switzerland (*ibid.*, § 68), United Kingdom (*ibid.*, §§ 70–71), United States (*ibid.*, § 72) and Yugoslavia (*ibid.*, § 75).

[18] First Geneva Convention, Article 18 (cited in Vol. II, Ch. 7, § 2.31).

[19] Additional Protocol I, Article 17(1) (adopted by consensus).

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humanitarian law, state that cease-fires and other local arrangements are seen as appropriate ways to create the conditions in which the wounded and sick can be evacuated and require the parties to the conflict to conclude such agreements, whenever circumstances permit, to remove, exchange and transport the wounded from the battlefield.[20] Many military manuals make the same point.[21]

Scope of application

This rule applies to all wounded, sick and shipwrecked, without adverse distinction (see Rule 88). This means that it applies to the wounded, sick and shipwrecked regardless to which party they belong, but also regardless of whether or not they have taken a direct part in hostilities. The application of this rule to civilians was already the case pursuant to Article 16 of the Fourth Geneva Convention, which applies to the whole of the populations of the countries in conflict, and is repeated in Article 10 of Additional Protocol I.[22] With respect to non-international armed conflicts, common Article 3 of the Geneva Conventions applies to all persons taking no active part in the hostilities, which includes civilians.[23] In addition, Article 8 of Additional Protocol II does not indicate any distinction (see also Article 2(1) of Additional Protocol II on non-discrimination).[24] Most military manuals state this rule in general terms.[25]

[20] First Geneva Convention, Article 15, second and third paragraphs (cited in Vol. II, Ch. 34, § 118); Second Geneva Convention, Article 18, second paragraph (*ibid.*, § 119); Fourth Geneva Convention, Article 17 (*ibid.*, § 120); UN Secretary-General's Bulletin, Section 9.2 (*ibid.*, § 126).

[21] See, e.g., the military manuals of Argentina (*ibid.*, § 127), Australia (*ibid.*, §§ 128–129), Cameroon (*ibid.*, § 134), Canada (*ibid.*, §§ 132–133), Ecuador (*ibid.*, § 137), France (*ibid.*, § 138), India (*ibid.*, § 140), Kenya (*ibid.*, § 142), Madagascar (*ibid.*, § 143), Netherlands (*ibid.*, § 144), New Zealand (*ibid.*, § 145), Nigeria (*ibid.*, § 146), Senegal (*ibid.*, § 152), Spain (*ibid.*, § 153), Switzerland (*ibid.*, § 154), United Kingdom (*ibid.*, §§ 156–157), United States (*ibid.*, §§ 158–159 and 161) and Yugoslavia (*ibid.*, § 162).

[22] Fourth Geneva Convention, Article 16 (*ibid.*, §§ 10 and 198); Additional Protocol I, Article 10 (adopted by consensus) (*ibid.*, §§ 199 and 346).

[23] Geneva Conventions, common Article 3 (*ibid.*, § 3).

[24] Additional Protocol II, Article 8 (adopted by consensus) (*ibid.*, § 13) and Article 2(1) (adopted by consensus) (cited in Vol. II, Ch. 32, § 369).

[25] See, e.g., the military manuals of Argentina (cited in Vol. II, Ch. 34, §§ 21–22 and 127), Australia (*ibid.*, §§ 23 and 128–129), Belgium (*ibid.*, §§ 24–25 and 130), Benin (*ibid.*, §§ 26 and 131), Burkina Faso (*ibid.*, § 27), Cameroon (*ibid.*, §§ 28–29 and 134), Canada (*ibid.*, §§ 30–31 and 132–133), Colombia (*ibid.*, §§ 32–35), Congo (*ibid.*, § 36), Croatia (*ibid.*, §§ 37–40 and 135), Dominican Republic (*ibid.*, § 136), Ecuador (*ibid.*, §§ 41 and 137), France (*ibid.*, §§ 42–43 and 138), Germany (*ibid.*, § 44), Hungary (*ibid.*, §§ 45 and 139), India (*ibid.*, § 140), Indonesia (*ibid.*, § 46), Italy (*ibid.*, §§ 47 and 141), Kenya (*ibid.*, §§ 48 and 142), Lebanon (*ibid.*, § 49), Madagascar (*ibid.*, §§ 50 and 143), Mali (*ibid.*, § 51), Morocco (*ibid.*, § 52), Netherlands (*ibid.*, §§ 53–55 and 144), New Zealand (*ibid.*, §§ 56 and 145), Nigeria (*ibid.*, §§ 58–60 and 146), Philippines (*ibid.*, §§ 61 and 147–149), Romania (*ibid.*, §§ 62 and 150), Rwanda (*ibid.*, § 151), Senegal (*ibid.*, § 64), Spain (*ibid.*, §§ 66 and 153), Switzerland (*ibid.*, §§ 68 and 154), Togo (*ibid.*, §§ 69 and 155), United Kingdom (*ibid.*, §§ 70–71 and 156–157), United States (*ibid.*, §§ 72–74 and 158–161) and Yugoslavia (*ibid.*, §§ 75 and 162).

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Rule 110. The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones.

Practice

Volume II, Chapter 34, Section B.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International armed conflicts

The duty to care for wounded and sick combatants without distinction is a long-standing rule of customary international law already recognised in the Lieber Code and codified in the 1864 Geneva Convention.[26] This subject is dealt with in more detail by the 1949 Geneva Conventions.[27] It is codified in Article 10 of Additional Protocol I.[28]

The numerous military manuals which contain this rule are phrased in general terms covering all wounded, sick and shipwrecked.[29] Sweden's IHL Manual, in particular, identifies Article 10 of Additional Protocol I as a codification of customary international law.[30] To deny medical care to the wounded, sick and shipwrecked is an offence under the legislation of many States.[31]

[26] Lieber Code, Article 79 (*ibid.*, § 205); 1864 Geneva Convention, Article 6 (*ibid.*, § 191).

[27] First Geneva Convention, Article 12, second paragraph, and Article 15, first paragraph (*ibid.*, §§ 193–194); Second Geneva Convention, Article 12, second paragraph, and Article 18, first paragraph (*ibid.*, §§ 193 and 196); Fourth Geneva Convention, Article 16, first paragraph (*ibid.*, § 198).

[28] Additional Protocol I, Article 10 (adopted by consensus) (*ibid.*, §§ 199 and 346).

[29] See, e.g., the military manuals of Argentina (*ibid.*, §§ 215 and 355), Australia (*ibid.*, §§ 216–217 and 357), Belgium (*ibid.*, §§ 218–219), Benin (*ibid.*, §§ 220 and 359), Bosnia and Herzegovina (*ibid.*, § 221), Burkina Faso (*ibid.*, § 222), Cameroon (*ibid.*, §§ 223–224), Canada (*ibid.*, §§ 225–226), Colombia (*ibid.*, §§ 227–229), Congo (*ibid.*, § 230), Croatia (*ibid.*, §§ 231 and 233), Ecuador (*ibid.*, § 234), El Salvador (*ibid.*, § 235), France (*ibid.*, §§ 236–238), Germany (*ibid.*, §§ 239–240), Hungary (*ibid.*, § 241), India (*ibid.*, § 243), Indonesia (*ibid.*, § 244), Israel (*ibid.*, § 245), Italy (*ibid.*, § 246), Kenya (*ibid.*, §§ 247 and 367), Lebanon (*ibid.*, § 248), Madagascar (*ibid.*, §§ 249 and 368), Mali (*ibid.*, § 250), Morocco (*ibid.*, § 251), Netherlands (*ibid.*, §§ 252–254 and 370), New Zealand (*ibid.*, §§ 255 and 371), Nicaragua (*ibid.*, § 256), Nigeria (*ibid.*, §§ 257–260), Philippines (*ibid.*, §§ 261–264 and 374), Romania (*ibid.*, § 375), Rwanda (*ibid.*, § 267), Senegal (*ibid.*, § 268), South Africa (*ibid.*, § 269), Spain (*ibid.*, § 270), Sweden (*ibid.*, §§ 271–272), Switzerland (*ibid.*, §§ [illegible] and 379), Togo (*ibid.*, §§ 274 and 380), Uganda (*ibid.*, § 275), United Kingdom (*ibid.*, §§ 276–[illegible] and United States (*ibid.*, §§ 278–281).

[30] Sweden, *IHL Manual* (*ibid.*, § 272).

[31] See, e.g., the legislation of Azerbaijan (*ibid.*, § 283), Bangladesh (*ibid.*, § 284), China (*ibid.*, § 285), Colombia (*ibid.*, § 286), Cuba (*ibid.*, § 287), Czech Republic (*ibid.*, § 288), Estonia (*ibid.*, § 289), Ireland (*ibid.*, § 291), Norway (*ibid.*, § 292), Slovakia (*ibid.*, § 293), Spain (*ibid.*, § 294), Ukraine (*ibid.*, § 295), Uruguay (*ibid.*, § 296), Venezuela (*ibid.*, § 297) and Vietnam (*ibid.*, § 298); see also the draft legislation of Argentina (*ibid.*, § 282) and El Salvador (*ibid.*, § 289).

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Non-international armed conflicts

In the context of a non-international armed conflict, this rule is based on common Article 3 of the Geneva Conventions, which provides that "the wounded and sick shall be collected and cared for".[32] It is codified in a more detailed manner in Additional Protocol II.[33] In addition, it is set forth in a number of other instruments pertaining also to non-international armed conflicts.[34]

The duty to care for wounded and sick combatants without distinction is set forth in a number of military manuals which are applicable in or have been applied in non-international armed conflicts.[35] Under the legislation of many States, it is an offence to deny medical care to the wounded, sick and shipwrecked.[36] Respect for this rule was required by Argentina's National Court of Appeals in the *Military Junta case* in 1985.[37] Furthermore, there are official statements and other practice supporting this rule in the context of non-international armed conflicts.[38]

No official contrary practice was found with respect to either international or non-international armed conflicts. States and international organisations have generally condemned violations of this rule.[39] The ICRC has called on

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[32] Geneva Conventions, common Article 3 (*ibid.*, § 192).

[33] Additional Protocol II, Articles 7–8 (adopted by consensus) (*ibid.*, §§ 201–202).

[34] Cairo Declaration on Human Rights in Islam, Article 3(a) (*ibid.*, § 208); Hague Statement on Respect for Humanitarian Principles, paras. 1 and 2 (*ibid.*, § 209); Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the SFRY, para. 1 (*ibid.*, §§ 210 and 351); Agreement on the Application of International Humanitarian Law between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.1 (*ibid.*, §§ 211 and 352); Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, Part IV, Article 4(2) and (9) (*ibid.*, § 212).

[35] See, e.g., the military manuals of Argentina (*ibid.*, §§ 215 and 355), Australia (*ibid.*, §§ 216–217 and 357), Belgium (*ibid.*, § 218), Benin (*ibid.*, §§ 220 and 359), Bosnia and Herzegovina (*ibid.*, § 221), Cameroon (*ibid.*, § 224), Canada (*ibid.*, §§ 225–226), Colombia (*ibid.*, §§ 227–229), Croatia (*ibid.*, §§ 231 and 233), Ecuador (*ibid.*, § 234), El Salvador (*ibid.*, § 235), Germany (*ibid.*, §§ 239–240), India (*ibid.*, §§ 242–243), Italy (*ibid.*, § 246), Kenya (*ibid.*, §§ 247 and 367), Lebanon (*ibid.*, § 248), Madagascar (*ibid.*, §§ 249 and 368), Netherlands (*ibid.*, §§ 252–253 and 369), New Zealand (*ibid.*, § 255), Nicaragua (*ibid.*, § 256), Nigeria (*ibid.*, §§ 257–258 and 260), Philippines (*ibid.*, §§ 261–264 and 374), Rwanda (*ibid.*, § 267), South Africa (*ibid.*, § 269), Spain (*ibid.*, § 270), Sweden (*ibid.*, § 271), Togo (*ibid.*, §§ 274 and 380), Uganda (*ibid.*, § 275), United Kingdom (*ibid.*, § 277) and United States (*ibid.*, § 278).

[36] See, e.g., the legislation of Azerbaijan (*ibid.*, § 283), Bangladesh (*ibid.*, § 284), Colombia (*ibid.*, § 286), Estonia (*ibid.*, § 290), Ireland (*ibid.*, § 291), Norway (*ibid.*, § 292), Spain (*ibid.*, § 294), Ukraine (*ibid.*, § 295), Venezuela (*ibid.*, § 297) and Vietnam (*ibid.*, § 298); see also the legislation of the Czech Republic (*ibid.*, § 288), Slovakia (*ibid.*, § 293) and Uruguay (*ibid.*, § 296), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Argentina (*ibid.*, § 282) and El Salvador (*ibid.*, § 289).

[37] Argentina, National Court of Appeals, *Military Junta case* (*ibid.*, § 299).

[38] See, e.g., the statements of Australia (*ibid.*, § 300), Rwanda (*ibid.*, § 311), Uruguay (*ibid.*, § 314) and Yugoslavia (*ibid.*, § 315), the practice of Honduras (*ibid.*, § 304) and the reported practice of Jordan (*ibid.*, § 307), Malaysia (*ibid.*, § 308) and Philippines (*ibid.*, § 309).

[39] See, e.g., the statements of South Africa (*ibid.*, § 312) and Yugoslavia (*ibid.*, § 315); UN Commission on Human Rights, Report of the Special Rapporteur on the Situation of Human Rights in Burundi (*ibid.*, § 320); ONUSAL, Report of the Director of the Human Rights Division (*ibid.*, § 322).

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parties to both international and non-international armed conflicts to respect this rule.[40]

Interpretation

The obligation to protect and care for the wounded, sick and shipwrecked is an obligation of means. Each party to the conflict must use its best efforts to provide protection and care for the wounded, sick and shipwrecked, including permitting humanitarian organisations to provide for their protection and care. Practice shows that humanitarian organisations, including the ICRC, have engaged in the protection and care of the wounded, sick and shipwrecked. It is clear that in practice these organisations need permission from the party in control of a certain area to provide protection and care, but such permission must not be denied arbitrarily (see also commentary to Rule 55).

In addition, the possibility of calling on the civilian population to assist in the care of the wounded, sick and shipwrecked is recognised in practice. Aid offered by the civilian population is recognised by the 1864 Geneva Convention, the First Geneva Convention and Additional Protocols I and II.[41] This possibility is also recognised in a number of military manuals.[42]

The rule that no distinction may be made among the wounded, sick and shipwrecked except on medical grounds is often expressed in international humanitarian law as a prohibition of "adverse distinction" (see also Rule 88). This means that a distinction may be made which is beneficial, in particular by treating persons requiring urgent medical attention first, without this being discriminatory treatment between those treated first and those treated afterwards. This principle is set forth in many military manuals.[43] It is also supported by

[40] See, e.g., ICRC, Memorandum on the Applicability of International Humanitarian Law (*ibid.*, §§ 329 and 397), Press Releases Nos. 1658 and 1659 (*ibid.*, § 330), Press Release, Tajikistan: ICRC urges respect for humanitarian rules (*ibid.*, § 331), Press Release No. 1670 (*ibid.*, §§ 332 and 398), Communication to the Press No. 93/17 (*ibid.*, § 333), Press Release No. 1764 (*ibid.*, § 334), Memorandum on Respect for International Humanitarian Law in Angola (*ibid.*, §§ 336 and 399), Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Operation Turquoise (*ibid.*, §§ 337 and 400), Press Release No. 1793 (*ibid.*, § 338), Press Release No. 1797 (*ibid.*, § 339) and Communication to the Press No. 00/42 (*ibid.*, § 340).

[41] 1864 Geneva Convention, Article 5; First Geneva Convention, Article 18 (*ibid.*, § 195); Additional Protocol I, Article 17(2) (adopted by consensus) (*ibid.*, § 200); Additional Protocol II, Article 18(1) (adopted by consensus) (*ibid.*, § 203).

[42] See, e.g., the military manuals of Argentina (*ibid.*, § 214), Cameroon (*ibid.*, § 224), Canada (*ibid.*, §§ 225–226), Croatia (*ibid.*, § 232), Germany (*ibid.*, § 240), Kenya (*ibid.*, § 247), New Zealand (*ibid.*, § 255), Russia (*ibid.*, § 266), Sweden (*ibid.*, § 272), Switzerland (*ibid.*, § 273), United Kingdom (*ibid.*, §§ 276–277) and United States (*ibid.*, §§ 278–279).

[43] See, e.g., the military manuals of Argentina (*ibid.*, §§ 354–355), Australia (*ibid.*, §§ 356–357), Belgium (*ibid.*, § 358), Canada (*ibid.*, §§ 360–361), Colombia (*ibid.*, § 362), Ecuador (*ibid.*, § 363), France (*ibid.*, § 364), Germany (*ibid.*, § 365), Hungary (*ibid.*, § 366), Netherlands (*ibid.*, §§ 369–370), New Zealand (*ibid.*, § 371), Nigeria (*ibid.*, §§ 372–373), Senegal (*ibid.*, § 377), Spain (*ibid.*, § 378), Switzerland (*ibid.*, § 379), United Kingdom (*ibid.*, § 381), United States (*ibid.*, §§ 382–383) and Yugoslavia (*ibid.*, § 385).

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the requirement of respect for medical ethics, as set forth in Additional Protocols I and II (see also Rule 26), to the effect that medical personnel may not be required to give priority to any person, except on medical grounds.[44]

Rule 111. Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property.

Practice

Volume II, Chapter 34, Section C.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. The acts against which the wounded, sick and shipwrecked have to be protected according to this rule, namely pillage and ill-treatment, are prohibited pursuant to Rules 52 and 87.

International armed conflicts

The obligation to take all possible measures to protect the wounded, sick and shipwrecked from pillage and ill-treatment in the context of international armed conflicts was first codified in the 1906 Geneva Convention and 1907 Hague Convention (X).[45] It is now set forth in the 1949 Geneva Conventions.[46]

Numerous military manuals refer to the duty to take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and pillage.[47] In particular, many manuals prohibit pillage of the wounded, sick and shipwrecked, sometimes referred to as "marauding", or specify that it constitutes a war crime.[48] For a definition of pillage, see Rule 52.

[44] Additional Protocol I, Article 15(3) (adopted by consensus) (*ibid.*, § 347); Additional Protocol II, Article 9(2) (adopted by consensus) (*ibid.*, § 349).

[45] 1906 Geneva Convention, Article 28 (*ibid.*, § 403); Hague Convention (X), Article 16 (*ibid.*, § 404).

[46] First Geneva Convention, Article 15, first paragraph (*ibid.*, § 405); Second Geneva Convention, Article 18, first paragraph (*ibid.*, § 406); Fourth Geneva Convention, Article 16, second paragraph (*ibid.*, § 407).

[47] See, e.g., the military manuals of Argentina (*ibid.*, § 415), Australia (*ibid.*, § 416), Canada (*ibid.*, §§ 419–420), Colombia (*ibid.*, § 421), Germany (*ibid.*, § 424), Indonesia (*ibid.*, § 427), New Zealand (*ibid.*, § 432), Nigeria (*ibid.*, § 433), United Kingdom (*ibid.*, §§ 438–439) and United States (*ibid.*, §§ 440–441).

[48] See, e.g., the military manuals of Burkina Faso (*ibid.*, § 417), Cameroon (*ibid.*, § 418), Canada (*ibid.*, § 420), Congo (*ibid.*, § 422), France (*ibid.*, § 423), Israel (*ibid.*, § 425), Italy (*ibid.*, § 426), Lebanon (*ibid.*, § 428), Mali (*ibid.*, § 429), Morocco (*ibid.*, § 430), Philippines ("mistreat") (*ibid.*, § 434), Romania (*ibid.*, § 435), Senegal (*ibid.*, § 436), Switzerland (*ibid.*, § 437), United Kingdom (*ibid.*, § 438) and United States ("mistreating") (*ibid.*, § 442).

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Non-international armed conflicts

The obligation to take all possible measures to protect the wounded, sick and shipwrecked from pillage and ill-treatment in non-international armed conflicts is set forth in Additional Protocol II.[49] In addition, it is contained in a number of other instruments pertaining also to non-international armed conflicts.[50]

A number of military manuals which are applicable in or have been applied in non-international armed conflicts prohibit pillage and ill-treatment of the wounded, sick and shipwrecked or specify the obligation to take all possible measures to protect them from pillage and ill-treatment.[51] In 1991, the Chief of Staff of the Yugoslav People's Army ordered troops to prevent the pillage and mistreatment of the wounded and sick.[52]

No official contrary practice was found with respect to either international or non-international armed conflicts.

Respect by civilians for the wounded, sick and shipwrecked

Practice further indicates that civilians have a duty to respect the wounded, sick and shipwrecked. With respect to international armed conflicts, this principle is set forth in Article 18 of the First Geneva Convention and in Article 17 of Additional Protocol I.[53] It is also stated in a number of military manuals.[54] Sweden's IHL Manual, in particular, identifies Article 17 of Additional Protocol I as a codification of customary international law.[55] The Commentary on the Additional Protocols notes with respect to Article 17 of Additional Protocol I that:

The duty imposed here upon the civilian population is only to respect the wounded, sick and shipwrecked, and not to protect them. Thus it is above all an obligation to refrain from action, i.e., to commit no act of violence against the wounded or take advantage of their condition. There is no positive obligation to assist a wounded

[49] Additional Protocol II, Article 8 (adopted by consensus) (*ibid.*, § 409).
[50] See, e.g., Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the SFRY, para. 1 (*ibid.*, § 412); Agreement on the Application of International Humanitarian Law between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.1 (*ibid.*, § 413).
[51] See, e.g., the military manuals of Australia (*ibid.*, § 416), Canada (*ibid.*, §§ 419–420), Colombia (*ibid.*, § 421), Germany (*ibid.*, § 424), Italy (*ibid.*, § 426), Lebanon (*ibid.*, § 428), Netherlands (*ibid.*, § 431), New Zealand (*ibid.*, § 432) and Philippines ("mistreat") (*ibid.*, § 434).
[52] Yugoslavia, *Order No. 579 of the Chief of General Staff of the Yugoslav People's Army* (*ibid.*, § 519).
[53] First Geneva Convention, Article 18, second paragraph (*ibid.*, § 524); Additional Protocol I, Article 17(1) (adopted by consensus) (*ibid.*, § 525).
[54] See, e.g., the military manuals of Argentina (*ibid.*, § 527), Australia (*ibid.*, § 528), Germany (*ibid.*, § 529), Spain (*ibid.*, § 530), Switzerland (*ibid.*, § 532), United Kingdom (*ibid.*, § 533) and United States (*ibid.*, §§ 534–535).
[55] Sweden, *IHL Manual* (*ibid.*, § 531).

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person, though obviously the possibility of imposing such an obligation remains open for national legislation, and in several countries the law has indeed provided for the obligation to assist persons who are in danger, on pain of penal sanctions.[56]

The duty of civilians to respect the wounded, sick and shipwrecked also applies in non-international armed conflicts, because non-respect would be a violation of the fundamental guarantees accorded to all persons *hors de combat* (see Chapter 32). Under the Statute of the International Criminal Court, it is a war crime for anyone to kill or wound a person *hors de combat* whether in international or non-international armed conflicts.[57]

[56] Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 701.

[57] ICC Statute, Article 8(2)(a)(i) and (c)(i) (cited in Vol. II, Ch. 32, §§ 675–676) and Article 8(2)(b)(VI) (cited in Vol. II, Ch. 15, § 217).

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THE HANDBOOK OF

COMPARATIVE CRIMINAL LAW

Edited by

KEVIN JON HELLER AND MARKUS D. DUBBER

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THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Kevin Jon Heller

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I. INTRODUCTION

A. Historical Sketch

The Rome Statute of the International Criminal Court (ICC, also the Court) entered into force on 1 July 2002, less than four years after 120 countries voted in favor of its adoption.[1]

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facts—convicting a defendant charged with committing war crimes, for example, of crimes against humanity instead. That right is common in inquisitorial systems but generally foreign to adversarial ones.[78]

II. GENERAL PART

Part 3 of the Rome Statute, titled "General Principles of Criminal Law," has been described as an "unsystematic conglomeration from a variety of legal traditions."[79] That description has a superficial plausibility, because the drafters deliberately avoided tradition-specific terminology, particularly that of the common law: the Statute defines crimes in terms of required "material elements" and "mental elements," not in terms of *actus reus* and *mens rea*; and it provides "grounds for excluding criminal responsibility" instead of defenses. In general, however, it is clear that the Statute's "two-pronged concept of crime"[80] is patterned after the common law, not the civil law. First, "it does not distinguish between the subjective/mental element of the offense, in the sense of a *Tatvorsatz* (*dolus*) and the blameworthiness of the act belonging to a separate and autonomous (third) level of culpability (*Schuld*)."[81] Second, the system "does not distinguish between wrongfulness/justification and culpability/excuse as the two- or three-fold structure of an offense as applied in the Germanic systems."[82]

A. Theories of Punishment

The Preamble to the Rome Statute affirms that "the most serious crimes of concern to the community must not go unpunished" and states the determination of the states parties "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." Retribution and deterrence, therefore, are the Court's primary sentencing objectives.

In giving meaning to these objectives, the ICC's judges will no doubt be guided by the sentencing practices of previous international tribunals. Those tribunals have consistently emphasized the importance of retribution,[83] although they have been careful to insist that punishment imposed for retributive purposes "is not to be understood as fulfilling a desire for revenge, but as duly expressing the outrage of the international community at these crimes."[84] A sentence must, therefore, always be proportionate to the seriousness of the crime.[85]

International tribunals have also recognized the importance of deterrence.[86] They have normally insisted, however, that the deterrent effect of punishment "must not be accorded undue prominence" in sentencing decisions, because punishment is supposed to deter by "bringing about the development of a culture of respect for the rule of law and not simply the fear of the consequences of breaking the law."[87] Promoting deterrence through retributively disproportionate sentences is thus unacceptable.[88]

B. Liability Requirements

1. Objective/Actus Reus

As noted earlier, the drafters of the Rome Statute made a conscious decision to refer to "material elements" instead of to an *actus reus*. There is no general provision in the Statute

concerning material elements; instead, following the Model Penal Code, article 30 of the Statute ("Mental Element") simply refers to conduct elements, consequence elements, and circumstance elements.[89] The material elements of a crime are thus "those characteristics . . . of the actor's behavior that, when combined with the appropriate level of culpability, will constitute the offense."[90]

A *conduct* element specifies the positive act or omission prohibited by the crime in question. The war crime of unlawful deportation or transfer, for example, requires the perpetrator to have "deported or transferred one or more persons to another State or to another location."[91]

A *consequence* element specifies the required result of the prohibited conduct. That result may involve either actual harm, such as the crime against humanity of torture's requirement that "[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons,"[92] or simply the possibility of harm, such as the war crime of biological experiment's requirement that an experiment "seriously endangered the physical or mental health or integrity" of the victim.[93]

A *circumstance* element specifies an additional state of affairs that must exist for the prohibited conduct and consequence to be criminal. That state of affairs can be either factual or legal. For example, the war crime of using child soldiers requires the children to have been "under the age of 15 years,"[94] a factual circumstance, while the war crime of denying a fair trial requires the defendant to have been "protected under one or more of the Geneva Conventions of 1949,"[95] a legal circumstance.

i. Act

The Rome Statute does not specify what qualifies as an "act" for purposes of a conduct element. Nevertheless, because article 30 defines intent in relation to conduct as "mean[ing] to engage in the conduct," it is clear that a conduct element is satisfied as long as the person voluntarily committed the prohibited act.[96] Involuntary actions, such as those committed in a state of automatism, do not qualify.[97]

ii. Omission

Various provisions in the Rome Statute and the Elements of Crimes criminalize specific omissions. The war crime of starvation as a method of warfare, for example, prohibits "depriv[ing] civilians of objects indispensable to their survival."[98] Similarly, a military commander (or civilian superior) can be punished for failing to prevent his subordinates from committing international crimes or for failing to punish those crimes once they are brought to his attention.[99]

General liability for omissions, however, proved to be one of the most controversial issues during the drafting of the Rome Statute. Article 28 of the 1998 Draft ICC Statute, then still titled "Actus Reus," provided that "conduct for which a person may be criminally responsible and liable for punishment can constitute either an act or an omission, or a combination thereof." Most states supported the provision, but a "small minority," particularly France, insisted that liability for omissions should be limited to specific crimes. The Preparatory Committee initially compromised by replacing references to "an act or an omission" with the more vague "conduct." When even that compromise met with resistance, the

Diplomatic Conference decided to drop the *actus reus* article entirely.[100] It is will thus be up to the Court to determine—keeping in mind article 22's prohibition of extending the definition of crimes by analogy—whether omissions other than those specified in the Rome Statute and the Elements of Crimes are criminal.[101]

iii. Status

There are no status crimes in the Rome Statute, but the concept is not foreign to international criminal law. Control Council Law no. 10, enacted by the Allies after World War II, declared that "[m]embership in categories of a criminal group or organization declared criminal by the International Military Tribunal is recognized as a crime." A number of defendants in the various war-crimes trials held pursuant to Law No. 10 were later convicted of membership in the Schutzstaffel (SS), the Gestapo, or the Leadership Corps of the Nazi Party.[102]

2. Subjective/Mens Rea/*Mental Element*

The mental element of a crime is determined by article 30 of the Rome Statute, which provides in paragraph 1 that "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." Article 30 thus takes an "element analysis" approach to *mens rea* that is similar to, and almost certainly based on, the approach taken by the Model Penal Code.[103]

Despite the plain language of paragraph 1, however, article 30 does not actually apply the default "intent and knowledge" requirement to every kind of material element. As discussed in the following subsections, paragraphs 2 and 3 of article 30 make clear that the intent requirement applies only to conduct and consequence elements, while the knowledge requirement applies only to consequence and circumstance elements. Intent and knowledge are thus both required only for consequence elements.[104]

i. Intent

Article 30(2) defines intent differently depending on whether the material element in question involves conduct or a consequence. A perpetrator acts with intent in regard to a conduct element when he or she "means to engage in the conduct."[105] This definition, with its volitional emphasis, is functionally equivalent to "purpose" in the Model Penal Code[106] and to *dol général* in French criminal law.[107]

A perpetrator acts with intent in regard to a consequence element, by contrast, when he or she either "means to cause that consequence" or "is aware that it will occur in the ordinary course of events.[108] The first definition is explicitly volitional and corresponds to "purpose" and the civil law's *dolus directus* in the first degree.[109]

The correct interpretation of article 30's second definition of intent, which is cognitive instead of volitional, is controversial. Textually, the definition is equivalent to "knowledge" in the Model Penal Code, to the common law's "oblique intent," and to the civil law's *dolus directus* in the second degree, all of which require the perpetrator to recognize that it is virtually certain that his or her conduct *will* lead to the prohibited consequence.[110] The question is whether the definition also includes *dolus eventualis*, which is satisfied if the

perpetrator reconciles himself or herself to the possibility that his or her conduct *may* lead to the prohibited consequence.[111] The Pre-Trial Chamber has held that article 30's cognitive definition of intent includes *dolus eventualis*,[112] and a number of scholars agree.[113] That position, however, contradicts the plain language of the article: "[I]t is not enough for the perpetrator to merely anticipate the possibility that his conduct would cause the consequence. This follows from the words 'will occur'; after all, it does not say 'may occur.' "[114]

Finally, it is important to note that a number of crimes in the Rome Statute also require the perpetrator to act with specific intent or *dolus specialis*. Some of these "otherwise provided" requirements modify article 30's default "intent and knowledge" requirement with regard to a material element. A perpetrator is guilty of hostage taking, for example, only if he or she specifically intends his or her act to "compel a State . . . to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons";[115] knowledge of that consequence is not enough. Others supplement article 30 because they do not apply to the material elements of a crime. To commit the crime of genocide, for example, the perpetrator must not only have acted with intent and knowledge regarding the material elements of the crime, such as killing members of a protected group, but must also have acted with the specific intent "to destroy" that group "in whole or in part."[116]

ii. Knowledge

Article 30(3) provides two different definitions of knowledge. The first definition, which concerns consequence elements, is the same as article 30(2)'s definition of intent with regard to consequences: "awareness that . . . a consequence will occur in the ordinary course of events." The fact that both intent and knowledge are required for circumstance elements is thus effectively meaningless; in practice, knowledge is all that is required.

The second definition concerns knowledge in relation to circumstance elements. Here knowledge is defined as "awareness that a circumstance exists." This is a very high threshold, going beyond the Model Penal Code's definition of knowledge, which is satisfied as long as the perpetrator is "aware of a high probability of [a circumstance's] existence, unless he actually believes it doesn't exist."[117] It also seems to exclude willful blindness, even in Glanville Williams's restrictive formulation: "He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge."[118]

iii. Recklessness

With one exception, common-law recklessness is never sufficient for criminal responsibility under the Rome Statute. Earlier drafts of article 30 included a definition of recklessness, but that provision was deleted when the drafters realized that the word *reckless* did not appear in any of the definitions of crimes.[119] Moreover, most of the states that were involved in drafting the article were reluctant to base criminal responsibility for serious international crimes on recklessness.[120]

The one exception concerns the responsibility of civilian superiors, a form of complicity. Article 28(b)(1) provides that a civilian superior is responsible for failing to prevent and/or punish crimes committed by subordinates if he or she "knew, or consciously disregarded information which early indicated, that the subordinates were committing or

about to commit such crimes." Scholars agree that the "consciously disregarded" language is equivalent to recklessness.[121]

iv. Negligence

The drafters of part 3 were equally reluctant to base criminal responsibility on negligence, in either its common-law or its civil law form.[122] Nevertheless, negligence appears both in the Rome Statute and in the Elements of Crimes as an "otherwise provided" mental element. Article 28(a)(1) of the Statute provides that a military commander is responsible for failing to prevent and/or punish crimes committed by his subordinate forces if he "knew or, owing to the circumstances at the time, should have known, that the forces were committing or about to commit such crimes." Moreover, the Elements apply a common-law negligence standard to a number of factual circumstances required by various war crimes. The war crime of improperly using the distinctive emblems of the Geneva Conventions, for example, requires that the perpetrator "knew or should have known of the prohibited nature of such use."[123]

3. Causation

There is no specific causation provision in the Rome Statute. The 1998 Draft Statute provided that "[a] person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of a crime is caused by and [accountable] [attributable] to his or her act or omission," but that provision was deleted prior to the Diplomatic Conference.[124] Most scholars agree, however, that a causation requirement is implicit in the Rome Statute whenever a crime contains a consequence element.[125] Indeed, article 30 initially defined intent with regard to a consequence as "mean[ing] to cause that consequence." Causation requirements are also explicitly required by certain crimes, such as genocide by causing serious bodily or mental harm[126] and the war crime of willfully causing great suffering.[127]

4. Theories of Liability

Article 25 of the Rome Statute provides a comprehensive list of the possible modes of participation in the crimes within the jurisdiction of the Court. The article thus represents a significant advance over previous international tribunals, which "did not pay much attention to distinguishing different modes of participation . . . but rather applied a so-called unified perpetrator model. The guiding principle was that any support or promotion of the crime was to be considered criminal participation."[128] The Nuremberg Military Tribunals, for example, routinely convicted defendants because they were "principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, [or] were members of organizations or groups connected with, atrocities."[129]

Article 25 divides modes of participation into four categories: (1) commission,[130] (2) ordering and instigating,[131] (3) assistance,[132] and (4) contribution to a group crime.[133] Modes of participation in category 1 are forms of principal liability; modes in categories 2–4 are forms of accessory liability. What distinguishes principals from accessories is "control over the crime": principal perpetrators either "physically carry out the objective

by means, the Rome Statute marks its first explicit appearance in international criminal law.[143] Unlike some national systems, however, article 25(3)(a) of the Rome Statute provides that a perpetrator by means is responsible for the crime committed by the direct perpetrator "regardless of whether that other person is criminally responsible."[144]

The Pre-Trial Chamber applied perpetration by means in the *Katanga* case, relying specifically on German criminal law.[145] According to the Pre-Trial Chamber, this form of participation is particularly relevant when the perpetrator behind the perpetrator—*Täter hinter dem Täter*—commits an international crime through another by means of his or her "control over an organized apparatus of power."[146] Objectively, such control has four elements. First, the apparatus must be "based on hierarchical relations between superiors and subordinates."[147] Second, the apparatus must be "composed of sufficient subordinates to guarantee that superiors' orders will be carried out, if not by one subordinate, then by another."[148] Third, each superior must exercise sufficient "authority and control" over the apparatus—normally because of his or her capacity to "hire, train, impose discipline, [or] provide resources"—that his or her orders will automatically produce their desired results.[149] Fourth, each superior must actually mobilize his or her authority and control over the apparatus to commit a crime within the jurisdiction of the Court.[150] Subjectively, perpetrators by means must not only act with the mental state necessary for the underlying crime[151] but must also "be aware of the character of their organizations, their authority within the organization, and the factual circumstances enabling near-automatic compliance with their orders."[152]

ii. Ordering and Instigating

a. Ordering

Article 25(3)(b) holds criminally responsible a person who "[o]rders . . . the commission of such a crime which in fact occurs or is attempted." Ordering presumes the existence of a superior-subordinate relationship: the superior uses his or her position of command to compel the subordinate to commit the crime.[153]

By virtue of its placement in paragraph b, ordering is a form of accessory liability. A number of scholars, however, have suggested that ordering is better understood as a form of perpetration by means, given that "exploiting a hierarchical power structure in terms of organizational predominance is typical of such intermediary perpetration."[154] Categorizing ordering as a form of accessory liability also fails to reflect the fact that the superior's culpability for the crime is greater than the subordinate's, because the superior not only violates his or her duty to control the subordinates but also misuses his or her power in order to ensure that the crime is committed.[155]

b. Soliciting and Inducing

Article 25(3)(b) also holds criminally responsible a person who "solicits or induces the commission of such a crime which in fact occurs or is attempted." No superior-subordinate relationship is necessary for soliciting or inducing; an instigator is simply someone who "prompts" another to commit an international crime,[156] usually by means of psychological pressure.[157] A causal link between the instigation and the crime is necessary, but it is sufficient if the instigation "substantially" contributes to the direct perpetrator's decision to act.[158] Subjectively, under article 30, the instigator must either intend that the direct

perpetrator commit the crime or recognize that the crime will be committed "in the ordinary course of events."

iii. Assistance

Article 25(3)(c) holds criminally responsible a person who, "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission." This category of accessory liability covers assistance that does not rise to the level of ordering and instigating but is more significant than mere contribution to a group crime. It includes, according to the ICTY, any "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[159] Article 25(3)(c) does not itself require a "substantial effect," but most scholars believe that the requirement is implicit in the paragraph, given that the ILC's 1996 Draft Code of Crimes explicitly included it.[160]

Subjectively, the assistance must not only be intentionally provided, as required by article 30, but must also be provided "for the purpose" of facilitating the crime. This "otherwise provided" specific-intent requirement, which is borrowed from the Model Penal Code,[161] means that the perpetrator must have consciously intended the direct perpetrator to commit the crime[162]—a much higher standard than the one applied by the ICTY and the ICTR, which have held that aiding and abetting only requires the perpetrator to know that his or her assistance will facilitate the direct perpetrator's commission of the crime.[163]

iv. Contribution

Finally, article 25(3)(d) holds criminally responsible a person who "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose." This provision, which is copied almost verbatim from the International Convention on the Suppression of Terrorist Bombings of 1997, resulted from contentious debates during the drafting over whether to include conspiracy in the Rome Statute.[164] It is a residual form of accessory liability that applies "to indirect forms of assistance—such as financing the group—that do not warrant liability for either co-perpetration or aiding and abetting, as they have no substantial effect on the commission of the crime under international law."[165] Subjectively, such assistance must be made either "with the aim of furthering" the group's criminal activity or "in the knowledge of the intention of the group to commit the crime."[166] The difference seems to be that the second standard requires the prosecution to prove that the person knew the specific crime the group intended to commit, whereas the first standard requires it to prove only that the person intended to further the group's general criminal activity.[167]

v. Inchoate Crimes

a. Conspiracy

Conspiracy is not criminal under the Rome Statute. Earlier versions of the Statute oscillated between the traditional common-law approach to conspiracy, which views conspiracy as an inchoate crime, and the civil law approach, which views conspiracy as a mode of participation in a crime.[168] The difficulty of reconciling those traditions ultimately led the drafters to compromise by replacing conspiracy with the idea of contribution to a group crime, art. 25(3)(d) of the Statute.[169]

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b. Incitement to Genocide

Article 25(3)(e) holds criminally responsible a person who, "[i]n respect of the crime of genocide, directly and publicly incites others to commit genocide." This provision, which is borrowed from the Genocide Convention, is a purely inchoate crime: the incited genocide need not be carried out or even attempted.[170] A perpetrator incites "publicly" by "communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large," usually through radio or television.[171] A perpetrator incites "directly" by "specifically urging another individual to take immediate criminal action rather than making a vague or indirect suggestion."[172] The later qualification obviously blurs the line between incitement and other forms of accessorial liability, such as solicitation and inducement.

Scholars agree that, subjectively, a perpetrator must intend to incite his or her listeners to commit an act of genocide, such as killing members of a protected group, with the specific intent to destroy that group in whole or in part.[173] They disagree, however, concerning whether the perpetrator must also possess that specific intent, as is the norm in national criminal codes.[174] It is difficult to imagine a situation in which a perpetrator who does not have genocidal intent would intentionally try to incite that intent in others. Nevertheless, because incitement to genocide does not "otherwise provide" a specific-intent requirement, unlike aiding and abetting and contributing to a group crime, the perpetrator would likely be guilty of incitement in such a situation.[175]

c. Attempt

Article 25(3)(f) holds criminally responsible a person who "[a]ttempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions." General criminal responsibility for attempts is an innovation of the Rome Statute; previously, "neither a duly generalized nor an adequate concept of attempt" existed in international criminal law.[176]

Objectively, article 25(3)(f) represents an amalgamation of French law (*commencement d'exécution*) and the Model Penal Code ("substantial step").[177] Preparatory acts do not qualify as substantial steps because they do not represent a "commencement of execution." The perpetrator is not required, however, to fulfill one of the physical elements of the crime; most scholars agree that the attempt provision is patterned after German criminal law's concept of attempt, which equates commencement with acts committed "immediately proceeding to the accomplishment of the elements of the offense" (*unmittlebares Ansetzen zur Tatbestandverwirklichung*).[178]

d. Abandonment

Article 25(3)(f) also provides that "a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose." Although abandonment is likely a general principle of criminal law, it was included in the Rome Statute only at the last minute. The provision is based on the Model Penal Code[179] and is thus, by requiring the perpetrator to both

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physically abandon the attempt and renounce his or her criminal intention, more strict than many national criminal codes.[180]

vi. Superior Responsibility

Superior responsibility is "an original creation of international criminal law."[181] At the broadest level, it holds military commanders and civilian superiors criminally responsible for failing to prevent their subordinates from committing international crimes or for failing to punish those crimes once they are brought to their attention.

The nature of superior responsibility is controversial. Some national legal systems treat it as a form of complicity, while others consider it an independent crime of omission akin to dereliction of duty.[182] Article 28 of the Rome Statute adopts the former approach, providing that a superior who fails to prevent or punish crimes committed by his or her subordinates "shall be criminally responsible" for those crimes.[183]

According to article 28, superior responsibility involves four elements. First, a superior-subordinate relationship must exist. The essence of that relationship is the superior's "effective control" over the direct perpetrators, understood as the "material ability to prevent and punish commission of the offenses."[184] Military commanders often possess effective control de jure, by virtue of their rank. Some civilian superiors, such as government officials, also exercise de jure control over their subordinates. De facto effective control is sufficient, however, in both the military and civilian contexts.[185]

Second, the superior must have the requisite mental element concerning his or her subordinates' crimes. Unlike the statutes of previous international tribunals, the Rome Statute holds military commanders and civilian superiors to different standards. A military commander is criminally responsible if he or she "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes"[186]—a negligence-like standard that asks whether the commander, "in the proper exercise of his duties, would have gained knowledge" of the crimes.[187] A civilian superior, by contrast, is criminally responsible only if he or she "either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes"[188]—a standard that seems to include both recklessness and willful blindness.[189]

Third, the superior must have failed to take "necessary and reasonable measures" to either prevent or punish his or her subordinate's crimes. What measures qualify as necessary and reasonable must be determined on a case-by-case basis, taking into account the degree of the superior's effective control: the greater the control, the greater the superior's obligation to take preventive or punitive measures. Typical prevention measures include teaching subordinates about the principles of international humanitarian law and creating effective systems of supervision, reporting, and sanctioning. With regard to punishment, the Rome Statute specifically mentions submitting subordinates' crimes "to the competent authorities for investigation and prosecution."[190]

Fourth, and finally, the subordinates' crimes must "result" from the superior's failure to exercise proper control over them.[191] This is clearly a negative causality requirement: the superior can only be held responsible for his or her subordinates' crimes insofar as,

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"but for his failure to fulfill his duty to act, the acts of his subordinates would not have been committed."[192]

vii. Corporate Criminal Liability

Article 25(1) of the Rome Statute provides that "[t]he Court shall have jurisdiction over natural persons pursuant to this Statute." Legal persons, therefore, cannot be held criminally responsible for crimes within the jurisdiction of the Court. This exclusion was a relatively late development: earlier versions of article 25 included an option to extend the Court's jurisdiction to legal as well as to natural persons.[193] That option was ultimately deleted at the Diplomatic Conference, largely because the idea of corporate criminal liability was simply alien to a number of national legal systems.[194]

C. Defenses

1. Types of Defense

As noted earlier, because they wanted to avoid tradition-specific language, the drafters of the Rome Statute chose to refer to "grounds for excluding criminal responsibility" instead of to "defenses." The Statute approaches those grounds in three different ways. First, articles 31–33 make certain defenses specifically available to a defendant. Some, such as self-defense, are traditionally categorized as justifications; others, such as mental disease or defect, are traditionally categorized as excuses. The Rome Statute, however, does not distinguish between the two.[195] Indeed, article 31(1)(d) collapses a justification (necessity) and an excuse (duress) into a single ground.

Second, article 31(2) provides that "[t]he Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it." If this provision simply authorizes the Court to prevent a defendant from raising a ground that is not supported by sufficient evidence, it is unproblematic. The provision will clearly run afoul of the principle of legality, however, if it authorizes the Court to exclude a ground for nonevidentiary reasons of "justice" or "fairness."[196] Unfortunately, the drafting history seems to support the latter interpretation.[197]

Third, and finally, article 31(3) gives the court the right to "consider a ground for excluding criminal responsibility other than those referred to . . . where such a ground is derived from applicable law as set forth in article 21." Such grounds will normally be found in customary international law.[198]

2. Burden of Proof

Article 66(2) of the Rome Statute provides that "[t]he onus is on the Prosecutor to prove the guilt of the accused." The relevant burden is—as it has been at every international tribunal since Nuremberg—proof beyond a reasonable doubt.[199] In addition, article 67(1)(i) guarantees a defendant the right "[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal." The latter provision is particularly important, because it implies that the Rome Statute follows the Model Penal Code in requiring the prosecution to disprove the existence of grounds for excluding criminal responsibility proffered by the defendant, at least insofar as those grounds are supported by sufficient evidence.[200] That is the position taken by Roger Clark,[201] one of the most important drafters of

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If the accused wishes to raise any of these matters in defence, evidence of them must be adduced at trial. Once that is done, the prosecutor must then disprove the defence beyond reasonable doubt. If the evidence leaves a doubt, the prosecutor will have failed to disprove the defence and the accused will be entitled to an acquittal.

Parties

Criminal liability is not restricted to the persons, known as "principals", who actually committed the prohibited activity. Others who assisted or encouraged the principals in committing the offence, or caused its commission, may also be liable. These persons, known as "secondary parties" or "accessories", can be convicted of the same offence as the principal, and are subject to the same potential penalties, although they will generally be sentenced more leniently than the principal offender(s). A person may only be convicted as a secondary party, however, where the offence in question has actually been committed. Where it has not, a secondary party may instead be liable for inciting, conspiring or attempting an offence. These three offences, based on preparatory acts, are collectively called "inchoate" offences.

Secondary Party Liability

Secondary party liability will arise firstly if it is proved that the accused assisted or encouraged the principal in committing the offence, either then or at some earlier time, in either case with knowledge or foresight of what the principal intended to do and, further, with the intention of assisting or encouraging the principal. In addition, it must generally be shown that the principal was aware of the accused's assistance or encouragement. A person who is liable in this way is known as either an "aider", "abettor", "counsellor", or "procurer", depending on what exactly is proved, and whether the alleged secondary party was present at the scene when the principal committed the offence. A person who, for example, supplied a gun to another, knowing or foreseeing that the other intended to commit an armed robbery and intending to help, may be held liable as a secondary party to the armed robbery if it occurs. This action would be considered aiding if the supplier was present at the time of the armed robbery; otherwise it would be considered procuring.

A second means of establishing secondary liability is by proving that the offence in question was committed in the course of a "joint enterprise" or by "common design". In this case, every person (other than the person who actually committed the offence) who agreed to participate in the joint enterprise knowing or foreseeing the possible commission of the offence while carrying out the joint enterprise, may be convicted as a secondary party to the offence in question. For example, consider the hypothetical case where three persons agree to burgle an apartment. One of them acts as lookout while the other two physically break in. Since the lookout does not perform acts amounting to actual burglary he is not a principal. But he will be liable as a secondary party for burglary because burglary was contemplated or foreseen by him. Assume, however, that during the burglary one of the two actual burglars intentionally stabs and kills someone in the apartment. The lookout would not be liable as a secondary party to the murder committed by that other person unless the intentional use of a knife was contemplated or foreseen by the lookout as a possible incident of carrying out the burglary.

Vicarious Liability

In general, a person cannot be made criminally liable for the conduct of another on the ground solely that he was responsible for the conduct of that other. Thus, parents and employers cannot in general be held criminally liable for the acts of their children or employees. There are two general exceptions to this rule. First, a person may be liable for the acts of another if the offence in question is a strict liability offence and the prohibited activity can be read as applying to him or her. A shop owner, for example, may be held to have sold contaminated food (in breach of relevant regulations) even though the sale was actually made by a shop assistant. Second, a person who is under a statutory duty to do some specific act but who delegates its performance to another may be liable if that other fails to perform it.

The Impact of 1997 on the Criminal Law in Hong Kong

The law is not independent of prevailing political and social forces. Indeed, it is a product of, and must change to reflect, such forces. This is particularly true of the criminal law which, by its very nature, is one of the principal means of state control over the social and individual conduct of its citizens.

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PARTS 2 TO 4

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and
SIR ARTHUR WATTS KCMG QC

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EXPULSION OF ALIENS

Kobarg, *Ausweisung und Abweisung von Ausländern* (1930) Borchard, §§ 27–32 Blondel, *Répertoire*, viii, pp 105–63 Boeck, Hag R, 18 (1927), iii, pp 447–646 (an exhaustive study) Puente, AJ, 36 (1942), pp 252–70 (as to Latin-America) Parry, BDIL, 6, pp 83–241 MacDonald, *Race Relations and Immigration Law* (1969), pp 61–81, and *The New Immigration Law* (1972), Ch 10 Shearer, *Extradition in International Law* (1971), pp 76–91 Goodwin-Gill, *International Law and the Movement of Persons between States* (1973), pp 201–310 (also in BY, 47 (1974–75), pp 55–156).

§ 413 Competence to expel aliens The right of states to expel[1] aliens is generally recognised.[2] It matters not whether the alien is only on a temporary visit, or has settled down for professional business or other purposes on its territory, having established his domicile there.

On the other hand, while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion.[3]

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[1] 'Expulsion' is not a technical term, and is often used interchangeably with 'deportation': both involve the removal of a person from a state by its unilateral act, as distinct from extradition (which involves agreement and a degree of cooperation between the two states concerned). See also § 414. The practice of some states may also be distinguished, whereby destitute aliens, foreign vagabonds, suspicious aliens without identity papers, alien criminals who have served their punishment, and the like, are, without any formalities, arrested by the police and reconducted to the frontier. But although such reconduction, often called *droit de renvoi*, is materially not much different from expulsion, it nevertheless differs much from it in form, since expulsion is an order to leave the country, whereas reconduction is forcible conveying away of foreigners. On the practice of deportation and reconduction in the USA, see Clark, *Deportation of Aliens from the United States to Europe* (1931); Oppenheim, *The Enforcement of the Deportation Laws of the United States* (1931); Van Vleck, *The Administrative Control of Aliens* (1932); Hackworth, iii, §§ 293–302; Whiteman, *Digest*, 8, pp 603–20. See also § 414, n 9.

A state is usually unable to expel its own nationals since no other state will be obliged to receive them. It may assimilate certain aliens to its own nationals, so affecting its powers under its own laws to expel them: see *Italian South Tyrol Terrorism Case (1)* (1968), ILR, 71, p 235.

[2] See, eg *Attorney-General for Canada v Cain* [1906] AC 542; the decision of the US Supreme Court in *Harisiades v Shaughnessy*, ILR, 19 (1952), No 69; and the decision of the Supreme Court of Burma in *Karam Singh v Controller of Immigration* (1956), ILR, 28, p 311.

See now as to the law of the UK, Immigration Act 1971, ss 3(5) and (6), 5–7, and 15, and the Statement of Changes in Immigration Rules 1990 (HC 251), paras 155–80. The UK Government had, until December 1919, no power to expel even the most dangerous alien without the recommendation of a court, or without an Act of Parliament making provision for such expulsion, except during war or on an occasion of imminent national danger or great emergency.

Expulsion of an alien after being lawfully admitted into a state is to be distinguished from the refusal to allow an alien to enter the state, expulsion or deportation in the two situations often being subject to different legal requirements, usually in the sense of allowing more easily the removal of those refused entry. See eg *Barber v Gonzales*, ILR, 20 (1953), p 276; *Roggenbihl v Lusby*, *ibid*, p 281; *The State v Ibrahim Adam*, ILR, 23 (1956), p 374; *Leng May Ma v Barber*, ILR, 26 (1958–II), p 475; *R v Pringle, ex parte Mills* (1968), ILR, 44, p 135.

Refusal of entry will usually involve the return of the alien to the state from which he came. Aliens who have been refused entry to a state, or who have illegally gained entry, may

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in the territory in which he seeks asylum, expelled or compulsorily returned to any state where he may be subjected to persecution (except only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons); and that the state granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations.

In 1977 a Conference on Territorial Asylum was held with a view to drawing up a Convention on the matter, but it failed to reach agreement.[13] The possibility of a further session of the Conference being convened was left open.

At present the so-called right of asylum is probably nothing but the competence of every state to allow a persecuted alien to enter, and to remain on, its territory under its protection. Such fugitive alien enjoys the hospitality of the state which grants him asylum; but it might be necessary to make his entry subject to conditions, to place him under surveillance, or even to intern him at some place. For it is the duty of every state to prevent individuals living on its territory from endangering the safety of another state by organising hostile expeditions or by preparing common crimes against its head, members of its government or its property.[14]

POSITION OF ALIENS AFTER RECEPTION

Frisch in Strupp, *Wört*, i, pp 330–34 Delessert, *L'Établissement et le séjour des étrangers* (1924) Steinbach, *Unter, suchungen zum internationalen Fremdenrecht* (1931) *The Legal Status of Aliens in Pacific Countries* (ed MacKenzie, 1937) Fraser, *Control of Aliens in the British Commonwealth of Nations* (1940) Gibson, *Aliens and the Law* (1940) (as to the USA) Konvitz, *The Alien and the Asiatic in American Law* (1946) Borchard, §§ 6–8, 14–25, 34–46, 133–6, and *Bibliotheca Visseriana*, 3 (1924), pp 3–52 Churchill, LQR, 31 (1920), pp 402–28 Holdsworth, *Revue d'histoire du droit*, 3 (1921), pp 175–214 Fachiri, BY (1925), pp 159–71 Zaitzeff in Mich Law Rev, 24 (1926), pp 441–60 (as to aliens in Russia) S Basdevant in *Répertoire*, 8, pp 3–61 Cavaglieri, Hag R, 26 (1929), i, pp 452–67 Healy, *ibid*, 27 (1929), ii, pp 405–92 Verdross, Hag R, 37 (1931), iii, pp 348–406 Kelsen, *ibid*, 42 (1932), iv, pp 248–60 Cutler, AJ, 27 (1933), pp 225–46 Bouvé, *AS Proceedings* (1934), pp 92–105 Borchard, *ibid* (1939), pp 51–63 Castrén, ZöV, xi (1943), pp 325–417 Whiteman, *Digest*, 8, Ch XXIII Parry, BDIL, 6, pp 247–440 McNair, *Opinions*, ii, pp 113–37 Baxter and Sohn, AJ, 55 (1961), pp 545–84 (Draft Convention on the International Responsibility of States for Injuries to Aliens) Ryan in *International Law in Australia* (ed O'Connell, 1965), pp 483–91 McDougal, Lasswell and Chen, AJ, 70

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[13] See GA Res 3465 (XXX) (1975); UNYB, 1977, pp 625–6; Weis, BY, 50 (1979), pp 151–71; Leduc, AFDI, 23 (1977), pp 221–67.

[14] See § 122. Provisions protecting states against subversive activities carried on against them by refugees in other states appear in, eg The Montevideo Treaty on Political Asylum and Refuge 1939, Ch II (AJ, 37 (1943), Suppl, p 99), the OAS Convention on Territorial Asylum 1954, Arts 7–9 (BFSP, 161 (1954), p 566); and the OAU Convention Concerning the Specific Aspects of Refugee Problems in Africa 1969, Art III (see § 399, n 25). See also *Re Lechin et al*, AD, 16 (1949), No 1. Article II.2 of the OAU Convention provides that the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act; see also the penultimate recital in the preamble to the UN Declaration on Territorial Asylum 1967 (GA Res 2312 (XXII)), Art 1 of the OAS Convention, and para 3 of the Council of Europe Declaration on Territorial Asylum 1977 (European YB, 25 (1977), p 351).

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

Commentary
Part IV : Civilian population #Section I -- General protection against effects of hostilities #Chapter II -- Civilians and civilian population
Art. 51 - Protection of the civilian population

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

[p.615] General remarks

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

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

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

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

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

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

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

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

1930 In the draft the ICRC had provided that Article 51 (46 of the draft) would be among the

provisions to which no reservations could be made. Finally the Conference deleted all provisions relating to reservations, but in the discussions Article 51 had been included in the list of articles to which reservations were prohibited. (5) In the absence of a specific provision it is therefore general international law that applies, in particular the Vienna Convention on the Law of Treaties (Articles 19-23). It may be recalled that that Convention prohibits reservations which are incompatible with the object and purpose of the treaty. (6)

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

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

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

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

Paragraph 1

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

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

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

[p.618] Paragraph 2

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

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

1940 In the second sentence the Conference wished to indicate that the prohibition covers acts intended to spread terror; there is no doubt that acts of violence related to a state of war almost

always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. (12) This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage. It is interesting to note that threats of such acts are also prohibited. This calls to mind some of the proclamations made in the past threatening the annihilation of civilian populations.

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

Paragraph 3

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

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

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

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

Paragraph 4

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

1947 On this subject the general rule was formulated in Article 48 ' (Basic rule): ' belligerents may direct their operations only against military objectives. The first specification is added in paragraph 2

of the present Article 51 [1]: attacks against the civilian population as such and against individual civilians are prohibited.

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

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

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

' Sub-paragraph (a) '

1951 This refers in the first place to attacks which are not directed at a specific military objective. Article 52 [1] ' (General protection of civilian objects), ' paragraph 2, defines military objectives, as far as objects are concerned, limiting them

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

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

1952 The military character of an objective can sometimes be recognized visually, but most frequently those who give the order or take the decision to attack will do so on information provided by the competent services of the army. In the majority of cases they will not themselves have the opportunity to check the accuracy of such information; they should at least make sure that the information is precise and recent, and that the precautions and restrictions laid down in Article 57 [1] ' (Precautions in attack) ' are observed. In case of doubt, additional information must be requested.

1953 The armed forces and their installations are objectives that may be attacked wherever they are, except when the attack could incidentally result in loss of human life among the civilian population, injuries to civilians, and damage to civilian objects which would be excessive in relation to the expected direct and specific military advantage. In combat areas (15) it often happens that purely civilian [p.621] buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population. For example, it is clear that if fighting between armed forces takes place in a town which is defended house by house, these buildings -- for which Article 52 [1] ' (General protection of civilian objects), ' paragraph 3, lays down a presumption regarding their civilian use -- will inevitably become military objectives because they offer a definite contribution to the military action. However, this is still subject to the prohibition of an attack causing excessive civilian losses.

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

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

' Sub-paragraph (b) '

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

1957 The term "means of combat" or "means of warfare" (cf. Article 35 [1] -- ' Basic rules ') generally refers to the weapons being used, while the expression "methods of combat" generally refers to the way in which such weapons are used.

1958 As regards the weapons, those relevant here are primarily long-range missiles which cannot be aimed exactly at the objective. The V2 rockets used at the end of the Second World War are an example of this. It should be noted that most armies endeavour to use accurate weapons as attacks which do not strike the intended objective result in a loss of time and equipment without giving a corresponding advantage. Thereby the margin of error of missiles is gradually reduced. Here, military interests and humanitarian requirements coincide.

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

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

' Sub-paragraph (c) '

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

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

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

1963 However, there are some means of warfare of which the effects cannot be limited in any circumstances. It is different with regard to other means, such as fire (24) or water (25) which, depending on the circumstances of their use, can have either a restricted effect or, on the contrary,

be completely out of the control of those using them, causing significant losses among the civilian population and extensive damage to civilian objects. The nature of the means used is not the only criterion: the power of the weapons used can have the same consequences. For example, if a 10 ton bomb is used to destroy a single building, it is inevitable that the effects will be very extensive and will annihilate or damage neighbouring buildings, while a less powerful missile would suffice to destroy the building. There are also methods which by their very nature have an indiscriminate character, such as poisoning wells.

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

1965 This point was discussed above; it is true that in most cases the indiscriminate character of an attack does not depend on the nature of the weapons concerned, but on the way in which they are used. However, as stated above, there are some weapons which by their very nature have an indiscriminate effect. The example of bacteriological means of warfare is an obvious illustration of this point. There are also other weapons which have similar indiscriminate effects, such as poisoning sources of drinking water. Of course, bacteriological means of warfare have been prohibited since 1925, and the use of poison was prohibited in 1899 by the Hague Regulations.

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

Paragraph 5

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

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

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

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

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

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

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

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

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

1976 The ' second type of attack ' envisaged in paragraph 5 includes those which have excessive effects in relation to the concrete and direct military advantage anticipated. Once again there were long discussions in the Diplomatic Conference and it was difficult to come to an agreement. The formula that was adopted is very similar to that proposed by the ICRC. (31) It is based on the wording of Article 57 ' (Precautions in attack) ' relating to precautionary measures. Committee III had suggested either a straightforward reference to Article 57 ' (Precautions in attack) ' or reproducing the formula used in that article. Finally, the Drafting Committee, which was requested to resolve the question, opted for the second solution. Thus reference may be made to Article 57 ' (Precautions in attack) ' for further details.

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

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

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

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

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

Paragraph 6

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

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

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

1985 This prohibition of attacks by way of reprisals and other prohibitions of the same type contained in the Protocol and in the Conventions have considerably reduced the scope for reprisals in time of war. At most, such measures could now be envisaged in the choice of weapons and in methods of combat used against military objectives.

Paragraph 7

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

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

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

Paragraph 8

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

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

[p.628] 1990 It is fairly clear from the deliberations and the report of Committee III (36) that the prohibitions referred to in paragraph 8 are those contained in paragraph 7. Military objectives are defined as far as objects are concerned in Article 52 ' (General protection of civilian objects), '

paragraph 2. Thus, even if civilians were intentionally brought or kept in the vicinity of military objectives, the attacker should take the measures provided for in Article 57 [] ' (Precautions in attack), ' especially those set out in paragraph 2 (a)(ii) and (iii) and (c). It is clear that in such cases a warning to the population is particularly appropriate as civilians are themselves rarely capable of assessing the danger in which they are placed.

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

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

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

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

' C.P./J.P. '

NOTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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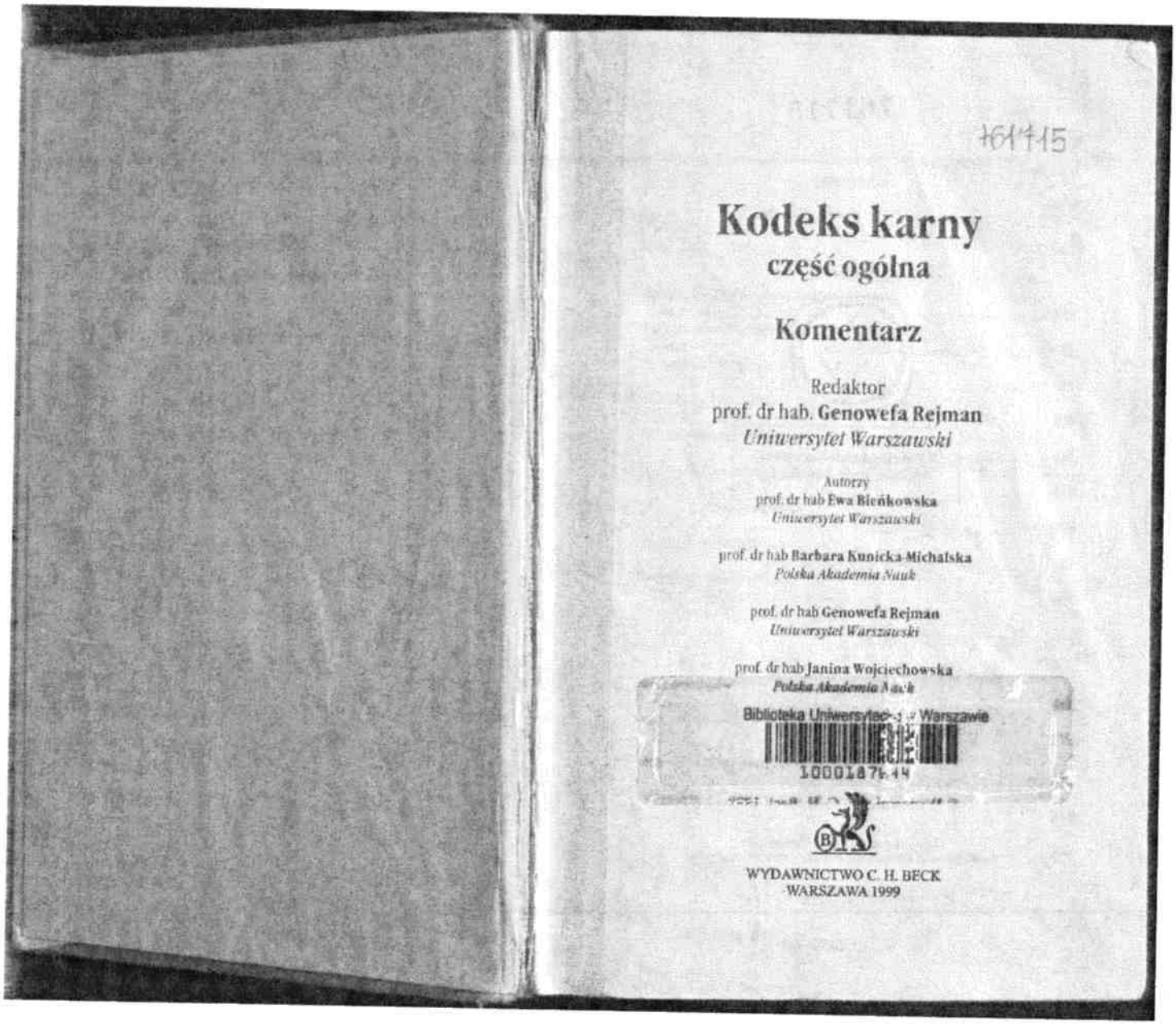

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Kodeks karny
część ogólna

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Stanowisko to jest zgodne z kodeksowymi zasadami określającymi podstawy odpowiedzialności karnej za podżeganie i pomocnictwo. Polskie prawo karne wprowadza tzw. zasadę indywidualizacji, w której nie posuwa się aż tak daleko, aby uzasadniać karalność za samo nakłanianie w oderwaniu od czynu przestępnego objętego treścią nakłaniania. Kodeks w sposób wyraźny wiąże odpowiedzialność za podżeganie ze znamionami przestępstwa rodzajowego. Nakłanianie stanowi więc samodzielną podstawę odpowiedzialności karnej tylko o tyle, o ile chodzi o sprecyzowanie ogólnych warunków karalności (wina, wiek, poczytalność, recydywa itp.). Na tym kończy się jednak samodzielność instytucji podżegania. Podżeganie jest związane z rodzajowymi cechami przestępstwa przez to, że stanowi ono szczególną jego postać i formę dokonania (*S. Śliwiński*, Polskie ..., s. 336).

Nakłanianie może polegać nie tylko na bezpośrednim oddziaływaniu na sprawcę głównego; – podżeganie za pośrednictwem osób trzecich jest możliwe zarówno pod względem prawnym, jak i życiowym.

80 2. Różnica pomiędzy podżeganiem a kierowaniem przestępstwem innej osoby polega na tym, że w pierwszym wypadku sprawca kończy swą rolę w momencie wywołania u innej osoby zamiaru popełnienia przestępstwa, a w drugim, gdy chodzi o sprawstwo kierownicze akcent nie jest położony na wywoływaniu zamiaru u drugiej osoby. Sprawstwo kierowane może objawić się po podjęciu zamiaru przestępstwa u innej osoby, jeżeli tylko w jego ramach zostaną podjęte czynności przygotowujące tę czynność, która zabezpiecza warunki wykonania przestępstwa i bezpieczeństwo wykonawców czynu zabronionego. Sprawstwo kierownicze trwa przez cały czas dokonywania czynności przestępnych, a także po ich zakończeniu, gdy np. decyduje o rozmieszczeniu korzyści pochodzących z przestępstwa.

81 3. Różnica pomiędzy podżeganiem a poleceniem wykonania czynu zabronionego osobie od siebie uzależnionej wyraża się także tym, że nie kończy się ono z chwilą wydania polecenia wywołującego postanowienie popełnienia przestępstwa u osoby pod adresem, której polecenie zostało sformułowane.

W zależności od podporządkowania się takiemu poleceniu lub nie, sprawca taki oddziaływuje w sposób negatywny na tę osobę, którą w postaci polecenia zmusza do wykonania czynu zabronionego. Jest to sprawstwo bardziej rozwinięte od strony przedmiotowej, bo obok wywołania zamiaru, wprowadza osobę, do której zwrócone jest polecenie, w stan psychicznego niepokoju lub nawet przymusu.

VI. Pomocnictwo

A. Pomocnictwo – określenie

82 1. Pomocnictwo w nowym Kodeksie karnym zostało ujęte w nowej formie. Jest to rozbudowana formuła, odbiegająca od tej znanej uchylonemu Kodeksowi karnemu z 1969 r. (art.18 § 2). Do zasadniczych zmian należy

a) Określenie umyślności pomocnictwa w postaci zamiaru, podczas gdy uchylony kodeks wyraźnie stwierdzał, że pomocnictwa można dopuścić się także w formie zamiaru ewentualnego. Obecnie problem ten będzie dyskusyjny. Ustawodawca w sposób wyraźny nie wprowadza zamiaru ewentualnego do podmiotowych znamion pomocnictwa. Wprawdzie wykładnia systemowa, nawiązująca do definicji podżegania może doprowadzić do wniosku wskazującego na to, że jeżeli ustawodawca sprowadza tę postać popełnienia przestępstwa do zamiaru bezpośredniego w sposób wyraźny, a w przypadku pomocnictwa ustawodawca operuje tylko pojęciem zamiaru, oznacza to, że w równym stopniu dotyczy to zamiaru ewentualnego. Wykładnia taka jest możliwa, ale nie przesądzająca. Wprawdzie w uzasadnieniu Komisji kodyfikacyjnej jest mowa o zamiarze ewentualnym przy pomocnictwie, to jednak liczy się tekst ustawy, a nie uzasadnienie.

b) Kodeks w sposób wyraźny wprowadza postać tzw. pomocnictwa fizycznego, przez wskazanie na czym ono może polegać i pomocnictwa psychicznego. W jednym i drugim wypadku pomoc polega na ułatwianiu popełnienia sprawcy przestępstwa.

c) Zasadniczą różnicą pomiędzy konstrukcją prezentowaną w KK z 1969 r. i art.18 § 3 KK z 1997 r. jest wyraźne stwierdzenie, że pomoc może polegać także na zaniechaniu wykonania obowiązku i ułatwieniu w ten sposób popełnienia przestępstwa innej osobie.

83 2. W uzasadnieniu Komisji kodyfikacyjnej (s.13) czytamy co następuje: „Projekt w tym samym artykule, w którym określa sprawstwo, wprowadza określenia podżegania i pomocnictwa, co ma jeszcze bardziej podkreślić charakter zjawiskowy tych postaci czynu zabronionego.

Nie przewiduje się zmiany określenia podżegania. Proponuje się natomiast inne ujęcie pomocnictwa. W określeniu zawartym w projekcie odrzuca się dopuszczoną przez Kodeks karny z 1969 r. tzw. wewnętrzną analogię. Projekt przyjmuje także wyraźnie pomocnictwo przez zaniechanie, warunkując je jednak tym, aby dopuszczający się zaniechania miał szczególny obowiązek niedopuszczenia do czynu zabronionego. Chodzi tu o taki sam obowiązek i pochodzący z tych samych źródeł, jaki uzasadnia przyjęcie odpowiedzialności za skutek w przypadku odpowiedzialności zaniechania. Strona podmiotowa obu odmian pomocnictwa (z działania i z zaniechania) jest taka sama i może polegać na zamiarze bezpośrednim lub na zamiarze wynikowym."

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Otto Triffterer (Ed.)

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Observers' Notes, Article by Article

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Article 67
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Literature:

Kambos, *The Right of Non-Self-Incrimination of Witnesses Before the ICC*, 15 LEIDEN J. INT'L L. 155 (2002); Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Statute of the International Court*, 19 WISCONSIN INT'L L. J. 197 (2001); Stuart Beresford/Hafida Chalal, *The Right to be Defended in Person or Through Legal Assistance and the International Criminal Court*, LEIDEN J. INT'L L. 949 (2000); Enrique Carnero Rojo, *The Role of Fair Trial Considerations in the Rome Statute of the International Criminal Court: From "No Peace Without Justice" to "No Peace with Victor's Justice"*, 18 LEIDEN J. INT'L L. 829 (2005); Antonio Converti, *The Rights of the Accused*, in: Flavia Lattanzi (ed.) THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE 219 (1998); Louise Doswald-Beck/Robert Kolb, JUDICIAL PROCESS AND HUMAN RIGHTS: UNITED NATIONS, EUROPEAN, AMERICAN AND AFRICAN SYSTEMS (2004); Hakan Friman, *Rights of Persons Suspected or Accused of a Crime*, in: Roy S. Lee (ed.) THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, AND RESULTS 247 (1999); Richard May/Marieke Wierda, INTERNATIONAL CRIMINAL EVIDENCE 259-298 (2002); Sara Sundby, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Possibility of Derogation*, 31 N. Y. U. J. INT'L L. & POLICY 525 (1999); Vladimir Tochilovsky, CASES, MATERIALS AND LEGAL ASSISTANCE IN INTERNATIONAL PROSECUTIONS (2005); Stefan Trechsel, HUMAN RIGHTS

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A. Introduction/General Remarks

1 During the Second World War, Churchill and other Allied leaders flirted with some form of summary justice for major war criminals[1]. The concept now is Indeed, only a few years later, one of the Nuremberg Tribunals held that prosecutors involved in a trial lacking the fundamental guarantees of fairness could be held respo crimes against humanity. Such guarantees include the right of the accused to introduc to confront witnesses, to present evidence, to be tried in public, to have counsel of cho be informed of the nature of the charges[2]. Certainly, the credibility of internation depends on rigorous respect for the rights of the accused to a fair trial, an id frequently expressed during the development of the ICC *Statute*. Nor can the exemplary international courts be gainsaid; their treatment of the accused provides a model justice systems throughout the world in the respect of fundamental human rights.

2 The *Statute* might well have omitted a general provision dealing with the rights accused. Many specific guarantees are incorporated in other articles of the *Statute* an be little doubt that even in the absence of a more general text, the judges would fo internationally recognized norms. Principle 5 of the *United Nations Basic Principles Independence of the Judiciary* provides: "The principle of the independence of the entitles and requires the judiciary to ensure that judicial proceedings are conducted that the rights of the parties are respected"[3]. The *Statute* imposes a duty upon the Trial to see that "a trial is fair and expeditious and is conducted with full respect for the rights accused"[4]. Furthermore, there is the constant danger that any codification, left in the conservative judges, may tend to constrict the development of the law rather than The original contribution of article 67 may well be that rather than merely restate have already been codified, it elaborates on the relatively laconic provisions of

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1 A.J. Kochavi, PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION (63-91 (1998).

2 *United States of America v. Hostages trial* ("Justice trial"), (1948) 3 TWC 1, 6 L.R. (T.W.C. 1 p. 97 (L.R.T.W.C.)

3 U.N. Doc. A/CONF.121/22/Rev.1, U.N. Res. 40/146 (1985). The *Basic Principles* are cited in th of the International Criminal Court's Code of Judicial Ethics, Document ICC-ASP/3/2003/3/Ad

4 Rome Statute, article 64 para. 1.

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and, moreover, develops new rights which do not yet appear in human rights treaties and declarations.

The right to a fair trial is recognized in the *Universal Declaration of Human Rights*[5], and in 3
the universal and regional human rights conventions that it inspired[6], as well as in humanitarian law instruments[7]. The model for article 67 of the *Statute* is article 14 of the *ICCPR*[8], although with some major distinctions. Article 14 of the *ICCPR* applies to civil and administrative proceedings, as well as criminal trials. Article 14 contains provisions dealing with trial of juvenile offenders[9] which are irrelevant to the work of the ICC because of the Rome Conference's decision to exclude jurisdiction in the case of suspects who were under eighteen years of age at the time of the offence[10]. The *ICCPR* fair trial provision also recognizes some specific rights that are enshrined elsewhere in the *Statute*, notably the presumption of innocence[11], a right of appeal[12], to compensation in cases of erroneous conviction[13], and to protection against double jeopardy[14].

The ILC Draft Statute of 1994 contained a provision entitled "Rights of the Accused" that 4
was essentially a copy of article 14 para. 3 of the *ICCPR*[15]. The only significant departure was the inclusion of a second paragraph requiring the prosecutor to disclose exculpatory evidence to the defence. In addition, the ILC made the text gender neutral, replacing masculine pronouns with reference to "the accused". In 1995, the *Ad Hoc* Committee of the General Assembly examined the ILC Draft Statute, observing that "in view of the considerable powers [the Court] would enjoy in relation to individuals, [it] should be bound to apply the highest standards of justice, integrity and due process"[16]. Its discussion focussed on the issue of mandatory legal assistance, and on the need to establish rules on the qualifications, powers and remuneration of defence attorneys, and on the procedure for their appointment by the Court[17].

G.A. Res. 217A(III), U.N. Doc. A/810 (1948). "Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11 para. 3. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".

ICCPR, 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976, article 14; American Convention on Human Rights, 1144 U.N.T.S. 123, *entered into force* 18 July 1978, article 8; European Convention on Human Rights, 213 U.N.T.S. 221, *entered into force* 3 Sep. 1953, article 6; African Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3 rev. 5, *entered into force* 21 Oct. 1986, article 7; Convention on the Rights of the Child, G.A. Res. 44/25, Annex, *entered into force* 2 Sep. 1990, article 40 § 2.

Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* 21 Oct. 1950, articles 84-87, 99-108; Geneva Convention Relative to the Protection of Civilians, *entered into force* 21 Oct. 1950, article 5, 64-76; Add. Prot. I to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, *entered into force* 7 Dec. 1978, article 75; Add. Prot. II to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 3, *entered into force* 7 Dec. 1978, article 6.

It was also the model for the provisions dealing with the rights of the accused in the Statute of the International Criminal Tribunal for the former Yugoslavia [ICTY], U.N. Doc. S/RES/827, Annex, article 21, and the Statute of the International Criminal Tribunal for Rwanda [ICTR], U.N. Doc. S/RES/955, Annex, article 20. The Secretary-General's Report, U.N. Doc. S/25704, para. 106, stated: "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights".

Supra note 6, ICCPR, article 14 paras. 1, 4.

Supra note 4, Rome Statute, article 26.

Supra note 6, ICCPR, article 14 para. 2. See: *supra* note 4, Rome Statute, article 66.

Supra note 6, ICCPR, article 14 para. 5. See: *supra* note 4, Rome Statute, articles 81-84.

Supra note 6, ICCPR article 14 para. 6. See: *supra* note 4, Rome Statute, article 85.

Supra note 6, ICCPR, article 14 para. 7. See: *supra* note 4, Rome Statute, article 20.

1994 ILC Draft Statute, article 41, pp. 114-115.

Ad Hoc Committee Report, para. 129, p. 29.

Ibid., para. 175, p. 35.

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5 Rights of an accused were considered by the informal working group at the August session of the Preparatory Committee, and a number of detailed comments and suggestions specific points appear in the report of these discussions[18]. The subject was again addressed the Preparatory Committee in August 1997. By this point, the innovative spirit of the Preparatory Committee was becoming apparent, and there were many departures from the text of article 14 para. 3 of the *ICCPR*, several of them without square brackets, indicating that it had been agreed to by consensus[19]. There were also many cross-references to other provisions of the *Statute*, showing the Committee's concern that the rights of the accused not only be recognized generally, but that they be reflected in specific procedural provisions. In addition to "improved" versions of the rights set out in article 14 of the *ICCPR*, the Committee's 1997 draft also contained several new rights: to make an unsworn statement, to have the Court seek co-operation in gathering evidence, to be protected against any reverse onus or duty of rebuttal, to be free from unjust search and seizure, and a general entitlement to due process. The August 1997 Preparatory Committee's text was reproduced in the Zutphen compilation and the Final Draft of the Preparatory Committee with little modification[20].

6 The Rome Conference quickly agreed on most of the provisions in article 67. It was made quite clear to the delegates that the minimum guarantees enshrined in article 14 of the *ICCPR* were being enlarged, and they were invited to accept or reject such an approach. The Conference adopted the latter route without hesitation. Negotiating difficulties with the provisions concerning appearance at trial, funded counsel and disclosure of evidence by the prosecution took slightly more time to be resolved. The proposals concerning search and seizure and due process were dropped as being redundant.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Chapeau

7 The *chapeau* provision of article 67 is an amalgam of norms contained in paras. 1 and 2 of article 14 of the *ICCPR*. In effect, it takes the *chapeau* of article 14 para. 3 of the *ICCPR*, with minor modifications, and adds the notions of a public, fair and impartial hearing that appear in article 14 para. 1. The text differs significantly from the original ILC Draft[21] and reflects a proposal made at the Rome Conference, on 2 July, by the Chair of the Working Group[22].

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18 1996 Preparatory Committee I, paras. 270-279, pp. 57-59.

19 Preparatory Committee Decisions Aug. 1997, pp. 34-36.

20 Zutphen Draft, pp. 114-115; Draft Statute for the ICC, U.N. Doc. A/CONF.183/2/Rev.1, pp. 126-128.

21 *Supra* note 15, 1994 ILC Draft Statute, article 41: "In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees: ...".

22 Draft proposal for article 67 submitted by the chairman, U.N. Doc. A/CONF.183/C.1/WGPM/L.42 (2 July): "In the determination of any charge, the accused is entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees in full equality"." It was adopted by the Committee with the addition of the word "and" before the words "to a fair hearing": Report of the Working Group on Procedural Matters, U.N. Doc. A/CONF.183/C.1/WGPM/L.2 (4 July), pp. 4-5. The Drafting Committee removed the word "and", and made other minor changes. Compendium of draft articles referred to the Drafting Committee by the Committee of the Whole as of 9 July 1998, U.N. Doc. A/CONF.183/C.1/L.58, pp. 41-42: "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality".

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a) "any charge"

The reference to "any charge" must apply to trials on accusations based on the four core crimes enumerated in article 5 of the *Statute*. The Court is also competent to judge "[o]ffences against the administration of justice", pursuant to article 70, and the rights of an accused would also apply in such proceedings. Some adaptation would appear to be required in proceedings for removal of a Registrar or Deputy Registrar, pursuant to article 46 para. 3 of the *Statute*, as these are not criminal in nature. Where the rights set out in article 67 do not apply necessarily is in other proceedings before the Court, for example those relating to a hearing subsequent to a decision by the Prosecutor not to proceed with charges[23] or to conduct an investigation[24]. Indeed, rights during an investigation are set out in a distinct provision of the *Statute*[25]. Nevertheless, the phrase "in the determination of any charge" is essentially identical to the wording of the international models, such as article 6 para. 1 of the *European Convention on Human Rights*[26]. The European Court of Human Rights considers this to be "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" or an act that has "the implication of such an allegation and which likewise substantially affects the situation of the suspect"[27]. An individual might become "substantially affected", to borrow the Strasbourg terminology, once a State party has asked that a case be examined[28], or upon the application by the Prosecutor to initiate an investigation[29]. If notions of complementarity are factored in, the right may even be extended to encompass proceedings under domestic law prior to exercise of jurisdiction of the Court. 8

b) "public hearing"

The principle of a public hearing, stated in the *chapeau* of article 67 para. 1, is developed in the Regulations of the Court. Regulation 20 states: 9

> "1. All hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.
> 2. When a Chamber orders that certain hearings be held in closed session, the Chamber shall make public the reasons for such an order.
> 3. A Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist".

The Regulations provide for broadcasting and recording of hearings. Subregulation 21 para. 1 says that "publicity of hearings may extend beyond the courtroom and may be through broadcasting by the Registry or release of transcripts or recordings, unless otherwise ordered by the Chamber". According to subregulation 21 para. 2, "[i[n order to protect sensitive information, broadcasts of audio- and videorecordings of all hearings shall, unless otherwise ordered by the Chamber, be delayed by at least 30 minutes"[30].

The text of article 67 of the *Statute* differs from that of article 14 of the *ICCPR* in that it does not enumerate the exceptions to the right to a public hearing. Article 14 para. 1 of the *ICCPR* allows the exclusion of the press and the public "for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Moreover, according to the *ICCPR*, the judgment must always be made public "except where the interest of juvenile

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[23] *Supra* note 4, Rome Statute, article 53 para. 3.
[24] *Ibid.*, articles 56-58.
[25] *Ibid.*, article 55.
[26] *Supra* note 6.
[27] *Corigliano* v. *Italy*, Ser. A, No. 57, 10 Dec. 1982, para. 34.
[28] *Supra* note 4, Rome Statute, article 14 para. 1.
[29] *Ibid.*, article 15 para. 3.
[30] See also Regulations of the Registry, Document ICC-BD/03-01-06, regulation 42.

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persons otherwise requires"[31]. A detailed enumeration of exceptions to the public hearing principle had been proposed but was rejected by the Preparatory Committee. These derogations included: the deliberations of the Court; protection of public order or of human dignity; safety and protection of the accused, of the victims or of witnesses. Victims of sexual violence were to be entitled as of right to an *in camera* hearing[32].

10 To the extent there is a residual power to derogate from the norm of a public hearing as found in article 64 para. 7: "The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence". That the public hearing requirement of the *chapeau* of article 67 is subordinate to article 64 para. 7 is implied by the words "having regard to the provisions of this Statute" in the *chapeau*. In any case, the exceptions listed in article 64 para. 7 are presented in a more elaborate fashion in articles 68, 69 and 72. According to the Regulations of the Court, "[a]t the request of a participant or the Registry, or *proprio motu* ... the Chamber may, in the interests of justice, order that any information likely to present a risk to the security or safety of victims, witnesses or other persons, or likely to be prejudicial to national security interests, shall not be published in any broadcast, audio- or video-recording or transcript of a public hearing"[33].

11 Article 68 concerns the protection of victims and witnesses. Specifically, article 68 para. 2 provides: "As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness". The already elaborate case law of the *ad hoc* Tribunals in this matter should guide the Court in this difficult area[34]. A mere glance at the jurisprudence of the Court indicates just how dramatic an impact issues concerning victim and witness protection can have on the general principle of public hearing and access to the record. Many hearings are held totally or partially in camera, and decisions are often published in severely redacted versions.

12 The second exception allowed by article 64 para. 7 is the protection of confidential or sensitive information[35]. Confidential or sensitive information may have several sources. There may be claims to confidentiality based on privilege, and the Court is to respect this pursuant to article 69 para. 5, as provided for in the *Rules of Procedure and Evidence*. But the major source of problems with this exception will be information derived from sovereign States. The *Statute* allows a State to apply "for necessary measures" to respect "confidential or sensitive information"[36]. Other exceptions to the rule dictating a public hearing are the possibility of *in camera* and even *ex parte* hearings with respect to the protection of national security information[37] and the power of the court to exclude disruptive individuals, including the accused[38].

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31 Note that article 76 para. 4 of the *Statute* requires that the judgment be rendered in public.

32 1996 Preparatory Committee II, pp. 195-196.

33 Regulations of the Court, Document ICC-BD/01-01-04, subregulation 21 para. 8.

34 For example: *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion requesting protective measures for victims and witnesses, 10 Aug. 1995; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Decision on the Preliminary Motion submitted by the Prosecutor for Protective Measures for Witnesses, 26 Sep. 1996. See: A.-M. La Rosa, *Réflexions sur l'apport du Tribunal pénal international pour l'ex-Yougoslavie au droit à un procès équitable*, REV. GÉN. DROIT INT'L PUBLIC 945, 962-970 (1997).

35 Also: *supra* note 4, Rome Statute, article 64 para. 6 (c).

36 *Ibid.*, article 68 para. 6.

37 *Ibid.*, article 72 para. 7.

38 *Ibid.*, articles 63 para. 2, 71 para. 1.

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Article 61 para. 1 specifies the right of the accused to be present at the hearing on the confirmation of charges. But this would clearly seem to be a hearing "[i]n the determination of the charge" of "an accused", and therefore the public hearing rule ought to apply. In other words, not only the accused but also the public should have access to such proceedings. The first confirmation hearing, that of Thomas Lubanga, was accordingly held in public with considerable publicity. Pre-Trial Chamber even made an order authorizing photography by representatives of the media[39]. 13

c) "having regard to the provisions of this Statute"

The words "having regard to the provisions of this Statute" suggest that article 67 can be limited by express provisions to the contrary. An example would be article 64 para. 7, which limits the right to a public hearing. The wording in the *chapeau* of article 67 is decidedly unenthusiastic. The Preparatory Committee Draft did not include any such general provision, preferring to enumerate any exceptions to the judicial guarantees recognized to the accused in a specific fashion[40]. A proposal from the United Kingdom submitted at Rome eschewed any equivocation on this point, beginning the text of article 67 with the words "[s]ubject to the provisions of this Statute ..."[41]. There is a suggestion in the *travaux préparatoires* that the words "subject to ..." put article 67 in a subordinate position, whereas the words "having regard to ..." do not[42]. 14

d) "fair hearing"

The general right to a "fair hearing" provides defendants with a powerful tool to go beyond the text of the *Statute*, and to require that the Court's respect for the rights of an accused keep pace with the progressive development of human rights law. The notion of a fair hearing goes back, in international human rights law, to article 10 of the *Universal Declaration of Human Rights*. Of course, it is repeated in article 14 of the *ICCPR* and in the regional instruments. The case law of the Strasbourg organs, established to implement the *European Convention on Human Rights*, has used this residual right to a fair hearing to fill in some of the gaps in the more specific provisions[43]. That the term "fair hearing" invites the Court to go beyond the precise terms of article 67 in appropriate circumstances is confirmed by the reference within the *chapeau* to "minimum guarantees"[44]. The term "fair hearing" also suggests that where individual problems with specific rights set out in article 67 do not, on their own, amount to a violation, the requirement of a fair hearing may allow a cumulative view and lead to the conclusion that there is a breach where there have been a number of apparently minor or less significant encroachments on article 67[45]. 15

The international case law has developed the notion of "equality of arms" within the concept of the right to a fair trial[46]. The ICTY Appeals Chamber has described the principle of equality

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39 *Prosecutor* v. *Lubanga*, ICC-01/04-01/0, Ordonnance autorisant la prise de photographies à l'audience du 9 novembre 2006, 6 Nov. 2006.

40 *Supra* note 20, Zutphen Draft, p. 114, article 60; *supra* note 20, Draft Statute, article 67, pp. 106-108.

41 Proposal submitted by the United Kingdom of Great Britain and Northern Ireland, U.N. Doc. A/CONF.183/C.1/WGPM/L.33 (29 June), p. 1.

42 *Supra* note 18, 1996 Preparatory Committee I, p. 59, para. 279.

43 D.J. Harris/M. O'Boyle/C. Warbrick, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 202-203 (1995).

44 *Prosecutor* v. *Lubanga*, ICC-01/04-01/06, Décision relative au système définitif de divulgation et à l'établissment d'un échéancier, Annexe I, Analyse de la décisions relative au système définitif de divulgation, 15 May 2006, para. 97.

45 *Stanford v. United Kingdom*, Ser. A, No. 182-A, 30 Aug. 1990, para. 24.

46 *Neumeister v. Austria*, Ser. A, No. 8, 11 Y.B. 822, 27 June 1968; M. Novak, CCPR COMMENTARY 247 (1993). For recognition of the principle of "equality of arms" by the ICTY, see: *Prosecutor v. Tadić*, Case

of arms 'as being only one feature of the wider concept of a fair trial'[47]. In *Tadić*, the ICTY Appeals Chamber explained that 'the principle of equality of arms falls within the fair trial guarantee under the Statute'. It continued:

> [U]nder the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses[48].

But 'equality of arms [...] does not necessarily amount to the material equality of possessing the same financial and/or personal resources'[49].

The concept of "equality of arms" has been invoked in early decisions of the International Criminal Court. For example, according to Pre-Trial Chamber II, "[f]airness is closely linked to the concept of 'equality of arms', or of balance between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour"[50].

e) "conducted impartially"

16 The *Statute* states that the hearing must be "conducted impartially", whereas article 14 of the *ICCPR* requires that it be conducted "by a competent, independent and impartial tribunal". The Zutphen Draft referred to "an independent and impartial tribunal"[51]. Curiously, the statutes of the *ad hoc* Tribunals impose no requirements in this respect[52], perhaps because the Security Council considered the matter to be beyond debate, although this did not prevent defendants from raising the issue[53]. At the International Criminal Court, not only judges, but also the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar are required to make a solemn undertaking in open court to exercise their functions "impartially"[54].

17 Of course, the issue of impartiality of the judiciary is also addressed elsewhere in the *Statute*[55]. Impartiality is also protected by specific provisions in the Court's Code of Judicial Ethics.

No. IT-94-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, 27 Nov. 1996, pp. 4, 7.

47 *Prosecutor v. Kordić et al.*, Case No. IT-95-14/2-A, Decision on the Application by Mario Cerkez for Extension of Time to File his Respondent's Brief, 11 Sep. 2001, para. 5.

48 *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, para. 52. The United States of America invoked the Appeals Chamber's comments before the Inter-American Commission on Human Rights, in a case dealing with capital punishment, as authority for the proposition that 'equality of arms' concerns procedural but not substantive equality: *Garza v. United States of America*, Report No. 52/01, Case 12.243, 4 Apr. 2001, para. 56.

49 *Prosecutor v. Kayishema et al.*, Case No. ICTR-95-1-A, Judgment (Reasons), 1 June 2001, paras. 63-71; *Prosecutor v.* Milutinovic *et al.*, Case No. IT-99-37-AR73. 2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 Nov. 2003.

50 *Situation in Uganda*, ICC-02/04-01/05, Decision on Prosecutor's Application for leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 Aug. 2005, para. 30. Also: *Prosecutor* v. *Lubanga*, ICC-01/04-01/06, Décision sur la demande d'autorisation d'appel de la Défense relative à la transmission des Demandes de participation des victimes, 6 Nov. 2006, p. 7.

51 *Supra* note 20, Zutphen Draft, p. 114, article 60.

52 *Supra* note 8, Statute of the ICTY, article 21; *supra* note 8, Statute of the ICTR, article 20.

53 *Prosecutor* v. *Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995.

54 *Supra* note 4, *Rome Statute*, article 45; Rules of Procedure and Evidence, Document ICC-ASP/1/3, pp. 10–107, Rule 5.

55 *Supra* note 4, Rome Statute, articles 35, 40, 41.

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"**Article 4**

Impartiality

1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.

2. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest"[56].

According to the European Court of Human Rights, "impartiality" means lack of "prejudice or bias"[57]. It comprises both a subjective and an objective dimension: "[t]he existence of impartiality ... must be determined according to a subjective test, that is, on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, namely, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect"[58].

The ICTY Appeals Chamber has described judicial impartiality as follows:

> [A] Judge should not only be subjectively free from bias, but also [...] there should be nothing in the surrounding circumstances that objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias[59].

The *Rome Statute* provides the most advanced and thorough regime in order to ensure both independence and impartiality of its judiciary. It constitutes a dramatic improvement on the norms applicable to the *ad hoc* tribunals. In this respect, the limitation of judges to one term of office, and a clarification of both the grounds for dismissal and the body responsible for doing so constitute major improvements upon earlier models.

f) "in full equality"

The terms "in full equality" are imported from article 14 para. 3 of the *ICCPR*. They complement the initial phrase of article 14, "[a]ll persons shall be equal before the courts and tribunals" for which there is no equivalent in article 67 of the *Statute*. Nevertheless, article 21 para. 1 of the *Statute* comprises a non-discrimination clause applicable to the instrument as a whole. The guarantee of full equality before the ICC protects the accused against discriminatory practices and even vexatious prosecution where it appears to be motivated by discriminatory criteria. **18**

In the *Čelebići* case, the ICTY Appeals Chamber considered the principle of equality before the law within the context of prosecutorial discretion. It said:

> "This provision reflects the corresponding guarantee of equality before the law found in many international instruments, including the 1948 Universal Declaration of Human Rights, the 1966 *International Covenant on Civil and Political Rights*, the *Additional Protocol I* to the *Geneva Conventions*, and the Rome Statute of the International Criminal Court. All these instruments provide for a right to equality before the law, which is central to the principle of the due process of law. The provisions reflect a firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law. Thus Article 21 and the principle it embodies prohibits discrimination in the application of the law based on impermissible motives such as, inter alia, race, colour, religion, opinion, national or ethnic

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56 Code of Judicial Ethics, *supra* note 3.

57 *Piersack* v. *Belgium*, Ser. A, No. 53, 1 Oct. 1982.

Hauschildt v. *Denmark*, Ser. A, No. 154, 24 Dec. 1989, para. 46.

58 *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-A), Judgment, 21 July 2000, para. 189.

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origin. The Prosecutor, in exercising her discretion under the Statute in the investigation and indictment of accused before the Tribunal, is subject to the principle of equality before the law and to the requirement of non-discrimination"[60].

The Appeals Chamber suggested that there would be a violation of equality before the law 'the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution failed to prosecute similarly situated defendants'[61]. To show the Prosecutor is proceeding on a selective basis, 'the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor's policy has a discriminatory effect, so that other similarly situated individuals of other ethnic or religious backgrounds were not prosecuted'[62].

An ICTY Trial Chamber has suggested that the right to equality before the law might be violated in cases of plea-bargaining. For example, it mentioned the possibility that the Prosecutor might seek to make a plea agreement with some accused because of their knowledge of particular events which may be useful in prosecutions of other, more high ranking accused. The Prosecutor could make the terms of such a plea agreement quite generous in order to secure the co-operation of that accused. "Other accused, who may not have been involved in the most egregious crimes or who may not have been part of a joint criminal enterprise with more high ranking accused, may not be offered such a generous plea agreement, or indeed any plea agreement", said the decision[63].

2. Minimum guarantees

(a) Information about the charge

19 Article 67 para. 1 (a) of the *Statute* complements similar provisions protecting suspects during an investigation[64] and at the time charges are confirmed[65]. The purpose of the norm is to provide an accused person with the information necessary for the preparation of a defence. The appropriate information required will depend on any questioning the accused has already undergone and on other circumstances of the case[66]. But the accused may be expected to show some diligence in seeking information about the charge, for example by insisting upon attendance at the confirmation hearing[67].

20 Article 14 of the *ICCPR* refers only to the "nature and cause" of the charge. The *Statute* goes further than the *ICCPR* and the other human rights models by requiring that this information also include the "content" of the charge[68]. According to the European Commission on Human Rights, the "nature" of the charge refers to the specific offence, while the "cause" of the charge

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60 *Prosecutor v. Dokalic et al.*, Case No. IT-96-21-A, Judgment, 20 Feb. 2001, para. 605 (reference omitted)

61 *Ibid.*, para. 607. Also: *Prosecutor v. Ntakirutimana et al.*, Case No. ICTR-96-10 & ICTR-96-17-T, Judgment, 21 Feb. 2003, paras. 870-871.

62 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001, paras. 94-96.

63 *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgment, 2 Dec. 2003, para. 66.

64 *Supra* note 4, Rome Statute, article 55 para. 2 (a)

65 *Ibid.*, article 61 para. 3. Also: *supra* note 33, Regulations of the Court, Regulation 52, which indicates the information that must be included in the document containing the charges: "The document containing the charges referred to in article 61 shall include: (a) The full name of the person and any other relevant identifying information; Regulations of the Court; (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28".

66 *Kamasinski v. Austria*, Ser. A, No. 168, 19 Dec. 1989, paras. 79-81.

67 *Campbell and Fell* v. *United Kingdom*, Ser. A, No. 80, 28 June 1984. See: *supra* note 4, Rome Statute, article 61 para. 2 (a).

68 At the August 1996 session of the Preparatory Committee it was said that the ICCPR provision "needed further elaboration in the Statute": *supra* note 18, 1996 Preparatory Committee I, para. 271, p. 58.

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means the relevant material facts[69]. There may be no meaningful distinction between "cause" and "content", except perhaps a message of exhaustivity[70]. In practice, the European case law has not been very demanding, with the Commission holding that the accused is entitled to material to enable preparation of a defence, "without however necessarily mentioning the evidence on which the charge is based"[71]. However, in the ICC *Statute* this provision must be taken in combination with the very thorough disclosure requirements that are imposed upon the Prosecutor[72]. Taken as a whole, these provisions indicate the desire of the Rome Conference that the Prosecutor ensure that the accused is not taken by surprise during the proceedings, and that he or she benefits from a level of information going well beyond the thresholds set by domestic justice systems and endorsed by international human rights tribunals as being acceptable.

The requirement that the information be "in a language which the accused fully understands and speaks" develops article 14 para. 3 (a) of the *ICCPR*, which requires only that it be "in a language which [the accused] understands". A proposal to refer to "his own language" had been left in square brackets by the Preparatory Committee[73], and was added at Rome. An amendment at the Rome Conference contained the phrase "in his or her own language or in a language of his or her choice"[74]. This prompted the Chair to propose: "in a language the accused understands or in his or her language"[75]. The matter sparked considerable controversy. The provision that was finally adopted included a footnote: "It is understood that this expression means the language for which the accused, in good faith, has clearly expressed his or her preference"[76]. To some degree, these are questionable improvements. The purpose served by requiring not only that the accused understand the language but also speak it seems unclear. Note that the *ICCPR*, in its general provision dealing with the right to an interpreter, presents this in the alternative: "if he cannot understand *or* speak the language used in court". It was surely not the intention of the drafters of the *Statute* to provided disabled persons who are unable to speak with a pretext to avoid the jurisdiction of the Court. On the other hand, insisting on this detail helps to exclude some Strasbourg case law by which the norm is respected if the language is understood by the accused's lawyer, and not necessarily by the accused personally[77]. It goes without saying that the information must be provided at no cost to the defendant[78]. 21

(b) Time to prepare defence

This provision is modeled on article 14 para. 3 (b) of the *ICCPR* with the addition of the words "freely" and "in confidence". It was introduced by the Preparatory Committee at its 22

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69 *Officer v. Austria* (No. 524/59), (1960) 3 Y.B. 322, 344. See also: *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on defence application for forwarding the documents in the language of the accused (Delalić), 25 Sep. 1996, for determination on the types of materials to be made available to the accused in his or her language.

70 See: Amnesty International, MAKING THE RIGHT CHOICES, PART V (1997).

71 *X v. Belgium* (No. 7628/76), (1977) 9 D.R. 169.

72 *Supra* note 4, Rome Statute, articles 61 para. 3 (b), 64 para. 3 (c), 67 para. 2. Also: *Prosecutor v. Delalić et al.*, *supra* note 77.

73 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 34; *supra* note 20, Zutphen Draft, p. 114, article 60; *supra* note 20, Draft Statute, article 67, pp. 106-108.

74 Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, U.N. Doc. A/CONF.183/C.1/WGPM/L.36 (29 June), p. 1.

75 *Supra* note 22, Draft proposal for article 67.

76 Report of the Working Group on Procedural Matters, U.N. Doc. A/CONF.183/C.1/WGPM/L.2/ Add.6 (11 July), pp. 3-4, fn. 5.

77 *X. v. Austria* (No. 6185/73), (1975) 2 D.R. 68.

78 *Luedicke, Belkacem and Koc v. Germany*, Ser. A, No. 29, 28 Nov. 1978. That these services were free of charge was spelled out in one of the proposals submitted to the Preparatory Committee: 1996 Preparatory Committee II, p. 196.

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August 1997 session[79], and the text remained unchanged through to the final version adopted i Rome[80].

23 Adequate time will depend on the circumstances of the case. Here the international case law is not particularly helpful, because it is a given that the types of cases to come before the IC will be extraordinarily complex and therefore difficult to compare with the more mundan matters of domestic tribunals. The only relevant normative provision, again not particularly helpful, is article 105 of the third *Geneva Convention* which specifies that counsel have "a period of two weeks at least before the opening of trial"[81]. According to the ICTY, adequate time is a flexible concept that "begs of a definition outside the particular situation of each case It is impossible to set a standard of what constitutes adequate time to prepare a defence because this is something which can be affected by a number of factors including the complexity of the case, and the competing forces and claims at play, such as consideration of the interests of other accused persons"[82].

24 The word "facilities" refers to "documents, records, etc. necessary for preparation of the defence"[83], a right that is complemented by the *Statute*'s extensive disclosure obligations According to the European Commission of Human Rights, this means the accused must have "the opportunity to organize his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court"[84].

25 With respect to communication with counsel, the addition of the words "freely" and "in confidence" underscore the privileged nature of the communication and the fact that it must be undertaken in secure premises not subject to eavesdropping by the authorities. However, there is nothing explicit in the *Statute* recognizing the privileged nature of solicitor-client communication[85]. The Preparatory Committee considered that the question of privileged communication should not be dealt with in the provision on rights of the accused[86]. Access to communication by the accused must be both in person and in writing.

(c) Trial without undue delay

26 The provision is identical to that of its model in the *ICCPR*. During the Preparatory Committee sessions, "[t]he point was also made that an expeditious trial process would prevent a guilty person from delaying the proceedings and would secure the early release of an innocent person. What was needed in this regard was a proactive court which would properly manage the case so as to achieve an early resolution of the case"[87]. Here, too, there were attempts to "improve" the *ICCPR* text, with suggestions that "undue" be replaced with "unreasonable" and

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79 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 34.

80 *Supra* note 20, Zutphen Draft, p. 114; *supra* note 20, Draft Statute, p. 127; *supra* note 22Draft proposal for article 67,; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; *supra* note 22, Compendium of draft articles, pp. 41-42.

81 Geneva Convention of 12 Aug. 1949 relative to the treatment of prisoners of war, 75 U.N.T.S. 135, *entered into force* 21 Oct. 1950.

82 *Prosecutor* v. *Delalić et al.*, Case No. IT-96-21-T, Decision on the applications for adjournment of the trial date, 3 Feb. 1997.

83 *Supra* note 46, M. Novak, p. 256.

84 *Can* v. *Austria*, Ser. A, No. 96, 30 Sep. 1985, Commission Report, para. 53.

85 See: article 69 para. 5, which indicates that this is a question for the Rules. In the *travaux*, see: 1996 Preparatory Committee II, pp. 196-197; *supra* note 20, Zutphen, p. 114, fn. 203; *supra* note 20, Draft Statute, p. 127, fn. 11. The Rules of the *ad hoc* Tribunals expressly recognize lawyer-client privilege: Rules of Procedure and Evidence, as amended 10 Dec. 1998, U.N. Doc. IT/32, article 97. The United States of America proposed a draft set of rules of evidence for the Court containing a provision ensuring lawyer-client privilege: Reference Paper Submitted by the United States of America, U.N. Doc. A/CONF.183, C.1/WGPM/L.21, p. 7, rule 10.

86 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 34, fn. 48.

87 *Supra* note 18, 1996 Preparatory Committee I, p. 58, para. 271.

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that the right "to enjoy a speedy trial" be added[88]. But at Rome, on a proposal from the Chair of the Working Group, the *ICCPR* text was retained[89].

Case law and academic comment on the *ICCPR* provision have considered that the time limit begins to run at the moment the suspect or the accused is informed that the authorities are taking steps towards prosecution. The period ends with a definitive decision[90]. What this means specifically will depend on each individual case. In one case, the Human Rights Committee considered the provision had been violated by Canada when the preparation of trial transcripts took twenty-nine months resulting in a three-year delay for an appeal hearing[91]. In *Pratt and Morgan* v. *Jamaica*, a delay of forty-five months between dismissal of an appeal and delivery of a written judgment was held to violate the norm[92]. The Nuremberg trial of the major war criminals set an awesome precedent that the *ad hoc* Tribunals have been unable even to approach. By domestic standards, today's international justice is an incredibly protracted affair. The Appeals Chamber of the International Criminal Tribunal for Rwanda has considered that inexcusable delay attributable to the Prosecutor, in extreme circumstances, entitles the accused to have the charges dropped 'with prejudice' to the Prosecutor, that is, without the possibility of retrial[93]. 27

In its Court Capacity Model, the International Criminal Court sets out optimistic assessments of the length of proceedings, projecting an average trial to last slightly less than three years from arrest until final judgment, apportioning three months for the confirmation of charges, six months for disclosure and preparation for trial, fifteen months for the trial itself and finally nine months for the appeal[94]. If it succeeds, it will be dramatically faster than the *ad hoc* tribunals. But in its first case, the confirmation of charges was issued ten months, not three, after the suspect had been taken into custody.

(d) Rights of the defence

Article 67 para. 1 (d) of the *Statute* substantially reflects the content of article 14 para. 3 (d) of the *ICCPR*, subject to a number of minor drafting changes. The text is little changed from the ILC Draft[95]. It was approved by the Working Group at the August 1997 Preparatory Committee[96] and was adopted at Rome without change[97]. 28

α) Presence at trial

The right to be present at trial is made subject to article 63 para. 2, which permits the trial to proceed in the absence of an accused who is disruptive. Exceptions exist within the Statute and 29

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88 *Supra* note 78, 1996 Preparatory Committee II, p. 197; *supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 34; *supra* note 20, Zutphen Draft, p. 114; *supra* note 20,Draft Statute, p. 127. Also, at the Rome Conference, *supra* note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

89 *Supra* note 22, Draft proposal for article 67; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; *supra* note 22, Compendium of draft articles, pp. 41-42.

90 *Supra* note 46, M. Novak, p. 257.

91 *Pinkney* v. *Canada* (No. 27/1978), U.N. Doc. CCPR/3/Add.1, Vol. II, p. 385, U.N. Doc. CCPR/C/OP /1, p. 95, 2 HUM. RTS. L.J. 344.

92 *Pratt and Morgan* v. *Jamaica*, Nos. 210/1986, 225/1987, U.N. Doc. A/44/40, p. 222, 11 HUM. RTS. L.J. 150.

93 *Prosecutor* v. *Barayagwiza*, Case No. ICTR-97-19-AR72, Decisions of 3 November 1999 and 31 March 2000.

94 Report on the Court Capacity Model, Document ICC-ASP/5/10, para. 23.

95 *Supra* note 15, 1994 ILC Draft Statute, article 41.

96 *Supra* note 19, 1996 Preparatory Committee Decisions Aug. 1997, pp. 34-35.

97 *Supra* note 20, Zutphen Draft, p. 114; *supra* note 20, Draft Statute, p. 117; *supra* note 22, Draft proposal for article 67; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; Report of the Working Group on Procedural Matters, U.N. Doc. A/CONF.183/C.1/WGPM/L.2/Add.8 (15 July), p. 6; *supra* note 22, Compendium of draft articles, pp. 41-42.

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the Rules of Procedure and Evidence for *ex parte* hearings under very specific circumstances. Article 72 para. 7 of the *Statute* allows for a hearing concerning the protection of national security information to take place *ex parte*, that is, in the absence of one or both of the parties[98]. *Ex parte* proceedings during the trial phase are also authorised under the Rules of Procedure and Evidence. The Trial Chamber may hear the Prosecutor *ex parte* in order to determine whether an assurance may be given to a witness who may make testify in such a way as to incriminate himself or herself[99]. A Trial Chamber may also sit *ex parte* to consider whether or not to authorise special measures to facilitate testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence[100].

Article 76 para. 4 of the *Statute* seems to imply that the presence of the accused when sentence is imposed is not indispensable, because it says this should take place "wherever possible". The curious phrase was introduced when the Preparatory Committee was considering the possibility of *in absentia* trials[101], and remained in the final version of the *Statute*, although the concept of *in absentia* trials had been abandoned, without any thought being given to the matter[102]. Thus, article 76 para. 4 should not be seen as an attenuation of the principle of presence of the accused at trial.

β) Defend oneself in person

30 The accused is entitled to defend himself or herself in person. The most celebrated example of this situation took place during the prosecution of Slobodan Milošević before the International Criminal Tribunal for the former Yugoslavia. In an initial challenge to the accused's insistence on defending himself, the Prosecutor invoked the fragile medical condition of the defendant. Presiding Judge Richard May wrote: "A plain reading of this provision indicates that there is a right to defend oneself in person and the Trial Chamber is unable to accept the Prosecution's proposition that it would allow for the assignment of defence counsel for the Accused against his wishes in the present circumstances"[103]. Judge May noted that the right to defend oneself was especially important in the essentially adversarial-type proceedings of the ICTY. Here he referred to a relevant decision of the United States Supreme Court, which held that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so"[104]. As Judge May explained:

> "There is a further practical reason for the right to self-representation in common law. While it may be the case that in civil law systems it is appropriate to appoint defence counsel for an accused who wishes to represent himself, in such systems the court is fulfilling a more investigative role in an attempt to establish the truth. In the adversarial systems, it is the responsibility of the parties to put forward the case and not for the court, whose function it is to judge. Therefore, in an adversarial system, the imposition of defence counsel on an unwilling accused would effectively deprive that accused of the possibility of putting forward a defence. In this connection, Article 21 (4) (d) of the Statute may be said to be reflective of the common law position"[105].

But in another case involving an obstreperous defendant, another Trial Chamber of the ICTY signalled the difference in approach between common law and "civil law" systems, noting that

98 *Supra* note 4, Rome Statute, article 72 para. 7.
99 *Supra* note 54, Rules of Procedure and Evidence, rule 74 para. 4.
100 *Ibid.*, rule 88(2).
101 *Supra* note 5, Draft Statute, article 76, fn. 25.
102 *Supra* note 97, Report of the Working Group on Procedural Matters (15 July), p. 10. In this respect, there is an error in Report of the Drafting Committee to the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/L.88 (16 July), p. 14, which states that the Committee of the Whole adopted the following: "The sentence shall be pronounced in public and in the presence of the accused", without the words "whenever possible".
103 *Prosecutor* v. *Milošević*, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 Apr. 2003, para. 18.
104 *Faretta* v. *California*, 422 US 806, 817 (1975).
105 *Supra* note 103, *Prosecutor* v. *Milošević*, para. 24.

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international human rights case law acknowledged that the right to defend oneself was subject to limitations. It also observed that "[t]he Accused is in fact increasingly demonstrating a tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance". Consequently, the Trial Chamber ordered the appointment of "standby counsel", who would be mandated to assist the accused, and "in exceptional circumstances to take over the defence from the Accused at trial should the Trial Chamber find, following a warning, that the Accused is engaging in disruptive conduct or conduct requiring his removal from the courtroom"[106]. Subsequently, the Trial Chamber attempted to impose counsel on Šešelj, who went on a hunger strike in protest. After he had been without food for many days, the Appeals Chamber overruled the Trial Chamber[107].

After Judge May withdrew from the *Milošević* case because of a serious illness of his own, his two colleagues, together with the new judge appointed in his place, and inspired by the *Šešelj* ruling of the other Trial Chamber, revised their earlier decision. Noting the ongoing medical problems of the accused, which had occasioned several adjournments in the course of the two and half years of hearings, the Trial Chamber said: "If at any stage of a trial there is a real prospect that it will be disrupted and the integrity of the trial undermined with the risk that it will not be conducted fairly, then the Trial Chamber has a duty to put in place a regime which will avoid that. Should self-representation have that impact, we conclude that it is open to the Trial Chamber to assign counsel to conduct the defence case, if the Accused will not appoint his own counsel"[108]. The Trial Chamber said it "was of the opinion that it was necessary to relieve the Accused of the burden of conducting his own case with a view to stabilising his health to ensure, so far as possible, that the trial proceeds with the minimum of interruption in a way that will permit the orderly presentation of the Accused's case and the completion of the trial within a reasonable time in his interests and the interests of justice: in other words, to secure for the Accused a fair and expeditious trial"[109].

The "assigned counsel" appealed the decision, which was reversed, in part, by the Appeals Chamber. The Appeals Chamber stated that the right of an accused person to defend himself or herself could indeed be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial. It reasoned by analogy with the right to be tried in one's own presence, which the Tribunal noted was subject to limitation in the event of disruption. "If a defendant's right to be present for his trial – which, to reiterate, is listed in the same string of rights and indeed in the same *clause* as the right to self-representation – may thus be restricted on the basis of substantial trial disruption, the Appeals Chamber sees no reason to treat the right to self-representation any differently", it said[110]. In the case of disruption, the accused can be said to have consciously and intentionally waived the right to be present at trial, and to act in his or her own defence. The Appeals Chamber said that "it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety. How should the Tribunal treat a defendant whose health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to withstand all the rigours of trial work – the late nights, the

106 *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj With his Defence, 9 May 2003.

107 *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 Oct. 2006.

108 *Prosecutor v. Milošević*, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 Sep. 2004, para. 33. See also: *Prosecutor v. Milošević*, Case No. IT-02-54-T, Order on Future Conduct of the Trial, 6 July 2004.

109 *Ibid.*, para. 66.

110 *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 Nov. 2004, para. 13.

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stressful cross-examinations, the courtroom confrontations – unless the hearing schedule is reduced to one day a week, or even one day a month"[111]?

The Trial Chamber of the Special Court for Sierra Leone has also considered the question of self-representation[112]. Referring to the formulation of the right of self-representation, the SCSL Trial Chamber said that because article 17 Para. 4 (d) of the Court's *Statute* spoke of 'the right to have legal assistance assigned', this proved that "the right to defend himself or herself in person" was only a qualified and not an absolute right. Unlike *Milošević*, the SCSL defendant, Hinga Norman, had no apparent medical problems, nor was he misbehaving in court. The judges simply felt he wasn't up to the job of defending itself, adding that the problems this might cause would also impact negatively on the right of the other two defendants in the case to a speedy trial[113]. Finally, the judges laid emphasis on the "time limited mandate of the Court"[114], a reference to the parsimonious resources allocated by the United Nations. The Trial Chamber concluded with an oxymoron, writing that "[t]he right to self-representation in this case ... can only be exercised with the assistance of Counsel"[115].

The Rules of Procedure and Evidence of the International Criminal Court do not contemplate this situation, probably because the issues had not yet arisen before the *ad hoc* tribunals when the Rules were drafted. No clear formula has yet emerged at the *ad hoc* tribunals, where the approach sometimes seems rather improvised. Even where the fundamental justification for setting aside the right to self-representation is expediency, it is doubtful whether such a result is in fact achieved.

γ) Choice of counsel

31 Although the accused is entitled to choice of counsel, this right cannot be unlimited. The Court may impose ethical, linguistic and other professional requirements in order to establish qualifications for counsel, as under domestic legal systems. The European Commission of Human Rights dismissed claims alleging a violation of the right to counsel on the basis of failure to respect professional ethics[116], where counsel was also a defence witness[117], and even for a refusal to wear a gown[118]. There is no right to choice of counsel when a defendant relies upon legal aid. According to the ICTR Appeals Chamber, "in the light of a textual and systematic interpretation of the provisions of the Statute and the Rules, read in conjunction with relevant decisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel"[119]. Nevertheless, the practice of the *ad hoc* tribunals has been to accommodate representation by counsel chosen by the accused, where feasible, and this approach is reflected in the Regulations of the Court:

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111 *Ibid.*, para. 14.

112 *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, Ruling on the Issue of Non-Appearance of the First Accused Samual Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused, Allieu Kondewa at the Trial Proceedings, 1 Oct. 2004, para. 23.

113 *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, Decision on the Application of Sam Hinga Norman for Self-Representation Under Article 17(4)(d) of the Statute of the Special Court, 8 June 2004.

114 *Ibid.*, para. 26.

115 *Ibid.*, para. 32.

116 *Ensslin, Baader and Raspe v. Federal Republic of Germany*, App. Nos. 7572/76, 7586/76 and 7587/76, (1978) 14 D.R. 64.

117 *K. v. Denmark* (No. 19524/92), unreported.

118 *X. and Y v. Federal Republic of Germany*, App. Nos. 5217/71 and 5367/72, (1972) 42 COLL. 139.

119 *Prosecutor v. Kambanda*, ICTR 97-23-A, Judgment, 19 Oct 2000, para. 33; *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001, paras. 60-61; *Prosecutor v. Ntakirutimana et al.*, ICTR-96-10-T and ICTR-96-17-T, Decision on the Motions of the Accused for Replacement of Assigned Counsel, 11 June 1997.

"**Regulation 75**

Choice of defence counsel

1. If the person entitled to legal assistance chooses a counsel included in the list of counsel, the Registrar shall contact that counsel. If the counsel is willing and ready to represent the person, the Registrar shall facilitate the issuance of a power of attorney for this counsel by the person.

2. If the person entitled to legal assistance chooses a counsel not on the list of counsel who is willing and ready to represent him or her and to be included in the list, the Registrar shall decide on the eligibility of that counsel in accordance with regulation 70 and, upon inclusion in the list, shall facilitate the issuance of a power of attorney. Until the filing of a power of attorney, the person entitled to legal assistance may be represented by duty counsel in accordance with regulation 73".

The classic problem in domestic legal systems concerning choice of counsel on legal aid is the low tariff, in effect discouraging more senior and expert lawyers from agreeing to take such cases. Remuneration at the international tribunals is however sufficient to attract top notch professionals.

The *ad hoc* Tribunals have adopted a rule requiring that counsel be either admitted to the practice of law in a State or be a university professor of law[120]. The Rules of Procedure and Evidence of the International Criminal Court are somewhat different, and focus on substance rather than form, requiring that "counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings". Counsel must have a minimum of ten years of relevant experience, and shall not have been convicted of "a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court"[121]. Defence counsel must also have "an excellent knowledge of and be fluent in at least one of the working languages of the Court"[122]. In the *Darfur Situation*, the Pre-Trial Chamber instructed the Registrar to appoint *ad hoc* counsel for the defence who was not only fluent in one of the working languages, but who was also capable of working in Arabic[123]. The Registrar may remove lawyers from the list of counsel for various disciplinary factors[124].

The Statute and the Rules of Procedure and Evidence establish norms that apply to defence counsel, including a Code of Professional Conduct for Counsel to be adopted by the Assembly of States Parties pursuant to a proposal from the Registrar, following consultation with the Prosecutor[125].

The accused is entitled to be informed of the right to counsel. In practice, this is unlikely to pose any problem. 32

δ) Free legal assistance

In the *ICCPR*, the right to funded counsel for indigent defendants is subject to the requirement that this be in cases "where the interests of justice so require". Arguably, this will be the situation in all cases before the ICC. Indeed, the ILC removed the condition in its Draft Statute[126], only to have it introduced again by the Preparatory Committee[127]. Consequently, the 33

120 *Supra* note 85, Rules of Procedure and Evidence, rule 44.
121 *Supra* note 33, Regulations of the Court, regulation 67.
122 *Supra* note 54, Rules of Procedure and Evidence, rule 22.
123 *Situation in Darfur* (ICC-02/05), Décision du Greffier relative à la nomination de Me Hadi Shalluf en qualité de conseil ad hoc de la Défense, 25 Aug. 2006, p. 2.
124 *Supra* note 33, Regulations of the Court, regulation 71; *supra* note 30, Regulations of the Registry, regulation 122 *et seq.*
125 *Supra* note 54, Rules of Procedure and Evidence, rule 8.
126 *Supra* note 15, 1994 ILC Draft Statute, p. 116. See also: Code of Crimes against the Peace and Security of Mankind, U.N. Doc. A/51/332 (1996), article 11 (e).
127 *Supra* note 19, Preparatory Committee Decisions Aug. 1997.

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rule is not an absolute one, although it is hard to imagine an example of a matter before the Court where the interests of justice would not require funded counsel for an indigent defendant

34 The most far-reaching discussion of this provision took place in the informal working group at the August 1996 session of the Preparatory Committee. There, a number of practical recommendations were made, closely following the practice of the *ad hoc* tribunals[128]. A detailed codification of principles governing the appointment of counsel was also set out at that time[129].

35 Administration of the system of legal aid to indigent defendants is the responsibility of the Registrar[130]. Legal aid is to encompass all that is necessary for "effective and efficient defence, including the remuneration of counsel"[131]. The right to counsel includes a right to adequate, qualified counsel. Unlike situations where a defendant chooses and remunerates counsel, when counsel are authorized and funded by the Court, it becomes responsible for their competence[132].

The experience of the *ad hoc* Tribunals shows that it is likely that counsel will be remunerated by the Tribunal in virtually all cases, given the fact that defendants, even if they were once powerful rulers who looted their countries before losing power, become suddenly and mysteriously impoverished at the time of indictment. The first defendant to come before the Court, Thomas Lubanga, was declared indigent and provided with Court-appointed counsel[133]. The Regulations of the Court indicate the criteria for determining eligibility for legal aid[134].

36 Legal assistance before the *ad hoc* Tribunals has had a turbulent history, and practice appears to differ between The Hague and Arusha. David Tolbert, who has worked in several senior positions with the ICTY over the years, describes the defence counsel and legal aid systems as 'the ICTY's Achilles' heel'[135].

(e) Rights of the defence

37 The first sentence of article 67 para. 1 (e) is virtually identical, aside from the changes to gender neutral terminology, to the text of article 14 para. 3 (e) of the *ICCPR*. The second sentence, dealing with entitlement to raise defences, is an original contribution.

α) Examination of witnesses

38 The ILC attempted to rewrite somewhat the *ICCPR* provision dealing with examination of witnesses, limiting the application of the right to prosecution witnesses, and thereby eliminating witnesses called by the Court on its own motion from the scope of the provision[136]. The Preparatory Committee adopted the language of the ILC[137] but the Rome Conference, in its wisdom, returned to the original *ICCPR* text[138]. According to Judge Vohrah, of the ICTY:

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128 *Supra* note 18, 1996 Preparatory Committee I, para. 272.

129 *Ibid.*, pp. 197-199.

130 *Supra* note 54, Rules of Procedure and Evidence, rule 21; *supra* note 30, Regulations of the Registry, regulation 130 *et seq.*

131 *Supra* note 33, Regulations of the Court, regulation 83.

132 The Right to a Fair Trial, Report to the U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities by Mr. S. Chernichenko and Mr. W. Treat on The Administration of Justice and the Human Rights of Detainees, U.N. Doc. E/CN.4/Sub.2/1991/29, paras. 54-57.

133 *Prosecutor v. Lubanga*, ICC-01/04-01/06, Décision du Greffier sur la demande de l'aide judiciaire aux frais de la Cour déposée par M. Thomas Lubanga Dyilo, 31 Mar. 2006.

134 *Supra* note 33, Regulations of the Court, regulation 84.

135 David Tolbert, *The ICTY and Defence Counsel: A Troubled Relationship*, 37 NEW ENGLAND L. J. 975 (2003).

136 *Supra* note 15, 1994 ILC Draft Statute, p. 116, article 41.

137 *Supra* note 78, 1996 Preparatory Committee II, p. 199; *supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; *supra* note 20, Zutphen Draft, p. 114; *supra* note 20, Draft Statute, p. 127.

138 *Supra* note 22; Draft proposal for article 67; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; *supra* note 22, Compendium of draft articles, pp. 41-42. But see: *supra* note 74,

"The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side ... [T]he European Commission of Human Rights equates the principle of equality of arms with the right of the accused to have procedural equality with the Prosecution"[139].

It is foreseeable that there be certain limits to this right. The formal provisions governing testimony of victims of sexual crimes is an example. Article 68 para. 2 enables the Court to allow the presentation of evidence by electronic or other special means. Of course, this is not a breach of article 67 para. 1 (e) unless it is read as including a right to cross-examination and to confrontation. 39

During the Preparatory Committee sessions, the issue was presented as a right to "confront and cross-examine all witnesses"[140]. But the wording of the provision is based on an international model which recognizes the legitimacy of trials without confrontation of witnesses and cross-examination, at least in the sense of common law procedure[141]. Article 14 of the *ICCPR* was not intended to impose a common law model on domestic justice systems, and those which do not indulge in cross-examination of witnesses before the Court cannot be considered, *prima facie*, to be in breach of the international norm. Thus, although the defence has the right to examine witnesses on the same basis as the Prosecutor, there is no explicit provision for a full right to cross-examination, as it is understood in the common law. The Regulations further confirm this perspective:

"Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to:
(a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth..."[142].

Under continental or Romano-Germanic legal systems, questions may be posed by the judge at the request of counsel. At trial, the presiding judge may issue directions as to the conduct of the proceedings[143], failing which the Prosecutor and the defence are to agree on the order and the manner in which evidence is to be presented[144]. Witnesses are questioned by the party that presents them, followed by questioning by the other party and by the Court. The defence has the right to be the last to examine a witness[145].

Nothing in the Statute provides for compellability of witnesses, for example by issuance of *subpoenae* or similar orders to appear before the Court. Although this may create hardship for the defence, it does not seem that it can argue that the right to a fair trial is being denied because of the impossibility of obtaining witnesses and compelling their attendance in court.

There are limits to the right to examine witnesses. The formal provisions governing the testimony of victims of sexual crimes are an example. In such circumstances, the Statute authorises the Court to allow the presentation of evidence by electronic or other special means[146]. Some questions are out of bounds: the Rules of Procedure and Evidence state that evidence of the prior or subsequent sexual conduct of a victim or witness is not to be admitted[147]. It may also disallow questions because they are abusive or repetitive. What is important is that the parties, prosecution and defence, be treated equally and that the trial be fundamentally fair.

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139 Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.
140 *Prosecutor* v. *Tadić*, Case No. IT-94-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness statements, 27 Nov. 1996, p. 4.
141 *Supra* note 18, 1996 Preparatory Committee I, p. 58, para. 275.
142 F.G. Jacobs/R.C.A. White, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 158 (1996).
143 *Supra* note 33, Regulations of the Court, regulation 43.
144 *Supra* note 4, Rome Statute, article 64 para. 8 (b).
145 *Supra* note 54, Rules of Procedure and Evidence, rule 140 para. 1.
146 *Ibid.*, rule 140 para. 2.
147 *Supra* note 4, Rome Statute, article 68 para. 2.
148 *Supra* note 54, Rules of Procedure and Evidence, rule 71.

The Statute also allows the Court to recognise witness privileges. The Assembly of States Parties agreed to confirm a principle already recognised by the International Criminal Tribunal for the former Yugoslavia, by which the International Committee of the Red Cross has a right to non-disclosure of evidence obtained by a former employee in the course of official duties. The Tribunal relied on customary international law in reaching its decision[148]. The Rules also recognise solicitor client privilege, and enable the Court to extend privilege to other categories of witnesses[149]. It has been suggested that on this basis privilege might be extended to other non-governmental organisations with humanitarian purposes, and bodies such as a truth and reconciliation commission.

β) Defences

40 The second sentence of subparagraph (e) recognizes the right of the accused to raise defences and to present other admissible evidence. The Preparatory Committee had appended to the provision, in square brackets, a sentence stating: "In addition the accused shall also be entitled to present any other evidence"[150]. At Rome, the Chair of the Working Group added the reference to raising defences[151].

41 These rights must surely be included within the general principle of the right to a fair trial, established in the *chapeau* of article 67 para. 1. Moreover, defences are described in considerable detail in Part 2 of the *Statute*, concerning general principles of law. It should be observed that some defences are formally excluded by Part 2, namely the defence of official capacity[152], lack of knowledge (in the case of command responsibility)[153] and superior orders (in cases of genocide and crimes against humanity)[154].

(f) Interpreter

42 The provision in the ICC *Statute* is considerably more detailed than the corresponding text in the *ICCPR* although it is doubtful whether anything really new has been added. Article 14 para. 3 (f) recognizes the right to "free assistance of an interpreter" if the accused "cannot understand or speak the language used in court"[155]. Here, too, the ILC attempted to improve on the text of the *ICCPR*, adding the requirement that the interpreter be "competent", specifying extension of the principle to include documents, and modifying the requirement that the accused either understand or speak the language to become a cumulative requirement, "understands and speaks"[156]. The *Statute* provision is essentially identical to the ILC Draft, except for the order of the phrases. These were reversed at the August 1997 session of the Preparatory Committee[157], and the word "fully" added during the Rome Conference[158].

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148 *Ibid.*, Rule 73 (3), (4), (5), confirming: *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

149 *Supra* note 54, Rules of Procedure and Evidence, rule 73.

150 *Supra* note 18, 1996 Preparatory Committee II, p. 199; *supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; *supra* note 20, Zutphen Draft, p. 114; *supra* note 20, Draft Statute, p. 127.

151 *Supra* note 22Draft proposal for article 67.

152 *Supra* note 4, Rome Statute, article 27.

153 *Ibid.*, article 28.

154 *Ibid.*, article 33.

155 Specific responsibility for ensuring respect of this right lies with the registry: *supra* note 30, Regulations of the Registry, regulation 40.

156 *Supra* note 15, 1994 ILC Draft Statute, p. 115, article 41. For a particularly interesting discussion of the difficulties of trials with interpreters, see *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 Sep 1998.

157 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; *supra* note 20, Zutphen Draft, pp. 114-115; *supra* note 20, Draft Statute, pp. 114-115; *supra* note 22, Draft proposal for article 67.

158 *Supra* note 76, Report of the Working Group on Procedural Matters (11 July), pp. 3-4; *supra* note 22, Compendium of draft articles, pp. 5-7.

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An accused who does not understand the proceedings is not "present" at trial. Thus, the right to an interpreter seems axiomatic. Supervision of the quality of such interpretation is a constant difficulty, however, because frequently the accused is the only person who is actually listening to the interpretation. Although the requirement that documents be translated may be cumbersome, time-consuming and costly, it has been recognized by the European Court of Human Rights as a corollary of the right to an interpreter[159]. **43**

The provision does not require interpretation into the accused's mother tongue, or into a language of the accused's choice[160]. In an interlocutory ruling, the ICTY denied an accused's request for a "Croatian" interpreter, given that the languages are similar enough and there was regular translation of Serbo-Croatian[161]. **44**

(g) Right to silence

The right to silence provision is also based on the norm in article 14 para. 3 of the *ICCPR*, but goes considerably farther. The *ICCPR* says that an accused has the right "[n]ot to be compelled to testify against himself or to confess guilt". The ICC *Statute* removes the qualification "against himself", and adds an additional norm that is not at all implicit in the *ICCPR*, namely that the silence of an accused cannot be a consideration in the determination of guilt or innocence. **45**

The words "against himself" were removed by the ILC in its Draft Statute, but otherwise the text of article 14 para. 3 (g) remained intact[162]. But this is not the same as the general right against self-incrimination found in the Fifth Amendment to the United States Constitution, because the right may only be invoked by an accused[163]. The text clarifies the fact that an accused may refuse to testify altogether, and not merely to testify when the evidence is "against himself". **46**

The second arm of the provision, providing that silence includes the right not to have it invoked against an accused, was added during the August 1997 Preparatory Committee[164]. Without square brackets, it sailed along effortlessly into the final version of the *Statute*[165], although at the Rome Conference the United Kingdom made an interesting proposal that changed the form without modifying the content[166]. The provision reflects concerns with encroachments upon the right to silence in some national justice systems. Specifically, English common law has always prevented any adverse inference being drawn from an accused's failure to testify. But in recent years, legislation adopted within the United Kingdom now allows prosecutors to propose such conclusions[167]. **47**

At the *ad hoc* tribunals, the right to silence has arisen in proceedings concerning provisional release, where prosecutors argued that the silence of the accused is a pejorative factor militating

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159 *Supra* note 79.*Luedicke, Belkacem und Koc v. Federal Republic of Germany*, para. 48; *Kamasinski v. Federal Republic of Germany*, Ser. A, No. 168, 19 Dec. 1989, para. 74.

160 *Guesdon v. France* (No. 219/1986), U.N. Doc. A/44/40, p. 222, paras. 10.2, 10.3.

161 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Order on Zdravko Mucić's Oral Request for Croatian Interpretation, 23 June 1997.

162 *Supra* note 15, 1994 ILC Draft Statute, p. 116, article 41.

163 According to *supra* note 18, 1996 Preparatory Committee I, para. 276, "The right of the accused not to be compelled to give testimony was supported, as was the right of witnesses to enjoy some degree of protection from giving self-incriminating testimony". But article 67 does not apply to witnesses, who have no general protection against self-incrimination.

164 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; *supra* note 20, Zutphen Draft, p. 117; *supra* note 20, Draft Statute, p. 127.

165 *supra* note 22, Draft proposal for article 67; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; *supra* note 22, Compendium of draft articles, pp. 41-42.

166 *Supra* note 41, Proposal submitted by the United Kingdom of Great Britain and Northern Ireland, p. 1: "Neither to be compelled to testify nor to confess guilt and to be permitted to remain silent without any inference as to guilt or innocence being drawn from such silence".

167 Criminal Justice and Public Order Act (1994), s. 4 (3).

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against release. But Trial Chambers have said that "lack of co-operation of an accused should not, as a rule, be taken into consideration as a factor" that might justify denying an application for provisional release. According to an ICTY Trial Chamber, "[t]he alternative would easily result in infringement of the fundamental right of an accused to remain silent"[168].

Cooperation with the Prosecutor may be cited as a mitigating factor at the sentencing stage, and to this extent there may be a price to be paid by an accused for exercising the right to silence. However, Trial Chambers have frequently insisted that the fact the accused does not plead guilty should not be viewed as an aggravating factor,"since an accused person has no obligation to do so and he has the right to remain silent should he choose that course"[169]. In *Niyitegeka*, an ICTR Trial Chamber wrote:

> The Accused chose not to testify in his own defence in the present case. The Defence made submissions concerning the right to remain silent and the right not to testify. The Chamber is mindful of the Accused's rights in this regard and has not drawn any adverse inference in the present case[170].

In *Čelebići*, the ICTY Appeals Chamber said there is 'an absolute prohibition against consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules... Similarly, this absolute prohibition must extend to an inference being drawn in the determination of sentence'[171].

The right to silence can of course be waived. An accused who pleads guilty in effect waives the right to silence, as well as certain other procedural rights[172]. This is often spelled out in plea agreements at the *ad hoc* tribunals[173]. Many accused before international tribunals have chosen to testify in their own defence. In the case of a defence of alibi, for example, it is virtually essential that the accused take the witness stand in order to explain his or her whereabouts at the time of the crime.

(h) Unsworn statement

48 The idea that an accused is entitled to make an unsworn oral or written statement in his or her defence, at least as a fundamental right, is a genuine innovation. There is nothing comparable in any of the international human rights instruments. But it is a practice recognized under many criminal codes throughout the world. In fact, continental European jurists are "astonished" that it could be otherwise, as in their jurisdictions the accused is never sworn[174]. The proposal first surfaced during the informal working group of the August 1996 session of the Preparatory Committee[175]. It was retained, in square brackets, by the Working Group in August 1997[176], and adopted without difficulty at the Rome Conference[177].

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168 *Prosecutor v. Jokić et al.*, Cases No. IT-01-42-PT and IT-01-46-PT, Orders on Motions for Provisional Release, 20 Feb. 2002. Also: *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, Decisions Granting Provisional Release to Enver Hadžihasanović, Mehmed Alagic and Amir Kubura, 9 Dec. 2001, para. 15.

169 *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, 29 Nov. 2002, para. 298; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, 20 Feb. 2001, para. 783; *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1, Sentencing Judgment, 27 Feb. 2003, para. 64; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, para. 687.

170 *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, 16 May 2003, para. 46.

171 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 Feb. 2001, para. 783. Also: *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1, Sentencing Judgment, 27 Feb. 2003, para. 64.

172 *Prosecutor v. Sikirica et al.*, Case No. IT-95-8, Sentencing Judgment, 13 Nov. 2001, para. 17.

173 See, e.g., *Prosecutor v. Obrenović*, Case No. IT-02-60-T, Plea Agreement, para. 17; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60-PT, Amended Plea Agreement, para. 5.

174 J. Pradel, DROIT PÉNAL COMPARÉ 449, fn. 1 (1995).

175 *Supra* note 78, 1996 Preparatory Committee II, p. 117, 200.

176 *Supra* note 18, 1996 Preparatory Committee I, p. 35; *supra* note 20, Zutphen Draft, p. 117; *supra* note 20, Draft Statute, p. 128.

177 *Supra* note 22, Draft proposal for article 67; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; *supra* note 22, Compendium of draft articles, pp. 41-42. See also: *supra* note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

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Under common law systems, an unsworn statement would in principle be inadmissible as evidence. If the accused chooses to testify, then he or she must be sworn and, moreover, must submit to cross-examination. Article 69 para. 1 requires every witness to "give an undertaking as to the truthfulness of the evidence to be given by that witness". In so doing, the witness submits to the possibility of prosecution for perjured testimony[178]. Although there is a lack of consistency with the terminology used in article 67 para. 1 (h), logically, testimony subsequent to the undertaking as to truthfulness must be the equivalent of a "sworn statement". Therefore, the "unsworn statement" seems to present itself as an exception to the general rule requiring that testimony be accompanied by an undertaking as to truthfulness. Although the judges cannot consider the accused's decision not to testify as a factor influencing guilt or innocence, pursuant to article 67 para. 1 (g), this surely does not require them to attribute the same weight to the unsworn statement of an accused as they would to sworn testimony. But an alternative view suggests that the unsworn statement is not evidence at all. If it is not, then the Court may not base its judgment on "facts" revealed in the course of the unsworn statement[179]. An accused who believes the unsworn statement is a way to introduce evidence might have an unfortunate surprise if the Court, in its final judgment, indicates that it does not consider such "facts" as being part of the record. **49**

(i) Reverse onus

The prohibition of any reverse onus or duty or rebuttal is really a corollary of the presumption of innocence, protected by article 66 of the ICC *Statute*. Reverse onus provisions are common to most criminal law systems. Upon proof of one fact, the Court is entitled, or in some cases is obliged, to conclude that another fact has been proven. Thus, the prosecution does not in reality prove a decisive fact in the case against the accused. The accused bears the onus of disproving such a fact, sometimes by raising a reasonable doubt as to its existence, and sometimes by actually proving the contrary, according to the principle of preponderance of evidence. Although many offences in national criminal codes are drafted in such a fashion, there are no examples in the ICC *Statute*. This does not mean that a reverse onus issue may not arise. For example, in the *Čelebići* trial before the ICTY, the Trial Chamber noted that "there is a presumption of sanity of the person alleged to have committed the offence"[180] and that the accused who raises a defence of insanity or diminished mental capacity "is to rebut the presumption of sanity"[181]. This question is discussed in greater detail in the commentary on article 66, particularly margin Nos. 18-22. **50**

The provision was not included in the ILC Draft Statute, nor did it form part of the first series of amendments, during the 1996 sessions of the Preparatory Committee. Article 67 para. 1 (i) was proposed during the August 1997 meeting, although it was left in square brackets[182]. It posed no problem during the debates at Rome and was adopted promptly[183]. **51**

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[178] *Supra* note 4, Rome Statute, article 70 para. 1 (a).
[179] *Ibid.*, article 74 para. 2.
[180] *Prosecutor* v. *Delalić* et al., Case No. IT-96-21-T, Judgment, 16 Nov. 1998, para. 1157.
[181] *Ibid.*, para. 1158.
[182] *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; also: *supra* note 20, Zutphen Draft, p. 155; *supra* note 20, Draft Statute, p. 128. Note the error in the *nota bene* at the end of article 60 in the Zutphen Draft. The reference is to paragraph 1 in general, and not to subparagraph 1 (j). The error is corrected in the Draft Statute of April 1998.
[183] *Supra* note 22, Draft proposal for article 67, p. 5; *supra* note 22, Compendium of draft articles, p. 42; Draft Statute for the International Criminal Court, U.N. Doc. A/CONF.183/C.1/L.76/Add.6, p. 5.

II. Paragraph 2

52 International human rights law is somewhat uncertain as to an obligation on the prosecution to disclose evidence to the defence prior to trial. Although the instruments impose no clear duty in this respect[184], recently, the European Court of Human Rights has declared "that it is a requirement of fairness ... that the prosecution authorities disclose to the defence all material evidence for or against the accused"[185]. The Rules of the *ad hoc* Tribunals make detailed provision for disclosure of the prosecution case and, according to recent amendments, for the defence case as well[186]. A duty on the prosecution to disclose its evidence, both exculpatory and inculpatory, is now recognized in many legal systems[187]. Existence of a reciprocal duty on the defence is less common although in some cases, such as a defence of alibi, the credibility of the defence will depend on prompt disclosure of material facts[188]. In an interlocutory decision in the *Tadić* case, Judge Stephen said the defence has "no disclosure obligation at all unless an alibi or a special defence is sought to be relied upon and then only to a quite limited extent ..."[189]. It is obvious that the defence can never be required to disclose inculpatory evidence, as this would violate the right against self-incrimination set out in paragraph (g).

53 In an effort to clarify this point, the ILC proposed the following provisions, to comprise a second paragraph in the article on rights of the accused: "Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide"[190]. At the August 1996 session of the Preparatory Committee, delegates observed that it was fundamental to a fair trial that provision be made for the full disclosure of evidence by the Prosecutor to the defence, and not only exculpatory evidence, as well as a reciprocal duty of disclosure on the part of the defence[191]. At Rome, a new version submitted by Australia formed the basis of debate[192]. The Drafting Committee added, at the beginning of the Australian text, the words "[i]n addition to any other disclosure provided for in this Statute ...". Australia had left two options as to the body competent for resolving questions about whether or not disclosure was required, the Pre-Trial Chamber and the Trial Chamber. The Preparatory Committee did not choose either, leaving the matter to "the Court"[193].

54 It is perhaps unfortunate that the obligation on the prosecution to disclose all relevant evidence is not explicitly included within the provision concerning rights of the defence. It is surely implicit in the general right to a "fair hearing" found within the *chapeau* of article 67, especially in light of recent case law of international human rights tribunals. Moreover, article

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184 The closest is Principle 21 of the United Nations Basic Principles on the Role of Lawyers, U.N. Doc. A/CONF.144/28/Rev.1 (1990): "It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients".

185 *Edwards* v. *United Kingdom*, Ser. A, No. 247B, 16 Dec. 1992.

186 *Supra* note 85, Rules of Procedure and Evidence, Rule 66. See: *supra* note 32, A.-M. La Rosa, 974.

187 *Supra* note 174, J. Pradel, 414-420.

188 *Williams* v. *Florida*, 399 U.S. 78 (1970).

189 *Prosecutor* v. *Tadić*, Case No. IT-94-1-T, Separate opinion of Judge Stephen on prosecution motion for production of defence witness statements, 27 Nov. 1996.

190 *Supra* note 15, 1994 ILC Draft Statute, p. 115.

191 *Supra* note 18, 1996 Preparatory Committee I, para. 274, p. 58.

192 Proposal submitted by Australia, U.N. Doc. A/CONF.183/C.1/WGPM/L.35 (29 June), p. 1: "The Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the [Pre-Trial Chamber/Trial Chamber] shall decide". There were other proposals relating to article 67 para. 2: *supra* note 41, Proposal submitted by the United Kingdom of Great Britain and Northern Ireland, p. 1; *supra* note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

193 *Supra* note 22, Draft proposal for article 67; *supra* note 76, Report of the Working Group on Procedural Matters (11 July), pp. 3-4.

64 of the *Statute*, entitled "Functions and powers of the Trial Chamber", requires that the Trial Chamber "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused". In this context, the *Statute* imposes upon the Trial Chamber assigned to deal with a case the obligation ("the Trial Chamber ... *shall*"; the ILC Draft had left this to the discretion of the Presidency[194]) "[s]ubject to any other relevant provisions of this Statute, [to] provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial". The relevant provisions that may qualify somewhat this duty on the prosecution are article 68 para. 5, concerning protection of witnesses, and article 72 para. 1, concerning protection of national security information, which makes express reference to article 67 para. 2.

The ICTY has set guidelines for disclosure pursuant to its rule 66. The Tribunal has concluded that documents and other objects "material to the preparation of the Defence" consist of material that is "... significantly helpful to an understanding of important inculpatory or exculpatory evidence; it is material if there is a strong indication that ... it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal'"[195]. 55

The Rules of Procedure and Evidence of the International Criminal Court establish a thorough regime of disclosure, applicable to both Prosecutor and defence. The prosecution is required to provide the defence with the names of witnesses it intends to call at trial together with copies of their statements, subject to certain exceptions relating to the protection of the witnesses themselves[196]. The defence has a corresponding obligation with respect to witnesses, although this is worded slightly more narrowly, applying only to those expected to support specific defences[197]. Both sides are required to allow the other to inspect books, documents, photographs and other tangible objects in their possession or control which they intend to use as evidence. The Prosecutor must also disclose any such items that may assist the defence, although a comparable duty is not imposed upon the defence to disclose items that might assist the prosecution[198].

The second sentence of article 67 para. 2 provides for a determination by the Court in cases where the prosecution is not sure about the nature of the evidence. An early amendment described this as a hearing "*ex parte*" and "*in camera*"[199]. The August 1997 session of the Preparatory Committee included a cross-reference to the provision enabling the Court to make orders for the conduct of the trial (now article 64 para. 3)[200]. Given that there are obligations of disclosure at both the pre-trial and the trial phase, and that the obligation set out in article 67 para. 2 must be respected "as soon as practicable", the appropriate body would be either the Pre-Trial Chamber or the Trial Chamber, depending on the circumstances. It is unclear whether this provision entitles the Prosecutor to seek a ruling in cases of doubt, or whether the defence could also apply where it suspects the Prosecution may have such evidence. There may be circumstances where the Prosecutor cannot seek such a determination without informing the Court of the evidence in question, and it would obviously defeat the purpose of the provision to allow the defence access to such evidence prior to the determination by the Court that it must be disclosed. Yet the defence is entitled to be present at trial, and the trial must be public. Should the Court decide to conduct some form of *ex parte* determination, this must be done with the 56

194 *Supra* note 15, 1994 ILC Draft Statute, article 27 para. 5 (b), p. 95.
195 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 Sep. 1996.
196 *Supra* note 54, Rules of Procedure and Evidence, rule 76.
197 *Ibid.*, rule 79.
198 *Ibid.*, rules 77–78.
199 *Supra* note 78, 1996 Preparatory Committee II, p. 200.
200 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; also: *supra* note 20, Zutphen Draft, p. 115; *supra* note 20, Draft Statute, p. 128.

greatest discretion. The Court might consider appointing a *amicus curiae* to ensure that the rights of the defence are protected and to assess, in appropriate circumstances, the usefulness of an appeal of its decision pursuant to article 81 para. 2 (d) of the *Statute*.

C. Special Remarks

1. Omitted provisions

57 The drafts of article 67 that were considered by the Preparatory Committee contained two provisions based rather closely on the United States constitutional model rather than the international instruments. The first concerned the protection against unreasonable search and seizure[201], while the second provided a guarantee not to be deprived of life or liberty without due process[202]. Another proposal entitled the accused to invoke the Court's power to compel state co-operation in order to assist the defence in the preparation of its case[203]. They were deleted at the Rome Conference[204]. The due process proposal is derived from article V of the United States Bill of Rights, which is an anachronistic provision, in that it recognizes the legitimacy of capital punishment, something which is excluded from the Rome Statute[205] and prohibited by contemporary human rights norms[206]. In any case, the notion of "due process" is comprised within that of "fair trial" in the *chapeau* of article 67 para. 1. Search and seizure, too, is governed by other provisions in the Statute. The protection against unreasonable search and seizure in effect enables a court to sanction misconduct at the investigation stage. Here, the Court has the power to exclude evidence, pursuant to article 69 para. 7 (b), where its admission "would be antithetical to and would seriously damage the integrity of the proceedings". Finally, the state co-operation provision is also incorporated in other provisions of the Statute.

2. Role of article 67 in the applicable law

58 Article 67 closely resembles article 14 para. 3 of the *ICCPR*, as well as the various fair trial clauses found in national constitutions. It is not, however, a typical provision found within criminal or penal codes as such. In effect, such clauses generally belong in constitution-type instruments, and claim a judicial role which is hierarchically superior to the criminal law texts that they frame and control. It is against the constitutional fair trial standard that provisions of the ordinary criminal law, as well as actions of the authorities in implementing it, including those of the Courts, are to be assessed. In national legal systems, two principal consequences result: where a provision of the ordinary criminal law is in conflict with the fundamental fair trial norm, the former must give way to the latter; where the investigating authorities, the prosecution or the Courts themselves have breached the fair trial rights of the accused, the

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201 *Supra* note 78, 1996 Preparatory Committee II, pp. 200-201; *supra* note 20, Zutphen Draft, p. 115; *supra* note 20, Draft Statute, p. 128.

202 *Supra* note 78, 1996 Preparatory Committee II, p. 201; *supra* note 20, Zutphen Draft, p. 115; *supra* note 20, Draft Statute, p. 128.

203 *Supra* note 20, Zutphen Draft, p. 115; *supra* note 20, Draft Statute, p. 128.

204 See also: *supra* note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

205 *Supra* note 4, Rome Statute, article 77.

206 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. No. 114, *entered into force* 30 Mar. 1985; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in all Circumstances, E.T.S. No. 187, *entered into force* 7 Jan. 2003; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty, G.A. Res. 44/128, *entered into force* 7 July 1991; Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S.T.S. No. 73, 29 I.L.M. 1447, *entered into force* 6 Oct. 1993. See W.A. Schabas, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (3rd ed. 2003).

Courts must grant an appropriate remedy, which may range from compensation to an order for a new trial and even, in some systems, the right to a stay of proceedings.

The application of these concepts to the ICC *Statute* is not obvious, and this raises questions about the role of article 67 itself within the general structure and legal philosophy of the *Statute*. To take the case of a breach of article 67 by the investigating authorities, the prosecution or the Courts, a number of scenarios may be contemplated. Although article 67 applies at the trial stage of the proceedings, it may be threatened by pre-trial events, such as irregular or illegal investigation, either by the national authorities or by the Prosecutor's office. The *Statute* provides the Court with the power to exclude evidence in cases of abuse[207] but there may be breaches of article 67 for which this may be an insufficient or inappropriate remedy. For example, what is the Court to do in cases of a violation of the right to a speedy trial, set out in article 67 para. 1 (c)? An acquittal would be inappropriate, because there would be nothing to suggest the innocence of the accused, and such a finding would offend the victims. The obvious remedy would be to suspend or stay the proceedings, but no such power is set out, at least explicitly, within the *Statute*. Moreover, it would seem unlikely that the Court will intervene to sanction what would quite possibly be, in effect, its own shortcomings. The accused is also entitled to a fair trial "in full equality", which must surely mean that he or she is protected from abusive prosecution based, for example, on prohibited criteria such as race, national origin or gender. The only conceivable remedy would be a stay of proceedings, as the Court must prevent abuse of its own process by the Prosecutor. Other examples abound, as a cursory review of constitutional jurisprudence of national courts indicates. **59**

Even more difficult is the problem of applicable law that is incompatible with article 67. In some cases, provisions of the *Statute* are explicitly protected from conflict with article 67. For example, article 67 para. 1 (d) employs the words "[s]ubject to article 63, paragraph 2 ...". In others, it was surely the intent to the *Statute*'s drafters to except other provisions from the scope of article 67. For example, despite the right to "raise defences" set out in article 67 para. 1 (e), this cannot be unlimited, because other provisions of the *Statute* prohibit or limit the defences of official capacity and superior orders. What if a provision of the applicable law is not sheltered, either implicitly or explicitly, from article 67? Can the Court determine that it is inoperative to the extent that there is an incompatibility with the provisions of article 67? If the Court may indeed make such a determination, does this only cover procedural issues or does it also concern substantive law? **60**

It is suggested that article 67, given its unique formulation and its historical origin, may be entitled to a form of hierarchically superior status within the *Statute*. In appropriate cases, some of which may have been unthinkable in July 1998 but which may become apparent over time, the Court may be required to declare provisions of the *Statute* inoperative because they conflict with article 67. The "fair trial" norm in the *chapeau* of article 67 para. 1 is a powerful concept and one that will evolve, in keeping with the development of international human rights law. Provisions of the *Statute* that meet the fair trial standard in 1998 may no longer do so at some point in the future. **61**

But for the sake of argument, even if it is assumed that the other norms in the Statute are either compatible with article 67 or else they are implicit or explicit exceptions to it, it must be born in mind that much of the applicable law remains to be devised. The two other principal sources, the Rules of Procedure and Evidence and the Elements of Crimes, are hierarchically subordinate to the *Statute*. Article 52 para. 5 of the *Rome Statute* declares that in the event of conflict between it and the Rules, the *Statute* shall prevail. Rules of evidence adopted by the Assembly of States Parties may conflict with fair trial rights enshrined in article 67[208], and the

[207] *Supra* note 4, Rome Statute, article 69 para. 7 (b).

[208] For an example drawn from the Rules of the ICTY, see: A.-M. La Rosa, *Défi de taille pour les Tribunaux pénaux internationaux: conciliation des exigences du droit international humanitaire et d'une procédure*

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Court is clearly entitled to disregard them or declare them inoperative in such cases. Moreover, the wording of article 67 – particularly its reference to defences and to onus of proof – suggests that this extends to substantive as well as procedural matters.

équitable, 828 REV. INT'L CROIX-ROUGE 677, 680-684 (1997).

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An Introduction to the International Criminal Court

Third Edition

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General principles of criminal law

The statutes of the Nuremberg and Tokyo tribunals, as well as those of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, are very thin when it comes to what criminal lawyers call 'general principles'. Once the crimes were defined, the drafters of these earlier models left issues such as the appreciation of the evidence or the assessment of responsibility for accomplices and other 'secondary' offenders to the discretion of the judges. After all, those appointed to preside over these tribunals were eminent jurists in their own countries and could draw on a rich, multi-cultural resource of domestic criminal law practice. The Rome Statute is far less generous to the judges. It seeks to delimit in great detail any possible exercise of judicial discretion. Part 3 of the Statute, consisting of Articles 22–33, is entitled 'General principles of criminal law'.[1] It directs the Court on such issues as criminal participation, the mental element of crimes and the availability of various defences. But elsewhere in the Statute can be found other provisions that are also germane to the issue of general principles. They present a fascinating experiment in comparative criminal law, drawing upon elements from the common law, the Romano-Germanic system, *Sharia* law and other regimes of penal justice.

Sources of law

Article 21 of the Rome Statute, entitled 'Applicable law', sets out the legal sources upon which the International Criminal Court may draw. The

[1] On the general principles, see Per Saland, 'International Criminal Law Principles', in Roy Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague: Kluwer Law International, 1999, pp. 189–216; William A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)', (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 84; Kai Ambos, 'General Principles of Law in the Rome Statute', (1999) 10 *Criminal Law Forum* 1; Robert Cryer, 'General Principles of Liability in International Criminal Law', in Dominic McGoldrick, Peter Rowe and Eric Donnelly, eds., *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford and Portland, OR: Hart Publishing, 2004, pp. 233–62.

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humanitarian law instruments.[48] The general right to a 'fair hearing' established in the *chapeau* of Article 67 of the Statute provides defendants with a powerful tool to go beyond the text of the Statute, and to require that the Court's respect for the rights of an accused keep pace with the progressive development of human rights law. Although Article 67 is placed with the provisions dealing with the trial itself, the right to a fair hearing applies at all stages of the proceedings, and even during the investigation, when no defendant has even been identified.[49] The case law of the Strasbourg organs, established to implement the European Convention on Human Rights, has used this residual right to a fair hearing to fill in some of the gaps in the more specific provisions.[50] That the term 'fair hearing' invites the Court to exceed the precise terms of Article 67 in appropriate circumstances is confirmed by the reference within the *chapeau* to 'minimum guarantees'. As Judge Steiner, sitting as a single judge of Pre-Trial Chamber I, has noted, the reference to 'minimum guarantees' in Article 67(1) means that sometimes the competent Chamber will need to go beyond the terms of Article 67 itself. She cited the case law of the European Court of Human Rights in support.[51] The term 'fair hearing' also suggests that, where individual problems with specific rights set out in Article 67 do not, on their own, amount to a violation, the requirement of a fair hearing may allow a cumulative view and lead to the conclusion that there is a breach where there have been a number of apparently minor or less significant encroachments on Article 67.[52]

[48] Geneva Convention (III) Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, Arts. 84–87 and 99–108; Geneva Convention (IV) Relative to the Protection of Civilians, (1950) 75 UNTS 287, Arts. 5 and 64–76; Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3, Art. 75; Protocol Additional II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 3, Art. 6.

[49] *Situation in the Democratic Republic of Congo* (ICC-01/04), Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, para. 35.

[50] D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London: Butterworths, 1995, pp. 202–3.

[51] *Lubanga* (ICC-01/04–01/06), Décision relative au système définitif de divulgation et à l'établissment d'un échéancier, Annexe I, Analyse de la décisions relative au système définitif de divulgation, 15 May 2006, para. 97. Judge Steiner also referred to the previous edition of this book as authority for such a view.

[52] *Stanford* v. *United Kingdom*, Series A, No. 182-A, 30 August 1990, para. 24.

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CHAPITRE 2
L'ÉLÉMENT MORAL

253 ***Nécessité de l'élément moral*** ◇ Pour que l'infraction existe juridiquement, il ne suffit pas qu'un acte matériel (élément matériel), prévu et puni par la loi pénale ait été commis, il faut encore que cet acte matériel ait été l'œuvre de la volonté de son auteur. Ce lien entre l'acte et l'auteur, que le droit anglais appelle la *mens rea* (la volonté criminelle) par opposition à l'*actus reus* (acte criminel), constitue *l'élément moral* [1]. Il faut que l'élément moral se joigne à l'élément matériel (qu'il apparaisse avant, après, ou au même moment) pour que l'infraction soit constituée [2].

Le législateur en effet ne punit que les conséquences antisociales d'un acte volontaire. En l'absence de volonté, en cas de force majeure par exemple, il n'y a pas d'infraction. Cela est vrai non seulement pour les infractions dites intentionnelles, telles que les crimes et la majorité des délits, mais encore pour les infractions appelées non intentionnelles comme par exemple les délits d'imprudence et la plupart des contraventions de police [3].

Sans doute on a prétendu, et même jugé, que les contraventions de police étaient des infractions purement matérielles qui se trouvaient réalisées du seul fait de l'accomplissement de l'acte prohibé par la loi ou le

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1. Pour quelques auteurs, l'élément moral n'est pas un élément constitutif de l'infraction, mais une condition psychologique de la culpabilité de l'auteur d'une infraction, objectivement constituée (MERLE et VITU « Traité de droit criminel », 7e éd., n° 572 et ss. ; Comp. G. LEVASSEUR « Étude de l'élément moral de l'infraction », *Annales de la Faculté de droit de Toulouse*, t. XVIII, fac. 1, p. 81 et ss.). Pour d'autres, une fois l'imputabilité établie, il faut rechercher si la société reproche une « réaction hostile aux règles sociales », (A.C. DANA, Essai sur la notion d'infraction pénale, p. 343). Quelques auteurs estiment qu'il y a essentiellement l'acte et que les aspects psychologiques intéressent la responsabilité de l'agent (PRADEL, 12e éd., n° 493). A vrai dire, l'élément moral est bien un composante de l'infraction puisque, en son absence, le juge d'instruction est en droit de rendre une décision de non-lieu, et le juge de jugement une décision de relaxe ou d'acquittement.

2. Dans les comportements qui se poursuivent dans le temps, et constituent des infractions successives, la *mala fides superviens* pouvait rendre délictueux à partir d'un certain moment un comportement qui jusque-là était licite. Tel était le cas pour le recel, par exemple, lorsque le détenteur apprend l'origine de la chose (Crim. 22 juin 1972, *Gaz. Pal.*, 1972.1.842 et la note, *Bull.* n° 220 ; Crim. 15 juin 1973, *D.* 1973, *Inf. Rap.*, p. 158). Mais un revirement de jurisprudence s'est produit : Crim. 24 nov. 1977, *D.* 1978, J. p. 42, note KEHRIG « L'acquéreur d'un bien mobilier ne saurait être déclaré coupable de recel, lorsque la régularité de la possession et la bonne foi impliquent la réunion des conditions d'application de l'article 2279 C. civil », c'est-à-dire lorsqu'il est propriétaire de ce bien ; on ne peut être receleur de sa propre chose. V. aussi Crim. 24 janv. 1978, *Bull. crim.* n° 27 ; Crim. 3 déc. 1984, *Bull. crim.* n° 381.

3. Sur les adages concernant la nécessité d'une volonté coupable en droit romain et sous l'ancien droit, voir LAINGUI, *Rev. sc. crim.*, 1986, p. 38 et ss.

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règlement [1]. Mais la loi admet qu'une contravention puisse ne pas exister en cas de force majeure [2], et l'on reconnaît que les causes subjectives de non-culpabilité prévues par l'art. 122-1 à 122-3 C. Pén. font disparaître l'infraction, même en cas de simple contravention.

C'est dire que l'infraction, qu'il s'agisse d'un crime d'un délit ou d'une contravention, n'est constituée et donc punissable que si un auteur a eu la volonté ou la conscience de violer la loi pénale. Cette volonté ou conscience constitue l'élément commun à toutes les infractions. C'est donc à tort que l'on parle souvent « d'infraction involontaire ». L'expression « atteinte involontaire à la vie » par laquelle le Code pénal désigne l'homicide et les blessures par imprudence (art. 221-6 et 222-19) ne signifie nullement que ces délits ne sont pas l'œuvre d'une volonté (l'acte d'imprudence a été voulu) mais seulement que leurs conséquences n'ont pas été voulues.

Toujours nécessaire à l'existence de l'infraction — tous les actes délictueux sont volontaires — la volonté n'a cependant pas toujours le même rôle, ni la même étendue [3]. Tantôt elle ne porte que sur l'acte lui-même ; tantôt elle porte à la fois sur l'acte et sur ses conséquences. Lorsque l'auteur a voulu l'acte et ses conséquences et qu'il a accompli l'acte pour les produire, on dit qu'il y a intention criminelle ou dol pénal (meurtre, assassinat, vol, etc.). Quand l'auteur a voulu l'acte mais sans en vouloir les conséquences, qu'il aurait dû prévoir et pu éviter, on dit qu'il y a faute pénale (atteinte involontaire à la vie ou à l'intégrité physique, la plupart des contraventions).

254 ***Intention et faute*** ◇ Cette distinction de l'intention criminelle et de la faute n'est pas nettement posée dans notre législation. Les mots « intention » ou « dol » et « faute » étaient rarement employés par l'ancien Code pénal ou les lois postérieures. On trouvait plutôt les mots « préméditation, frauduleusement, sciemment, à dessein » ou même « volontairement ». Par ailleurs, le terme « faute »ne figurait guère dans les textes ; pour désigner la faute, le législateur parlait de « maladresse, d'imprudence ou de négligence » ou « de défaut d'adresse ou de précaution » (art. 320 C. pén). Quelquefois même, il passait complètement sous silence l'existence de l'intention ou de la faute, et c'est la jurisprudence qui indiquait si l'infraction nécessitait une faute prouvée [4] ou une faute

1. V. à propos de la contravention de dégradation de chemins publics (anc. art. R. 34-11°) : Crim. 7 mars 1918, S. 1921.I.89 note ROUX.

2. Crim. 15 mai 1926, S. 1928.I.33, note ROUX.

3. Sur l'élément moral en droit comparé, cf. BROSENS, « L'élément moral dans les infractions et le futur code pénal belge », *Rev. dr. pén. crimin.*, 1980, p. 407.

4. Depuis la loi du 29 déc. 1977 (art. 2), la Cour de Cassation décide qu'en matière de fraudes fiscales (art. 1741 et 1743 C.G.I.), il incombe au Ministère public et à l'administration, parties poursuivantes, de rapporter la preuve du caractère intentionnel soit de la soustraction soit de la tentative de soustraction à l'établissement ou au paiement des impôts : Crim. 5 juin 1979, *J.C.P.*, 1979.IV.263, *Rev. soc.*, 1980, p. 1980, p. 106, note B. BOULOC ; Crim. 8 juin 1979, *D.* 1979, *Inf. Rap.*, 527 ; Crim. 17 oct. 1983, *Rev. soc.*, 1985, p. 149 note B. BOULOC ; Crim. 29 juin 1987, *Bull.*

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présumée [1], ou bien si l'élément moral devait obligatoirement consister dans une intention criminelle.

Et cependant, en ce qui concerne l'élément moral, la distinction de l'intention et de la faute est si importante que plusieurs législations étrangères en ont fait la base de leur division des infractions. A la classification tripartite de notre droit, en crimes, délits et contraventions, fondée apparemment sur la peine mais en réalité sur la gravité objective de l'acte, elles ont substitué une classification bipartite, en délits (crimes et délits), c'est-à-dire infractions intentionnelles d'une part, et contraventions, c'est-à-dire infractions non intentionnelles d'autre part (C. pén. norvégien de 1902, C. pén. italien de 1930, C. espagnol de 1944). Satisfaisante pour l'esprit, cette division serait difficile à appliquer dans notre droit positif, où tous les délits ne sont pas intentionnels (il y a, en effet, des délits d'imprudence), et où il existe des contraventions intentionnelles telles le dommage volontairement causé à la propriété mobilière ou immobilière d'autrui et la contravention de coups et blessures volontaires. De plus, cette division bipartite bouleverserait notre organisation judiciaire répressive, et la compétence respective des cours d'assises (crimes), des tribunaux correctionnels (délits) et des tribunaux de police (contraventions). Le droit français qualifiait cependant différemment les mêmes agissements selon qu'ils ont eu lieu de façon intentionnelle (auquel cas il y a crime ou délit) ou non intentionnelle (auquel cas il y a simplement contravention [2]).

Les rédacteurs du nouveau Code pénal ont, ce point, adopté une règle plus claire. Selon l'art. 121-3, « il n'y a pas de crime ou de délit sans intention de le commettre ». Le principe est donc que les infractions graves (crimes ou délits) sont naturellement intentionnelles. Toutefois, ils ont prévu, lorsque la loi en disposerait ainsi, qu'il y aurait délit en cas de mise en danger délibérée de la personne d'autrui et également en cas d'imprudence ou de négligence. Ainsi, une faute peut suffire en matière de délits. Par ailleurs, l'art 339 de la loi d'adaptation 16 décembre 1992 a entendu régler la question pour les délits matériels résultant de textes antérieurs au nouveau Code pénal. Ceux-ci ne peuvent être constitués qu'en cas d'imprudence, de négligence ou de mise en danger délibérée de la personne d'autrui. Cette disposition impose donc la constatation d'une faute pour les délits non intentionnels régis par des lois spéciales [3]. Quant aux contraventions, elles

n° 269. En matière de délit d'émission de chèques sans provision, la Cour de Cassation avait décidé, après la loi du 3 janvier 1975 et avant celle du 31 décembre 1991, que l'intention requise consiste dans la conscience de ce que le chèque sera impayé et dans la volonté de le laisser impayé (Crim. 3 avril 1979, *Bull. crim.* n° 133 ; Crim. 5 oct. 1983, *D.* 1984, p. 461). En matière de défense faite au tiré de payer (délit dit de blocage de la provision), l'intention de porter atteinte aux droits d'autrui n'existait pas s'il y avait contestation sur le montant de la créance : Crim. 13 avril 1983, *Bull. crim.* n° 102, *D.* 1984, p. 461 note B. BOULOC.

1. Elle faisait état, non plus d'infraction non intentionnelle, mais d'*infraction matérielle*, voir Crim. 28 avr. 1977, *D.* 1978, J. 149, note M.L. RASSAT, (pollution des cours d'eau).

2. V. par exemple en matière de fraude (L. 1er août 1905, art. 1 et ss. et 13 et ss. ; B. BOULOC, « La loi du 1er août 1905 en tant qu'instrument de la sécurité du consommateur » *in* ouvrage collectif sur la sécurité des consommateurs, L.G.D.J. 1987) ; ou de circulation routière (art. L. 10 et R. 241 code route : Crim. 28 févr. 1973, *Bull.* n° 101).

3. Certains auteurs ont prétendu que ce texte contredirait l'art. 121-3 C. Pén. et que la circulaire serait d'une obscure clarté (SOYER, droit pénal et proc. pénale, 14e éd., nos 202 à 205). A

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peuvent comporter un élément intentionnel, ou une faute, mais celle-ci ne peut pas être retenue en cas de force majeure.

Il importe dès lors d'étudier, tout d'abord l'intention ou dol criminel (section 1) la faute pénale (section 2) et enfin la distinction des infractions intentionnelles et des infractions non intentionnelles (section 3).

SECTION 1. L'INTENTION OU DOL CRIMINEL

355 L'intention ou dol criminel constitue l'élément moral (sans doute est-il préférable de parler d'*élément psychologique*) dans les crimes, la plupart des délits [1] et exceptionnellement certaines contraventions [2]. Cette intention ne peut évidemment se concevoir que dans la mesure où la personne est dotée de conscience ; c'est pourquoi chez le dément, la question de l'existence de l'intention ne se pose même pas. En revanche, dans l'hypothèse de la contrainte, l'agent a conscience, et même a voulu l'acte, mais il n'était pas libre d'agir différemment, de sorte que sa responsabilité pénale sera écartée, bien que l'infraction ait été pleinement constituée.

la vérité, l'art. 339, d'origine législative est une mesure d'adaptation des solutions anciennes à la loi nouvelle, et signifie qu'une faute doit être établie pour qu'il soit possible de reconnaître la culpabilité de l'agent. Saisie de ce problème à propos d'infractions jugées avant le 1er mars 1994, la Cour de cassation a décidé que la constatation de la violation en connaissance de cause d'une prescription légale ou réglementaire impliquait l'intention coupable : Crim. 25 mai 1994, *Bull.* n° 203, *Rev. sc. crim.* 1995, p. 97, obs. BOULOC (vente sans facture) ; Crim. 12 juillet 1994, *Bull.* n° 280 (construction) ; Crim. 28 nov. 1994, *Bull.* n° 380 *Rev. sc. crim.* 1995, p. 570, obs. BOULOC (contributions indirectes) ; Crim. 14 déc. 1994, *Bull.* n° 415 (publicité trompeuse). V. aussi Crim. 25 oct. 1995, *Bull.* n° 322 ; Crim.26 oct. 1999, *Bull.* n° 233.

1. Bien que l'art. 121-3 C. Pén. exige en principe une intention, de nombreux textes croient nécessaire de faire état de la fraude ou de l'action volontaire (V. art. 311-1, 223-5, 313-4...). En matière de publicité trompeuse, depuis la loi du 27 décembre 1973, la mauvaise foi de l'agent n'est plus exigée : Crim. 8 mars 1978, *J.C.P.* 1979.II.19019 note FOURGOUX ; Crim. 4 déc. 1978, *D.* 1979, *Inf. Rap.*, 186 note ROUJOU DE BOUBÉE ; Crim. 13 mars 1979, *J.C.P.*, 1979.IV.179 ; Crim. 3 janvier 1984, *Bull.* n° 450 ; Crim. 5 avril 1995, *Bull.* n° 151.

2. Il faut tenir compte du fait que, même lorsqu'elle proclame que l'élément moral d'une infraction est un dol (intention criminelle), la jurisprudence se contente parfois, en pratique, d'un comportement qui ne dépasse guère la faute d'imprudence ; tel est le cas en matière de recel, de fraudes sur la qualité de la marchandise vendue, etc. La Cour de Cassation estime par ailleurs, que l'existence d'une intention coupable est implicitement contenue dans les constatations des juges du fait concernant l'élément matériel. Il en est ainsi depuis longtemps en matière de diffamation, de fraude dans les ventes (Crim. 21 juillet 1977, *D.* 1978, I.R. 111, note PUECH ; Crim. 11 oct. 1989, *Bull.* n° 355) ou le détournement dans le délit d'abus de confiance (Crim. 4 juill. 1972, *Bull.* n° 228 ; Crim. 5 avril 1973, *Bull.* n° 177, *D.* 1973, *Inf. Rap.*, p. 113 ; Crim. 9 avr. 1973, *Bull.* n° 179, *D.* 1973, *Inf. Rap.*, p. 133 ; Crim. 16 mars 1987, *Bull.* n° 122). En matière de pollution de cours d'eau, le prévenu ne peut être exonéré que par la force majeure (Crim. 28 avr. 1977, *D.* 1978, J. 149, note M.L. RASSAT, *J.C.P.* 1978.II.18931 note Mme DELMAS-MARTY). En matière de délits de société : V. Crim. 7 nov. 1983, *Rev. soc.*, 1984, p. 327, note BOULOC ; mais voir : Crim. 17 oct. 1983, *Bull. crim.* n° 246 et surtout Crim. 19 déc. 1973, *Rev. soc.*, 1974, p. 363, note BOULOC (abus de biens sociaux), et Crim. 1 mars 2000, *Bull.* n° 101 (nécessité de recherche l'interêt personnel du dirigeant).

§ 1. Définition et notion de l'intention criminelle

256 Au sens étymologique, l'intention *(intendere)* est la volonté tendue vers un certain but ; c'est une volonté dirigée. En droit pénal, l'intention criminelle qu'on appelle aussi le dol criminel est donc la volonté tendue à dessein vers un but interdit par la loi pénale (tuer ou s'approprier le bien d'autrui). Si le but recherché, quoique contraire en soi à l'ordre social, n'est pas défendu par un texte légal, la volonté de l'atteindre ne constitue pas une intention criminelle.

Partant de ce sens très général, deux notions très différentes de l'intention criminelle ont été dégagées : une notion classique et abstraite à laquelle s'oppose une notion positiviste et concrète.

A. La doctrine classique

257 D'après E. Garçon [1] et la plupart des *criminalistes classiques*, l'intention criminelle réside dans la connaissance ou la conscience chez l'agent qu'il accomplit un acte illicite [2]. D'une façon plus complète et plus précise (car pour qu'il y ait intention il ne suffit pas de connaître, il faut aussi vouloir), elle est la volonté d'accomplir un acte que l'on sait défendu par la loi pénale (homicide, vol, etc.) ou de s'abstenir d'un acte que l'on sait ordonné par la loi (omission volontaire de porter secours à une personne en péril, art. 223-6 C. Pén.).

Il est vrai qu'en raison de la règle *nemo censetur ignorare legem* et de la présomption de connaissance de la loi qu'elle fait peser sur chacun de nous, il n'est pas besoin, pour établir l'intention, de prouver que l'agent connaissait la loi pénale, mais seulement qu'il a eu la volonté de commettre l'acte défendu par la loi. La preuve de l'intention incombe normalement au ministère public [3]. Cependant la jurisprudence admet que, pour certaines infractions, l'existence de l'élément moral résulte de la seule constatation de l'élément matériel [4], ce qui n'est pas contraire à la présomption

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1. Code pénal annoté, 1ère éd. art. I, n° 77.

2. Sur des espèces où la jurisprudence a admis l'absence d'intention, cf. Poitiers 7 févr. 1974, *D.* 1974.693, note PRADEL et ALAPHILIPPE (chantage du commerçant qui exige une somme très supérieure à la valeur de l'objet volé) ; Paris 22 juin 1974, *Gaz. Pal.*, 1974.2. Somm. 290 (abandon de famille).

3. *V. Procédure pénale*, 17e éd., n° 129.

4. C'est le cas pour le délit d'excitation de mineurs à la débauche (art. 334-1, dernier alinéa C. Pén.), pour le délit de contrefaçon d'une œuvre littéraire ou artistique (art. 425 C. Pén., cf. Crim. 15 mai 1934, D. H. 1934, p. 350 ; Crim. 12 juin 1976, *Bull.* n° 209), pour le délit de contrefaçon de marque (Crim. 26 avril 2000, *Bull.* n° 166) et pour le délit de diffamation (Crim. 3 janv. 1970, *D.* 1970, somm. 68 « Les imputations diffamatoires sont réputées faites avec intention coupable et portent elles-mêmes l'intention de nuire » ; Crim. 12 juin 1987, *B.* n° 247 ; Crim. 14 avril 1992, *B.* n° 162 ; Crim. 29 nov. 1994, *Bull.* n° 382). Voir : A. TOULEMON, « L'intention coupable en matière de diffamation » *J.C.P.* 1970.I.1230 ; CONTE, *Mélanges* Chavanne p. 49. Il est possible néanmoins au prévenu de démontrer sa bonne foi, et par suite l'absence d'élément moral, mais la charge de la preuve lui en incombe et le doute ne suffit pas, contrairement

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d'innocence dès lors que l'intéressé a la possibilité de rapporter la preuve contraire [1].

Dans cette conception, l'intention existe du moment que celui qui a accompli l'acte délictueux est une personne vivante, douée de raison et de volonté. Les animaux, les morts et les déments ne peuvent avoir une intention criminelle et par suite ne peuvent tomber sous le coup de la loi pénale. En revanche, dès que la volonté d'accomplir un acte illicite existe, l'infraction intentionnelle se trouve réalisée [2] et la peine doit frapper sans distinction et sans merci, celui qui a commis cet acte, quelles que soient les raisons (mobiles ou motifs) pour lesquelles il l'a voulu [3]. Il importe peu qu'il ait agi par haine, par cupidité, par convoitise, par passion amoureuse ou politique, par fanatisme, par pitié ou sous l'influence de la misère ou de la nécessité. C'est cette conception qu'adopte la Cour de cassation depuis la mise en vigueur du nouveau Code pénal, notamment en ce qui concerne les délits matériels [4].

B. La conception réaliste

218 A cette notion classique s'oppose la *notion réaliste* de l'intention qui a été dégagée par les positivistes, en particulier par Enrico FERRI [5]. Pour ceux-ci, l'intention n'est pas une volonté abstraite, mais une volonté déterminée par un motif ou un mobile. Il faut donc analyser le mobile, rechercher s'il est social ou antisocial ; un fait n'est punissable que s'il a été voulu dans un but contraire à l'ordre social (cf. art. 63 du C. pén. suisse de 1937 ; art. 133 du C. pén. italien de 1930).

Entre la conception classique et la conception réaliste, le droit pénal français a choisi la conception classique : l'intention est tout à fait distincte des mobiles. Aussi, est punissable celui qui a recours à des moyens frauduleux pour tenter de rentrer en possession d'un bien lui appartenant, ou celui

au droit commun (Crim. 16 mai 1973, *Bull.* n° 225, *D.* 1973, *Inf. Rap.*, p. 136). La Cour de Cassation a de même répété fréquement qu'en matière d'abus de confiance, la mauvaise foi peut résulter nécessairement de la constatation du détournement (Crim. 5 nov. 1975, *Bull.* n° 237 ; Crim. 17 mai 1976, *Bull.* n° 159, *D.* 1976, *Inf. Rap.*, p. 177 ; Crim. 12 févr. 1979, *D.* 1979, *Inf. Rap.*, p. 482 ; Crim. 16 mars 1987, *Bull.* n° 122 ; Crim. 3 juillet 1997, *Bull.* n° 265). A propos du délit de pollution des cours d'eau, elle a jugé que « le fait d'avoir laissé s'écouler dans une rivière des substances toxiques implique une faute dont la preuve n'a pas à être spécialement rapportée par le ministère public et dont le prévenu ne peut être exonéré que par la force majeure » (Crim. 28 avr. 1977, *Bull.* n° 148, *D.* 1978.149, note critique M.L. RASSAT). Le droit anglo-américain connaît une solution assez voisine avec l'application de l'adage « *res ipsa loquitur* ».

1. V. Crim. 17 déc. 1991, *B.* n° 481, *Rev. sc. crim.*, 1993, p. 89 obs. BOULOC ; Crim. 1 février 2000, *Bull.* n° 51.

2. V. en matière de fraude fiscale : Crim. 11 janvier 1996, *Bull.* n° 19.

3. En matière de mise en danger délibérée, l'intention résulte du caractère délibéré de la violation d'une obligation particulière de prudence ou de sécurité : Crim. 9 mars 1999, *Bull.* n° 34.

4. V. en matière de construction sans permis : Crim. 25 mai 1994, *Bull.* n° 203 ; Crim. 12 juillet 1994, *Bull.* n° 280 ; Crim. 10 janv. 1996, *Bull.* n° 13. En matière de publicité illicite pour le tabac : Crim. 30 oct. 1995, *Bull.* n° 335.

5. *Sociologie criminelle*, p. 628 et ss. ; Crim. 10 mai 1976, *Bull.* n° 149, *D.* 1976, *Inf. Rap.*, 169.

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qui cherche à empêcher la réalisation d'interruptions volontaires de grossesse en usant de menaces à l'encontre du personnel médical (art. L. 162-15 C. santé publique).

§ 2. Intention et mobile

259 Dans la conception positiviste, l'intention criminelle se confond avec le motif ou tout au moins est conditionnée par lui. D'après la conception classique, au contraire, qui ne voit dans l'intention criminelle qu'une volonté abstraite, l'intention et le mobile sont nettement distincts. Alors que l'intention, qui n'est autre que la volonté consciente d'accomplir un acte illicite est toujours la même, le mobile, c'est-à-dire l'intérêt ou le sentiment qui a déterminé l'action, ou encore « la cause impulsive et déterminante de l'acte criminel » est, par contre, essentiellement variable avec les individus et les circonstances.

Fidèle à cette conception classique, le Code pénal français ne considère que l'intention ; il ne tient aucun compte du mobile [1]. En règle générale, celui-ci est indifférent tant en ce qui concerne l'*existence* de l'infraction que la *répression* de celle-ci.

A. Le mobile et l'existence de l'infraction

260 ***Le principe : le mobile est indifférent*** ◇ En principe, l'infraction intentionnelle est constituée, dès l'instant qu'il y a intention criminelle, quel que soit le mobile de cette infraction [2]. Dans certains cas cependant, la considération du motif peut faire considérer comme licite un acte qui par ses éléments extérieurs participe à la nature d'un délit et inversement faire considérer illicite, un acte, qui sans le mobile qui l'a inspiré, ne le serait pas.

C'est ainsi, prétend-on, qu'il n'y a pas infraction, bien qu'il y ait intention, lorsque l'acte délictueux a été commis en état de légitime défense (art. 122-5 C. Pén.) ou sur

1. Voir : Angers 30 janv. 1969, *Gaz. Pal.*, 1969.I.291 ; Crim. 18 juill. 1973, *Gaz. Pal.*, 1973.2.709, note J.P.D. ; Crim. 13 mars 1974, *Bull.* n° 107, *Gaz. Pal.*, 1974.I.421 ; Crim. 24 févr. 1976, *Bull.* n° 69, D. 1976, *Inf. Rap.*, p. 126 (violences volontaires et dégradation de véhicules). Cf. MIMIN, « L'intention et le mobile », *Mélange Patin*, p. 113.

2. Crim. 21 oct. 1969, *Bull.* n° 258 ; Crim. 18 juill. 1975, *Gaz. Pal.*, 1975.II.661 ; Crim. 8 févr. 1977, *Bull.* n° 52, obs. LEVASSEUR, *Rev. sc. crim.*, 1977, p. 590, n° 3 : la destruction de fleurs sur une tombe constitue le délit de vol « quels qu'en soient les mobiles » ; Crim. 8 déc. 1998, *Bull.* n° 336 ; Crim. 19 mai 1983, *Bull. crim.* n° 150, *Rev. sc. crim.*, 1984, p. 736, obs. LARGUIER : les juges ne peuvent se déterminer par des considérations étrangères au principe de la légalité des délits et des peines et tirées de l'allégation d'un mobile subjectif ; en l'espèce, la raison d'ordre idéologique invoquée par un maître-assistant des facultés de droit pour écarter un délit de fraude fiscale, n'a pas été retenue ; Crim. 7 juin 1988, *Bull.* n° 289 arrêt n° 1, obs. LEVASSEUR, *Rev. sc. crim.*, 1989.107 (plaisanterie) ; Crim. 8 janvier 1992, *Bull.* n° 5 (vente de bois par des ouvriers forestiers pour se payer des salaires non perçus par la suite d'une grève) ; Crim. 21 oct. 1998, *Bull.* n° 273 (refus de vente de produits contraceptifs en raison de convictions personnelles, et non d'une indisponibilité matérielle des produits).

l'ordre de la loi et le commandement de l'autorité légitime (art. 122-4 C. Pén.) ou en état de nécessité parce qu'en ce cas le mobile de l'agent n'est pas antisocial. Il nous paraît plus exact de dire que dans tous ces cas l'acte se trouve justifié par la loi et qu'il ne constitue plus une infraction en raison de la disparition de l'élément légal [1].

S'il est douteux que le mobile à lui seul fasse disparaître l'infraction, il est, en tout cas, certain qu'il est parfois un élément constitutif de l'infraction.

L'exception : la prise en considération du mobile ◇ L'intention criminelle, considérée comme une volonté abstraite, ne suffit plus alors à constituer l'infraction ; celle-ci n'existe qu'en raison du mobile qui l'a inspirée. Ainsi, la loi du 28 juillet 1894 ne réprimait les menées anarchistes que si elles avaient été faites « dans un *but* de propagande anarchiste» (art. 1 et 2). En cas d'atteinte au crédit de l'État, la loi du 12 février 1924 ne frappait que ceux qui avaient agi « dans un but de spéculation ou de dépréciation de la monnaie ».

La considération du but pour l'incrimination apparaît aussi dans certaines atteintes aux intérêts fondamentaux de la Nation. Il est aussi présent dans les actes de terrorisme (art. 421-1 C. Pén.).

La diffamation de certains groupes sociaux n'était réprimée avant la loi du 1er juillet 1972, que si elle avait pour *but* d'exciter à la haine entre les citoyens (loi 29 juill. 1881, art. 32 modifié par décret-loi 21 avril 1939). De même, l'infraction prévue par l'article 434-25 C. Pén. n'est réalisée que si l'auteur commentant la décision judiciaire a cherché à porter atteinte à l'autorité de la Justice [2]. La provocation à l'abandon d'un enfant né ou à naître, comme l'entremise apportée pour faire recueillir ou adopter un enfant, ne sont punissables que si l'agent a agi « dans un esprit de lucre » (art. 227-12 C. pén.). La banqueroute n'est punissable, dans certains cas, que si l'agent a fait des achats en vue d'une revente au-dessous du cours ou a employé des moyens ruineux pour se procurer des fonds, et ce dans l'intention d'éviter ou de retarder l'ouverture de la procédure de redressement judiciaire (art. 197-1, loi du 25 janv. 1985).

Enfin, le délit d'organisation de sa propre insolvabilité, institué par l'art. 1er de la loi du 8 juill. 1983 (art. 314-7 C. Pén.) requiert de l'agent qu'il ait eu en vue de se soustraire à l'exécution d'une condamnation pécuniaire prononcée par une juridiction répressive ou, en matière délictuelle, quasi-délictuelle ou d'aliments, par une juridiction civile.

Ce ne sont là que des cas exceptionnels. En principe, le mobile n'intervient pas dans la constitution du délit ; celui-ci est réalisé par la seule volonté criminelle, abstraction faite du mobile qui l'a déterminée.

1. Crim. 24 févr. 1976, *Inf. Rap.*, 126 et 127, relatif à un délit de dégradation volontaire de véhicules ; Crim. 15 mars 1977, *Bull.* n° 94, *D.* 1977, *Inf. Rap.*, 28, concernant le délit de coups et blessures volontaires. Ces délits sont constitués dès lors qu'il existe un acte volontaire, quel que soit le mobile qui les ait inspirés, et alors même que leur auteur n'aurait pas voulu le dommage qui en est résulté. Il en est de même, nous semble-t-il, dans le cas de justification prévu par l'ordonnance du 6 juillet 1943, dont l'article 1 a déclaré légitimes « tous les actes accomplis postérieurement au 10 juin 1940, *dans le but* de servir la cause de la libération de la France », quand bien même ils auraient constitué des infractions au regard de la législation appliquée à l'époque.

2. Crim. 27 févr. 1964, *D.* 1964.623.

Sans influence sur l'existence ni la qualification de l'infraction, le mobile n'influe pas davantage sur la peine ; il peut, au contraire, jouer un rôle sur le terrain de la compétence et de la procédure.

B. Le mobile et la répression de l'infraction

262 Sans doute, l'article 224-4 du nouveau Code pénal, punit de la peine de la réclusion criminelle de 30 ans, non seulement l'enlèvement d'une personne comme otage, mais encore l'enlèvement accompli *en vue* de se faire payer une rançon, ou d'obtenir l'exécution d'un ordre ou d'une condition. Mais, en règle générale, la loi ne tient pas compte des motifs. Elle prévoit toujours la même peine, *quel qu'ait été le mobile de l'acte*. L'assassin, qu'il ait tué par vengeance, par haine, par pitié (euthanasie) ou par amour (crime passionnel) est punissable de la réclusion criminelle à perpétuité (art. 221-3 C. Pén.). De même qu'il ait volé par cupidité, par convoitise, par habitude, par manie (kleptomane) ou par misère, l'auteur d'un vol simple est toujours exposé à la peine de prison édictée par l'article 311-3 C. Pén.

263 Toutefois si, *en droit*, le mobile n'a aucun effet sur la peine, *en fait* il en est autrement. En vue de corriger la rigueur excessive et automatique de la loi, le juge tient souvent compte des mobiles dans l'application judiciaire de la peine. Les cours d'assises acquittent fréquemment, trop souvent peut-être, les criminels passionnels. Quand le mobile ne lui paraît pas répréhensible, le juge répressif n'hésite pas à acquitter, en déclarant que le prévenu n'est pas coupable et qu'il a agi sans intention délictueuse, ce qui suppose une confusion regrettable entre l'intention et le mobile. Et même, lorsqu'il condamne, en considération du motif qui a inspiré l'auteur, il condamne celui-ci à une peine inférieure au maximum légal, car la loi lui permet de tenir compte des circonstances de l'infraction et de la personnalité de son auteur (art. 132-24 C. Pén.) [1].

Or plutôt que d'acquitter ou de condamner à une peine moins sévère, ne conviendrait-il pas, dans un but de défense sociale, puisque aussi bien un acte antisocial a été commis, d'en punir toujours l'auteur, mais de lui appliquer une sanction d'un caractère différent (déshonorant ou non) suivant le motif qui l'a fait agir ? C'est le système des *peines parallèles*, en vertu duquel le juge, en tenant compte du mobile, peut prononcer soit une peine humiliante et infamante (la réclusion), soit une peine « honorable » (la détention). Sous l'influence de la doctrine néo-classique, le Code pénal italien de 1889 l'avait admis pour certaines infractions (avortement, infanticide, abandon d'enfant nouveau-né) accomplies pour un « mobile d'honneur » ; le Code pénal italien de 1930 n'a pas reproduit ce parallélisme des peines, qui a trouvé son application la plus large dans le Code pénal norvégien de 1902 (art. 24) et l'ancien code pénal de Cuba de 1936 (art. 55).

Il existe bien en droit français une double échelle de peines : peines de droit commun et peines politiques, mais cette double échelle n'existe que pour les crimes,

1. Par exemple pour une modération de la peine : Crim. 25 mars 1998, Dr. pén. 1998 n° 112 obs. VERON.

et par ailleurs le critère de la distinction des infractions de droit commun et des infractions politiques repose plutôt sur la nature objective de l'acte que sur la considération du mobile politique de l'auteur [1]. Ce n'est donc pas le système des peines parallèles ; et c'est regrettable, car si, quel qu'ait été le motif qui ait poussé à commettre un acte délictueux, une sanction s'impose, en cas de motif honorable cette sanction pourrait ne pas être infâmante.

C. Le mobile et la procédure

264 Le mobile est pris en considération par la jurisprudence pour décider que deux infractions sont unies par un lien d'indivisibilité. Il en est ainsi lorsque les différents faits ont été « commis dans le même trait de temps, dans le même lieu et ayant été déterminés par le même mobile ». En pareil cas, cette indivisibilité agit d'ailleurs non seulement sur la compétence, mais même sur le caractère intentionnel ou non des divers agissements reprochés [2].

Par ailleurs, depuis la loi du 9 septembre 1986, le droit pénal prend en compte le mobile pour soumettre les infractions de terrorisme à certaines règles dérogatoires de procédure pénale, et en particuler à la compétence de la Cour d'assises sans jurés (V. art. 421-1 C. Pén. et art. 706-16 et ss. C.P.P.). Il s'agit, rappelons-le, d'actes « en relation avec une entreprise individuelle ou collective *ayant pour but* de troubler gravement l'ordre public par l'intimidation ou la terreur ».

§ 3. Les modalités et les degrés de l'intention criminelle

265 Bien qu'elle soit une volonté abstraite indépendante des motifs qui l'ont déterminée, l'intention criminelle n'est pas cependant uniforme ; elle peut comporter des modalités différentes et des degrés divers [3]. Le droit pénal classique distingue, en effet, le *dol général et le dol spécial, le dol simple et le dol aggravé, le dol déterminé et le dol indéterminé, et enfin le dol direct et le dol éventuel.*

1. Voir *supra*, n° 190 ; Comp. Crim. 28 sept. 1970. *D.* 1971, p. 36, note F. CHABAS, qui a assimilé à une infraction politique en ce qui concerne la contrainte par corps, le délit de dégradation d'un monument d'utilité publique par une inscription d'un libellé objectivement politique. Et même, pendant quelques années, en vertu d'un décret du 16 septembre 1971 (art. D. 496. C.P.P., qui a été abrogé par un décret du 23 octobre 1975), ont pu bénéficier d'un régime spécial de détention, les personnes qui, lorsqu'elles ont commis leur infraction, étaient animées par des mobiles présentant un caractère politique.

2. Crim. 28 juill. 1969, *Gaz. Pal.*, 1969.2.364, note J.P. DOUCET, obs. LEVASSEUR, *Rev. sc. crim.*, 1970, p. 96.

3. Cf. BERNARDINI, « L'intention coupable en droit pénal », thèse Nice, 1976, 2 vol. (ronéo) ; A. HAUTEVILLE, « La gradation des fautes pénales », in *Réflexions sur le nouveau Code pénal*, Pédone 1995, p. 31.

A. Dol général et dol spécial

266 Le *dol général* consiste selon E. Garçon [1] dans la volonté d'accomplir un acte que l'on sait défendu par la loi [2] et il n'est pas toujours suffisant. Quelquefois, la loi subordonne l'existence de l'infraction à une volonté criminelle plus précise qu'on appelle le *dol spécial* ou dol spécifique [3]. C'est ainsi qu'en plus de la volonté consciente de violer la loi pénale, elle exige, en outre, soit l'intention de donner la mort (art. 221-1 N. C. pén.) [4], soit la volonté de s'approprier la chose d'autrui (en cas de vol par exemple, art. 311-1 C. Pén.), soit la volonté de causer un préjudice individuel ou social (en cas de faux documentaire, art. 441-1 C. Pén.). En cas de diffamation, la volonté de nuire à l'honneur ou à la considération d'une personne (art. 29 loi du 29 juillet 1881) [5] est exigée, tandis qu'en matière de chèque émis au mépris d'une interdiction, la loi impose que l'agent ait eu l'intention de porter atteinte aux droits d'autrui [6].

B. Dol simple et dol aggravé

267 Le dol est par ailleurs susceptible de degrés, dont la considération peut influer sur la qualification et la répression [7].

A cet égard, au dol simple qui entraîne la peine ordinaire, on oppose le dol aggravé ou *préméditation* [8], qui entraine une peine plus sévère, en cas d'homicide et de coups et blessures (art. 221-3, 222-12, 222-13 C. Pén.). Ainsi, le meurtre avec préméditation constitue un assassinat, punissable de la réclusion criminelle à perpétuité, au lieu de la réclusion criminelle de trente ans.

1. Voir *supra*, n° 257.

2. L'existence même du dol général est contestée par A.C. DANA, au moins sur le plan conceptuel. A ses yeux la volonté de l'agent est absorbée par l'imputabilité et la conscience de l'illicéité par la légalité pénale.

3. Pour A.C. DANA, le dol spécial consiste dans la volonté utilisée dans le but de nuire à une valeur sociale déterminée ; le comportement de l'agent est une réaction d'hostilité, et non de simple indifférence.

4. Crim. 9 janv. 1990, obs. LEVASSEUR, *Rev. sc. crim.*, 1990, p. 337 ; Crim. 23 janvier 1990, *Dr. pén.* juillet 1990, n° 215 obs. VÉRON ; obs. LEVASSEUR, *Rev. sc. crim.*, 1990, p. 784 ; Crim. 13 novembre 1990, obs. LEVASSEUR, *Rev. sc. crim.*, 1991, p. 345.

5. V. Crim. 23 mars 1978, *J.C.P.* 1978.IV.168 ; Crim. 15 oct. et 19 nov. 1985, *Bull. crim.* n^{os} 315 et 363 ; Crim. 28 février 1989, *Bull.* n° 98 ; Crim. 29 nov. 1994, *Bull.* n° 382.

6. V. Crim. 13 avril1983 et 5 oct. 1983, *D.* 1984, p. 461 note BOULOC ; Crim. 21 oct. 1985, *D.* 1986, *Inf. Rap.*, 406 obs. ROUJOU DE BOUBÉE ; Crim. 22 mai 1989, *Bull.* n° 210. V. aussi Crim. 4 janvier 1996, *Bull.* n° 3.

7. L'ancien Code pénal faisait de la provocation en matière d'atteintes à l'intégrité physique, une cause d'atténuation de la peine, sans doute parce que la volonté de l'agent avait été influencée. Le nouveau Code pénal n'a pas retenu cette excuse, qui est mentionnée cependant à l'art. R. 621-2 (injure non publique).

8. Le guet-apens comporte nécessairement un dessein formé à l'avance et par conséquent la préméditation : Crim. 22 févr. 1989, *Bull.* n° 89, comp. obs. LEVASSEUR, *Rev. sc. crim.*, 1989, p. 737. Le nouveau Code pénal ne fait plus état du guet-apens.

La préméditation qui consiste dans le dessein formé avant l'action de commettre un crime (ou un délit) déterminé constitue une circonstance aggravante de l'homicide volontaire [1]. Aussi bien, cette circonstance aggravante doit faire l'objet d'une question posée à la Cour d'Assises [2]. Bien qu'elle puisse n'exister que chez l'auteur lui-même, la jurisprudence a souvent considéré qu'elle constituait une circonstance aggravant la criminalité de l'acte, et l'appliquait au complice de l'assassin [3].

C. Dol déterminé et dol indéterminé

168 Si l'on envisage la volonté non plus dans ses degrés et son intensité, mais dans ses résultats, on est amené à distinguer le dol *déterminé* et le dol *indéterminé*.

Le dol est déterminé lorsque l'agent a voulu d'une façon précise commettre tel crime ou tel délit (tuer ou voler) et à l'encontre de telle personne déterminée. Il l'est également quand l'agent a voulu le résultat, mais n'a pas connu l'identité de la victime, car la détermination du dol dépend d'abord de l'étendue de la volonté par rapport au résultat de l'infraction. En revanche, il est indéterminé lorsque l'agent n'a pas voulu l'acte délictueux d'une façon précise en ce qui concerne soit la gravité du résultat, soit l'identité de la victime [4].

Ainsi, celui qui volontairement donne des coups peut provoquer chez la victime une douleur passagère, des ecchymoses, une incapacité temporaire, une incapacité permanente (perte d'un œil, de l'usage d'un membre), soit même la mort. L'auteur de ces coups va-t-il être puni d'après la gravité du résultat produit, mais qu'il n'a pas précisément voulu *(dolus indeterminatus determinatur eventu)* ? C'est la solution consacrée pour les coups et blessures volontaires par les art. 222-7, 222-9, 222-11 et R. 625-1 C. Pén., et pour l'incendie volontaire par les art. 322-9 et 322-10 C. Pén. En général, la peine est proportionnée à la gravité du dommage éprouvé par la victime.

De même, lorsque l'indétermination porte sur l'identité de la victime, la loi considère que l'agent avait l'intention de créer un danger pour les personnes qui en seront les victimes (art. 322-6 C. Pén.) ; elle assimile

1. Voir *infra*, n° 343. Aussi, doit-elle faire l'objet d'une question distincte dans une accusation pour homicide volontaire : Crim. 19 oct. 1977, *D.* 1978, *Inf. Rap.*, 52 ; Crim. 15 déc. 1982, *Bull.* n° 294.

2. V. en ce qui concerne la circonstance aggravante de préméditation : Crim. 4 janv. 1978. *J.C.P.* 1978.IV.77 ; Crim. 2 avr. 1979, *D.* 1979, *Inf. Rap.*, 548.

3. Crim. 5 juin 1956, *D.* 1956.576 ; Crim. 27 déc. 1960, *B.* n° 621 ; Crim. 12 mai 1970, *D.* 1970.515, qui ont étendu au complice la circonstance aggravante de la préméditation. V. *infra*, n° 343.

4. Sur l'indétermination de la victime, en cas de piège à feu, voir : Crim. 17 mai 1977, *J.C.P.* 1978.II.18869, note BOUZAT ; Troyes, 24 mai 1978, *J.C.P.*, 1979.II.19046, note BOUZAT ; Reims, 8 nov. 1978, *D.* 1979.92, note PRADEL, *J.C.P.*, 1979.II.19046, note BOUZAT.

encore le dol indéterminé au dol déterminé, car il y a eu volonté de produire les résultats nuisibles [1].

269 ***Dol éventuel*** [2] ◇ Mais, lorsque l'agent, sans vouloir en aucune façon le résultat dommageable qui s'est produit, ou même aucun résultat, l'a simplement prévu comme possible, on parle alors de dol éventuel. C'est le cas du directeur d'une compagnie de transport aérien qui fait partir un avion qu'il sait ne pas être en parfait état de navigabilité. Si des passagers sont tués au cours de ce transport, peut-on dire qu'il soit coupable d'un homicide volontaire ? C'est également le cas de l'automobiliste imprudent qui double d'autres voitures au sommet d'une côte et provoque la mort d'un automobiliste venant en sens inverse. Peut-il être poursuivi comme auteur d'un homicide volontaire ? Le résultat délictueux n'est-il pas plutôt la conséquence d'une faute d'imprudence ?

Du point de vue psychologique, le dol éventuel se situe entre l'intention proprement dite et la faute d'imprudence ou de négligence, qui ne suppose ni l'acceptation éventuelle du résultat illicite, ni la recherche d'un tel résultat. Aussi, la plupart des auteurs et même la jurisprudence [3] considèrent-ils le dol éventuel comme une simple faute. Si probable qu'ait été le résultat, le fait d'avoir agi sans l'avoir voulu, constitue une faute d'imprudence, fût-elle lourde, mais en tout cas non intentionnelle [4], car pour qu'il y ait intention, il faut qu'il y ait eu prévision et acceptation au moins éventuelle du résultat [5].

Toutefois, la solution contraire, qui assimile le dol éventuel au dol direct et le punit comme une intention criminelle, a trouvé son application légale dans le cas où un incendie volontairement provoqué a entraîné accidentellement la mort ou les blessures d'une ou plusieurs personnes (art. 322-10 C.P.). D'après ce texte, l'auteur de cet incendie est punissable de réclusion criminelle à perpétuité, comme s'il avait eu l'intention de tuer les victimes accidentelles [6]. De même, aux termes de l'article 222-14 du nouveau Code pénal, les auteurs de violences habituelles sur des enfants de moins de 15 ans, sont punissables de trente ans de réclusion criminelle, — dès lors que ces mauvais traitements ont entraîné la mort — même si les blessures, les coups ou la privation d'aliments n'ont pas été accomplis dans l'intention de la donner.

1. Crim. 4 mai 1984, obs. LEVASSEUR, *Rev. sc. crim.*, 1984, p. 737 ; Crim. 21 oct. 1998, *Bull.* n° 269.

2. DUVAL, « Le dol éventuel » thèse Paris 1900 ; JIMENEZ DE ASUA, « La faute consciente et le dolus eventualls », *Rev. crim.*, 1959-1960, p. 603 ; J. CÉDRAS « Le dol éventuel : aux limites de l'intention », *D.* 1995, ch. 18.

3. Crim. 27 mars 1902, *Bull.* n° 128.

4. On rappellera que le nouveau Code pénal inclut dans les délits non intentionnels, les cas d'imprudence ou de négligence mais aussi « la mise en danger délibérée de la personne d'autrui » dont la sanction est plus forte que celle de la simple imprudence.

5. Sur le dol éventuel en droit belge, cf. J. VERHAEGEN, *Liber Amicorum H. BEKAERT*, p. 437.

6. Crim. 2 juillet 1986, *Bull. crim.*, n° 229, obs. LEVASSEUR, *Rev. sc. crim.*, 1987, p. 202.

70 *La mise en danger délibérée* ◇ Les rédacteurs du nouveau Code péna ont entendu aussi prendre en compte le dol éventuel lorsqu'ils ont retenu comme élément moral « la mise en danger délibérée de la personn d'autrui » (art. 121-3, al. 2 C. Pén.) [1]. Ainsi, en cas de manquement déli béré à une obligation de sécurité ou de prudence, l'homicide involontaire es puni plus sévèrement (art. 221-6 C. Pén.), comme d'ailleurs les blessure involontaires (art. 222-19, al. 2 C. Pén.). De même, il existe quelques incri minations de mises en danger de la personne (art. 223-1 et ss. C. Pén.) Dans ces différentes situations, la loi n'a pas assimilé le dol éventuel au do direct, mais elle a considéré qu'il s'agissait d'une faute aggravée se rappro chant de l'intention. On pouvait craindre que cet échelon intermédiaire n soit source d'arbitraire [2].

Mais la Cour de cassation a veillé à ce qu'une obligation particulière d sécurité et de prudence préexiste [3], ce qui est souvent le cas en matière d circulation routière [4], ou de navigation maritime [5]. De plus, elle a jugé que l faute constitutive de la mise en danger est caractérisée par la violatio manifestement délibérée de l'obligation imposée par la loi ou le réglemen sans que l'agent ait eu connaissance du risque particulier causé par so manquement [6].

71 *Le résultat excédant les prévisions de l'agent* ◇ Du dol éventuel, o rapproche généralement l'*infraction praeterintentionnelle* dans laquelle l résultat produit dépasse le but que se proposait l'agent, et est beaucoup plu grave qu'il ne l'avait voulu. Il en est ainsi lorsque, par exemple, celui qui ava simplement l'intention de blesser a tué. Faut-il punir l'auteur de ces coup mortels par leur résultat, comme s'il avait eu l'intention de tuer, comme u meurtrier ? Ou bien, puisqu'il n'a eu que l'intention de blesser, comm l'auteur d'un homicide par imprudence ?

Dans le délit praeterintentionnel, comme dans le dol éventuel, le résulta tel qu'il s'est réalisé, n'a pas été voulu ; dans les deux cas, l'intention n'a p

1. V. ACCOMANDO et GUÉRY, « Le délit de risque causé à autrui ou de la malencontre l'art. 223-1 N.C. Pén. », *Rev. sc. crim.* 1994, p. 68 ; M. PUECH « De la mise en danger d'autrui », . 1994, chr. 153 ; V. aussi A. d'HAUTEVILLE, « La gradation des fautes » in *Réflexions sur le nouve Code pénal*, Pédone 1995, p. 40 et ss.

2. V. pour une vitesse de 200 km/h sur autoroute : Douai 26 oct. 1994, *D.* 1995, p. 174 nc COUVRAT et MASSÉ (pas de mise en danger) ; TGI Saint-Etienne 4 et 10 août 1994, *Gaz. P.* 1994.II.773 et 775 ; Paris, 9 nov. 1995, *Dr. pén.* 1996, n° 57. obs. VÉRON ; Paris, 27 oct. 1995, *D pén.* 1996, n° 5 *D.* 1996 p. 445 note COCHE (vitesse excessive).

3. Crim. 25 juin 1996, *Bull.* n° 274, *Rev. sc. crim.* 1997, p. 106 obs. Y. MAYAUD et p. 390 ol J.H. ROBERT.

4. Crim. 12 mars 1997, *Bull.* n° 102 ; Crim. 12 nov. 1997, *Bull.* n° 384 ; Crim. 11 mars 195 *Bull.* n° 99 ; *J.C.P.* 1998.II.10064, note HOYEZ.

5. Crim. 11 févr. 1998, *Bull.* n° 55, *J.C.P.* 1998.II.10084 note J.Y. COCHE, *Rev. sc. crim.* 19 p. 545 obs MAYAUD rejetant le pourvoi c/ Rennes 26 sept. 1996, *J.C.P.* 1997.II.22902 note J CHEVALLIER.

6. Crim. 16 fév. 1999, *Bull.* n° 24 ; Crim. 9 mars 1999, *Bull.* n° 34 (pratique du ski sur u piste interdite).

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porte sur le résultat effectivement produit. Mais — et c'est là la différence — rien dit que dans le dol éventuel, le résultat qui n'a pas été prévu ou l'a été simplement comme possible, n'a été voulu ni sous la forme dans laquelle il s'est réalisé, ni sous une forme moins grave, dans le délit praeterintentionnel, au contraire, le résultat a été partiellement voulu. Par là, le délit praeterintentionnel se rapproche du délit intentionnel, où le résultat qui s'est produit a été voulu ; il s'en distingue cependant en ce que l'intention n'a porté que sur un résultat moins grave que le résultat réalisé. C'est pour cette raison que le Code pénal (art. 222-7), édicte seulement la peine de la réclusion criminelle à temps de quinze ans, et non pas la peine de la réclusion criminelle de trente ans (applicable au meurtrier volontaire) contre l'auteur de coups et blessures volontaires ayant entraîné la mort sans intention de la donner.

En réalité, le dol éventuel, la mise en danger délibérée et l'infraction praeterintentionnelle constituent une catégorie intermédiaire entre l'intention criminelle et la faute. Avec eux, on se trouve aux limites de l'intention, et très proche de la simple faute pénale.

SECTION 2. LA FAUTE PÉNALE

272 Dans toutes les infractions, même dans les infractions non intentionnelles (délits d'imprudence, ou involontaires [1], délits punissables malgré la bonne foi de leur auteur [2], la plupart des contraventions de police [3]) qui ne supposent pas une intention criminelle, il existe un élément moral. Cet élément consiste dans une simple faute : la faute pénale. Mais celle-ci n'a pas la même nature, ni les mêmes caractères suivant qu'il s'agit d'un délit d'imprudence ou d'une contravention [4].

§ 1. La nécessité d'une faute dans les infractions non intentionnelles

273 L'existence d'une faute, qui n'a jamais été contestée pour les délits d'imprudence, l'a été en revanche pour quelques délits correctionnels et la plupart des contraventions qui n'exigent pas une intention coupable et sont punis-

1. Ces mots homicides et blessures par imprudence (art. 221-6, 222-19 et R. 625-1 C. Pén.)
2. Par exemple : délits en matière de chasse ou de pêche.
3. A l'exception de celles pour lesquelles la loi exige un élément moral analogue au dol général ou spécial, comme par exemple l'art. R. 624-1, R. 625-1, R. 635-1 C. Pén. (coups et blessures volontaires, détérioration volontaire du bien d'autrui).
4. Pour A.C. Dana il s'agit cependant dans les deux cas d'une réaction d'indifférence du délinquant à l'égard des valeurs sociales, ce qu'il appelle la « faute normative ». Celle-ci implique la culpabilité sans recherche sur la psychologie de l'agent. La faute serait tout fait de l'homme défaillant par rapport à une norme de conduite (*op. cit.* p. 242). On remarquera que cette conception donne plus d'importance à la recherche au lien de causalité avec le dommage subi par la victime.

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sables du fait même de leur commission. On a prétendu, l'on a même jugé [1] que ces infractions purement *matérielles* se trouvaient réalisées par le seul fait de leur commission, indépendamment de la volonté de leur auteur. En d'autres termes, à la différence des crimes et de la grande majorité des délits qui supposent trois éléments, les contraventions et les délits contraventionnels ne comporteraient que l'élément légal et l'élément matériel ; l'élément moral en serait exclu. A suivre cette opinion, l'auteur d'une contravention ou d'un délit contraventionnel, du moment qu'il a commis l'acte matériel, devrait toujours être puni non seulement lorsqu'il a été de bonne foi, mais même s'il a agi sous l'empire de la démence ou de la force majeure. Telle n'est pas la position de notre droit, qui a tenu, avec le nouveau Code pénal à affirmer le principe même de la responsabilité de son propre fait (art. 121-1), et à soumettre les « délits matériels » à la constatation d'une faute (art. 339 loi du 16 déc. 1992) [2].

274 La *jurisprudence* décide qu'en cas de force majeure la contravention n'est pas punissable [3], solution qui se trouve confirmée par l'art. 121-3, al. 5 C. Pén. Par ailleurs, de nombreux criminalistes admettent que les faits justificatifs (légitime défense, ordre de la loi, état de nécessité) et les causes de non-imputabilité (démence et contrainte) qui suppriment la faute pénale, font en même temps disparaître la contravention. Sans faute, pas d'infraction *(Nulla poena sine culpa)* [4]. Telle est semble-t-il, la position qui résulte du nouveau Code pénal, dont les dispositions sur les causes d'irresponsabilités ne sont pas limitées aux crimes et aux délits.

Ce qui a pu faire croire que la faute n'était pas nécessaire en matière de contravention, c'est que la faute contraventionnelle n'a généralement pas à être prouvée et que, d'autre part, la preuve de l'absence de faute ne libère pas le contrevenant [5]. Or cela tient à ce que dans la plupart des contraventions, la faute n'a pas du tout la même nature que dans les délits d'imprudence.

§ 2. Distinction de la faute d'imprudence et de la faute contraventionnelle

A. Particularités de ces deux fautes

275 ***Notion de faute d'imprudence*** ◇ La faute d'imprudence, qui n'est pas définie d'une façon générale par le Code pénal, consiste d'après les articles 221-6, 222-19 et R. 625-2 du nouveau Code pénal « en une maladresse, imprudence, inattention, négligence ou manquement à une obliga-

1. Crim. 7 mars 1918, S. 1921.I.89, note ROUX.
2. V. en matière de fraude (art. L. 213-4 C. Cons.) : Crim. 22 août 1995, *Bull.* n° 268 : V. aussi *supra* n° 254.
3. Crim. 15 mai 1926, S. 1929.I.33, note ROUX.
4. LÉGAL,« La responsabilité sans faute et les délits matériels », *Mélanges* Patin, p. 129.
5. V. Crim. 16 nov. 1976, *Bull.* n° 325.

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tion de prudence ou de sécurité imposée par la loi ou les règlements ». En outre, le manquement délibéré à une obligation de sécurité ou de prudence imposée par la loi ou le règlement est pris en compte par le nouveau Code pénal, ce qui constitue soit une infraction autonome, soit une circonstance aggravante. Dans ce dernier cas, il y a mise en danger, qui constitue une faute aggravée, mais la sanction dépendra encore du résultat produit et non vraiment voulu.

Commet en tout cas une faute d'imprudence, l'automobiliste qui, par son manque d'habileté ou par la violation d'une disposition du Code de la route [1] (vitesse excessive, non-respect d'un stop, franchissement d'une ligne continue), tue ou blesse quelqu'un. De même, une faute pénale d'imprudence peut être reprochée au chirurgien ou à l'anesthésiste qui ne prend pas avant, pendant ou même après une opération, les précautions conformes aux données acquises de la science contre les risques prévisibles de mort de l'opéré [2].

Bien que le résultat n'en ait été ni voulu ni même prévu, cette faute qui est semblable à la faute d'imprudence ou de négligence de l'art. 1383 C. civ., n'engage pas seulement la responsabilité civile de son auteur (obligation de réparer le dommage), mais aussi sa responsabilité pénale, car elle entraîne, pour la sécurité publique, des dangers qu'il faut réprimer et prévenir par la menace d'une peine.

En vue, cependant, de limiter certains excès révélés par des poursuites récentes, une loi du 13 mai 1996 avait modifié l'art. 121-3 C. Pén. Selon ce texte, il n'y a pas faute si l'auteur des faits a accompli les diligences normales compte tenu de la nature des missions ou des fonctions, des compétences, du pouvoir et des moyens dont il disposait.

En conséquence de cette précision qui concerne toute personne, des dispositions particulières ont été insérées dans le Code général des collectivités territoriales pour prohiber la condamnation d'un maire, d'un président de Conseil général ou d'un président de Conseil régional ou des personnes ayant reçu délégation pour des faits non intentionnels commis dans l'exercice des fonctions s'il est établi que l'élu a

1. Cette violation du Code de la route peut être retenue, même si elle n'a pas été poursuivie : Crim. 21 févr. 1996, *Bull.* n° 83 ; V. aussi Crim. 28 juin 1995, *Bull.* n° 242.

2. Trib. Montpellier 21 déc. 1970, *D.* 1971.637, note CHABAS ; Cour de Montpellier, 5 mai 1971, *J.C.P.* 1971.II.16783, obs. LEVASSEUR, *Rev. sc. crim.*, 1971, p. 681, n° 1-II ; Crim. 22 juin 1972, *Bull.* n° 217 ; Toulouse, 24 avril 1973, *Gaz. Pal.*, 1973.I.401, obs. LEVASSEUR, *Rev. sc. crim.*, 1973, p. 900, n° 2.IV-A (toutes intervenues dans l'affaire Albertine SARRAZIN) ; Crim.22 juin 1972, *Bull.* n° 218, obs. LEVASSEUR, *Rev. sc. crim.*, 1973, p. 902, n° 2-IV-b ; Crim. 18 nov. 1976, *Bull.* n° 333, obs. LEVASSEUR, *Rev. sc. crim.*, 1977, p. 336, n° 2-III ; Crim. 26 janv.1977, *Bull.* n° 38, obs. LEVASSEUR, *Rev. sc. crim.*, 1977, p. 577 ; Marseille, 24 févr. 1977, *Gaz. Pal.*, 29 janv. 1978, obs. LEVASSEUR, *Rev. sc. crim.*, 1978, n° 2 ; Paris, 5 mai 1977, *Gaz. Pal.*, 12 févr. 1978, obs. LEVASSEUR, *eod. loc.* ; Crim. 9 juin 1977, *J.C.P.* 1978.II.18839, note R. SAVATIER, obs. LEVASSEUR, *Rev. sc. crim.*, 1978, n° 1 ; Crim. 9 nov. 1977, *Bull.* n° 346, *D.* 1978, *Inf. Rap.*, 71, obs. ROUJOU DE BOUBÉE, *J.C.P.*, 1978.IV.12, *Gaz. Pal.*, 19 avr. 1978 ; Crim. 9 juill. 1979, *J.C.P.*, 1980.II.19272 note CHABAS ; Crim. 10 mai 1984, *Bull. crim.*, n° 167 ; Crim. 23 nov. 1994, *Dr. pén.* 1995, n° 88, obs. VÉRON ; Crim. 19 février 1997, *Bull.* n° 67, *J.C.P.* 1997.II.22889 note J.Y. CHEVALLIER, *D.* 1998, p. 236 note LEGROS.

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accompli des « diligences normales », compte tenu de ses compétences, des pouvoirs et des moyens dont il disposait ainsi que des difficultés propres aux missions confiées (cf. art. 2123-34, 3123-28, 4135-28 et 4422-10-1 C.G. coll. terr.). Les fonctionnaires et les agents non titulaires de droit public sont soumis à un régime identique (cf. art. 11 bis A loi du 13 juillet 1983). On pouvait se demander si la loi nouvelle était de nature à endiguer les excès [1]. De fait, si l'agent a été diligent, aucune faute ne peut lui être reprochée. Inversement s'il a commis une imprudence, le respect des diligences normales n'évitera pas la poursuite [2]. Une faute imputable au prévenu suffit [3], la loi du 13 mai 1996 n'ayant pas instiué un fait justificatif nouveau [4].

1-1 *La précision de la définition de la faute non-intentionnelle* ◇
Malgré l'apport de la loi su 13 mai 1996, des groupes d'étude ont tenté de rechercher le moyen de limiter la responsabilité pénale des élus et des fonctionnaires (commission MASSOT). Finalement, un proposition de loi du Sénateur FAUCHON, après modifications et aménagements, a abouti à la loi 2000-647 du 10 juillet 2000, qui aménage l'alinéa 3 de l'art. 121-3 du C. Pén., et ajoute un alinéa 4 au même article.

En ce qui concerne l'alinéa 3 de l'art. 121-3, la faute s'entend toujours de l'imprudence, de la négligence ou du manquement à une obligation de prudence ou de sécurité prévue par la loi ou le règlement. Mais au lieu d'écarter l'incidence de cette faute, en cas de diligences normales (« sauf si »), le texte nouveau indique que la faute requiert que l'agent n'ait pas accompli les diligences normales, compte tenu de la nature des missions, des fonctions ou des compétences, ou du pourvoi ou des moyens dont il disposait. Eu égard aux solutions intervenues depuis la loi du 13 mai 1996, le dispositif nouveau ne paraît pas de nature à limiter la notion de faute pénale, car l'imprudence découle souvent du défaut de diligences normales.

En revanche, beaucoup plus novatrice est la disposition de l'art. 121-3 al. 4 C. Pénal. Dans l'hypothèse d'une imprudence, les personnes physiques qui n'ont pas causé directement le dommage mais qui ont créé ou contribué à créer la situation ayant permis la réalisation du dommage ou n'ont pas pris les mesures permettant de l'éviter, ne sont responsables pénalement que s'il est établi qu'elles ont, soit violé de façon manifestement délibérée, une obligation particulière de prudence ou de sécurité prévue par la loi ou le réglement, soit commis une faute caractérisée, exposant autrui à un risque d'une particulière gravité qu'elles ne pouvaient ignorer. Sous réserve de l'interprétation des tribunaux, les fautes lointaines ne seront source de responsabilité pénale que si elles sont dument établies ; bref si ce sont des fautes lourdes. La faute légère lointaine ne sera plus une faute pénale, mais elle demeurera éventuellement une faute civile.

1. V. M.L. RASSAT, *Dr. pén.* 1996, chr. 28.
2. V. d'ailleurs : Crim. 2 avril 1997, *Bull.* n° 132 ; Crim. 17 et 24 juin 1997, *Bull.* n° 237 et 251 ; Crim. 29 juin 1999, *Bull.* n° 163 ; Crim. 9 nov. 1999, *Bull.* n° 250.
3. Crim. 5 mars 1997, *Bull.* n° 89.
4. Crim. 14 octobre 1997, *Bull.* n° 334, *Rev. sc. crim.* 1998 p. 328, obs. Y. MAYRAUD, RTD Com. 1998 p. 431 obs. BOULOC.

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Il faut noter que les art. 221-6, 222-19 et 222-20 C. Pén. sont harmonisés avec le nouvel art. 121-3 C. P., ainsi d'ailleurs que les différents textes concernant les maires, président de conseil général ou de conseil régional (art. L. 2123-34, 3123-28 et 4135-28 C.G. Coll. Terr.). Les fonctionnaires, agents publics non titulaires et militaires sont traités comme les élus (cf. art. 11 bis A loi du 13 juillet 1983 et art. 16-1 loi du 13 juillet 1972), tous devant bénéficier de la protection de la collectivité ou de l'État, en cas de poursuites pénales pour des faits n'ayant pas le caractère de faute détachable de l'exercice des fonctions.

276 ***L'identité de la faute pénale et de la faute civile d'imprudence*** ◇
Après avoir pendant longtemps distingué la faute pénale et la faute civile et consacré la thèse de la dualité des fautes, la jurisprudence, depuis 1912 [1], adoptant la thèse contraire de l'unité des fautes, décide que la faute pénale d'imprudence est identique à la faute civile. Il en résulte que celui qui est déclaré coupable d'une faute pénale d'imprudence peut être condamné non seulement à une peine, mais aussi à des dommages-intérêts envers la victime. Mais à l'inverse, celui qui est reconnu non coupable de cette faute par le tribunal correctionnel, ne peut être condamné ni à une peine, ni à des dommages-intérêts sur la base d'une faute civile des articles 1382 et 1383 du Code civil. Il reste toutefois possible, malgré l'absence de faute pénale d'imprudence, de le faire condamner par le tribunal civil à payer une réparation à la victime de l'accident, sur la base de l'article 1384, alinéa 1 du Code civil ou de la loi sur les accidents de la circulation, car la présomption de responsabilité édictée par ces textes à l'encontre du gardien d'une chose inanimée ou du conducteur qui a causé un dommage, est entièrement distincte de la faute pénale. Afin de protéger les victimes, la loi du 8 juillet 1983 a autorisé les tribunaux correctionnels ou de police à accorder, d'après les règles du droit civil, la réparation de tous dommages résultant des faits ayant fondé la poursuite (art. 470-1 C.P.P.), à la condition que le tribunal ait été saisi, à l'initiative du parquet ou sur renvoi d'une juridiction d'instruction, de poursuites exercées pour une infraction non intentionnelle au sens des al. 2 et 3 de l'art. 121-3 C. Pén., et qu'il ait prononcé une relaxe [2]. En tout cas, la Cour de Cassation avait pris nettement parti en faveur du maintien du principe d'unité de la faute pénale et de la faute civile d'imprudence, malgré l'intervention de la loi de 1983 [3].

La loi du 10 juillet 2000 en limitant la responsabilité pénale des personnes physiques n'ayant pas causé directement le dommage, en l'absence de faute caractérisée ou de violation manifestement délibérée d'une obligation particulière de prudence ou de sécurité, a entendu revenir sur la jurisprudence

1. Civ. 19 déc. 1912, S. 1914.I.249, note MOREL. Cette jurisprudence a été maintenue après la loi du 8 juillet 1983, voir : Crim. 18 nov. 1985, *Bull. crim.*, n° 343, obs. LEVASSEUR, *Rev. sc. crim.*, 1987, p. 427.

2. Le juge ne saurait en faire application d'office (crim. 12 février 1997, *Bull.* n° 56). Cf. *Précis de Procédure Pénale*, 17e éd. n°s 311 et 592.

3. Crim. 18 nov. 1986, *Bull.* n° 343, *Rev. sc. crim.*, 1987.426, obs. LEVASSEUR ; BOUILLANE DE LACOSTE, *Gaz. Pal.*, 1987.1 Doc. 297.

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de la Cour de cassation. L'art 4-1 nouveau C.P.P. prévoie que l'absence de faute pénale non intentionnelle ne fait pas obstacle à l'exercice, devant un juge civil, d'une action en réparation d'un dommage, fondée sur l'art. 1383 du C. civ. ou sur l'art. L. 452-1 C. Séc. Soc. La faute pénale serait donc plus importante que la faute civile d'imprudence ou la faute inexcusable. Corrélativement, le juge pénal saisi d'une poursuite pour infraction non intentionnelle engagée par le ministère public ou sur renvoi d'une juridiction d'instruction, demeure compétent, malgré une relaxe, pour statuer sur la réparation due à la victime, selon les règles du droit civil (art. 470-1 C.P.P. modifié). Il semble que cette faculté s'appliquera plutôt dans l'hypothèse prévue par l'art. 121-3 al. 4, et à la condition que la faute indirecte soit en relation causale avec le dommage invoqué.

377 *Notion de faute contraventionnelle* ◇ En revanche, la faute contraventionnelle ne peut être assimilée à la faute pénale ou civile d'imprudence. A la différence de la faute d'imprudence, la faute en matière de contravention non intentionnelle (sauf s'il s'agit d'une contravention d'imprudence – art. R. 625-2 et R. 625-3 C. pén.) n'exige même pas une imprudence ou une négligence ; elle résulte du seul fait de la violation de la prescription légale ou réglementaire. Il importe peu, sauf pour certaines contraventions, que cette violation ait été intentionnelle, volontaire, commise par imprudence ou de bonne foi, dans l'ignorance du règlement. Pour un certain nombre de délits, l'élément moral consiste, parfois, en une faute contraventionnelle [1].

Toutefois, même les fautes contraventionnelles ne peuvent engager la responsabilité de leur auteur que si celui-ci a une volonté libre. C'est pourquoi le fait cesse d'être punissable si l'agent peut invoquer un cas de force majeure [2], un état de démence ou de nécessité [3], l'absence de maturité, etc [4].

B. Conséquences de la différence de nature

378 *Sur le plan de la preuve* ◇ De la différence de nature entre la faute d'imprudence et la faute contraventionnelle, il résulte tout d'abord une différence importante *au point de vue de la preuve*. Tandis que la faute pénale des articles 221-6 et 222-19 du nouveau Code pénal doit, comme l'intention dans les infractions intentionnelles, être prouvée par l'accusation, la

1. V. par exemple : Crim. 4 janv. 1973, *Bull.* n° 6, *D.* 1973, *Inf. Rap.*, p. 18 (infraction à la police de la navigation) ; Crim. 28 avr. 1977, *Bull.* n° 148, *D.* 1978.149, note M.L. RASSAT, *J.C.P.*, 1978.II.18931, note Mme DELMAS-MARTY (délit de pollution des cours d'eaux) ; Crim. 16 nov. 1976, *Bull.* n° 325 (l'excuse tirée de la bonne foi ne fait pas disparaître la contravention dès lors que le fait punissable est régulièrement constaté) ; T.G.I. Nancy, 6 janv. 1978, *D.* 1978.447, note M.L. RASSAT (même solution) ; Crim. 22 décembre 1987, *Bull.* n° 482, affichage irrégulier. Sur les délits dits « contraventionnels », cf. *infra*, n° 282.

2. Crim. 31 juill. 1937, D.H. 1937, p. 523.

3. Trib. pol. Verdun 20 mars 1987, *Gaz. Pal.*, 18 juill. 1987.

4. Tel est bien l'avis de A.C. DANA. « En tant qu'action humaine l'infraction est un tout indivisible. Elle est la traduction d'une volonté consciente et libre. Elle existe ou elle n'existe pas » (p. 273).

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faute contraventionnelle (sauf s'il s'agit d'une contravention d'imprudence ou volontaire) n'a pas à être prouvée par le ministère public. Cette dispense de preuve est pour la majorité des auteurs la conséquence d'une présomption de faute en matière de contravention. Pour quelques autres (notamment Legros, « *L'élément moral dans les infractions* ») elle résulte de ce que le seul fait de commettre une contravention constitue par lui-même une faute. Du moment que le fait matériel est établi, la faute contraventionnelle existe ; en prouvant le fait, on prouve par là même la faute *(res ipsa loquitur)*.

279 ***Conséquence quant à la nécessité d'un dommage*** ◇ La différence de nature entre la faute d'imprudence et la faute contraventionnelle commande aussi une autre différence en ce qui concerne la nécessité de l'*existence d'un dommage*.

A cet égard, *la faute d'imprudence* se rapproche de la faute civile. De même que la faute civile n'engage la responsabilité que s'il en résulte un dommage, la faute pénale d'imprudence — et par là, le délit pénal d'imprudence s'apparente au délit civil [1] — n'entraîne la responsabilité pénale de son auteur que lorsqu'un préjudice physique (homicide, blessure) a été réalisé.

De plus, comme en droit civil, le préjudice doit résulter de la faute pénale qui a été commise (lien de causalité entre la faute et le dommage) [2]. A cet égard, une première théorie consiste à retenir toutes les conditions, positives ou négatives, qui ont produit le résultat incriminé (théorie de l'équivalence des conditions), tandis que d'autres systèmes soutiennent qu'il convient de ne prendre que les causes les plus proches de l'événement, ce qui limite la chaîne de causalité.

280 De manière générale, la *jurisprudence* adoptait plutôt la théorie de l'équivalence des conditions. En matière d'imprudence [3], elle décidait que les articles 221-6 et 222-19 du nouveau Code pénal n'exigent pas, pour recevoir application, un lien de causalité direct et immédiat entre le comportement de l'agent et le résultat dommageable [4], ni même que la faute ait été la cause

1. A telle enseigne qu'il n'y a pas de faute pénale en cas de force majeure, comme en droit civil : Crim. 18 déc. 1978, *J.C.P.*, 1980.II.19263.

2. La Cour de cassation contrôle la qualification du lien de causalité entre la faute et le dommage : Crim. 2 mars 1994, *Bull.* n° 85.

3. La solution est différente en cas de coups mortels : Crim. 8 janvier 1991, *Bull.* n° 14, obs. LEVASSEUR, *Rev. sc. crim.* 1991, p. 760.

4. Crim. 19 mai 1958, *Bull.* n° 395 ; Crim. 14 janv. 1971, *D.* 1971.164, rapport J. ROBERT ; Crim. 7 févr. 1973, *Bull.* n° 72, *D.* 1973, *Inf. Rap.*, p. 45 ; Crim. 28 mars 1973, *Bull.* n° 157, *D.* 1973, *Inf. Rap.*, p. 115 ; Crim. 21 mai 1974, *Bull.* n° 187, *D.* 1974 I.R., p. 155 ; Crim. 19 juin 1974, *Bull.* n° 228, *D.* 1974 I.R. p. 195 ; Crim. 8 août 1977, *Bull.* n° 277, *D.* 1977, *Inf. Rap.*, 493 ; Crim. 16 mars 1977, *Bull.* n° 98, *D.* 1977.469, note critique MORANGE ; Crim. 8 août 1977, *D.* 1977, I.R. 493 ; Crim. 19 mai 1978, *D.* 1978, *Inf. Rap.*, 345, obs. ROUJOU DE BOUBÉE, *D.* 1980, J. 3 note Mme GALIA-BEAUCHESNE.

Cependant il faut que le lien de causalité entre la faute du prévenu et le décès ou les blessures de la victime soit *certain*, pour que le prévenu puisse être condamné. Crim. 6 oct. 1977, *D.* 1977, *Inf. Rap.* ; 417 Paris, 20 avril 1977, *Gaz. Pal.*, 1977.2.575, obs. LEVASSEUR, *Rev. sc. crim.*, 1978, p. 98 ;

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unique des blessures ou de l'homicide [1] ; elle retient le délit pénal même si la faute n'a été que la cause médiate [2]. Il suffit que le lien de causalité soit certain [3]. Cette conception jurisprudentielle devrait être remise en cause du fait de la loi du 10 juillet 2000 qui procède à une distinction entre les personnes qui ont causé directement le dommage et les autres. La théorie de la causalité adéquate devrait limiter le nombre des personnes susceptibles de répondre pénalement d'une imprudence ou négligence.

Enfin, comme en droit civil où la réparation est proportionnée à l'étendue du dommage, la sanction de la faute pénale d'imprudence dépend de la gravité du dommage. Cette faute a-t-elle provoqué la mort, elle constitue un délit correctionnel passible de trois ans d'emprisonnement (art. 221-6). En cas de simples blessures, elle constitue, soit un délit correctionnel punissable de deux ans d'emprisonnement, si ces blessures ont entraîné une incapacité totale de travail personnel de plus de trois mois (art. 222-19 C. Pén.), soit une contravention de police, punissable d'une amende de 10 000 F, si l'incapacité totale de travail en résultant n'excède pas trois mois (art. R.625-2 C. Pén.) [4].

311 En matière de contravention au contraire — réserve faite des contraventions qui supposent une intention [5] ou une faute d'imprudence [6] et qui ne peuvent être réprimées que s'il en est résulté un préjudice physique ou matériel — d'une façon générale, l'*existence d'un dommage* n'est pas nécessaire à la répression. La faute contraventionnelle est punie pour elle-même, indépendamment de tout résultat dommageable. Cela tient à ce que la contravention consiste le plus souvent dans une désobéissance à une mesure de police, à une règle jugée nécessaire au maintien de l'ordre et destinée à prévenir des atteintes à la sécurité ou à éviter des dommages (art. R. 610-5 C. Pén.) Au lieu de se projeter sur le plan de la conscience juridique ou

Crim. 6 oct. 1977, *D.* 1977, *Inf. Rap.* ; 417 ; Crim. 9 juill. 1979, *J.C.P.*, 1980.II.19272 note F. CHABAS ; Crim. 7 janv. 1980, *Bull.* n° 10 ; Crim. 27 nov. 1984, *Bull.* n° 369 ; Crim. 14 févr. 1996, *Bull.* n° 78.

1. Crim. 13 oct. 1980, *Bull.* n° 256 ; Crim. 25 mai 1982, *Bull.* n° 134 ; Crim. 24 janvier 1989, *Bull.* n° 27.

2. Crim. 18 nov. 1927, S. 1928.I.192 ; Crim. 14 mars 1956, *J.C.P.*, 1956.IV.61. V. également, Tribunal pour enfant de Marseille, 11 juin 1964, *D.* 1965.381, note G. V. Et, à propos d'un homicide involontaire reproché à un chirurgien et un anesthésiste, les arrêts rendus dans l'Affaire Albertine SARRAZIN, cités *supra* n° 265 ; Crim. 9 mars 1977, *D.* 1978, *Inf. Rap.* ; 71 ; Crim. 9 juin 1977 ; *J.C.P.* 1978.II.18839, note SAVATIER ; Crim. 11 juill. 1977, *Bull.* n° 261, obs. LEVASSEUR, *Rev. sc. crim.*, 1978, p. 100 ; Crim. 5 janv. 1988, *Bull.* n° 7 (action dangereuse menée en commun).

3. Crim. 20 mai 1980, *D.* 1981, I.R. 257 obs. PENNEAU ; Crim. 10 janv. 1991, *dr pén.* 1991, p. 69, *Rev. sc. crim.*, 1992, p. 77, obs. G. LEVASSEUR.

4. En cas de manquement délibéré à une obligation de sécurité ou de prudence imposée par un texte, les peines sont aggravées soit 5 ans de prison au lieu de trois (art. 221-6 C. Pén.), 3 ans au lieu de deux (art. 222-19) ; et la contravention de l'art. R. 625-2 devient alors le délit de l'art. 222-20 C. Pén.

5. Art. R. 625-1, R. 635-1, R. 654-1, R. 655-1.

6. Art. R. 625-2, R. 625-3, R. 653-1.

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morale, la contravention n'est que la lésion d'intérêt administratifs ; c'est on l'a dit, « du droit pénal de bagatelles ».

En résumé, si dans toutes les infractions, il existe un élément mora (l'intention dans les infractions intentionnelles, la faute dans les infrac tions non intentionnelles), dans les infractions non intentionnelles, tantô la faute doit être soutenue par le préjudice (en cas de délit d'imprudence) tantôt elle est réprimée du fait seul de la violation de la prescription légale o réglementaire établie dans l'intérêt de la sécurité publique même s'il n'y pas dommage (dans le cas de la plupart des contraventions de police).

SECTION 3. LA DISTINCTION DES INFRACTIONS INTENTIONNELLES ET NON INTENTIONNELLES

Suivant que l'élément moral consiste dans l'intention ou dans une simpl faute, on distingue l'infraction intentionnelle et l'infraction non intention nelle.

§ 1. Principe de la distinction

282 Les infractions intentionnelles dans la catégorie desquelles rentrent le crimes, les délits correctionnels et même quelques contraventions de polic supposent une intention coupable ; elles ne sont punissables que si cett intention est établie [1].

Les infractions non intentionnelles au contraire – qui comprennent le délits d'imprudence, la plupart des contraventions de police et même cer tains délits correctionnels punissables malgré la bonne foi de leur auteu

1. En cas de fraude dans les ventes de marchandises (loi du 1er août 1905) qui est un dél intentionnel, la preuve de l'intention coupable est rapportée dès qu'il est établi que le prévenu so connaissait la fraude, soit était sans excuse (parce que spécialiste), d'en avoir ignoré les circon tances constitutives. Ainsi, « le seul fait par un commerçant spécialisé dans la vente de véhicul d'occasion, sans en avoir vérifié le degré d'usure et en laissant croire que ce véhicule n'ava parcouru qu'un nombre de kilomètres inférieur au nombre réel ; ce fait constitue d'une part, le fa matériel de tromperie sur les qualités substantielles de la marchandise vendue et d'autre part, suff à caractériser, au sens de la loi du 1er août 1905, l'élément intentionnel du délit ». (Crim. 21 juil 1977, *D.* 1978, *Inf. Rap.*, 111, observations PUECH ; Crim. 17 oct. 1991, *Bull.* n° 356).

De même, en cas de délit de publicité mensongère, qui n'exige pas la mauvaise foi (loi du 27 dé 1973, art. 44-1) mais comporte toujours un élément intentionnel, la preuve de cet élément mor est établie, dès l'instant que le prévenu ne pouvait ignorer que la marchandise, qu'il vendait sou telle appellation, était bien différente de celle qui bénéficiait de cette appellation (Paris, 13 m 1977 et 18 nov. 1977, *D.* 1978, *Inf. Rap.* ; 72, note ROUJOU DE BOUBÉE ; V. aussi Crim. 8 mai 197 *Bull.* n° 167 ; Crim. 3 janvier 1984, *Bull. crim.* n° 1 ; Crim. 4 févr. 1986, *Bull. crim.* n° 45 ; Crim 3 déc. 1987, *Bull.* n° 456).

L'emploi d'un travailleur étranger en situation irrégulière est un délit intentionnel (Crim 1er oct. 1987, *Bull.* n° 327).

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(délits de pêche, de chasse, en matière de douanes [1], de contributions indirectes, certaines infractions à la législation pharmaceutique, à la législation économique, délit de pollution des cours d'eau) — impliquent simplement une faute (V. art. 339, loi du 16 déc. 1992), qui peut consister dans la seule violation de la prescription légale ou réglementaire et dont la preuve, parfois même, n'est pas à la charge du ministère public [2]. L'ignorance de la loi ou du règlement peut constituer, en soi, la faute indispensable.

§ 2. Intérêts de la distinction

133 De ce que l'intention criminelle requise pour les premières ne l'est pas pour les secondes, il résulte que toutes les règles du droit pénal qui se rattachent à l'existence de l'intention criminelle ne peuvent s'appliquer aux infractions non intentionnelles. C'est ainsi que la *tentative*, toujours punissable en matière de crimes et parfois en matière de délits correctionnels (lorsque la loi l'a prévue), n'est pas punissable en matière de délits d'imprudence ni de contraventions.

De même, l'*erreur de fait* qui, dans les infractions intentionnelles, peut faire disparaître l'intention et muer celle-ci en une faute d'imprudence (changer un crime de meurtre en un délit d'homicide par imprudence), est sans effet dans les infractions non intentionnelles [3]. Quant à l'erreur de droit de l'art. 122-3 C. Pén., elle paraît ne devoir être admise qu'en cas d'agissement volontaire. Enfin, la légitime défense n'est pas acceptée par la jurisprudence dans l'hypothèse d'infraction non intentionnelle commise par l'agresseur [4].

En matière de *complicité*, la distinction du délit intentionnel et du délit non intentionnel ne présente plus d'intérêt, car la complicité réprimée en cas de crimes et de délits intentionnels mais non en cas de contraventions, sauf en cas de provocation (art. 121-7 et R. 610-2 C. Pén.), est, d'après la jurisprudence et quelques dispositions légales [5], punissable même en cas de délits non intentionnels [6], et de délits d'imprudence [7].

1. V. de GARDIA, « L'élément intentionnel dans les infractions douanières », *Rev. sc. crim.*, 1990, p. 487 ; note BERR sous crim. 26 mars 1989, *D.* 1989.515 ; note PANNIER sous crim. 1er oct. 1990, *Gaz. Pal.*, 11 mai 1990.

2. Lorsque l'élément moral d'une infraction consiste dans une faute, dont la preuve n'a pas à être spécialement rapportée par l'accusation, et que le prévenu n'est exonéré de toute responsabilité pénale que s'il démontre la force majeure, la Cour de Cassation qualifie cette infraction de « matérielle » (Voir en particulier, à propos du délit de pollution des cours d'eaux de l'art. L. 232-2 du N. Code rural : Crim. 28 avr. 1977, *D.* 1978, J. 149, note M.L. RASSAT).

3. Voir *infra*, n° 440.

4. Crim. 16 février 1967, *Bull.* n° 70, *J.C.P.* 1967.II.25034, note COMBALDIEU ; Crim. 28 nov. 1991, *Bull.* n° 446, *Rev. sc. crim.*, 1992.751, obs. LEVASSEUR.

5. En ce qui concerne le délit de publicité mensongère, la loi du 27 déc. 1973 (art. 44) prévoit que la « complicité est punissable dans les conditions du droit commun ».

6. Crim. 14 nov. 1924, S. 1925.I.232.

7. Chambéry, 9 mars 1956, *J.C.P.*, 1956.I.9224, note VOUIN. Cette solution est cependant contestée par de nombreux auteurs.

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CHAPITRE 1

LES PERSONNES RESPONSABLES

389 Dans la conception classique qui est celle du Code pénal français, la notion de délinquant est étroitement liée à celle d'infraction. Pour être délinquant, il faut avoir commis une infraction, c'est-à-dire, non pas un acte quelconque préjudiciable à la société, mais un acte prévu et puni par la loi pénale. Or, comme l'infraction suppose un élément moral, ni les choses, ni les animaux qui n'ont ni intelligence, ni volonté, ne peuvent être sujets actifs d'une infraction et poursuivis comme délinquants [1]. Seuls les êtres humains peuvent être délinquants ; or les êtres humains, ce sont les *personnes physiques*.

Est-ce à dire que les groupements de personnes physiques — auxquels la loi reconnaît une existence juridique distincte de celles des individus qui les composent, qui ont un patrimoine, des droits et des obligations propres, et qu'on appelle les *personnes morales* (sociétés, associations, syndicats) — ne puissent jamais commettre d'infraction et engager leur responsabilité pénale ? Depuis le nouveau Code pénal, la responsabilité pénale des personnes morales est admise en principe par la loi, en plus de celle des personnes physiques qui ont matériellement commis l'infraction . C'est qu'en effet, sont délinquants, non seulement ceux qui ont commis eux même l'acte, mais encore ceux qui ont aidé à réaliser l'acte matériel constitutif de l'infraction (complicité). Il restera à se demander, si du fait de la proclamation du principe de la responsabilité pénale de son propre fait, il est possible d'admettre qu'une personne (un chef d'entreprise par exemple) puisse être responsable pénalement de l'acte matériel commis par autrui. Aussi examinera-t-on successivement :

Section 1. — La détermination des personnes responsables.

Section 2. — Le complice.

Section 3. — Le pénalement responsable du fait d'autrui.

1. V. pour quelques exemples de procès faits, dans l'ancien droit français à des animaux, Mme DELMAS-MARTY, « Les chemins de la répression », p. 35.

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C. L'intention criminelle

333 ***L'intention criminelle*** ◇ Troisième et dernière condition de la répression de la complicité, elle constitue en quelque sorte l'élément moral de l'incrimination de la complicité.

Pour que le complice soit punissable, il faut qu'il ait participé en connaissance de cause à l'infraction principale, qu'il ait su qu'il s'associait à un crime ou à un délit déterminé, comme un meurtre ou un vol. Il faut « l'intention de contribuer à l'acte délictueux consommé ou tenté par autrui [1] ». On ne pourrait par exemple considérer comme complice d'un meurtre exécuté avec un fusil de chasse, celui qui aurait prêté le fusil au meurtrier pour lui permettre de chasser [2]. Mais la jurisprudence n'exige pas que le complice ait connu les circonstances aggravantes de l'infraction à laquelle il a voulu s'associer. L'exigence d'une intention criminelle personnelle au complice résulte de l'article 121-7 du C. Pén. qui vise la provocation à l'infraction et les instructions données « pour commettre » l'infraction (al. 2), et l'aide et l'assistance prêtées « sciemment » (al. 1er).

334 ***Notion d'intention du complice*** ◇ L'intention requise chez le complice est tout à fait distincte de l'intention criminelle ou de la faute pénale de l'auteur principal. Elle consiste toujours dans une *faute intentionnelle*, dans une volonté de s'associer intentionnellement à l'acte délictueux de l'auteur principal [3]. Le plus souvent, elle résulte d'une entente préalable avec celui-ci ; mais parfois, l'entente n'a lieu qu'au moment même de la commission de l'infraction. En tout cas, il faut, selon la formule des arrêts, que le complice et l'auteur principal aient agi « ensemble et de concert », en vue d'obtenir le résultat délictueux.

Il s'en suit que l'auteur d'une faute d'imprudence ne peut pas être poursuivi comme complice, même si cette imprudence ou cette négligence constitue une faute au point de vue civil et engage sa responsabilité civile. Mais dans le cas où l'infraction commise par l'auteur principal est une infraction involontaire, la faute pénale d'imprudence commise par un tiers

1. Crim. 6 août 1924, B. n° 323 ; Ch. Acc. Bourges, 17 mai 1963, *D.* 1963, 355 ; Trib. Nevers, 8 mai 1964, *J.C.P.* 1964-II-13.752 *bis* ; Crim. 16 mars 1970, *J.C.P.* 1971-II-16.813, note BOULOC ; « En l'état des faits constatés par eux et desquels ne ressort pas une participation volontaire à une escroquerie, les juges du fond peuvent relaxer celui qui est poursuivi comme complice » ; Crim. 25 juin 1979, *Bull.* n° 233.

2. Crim. 13 janv. 1955, *D.* 1955, 291, note CHAVANNE.

3. Elle suppose une conscience de s'associer à une infraction pénale et de favoriser la réalisation de cette infraction par une intervention volontaire. Voir notamment : Crim. 21 oct. 1948, *Bull. crim.* n° 242 ; Crim. 8 févr. 1950, *J.C.P.* 1950-IV-53 ; Crim. 26 nov. 1974, *Bull.* n° 349, *D.* 1975, I. R. p. 12. Il faut un fait de participation consciente du prévenu aux faits qui constituent l'infraction retenue contre l'auteur principal ; Crim. 15 févr. 1982, *Bull. crim.* n° 50, *D.* 1983, p. 275, note D. MAYER et J.-P. PIZZIO (complicité en matière de publicité trompeuse : le complice doit avoir fourni les moyens en connaissance de cause) ; Crim. 1er avril 1984, *Gaz. Pal.*, 4 avril 1985. V. aussi R. KOERING-JOULIN, « L'élément moral de la complicité par fourniture de moyens ruineux », *D.* 1980, chr. 231.

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ne peut-elle pas être retenue à son encontre et le rendre punissable au titre de la complicité ? C'est la question de savoir si la complicité existe dans les délits d'imprudence.

Contrairement à une partie de la doctrine — pour qui dans ces infractions il ne peut y avoir de complices mais seulement des coauteurs, car la complicité suppose toujours chez le complice une intention délictueuse, — la jurisprudence admet parfois que la complicité s'applique à tous les délits, même aux délits non intentionnels [1].

135 ***Moment de l'intention*** ◇ La conscience chez le complice de participer à une infraction doit être concomitante de la fourniture des instructions ou de la prestation de l'aide ou de l'assistance. La Cour de cassation exige en effet que la connaissance ait existé chez le complice au moment même où il a, soit fourni les instructions et les moyens pour commettre l'infraction, soit prêté aide et assistance [2] mais il importe peu que l'acte principal ait été encore à l'état de projet lors de la fourniture des moyens [3]. En revanche, le fait d'avoir su par la suite que l'aide ou l'assistance avait permis ou facilité la commission d'une infraction n'est pas, d'après la jurisprudence, un acte de complicité punissable, faute d'intention chez le complice.

136 ***Preuve de l'intention*** ◇ Puisque la complicité ne peut être réprimée que s'il existe une intention personnelle au complice, c'est au Ministère public qu'il appartient de rapporter la preuve que le complice savait effectivement et au moment même où il a agi, que l'aide et l'assistance qu'il prêtait, allait servir à l'infraction. Cette action consciente peut résulter de la qualité de directeur d'un journal [4]. Elle peut aussi se déduire de comportement ultérieurs, même si la complicité ne peut pas résulter d'actes postérieurs au fait principal [5]. De toute façon, lorsqu'il retient la culpabilité d'un complice, le juge doit toujours préciser qu'il a constaté l'intention criminelle, et indiquer dans les motifs de sa décision sur quoi repose sa conviction [6].

1. Crim. 17 nov. 1887, B. n° 392 ; Crim. 14 déc. 1934, D. P. 1935-1-96 — à propos d'un homicide par imprudence, Chambéry, 8 mars 1956, *J.C.P.* 1956-II-9.224, note VOUIN. V. toutefois Crim. 24 oct. 1956, *Bull.* n° 375. Il y a complicité en matière de publicité trompeuse : Crim. 15 févr. 1982, *Bull.* n° 50 ; Crim. 23 avril 1997, *Bull.* n° 143.

2. Crim. 5 nov. 1943, D. A. 1944, 29 ; Paris 30 juin 1977, *Rev. Jurisp. Com.*, 1978, p. 419, note B. BOULOC ; Crim. 28 juin 1995. *Bull.* n° 241 ; Crim 23 avril 1997, *Bull.* n° 143 ; Crim. 7 oct. 1998, *Bull.* n° 249. V. toutefois Crim. 15 novembre 1990, *Bull.* n° 388, *Gaz. Pal.*, 28 mars 1991, note J.-P. DOUCET affirmant que l'élément intentionnel doit être apprécié au moment où les faits ont été commis.

3. Crim. 8 janvier 1991, *Bull.* n° 15.

4. Crim. 27 oct. 1992, *Bull.* n° 343.

5. Crim. 4 nov. 1991, *Bull.* n° 391.

6. Crim. 11 nov. 1921, *D.* 1922-1-64.

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The Court here rules that conduct inconsistent with an existing rule is not necessarily an indication of the recognition, or even the emergence, of a new rule; but it does at the same time recognize that this is a way in which a new rule may be discerned. Later in the same decision, discussing the principle of non-intervention, it observed that 'Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend toward a modification of customary international law'.[27] The paradox of *opinio juris* is of course here emphasized: if a State decides to act in a way inconsistent with a recognized rule of custom, it will no doubt have good and sufficient reason for doing so, and perhaps even for thinking that its approach should be generalized—that the rule needs to be modified consistently with its action. It will however, almost by definition, not be acting because it is convinced that there is already a new rule. The process by which customary rules change and develop thus presents theoretical difficulties; but it is a process which does occur. Customary law, in the traditional conception of it, is not a rigid and unchangeable system, though it is sometimes criticized as being such.

An important difference between customary law and law derived from treaties is that, as already observed, in principle customary law is applicable to all States without exception, while treaty-law is applicable as such only to the parties to the particular treaty. A State which relies in a dispute on a rule of treaty-law has to establish that the other party to the dispute is bound by the treaty; whereas if a claim is based on general customary law, it is sufficient to establish that the rule exists in customary law, and there is no need to show that the other party has accepted it, or participated in the practice from which the rule derives.[28] There are two exceptions to this principle: alongside general customary law there exist rules of *special* or *local* customary law, which are applicable only within a defined group of States; and it is in principle possible for a State which does not accept a rule which is in the process of becoming standard international practice to make clear its opposition to it, in which case it will be exempted from the rule when it does become a rule of law, having the status of what is generally called a *persistent objector.*

As regards *local customary law*, perhaps the only clear and well-known example is that relating to the practice of diplomatic asylum in Latin America, whereby the States of the region recognize the right of the embassies of other States of the region to give asylum to political fugitives.[29] The rule is purely local in that it is not asserted in favour of, or against, States outside the region: for example, neither the British Embassy in Buenos Aires, nor the Argentine Embassy in London, would be regarded as entitled to offer asylum. The International Court had to consider the detailed application of the rule in the *Asylum* and *Haya de la Torre* cases, in which Colombia relied, against Peru, on 'an alleged regional or local custom peculiar to Latin-American States'. In the *Asylum* case the Court observed that:

[27] Ibid, para 207.

[28] If the dispute is subjected to arbitration or judicial settlement, there is theoretically no need even to establish the existence of the rule; according to the principle *jura novit curia* (the court knows the law), no proof of general rules of law is required. However, in practice litigant States do endeavour to prove the existence of the rules of law on which they base their claims.

[29] Another alleged rule of regional customary law was pleaded in the *Dispute regarding Navigational and Related Rights between Costa Rica and Nicaragua*, but the ICJ found it unnecessary to decide whether such a rule existed: Judgment of 13 July 2009, paras 34–36.

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I. INTRODUCTION

A. Historical Sketch

The criminal law of India is governed principally by the Indian Penal Code of 1860 (hereinafter the Code). Before its advent the prevailing criminal law in India was a patchwork of Muslim and Hindu law. The Code's authors drew their inspiration from several sources, notably the English criminal law, the French Penal Code, and Edward Livingston's Code for Louisiana. When they were drafting the Code, they were very clear in their goal of making it exhaustive.

The Code's authors proposed a scheme whereby ambiguities or gaps in the Code were to be referred to Parliament, which should decide the point and, if necessary, amend the Code. Regrettably, this proposal was not adopted in India, so the courts have had to undertake the tasks of determining the meaning to be given to an ambiguous provision and filling a gap left by the Code.

Two points from legal history are worth noting because they provide useful background from which to consider the Code. The first is that English criminal law when the Code was drafted was in a state of chaos, and serious efforts at reforming the law were being made. Second, the Code's authors were heavily influenced by the individualistic libertarian philosophy of Jeremy Bentham. This philosophy imbued the Code with a utilitarian base and cast *mens rea* in largely subjective terms, in contrast to the prevailing retributionism and frequently objectively based *mens rea* of nineteenth-century English criminal law.

B. Jurisdiction

The Code specifies the extent of criminal jurisdiction over offences committed within and outside India. India's territory comprises its land, internal waters, territorial coastal waters, and airspace above its land and waters. Section 2 makes the Code applicable to every person irrespective of rank, caste, creed, or nationality. Section 108A also provides that a person who in India instigates the commission of an offence outside India is liable to be punished under the Code. Foreign nationals who commit a crime in India cannot plead ignorance of Indian law. It has also been held that a foreign national who in India instigates the commission of a crime outside India is also liable to punishment under the Code.[1]

Certain people are exempt from the criminal jurisdiction of the courts by virtue of the constitution of India, statutory provisions, or rules of international law. They include the president of India, the governor of an Indian state, Supreme Court and High Court judges, and foreign sovereigns and ambassadors.

Extraterritorial jurisdiction is afforded by section 3 of the Code, which stipulates that any person may be tried for an offence committed by him or her outside India provided he or she is liable to be punished for it by Indian law as if he or she had committed it within India. This section therefore postulates the trial of Indian citizens for crimes committed abroad even though their conduct may not be recognized as a crime in the place where it was committed.

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Also, the section applies to foreigners who are covered by special laws bringing them under Indian jurisdiction.[2] Additionally, section 4 provides that the Code applies to any offence committed by any Indian citizen in any place outside India and to any person on any ship or aircraft registered in India, wherever it may be at the time of the offence.

There is no statute of limitations for the prosecution of offences mentioned in the Code. However, some offences created by special laws may be subject to a limitation period prescribed by those special laws.[3]

C. Legality Principle

Although the legislature has the power to enact both prospective and retrospective laws, those laws are subject to the maxim *nulla poena sine lege* (no punishment without law). This maxim is enshrined in article 20 of the constitution, which consists of two parts. The first proclaims that "no person shall be convicted of any offence except for a violation of law in force at the time of the commission of the act charged as an offence." The second declares that no person shall "be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence." Hence, if a trial is held with respect to a law which came into force after the date when the offence was committed, article 20 requires the court to consider whether the penalty imposed is higher than the penalty which could have been imposed under the previous law.[4] Article 20 would not be infringed if the court imposed a penalty which was not greater than the one prescribed under the previous law.

These two constitutionally entrenched limitations do not prevent the legislature from enacting retrospective procedural laws. Consequently, the Supreme Court has held that a trial under a procedure different from that which obtained at the time of the commission of the offence is not in itself unconstitutional.[5]

D. Sources of Criminal Law

1. Legislature

The general principles of criminal liability and major offences are contained in the Code. There are also various statutes enacted by the central and state legislatures criminalizing conduct which may apply generally,[6] specially,[7] or locally.[8] A special law is applicable to the particular subject, while a local law applies to a particular part of India. The defences provided for in the Code are available to persons charged with an offence under special or local laws.[9]

2. Judiciary

The courts have an important role in interpreting the provisions of the Code and other penal statutes and applying them to the case at hand. Since the legislature has not been forthcoming in clarifying or resolving many ambiguities or gaps in the Code, this task has fallen on the courts. Moreover, the courts have often displayed ingenuity in interpreting Code provisions in ways which accommodate the social, cultural, and religious diversity of Indian society. It would therefore be correct to assert that the criminal law of India comprises statute law as interpreted and applied by a large body of case law which has been built up over time.

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3. Executive

The executive cannot enact offences; that power belongs to the legislature. However, the legislature occasionally provides the executive with a range of powers to regulate activities which may be subjected to criminal sanction. For example, under special laws like the Unlawful Activities (Prevention) Act 1967 and the Armed Forces (Special Powers) Act 1958, wide powers are conferred on the executive to declare an organization "unlawful" or an area a disturbed area. Similarly, the Police Act 1861 confers on the police wide powers of surveillance over persons whom the police have reasonable grounds to believe are leading a life of crime.

4. Scholars

Several voluminous and long-standing commentaries on the Code have been edited by distinguished Indian jurists and judges of higher courts.[40] They are occasionally referred to in judgments. Recent editions of these commentaries have tended toward becoming mere repositories of case summaries.

B. Process

1. Adversarial/Inquisitorial

The Indian criminal justice process has inherited and maintained the English adversarial model with its underlying premise that a person is presumed innocent until he or she is proved guilty. The judge's role is more than that of a mere umpire; he or she takes an active interest in the proceedings by putting questions to witnesses to ascertain the truth.[41] As the state's representative, the prosecution assists the trier of fact to arrive at the truth. In doing so, the prosecutor is disallowed from urging an argument which in his or her opinion does not carry weight, nor can he or she exclude legal evidence which supports the interests of the defendant. Counsel for the defence, if there is one, is required to do everything he or she ethically can to protect the interest of the defendant. Criminal proceedings are held in open court and may be reported in the press, and judgments are accessible to the public.

2. Jury/Written Opinions

Under colonial rule, the British administration introduced a jury system very much like the one operating in England at the time. However, the system did not work well, largely because it was difficult in such a diverse country as India to find sufficient numbers of people with similar status and backgrounds to sit in judgment of their peers. This resulted in a modification of the jury system which effectively overrode the jury verdict by vesting in the judge the power to set aside verdicts of acquittal by juries. Jury trials were eventually abolished by the legislature in 1960 on the ground that they were susceptible to media and public influence.

II. GENERAL PART

A. Theories of Punishment

None of the penal statutes, including the Code, expressly specify the theories of punishment. The Benthamite philosophy with its emphasis on utilitarianism has had a strong influence on the Code's approach to punishment. This is evident in the types of punishment

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which the Code recognized when it was first enacted, namely, the death penalty, transportation, imprisonment, whipping, and fines of sizable amounts. Likewise, the severe maximum penalties imposed for most offences in the Code attest to the view that the meting out and threat of punishment are essential for the control and prevention of crime.

Courts and commentators have suggested that the main theories of punishment are deterrence, retribution, and rehabilitation. The deterrent theory of punishment aims to deter the particular offender from reoffending and also to deter prospective offenders from committing the type of crime for which the offender was convicted.[12] The retributive theory views punishment as necessary to satiate the desire of crime victims and other members of society for vengeance. However, "[N]o sentence should ever appear to be vindictive [since] an excessive sentence defeats its own object and tends to further undermine respect for the law."[13] The rehabilitative theory of punishment seeks to make offenders harmless by curing them of those drawbacks which caused them to commit crime. Proponents of rehabilitation regard the punishment structure of the Code as brutal and harsh and a relic of former regressive times. They contend that in modern Indian society, sentencing should be seen as a process of reshaping a person who has degenerated into criminality. As a leading commentary has colorfully put it, "[A] therapeutic rather than an 'in terrorem' outlook should prevail in our criminal courts since brutal incarceration of the person merely produces laceration of his mind."[14]

Although these various theories of punishment may appear incompatible, they have in common the general aim of social defence. The Supreme Court endorsed this view when it dictated that the "sentence should bring home to the guilty party the consciousness that the offence committed by him was against his own interest and also against the interest of the society of which he happens to be a member."[15]

B. Liability Requirements

1. *Objective*/Actus Reus

i. Act

The word *act* is not defined in the Code. The courts have advised interpreting it in a commonsensical way by stating that "['act'] must necessarily be something short of a transaction which is composed of a series of acts . . . it means the action taken as a whole and not the numerous separate movements involved."[16]

There is a fundamental principle of criminal law which declares that, where the physical elements of the crime include conduct (whether an act or an omission), such conduct must be voluntary. This is implicit in all the offence-creating provisions of the Code. Where conduct is involuntary, the defendant cannot be held criminally liable for the crime charged. Voluntariness comprises the will or ability of the person to control his or her conduct.[17]

In cases where the defendant has performed a series of acts, it may be important to determine when the conduct element of the crime in question is concluded. This will be so in relation to *mens rea* crimes which require the defendant to have possessed the requisite mental element during the commission of the conduct element of the crime. For instance, if D has strangled V with the intention of killing him and, wrongly believing him to be

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dead, hangs V from a tree, is D liable for murder? This type of case raises the issue of the need for concurrence between the *actus reus* and the *mens rea* of a crime before D may be held liable. The courts have dealt with this issue by holding that D is liable if his or her subsequent act was morally congruent with his or earlier act.[18] Thus, in the example given, D would be liable for murder if his act of hanging V was prompted by D's desire to conceal his or her previous act of strangulation which was done with the requisite *mens rea* for that offence.

ii. Omission

The general rule is that criminal liability is attached to conduct comprising positive activity by the defendant, but not to his or her failure to act. However, the law recognizes exceptions to this general rule. Section 43 of the Code confines these exceptions to omissions which are "illegal," by which is meant "everything which is an offence or which is prohibited by law, or which furnishes a ground for a civil action." Briefly stated, "[A]n illegal omission would apply to omissions of everything which [a person] is legally bound to do."[19]

There are three types of circumstances described in section 43 which render omissions illegal for the purposes of criminal liability. The first is omissions which are expressly made offences by the Code or other penal statutes. The second circumstance envisaged by section 43 is where the omission was prohibited by law. What is "prohibited by law" certainly includes omissions which are expressly made offences, but the term is not restricted to these offences. For example, shipping legislation may impose a duty on a captain to provide medical treatment to sick persons on board. Although the legislation does not make a captain's failure to discharge this duty an offence, it does prohibit such failure, which would therefore constitute an illegal omission under section 43.[20]

The third circumstance requires a court to determine whether the particular defendant's omission would attract civil liability. Failures to act which furnish ground for a civil action are most commonly related to tort law, in particular, the tort of negligence. Like criminal law, tort law has a general rule imposing a legal duty of care in respect of positive activity which might harm others, and it imposes such a duty of care for omissions in exceptional situations. Civil law imposes a legal duty to act where a special relationship exists between the defendant and the person injured by the defendant's omission. Examples include the relationship between a parent and his or her young child, or when a person voluntarily assumes responsibility for a physically and mentally infirm adult who is incapable of looking after himself or herself. Civil law also imposes a duty of care in respect of omissions when the defendant has negligently created the dangerous situation. Besides tort law, a failure to act may furnish ground for a civil action based on contract law.

iii. Status

There are some offences which base criminal liability on the defendant's status, that is, relationship with a specified state of affairs, which may be a circumstance or an event. These offences are invariably created by statute and are relatively minor in nature. An example is provided in section 3 of the Public Gambling Act 1867 of being the occupier of any premises used as a common gaming house. The crime is established upon proof that the defendant was the occupier of the premises fitting the specified description, and there

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is no formal requirement of an act or omission by him or her. Furthermore, the defendant cannot escape liability on the ground of ignorance.

As in the case of omissions, criminal law is circumspect in imposing criminal liability based merely on status, for otherwise, freedom of individuals to be connected to a circumstance or an event would be greatly stifled. Such a form of liability is therefore limited to persons who have responsibility for, or are in control of, the proscribed situation. Thus, in the example just given, the statute creating the offence confines liability to the occupier of the premises used as a common gaming house and does not extend it to other occupants or visitors who have no control over the state of affairs of those premises.

2. *Subjective*/Mens Rea/*Mental Element*

i. Intent

The term *intention* is not defined in the Code, and the task of doing so is thus left to the courts. The Supreme Court has held that it comprises "a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event."[21] It is uncertain whether the meaning of intention extends beyond its purposive sense to include knowledge of the virtual certainty of an event occurring (sometimes described as "oblique" or "indirect" intention). Against such an extension is the fact that many Code offences include, besides intention, the *mens rea* of knowing the likelihood of the proscribed result. For these offences, oblique intention would more than satisfy this type of knowledge.

The courts have ruled that the concept of intention is distinguishable from desire. Desire introduces an emotional or motivational element that may or may not be present in intention. Similarly, intention is not to be confused with motive.[22] Motive is the emotional force behind the defendant's conduct and is distinguished from intention, which is a technical concept denoting a mental state in which the defendant acts with the purpose to bring about a result.

ii. Recklessness

Although the term *reckless* does not appear in the Code, this type of *mens rea* is expressed in other ways in the Code insofar as it denotes advertence to a risk. The most common expression of this nature in the Code is "knows to be likely" to cause a proscribed result, an instance of which is section 299(3) concerning the offence of culpable homicide. Another expression used by the Code is "rashness," which is the *mens rea* for the crime of causing death by a rash act under section 304A. This term has been judicially interpreted as "acting with the consciousness that mischievous and illegal consequences may follow, but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening."[23] The difference between "rash" and "knows to be likely" is one of degree, with the former requiring only knowledge that the proscribed harm was possible, while the latter requires knowledge that a harm was probable.[24] Clearly, oblique intention will satisfy either of these forms of recklessness.

iii. Negligence

There are some offences in the Code which are based on negligence.[25] The Code does not define the term *negligence*, and it has been left to the courts to do so. It has been held that "[c]riminal negligence is the gross and culpable neglect or failure to exercise that reasonable

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and proper care and precaution to guard against injury . . . , which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the defendant person to have adopted."[26] A gross degree of negligence is required before criminal liability will lie.[27]

The defendant's conduct is measured against what a reasonable person, judged according to the knowledge, experience, and skill expected of such a person, would have done in the same or similar circumstances as those of the defendant. The courts have been prepared to partially subjectivize this objective standard of care by taking into account the mental incapacity of a particular defendant which prevented him or her from appreciating the danger at the material time.[28]

Although the concept of "good faith" as used in the Code is not strictly a form of *mens rea*, it is closely related to that of negligence. Section 52 of the Code states that "[n]othing is said to be done or believed in good faith which is done or believed without due care and attention."

3. *Theories of Liability*

i. Inchoate Crimes

a. *Attempt*

The Code provisions on attempt comprise a general provision[29] coupled with specific provisions[30] for the punishment of attempt. All these provisions serve only to regulate the extent of punishment for an attempt and do not contain a definition of what constitutes an attempt. Consequently, the courts have had to pronounce on the elements of attempt.

In relation to the *actus reus*, the courts have applied several tests. One is that the defendant's conduct must have gone beyond the stage of preparation and have been sufficiently proximate to the substantive offence. However, this does not require such conduct to have been the last act which the defendant was capable of doing.[31] Another test is whether the defendant's conduct was such as to unequivocally indicate his or her intention to commit the offence.[32]

With respect to the *mens rea*, the courts have held that, insofar as the general provision on attempt is concerned, criminal liability requires nothing less than an intention by the defendant to commit the substantive offence.[33] The words appearing in the general provision, "Whoever attempts . . . to cause such an offence to be committed," make it possible to convict a person of attempting to abet, or attempting to conspire with, another person to commit an offence. This is because abetment and conspiracy are recognized as offences in their own right by the Code. Conviction for attempt will lie even if the person abetted or conspired with does not proceed to commit the substantive offence.

The courts have ruled that a person may be liable for attempt even if what he or she had set out to do was factually impossible to achieve.[34] Supporting this ruling are the illustrations accompanying section 511 of the Code, which show that a person may be guilty of attempting to steal from an empty receptacle.

b. *Conspiracy*

The Code defines the offence of criminal conspiracy as constituting an agreement by two or more persons to do or cause to be done an illegal act, or an act which is not illegal by

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illegal means.[35] Furthermore, where the agreement is not to commit an offence, an overt act done by one or more of the parties in pursuance of the agreement is required. The *actus reus* of criminal conspiracy is the agreement which involves a meeting of minds and unity of purpose between the conspirators.[36] There need not be a physical meeting of the parties, nor does a person have to be a party to the agreement from the start.[37] A person may be convicted of criminal conspiracy even though the other party involved is still at large, dead, unknown, or has been acquitted on a technical ground.[38] The Code does not explicitly exclude agreements between spouses or with the intended victim of the offence from the scope of criminal conspiracy.

The *mens rea* of criminal conspiracy consists of an intention by the parties to carry out the object of the agreement. Such an intention is absent from a party who merely pretends to join a criminal conspiracy but does not share the object of the scheme. Each party to the agreement is not required to know all the details of the scheme.[39]

People may be liable for criminal conspiracy whose object was factually impossible to achieve, provided the agreement was to commit an offence. Thus, in one case, two men who had agreed with each other to kill their intended victim by witchcraft were held liable for criminal conspiracy to commit murder, since they had agreed to commit murder and not merely to perform acts of witchcraft.[40]

ii. Complicity

The Code contains a number of provisions dealing with complicity, which is described as "abetment." The main provision is section 107, which provides for three types of abetment: by instigation, by conspiracy, and by intentional aiding. Abetment is recognized as an offence in its own right and, subject to one qualification, is not dependent on the person abetted committing the substantive offence.[41] The courts have held that this is true for cases of abetment by instigation and abetment by conspiracy. The qualification is that, for abetment by aiding, the person abetted must be proved to have committed the offence since the word *aid* suggests that the act aided was committed.[42] The Code recognizes a double inchoate crime by stipulating that "[t]he abetment of an offence being an offence, the abetment of such an abetment is also an offence."[43]

Regarding the *actus reus*, abetment by instigation requires the defendant to have actively suggested or stimulated the commission of the substantive offence.[44] As for abetment by conspiracy, the abettor must have engaged with one or more persons in a conspiracy, the conspiracy must be for the doing of the act abetted, and an act or illegal omission must have taken place in pursuance of the conspiracy and in order to the doing of the act abetted. A person cannot be convicted of abetment by conspiracy if the charges against all the other alleged conspirators have failed.[45] Regarding abetment by aiding, "aid" involves facilitating the commission of the act[46] and, therefore, must have been given before or at the time of the commission of the act. It has been held that mere presence at or near the scene of the crime does not itself amount to abetment by aiding.[47]

In relation to the *mens rea*, the general position is that the defendant must have intended that the person abetted carry out the conduct abetted, and must have known that

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such conduct amounted to a crime.[48] The law does not require the person abetted to have any guilty intention or knowledge or even to be capable of committing the crime.[49]

The Code has provisions dealing with cases where the person abetted committed an offence which differed from that intended by the abettor. Section 111 provides that when an act was abetted but a "different act" was done, the abettor is liable for that act provided it was "a probable consequence of the abetment and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment." Section 113 provides that when the act abetted causes a "different effect" than that which was intended by the abettor, the abettor is liable for the effect caused, provided he or she "knew that the act abetted was likely to cause that effect." It has been observed that the test for criminal liability under section 111 is objective, while that under section 113 is subjective.

The Code also specifies the law in relation to joint criminal liability. The main provision is section 34, which states that "[w]hen a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone." The offence for which the secondary offender may be liable on the basis of section 34 is that which was committed by the principal offender; they cannot be liable for different offences. Participation in some form or other in the criminal act constitutes the main feature of section 34. For participation to be made out, the defendant must have been physically or constructively present when the offence occurred.[50]

The term *common intention* in section 34 refers to the common design of two or more persons acting together and signifies the reason for doing the acts collectively forming the "criminal act."[51] The phrase "in furtherance of a common intention" contained in this section enables criminal liability for collateral offences to be imputed to persons acting in concert even though those offences may not have formed part of the common design. Case authorities recognize three situations when this could occur. The first is the act which was intended by all the parties;[52] the second is the act which, though not intended, was known by the parties to be a possible consequence of the criminal enterprise; and the third is the act which any one of the parties commits "in order to avoid or remove any obstruction or resistance put up in the way of the proper execution of the common intention."[53]

iii. Corporate Criminal Liability

In spite of its antiquity, the Code does criminalize and punish corporations for offences having a *mens rea* element. For example, a corporation can be liable for certain offences of personal violence, including culpable homicide, by virtue of the particular definitions given to these offences, read with section 11 of the Code. That section provides that the word *person* appearing in the Code includes a company, association, or body of persons, whether incorporated or not. However, other offences such as rape and perjury are excluded because the wording of these offences shows that they can be committed only by a natural person.[54]

A difficulty arises in establishing the *mens rea* element of an offence where a corporate

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entity is involved. Since the Code is silent on this issue, the courts have adopted the doctrine of identification developed by English common law.[55] Under this doctrine, a corporation will be held criminally liable if its "directing mind" (which could be an individual person or the board of directors of the corporation) possessed the requisite *mens rea*.[56] Where individuals are concerned, they have to be sufficiently high up in the organizational hierarchy of the corporation to satisfy this test.[57]

Since a corporation is a fictitious entity, it is incapable of receiving bodily punishments such as imprisonment. Consequently, a corporation can be prosecuted for offences which are punishable only by a fine.[58] There is also case authority holding that corporations may be prosecuted for offences where a fine and imprisonment term are mandatory, in which case it would be punished only by a fine.[59]

4. Causation

The authors of the Code considered prescribing general rules on causation but eventually decided that the infinite variety of cases made the rules a matter for the courts to develop. Although the Code's authors chose not to devise general principles on causation, they thought it necessary to include specific provisions on causation in respect of the offence of culpable homicide. The relevant provisions appear as explanations to section 299 (the section on culpable homicide) and read as follows:

> *Explanation 1*
> A person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.
>
> *Explanation 2*
> Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

The courts have generally applied a two-stage inquiry to the issue of causation.[60] The first stage involves inquiring whether the defendant caused the proscribed result in fact. This is resolved by applying the "but-for" test, which, if met, shows that the defendant's conduct was a *causa sine qua non* (a necessary or indispensable condition) of the victim's harm. The second stage involves inquiring whether the defendant's conduct had caused the victim's harm as a matter of law (a *causa causans*). This involves a value judgment whether the defendant was sufficiently blameworthy for causing the harm to warrant conviction and punishment. The courts have occasionally applied the test of "a substantial cause" in relatively straightforward cases of causation. However, the judicial preference appears to be for a test of reasonable foresight by the defendant of the harm. For example, it was held in a murder case that "any act is said to cause death . . . when the death results either from the act itself or from some consequences necessarily or naturally flowing from that act, and reasonably contemplated as its result."[61]

In many cases the defendant's conduct would have been the primary or even sole cause of the proscribed result. However, there will be other cases where a subsequent causal act

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or event occurs (a *novus actus interveniens*), thereby raising the question whether the defendant's conduct continued to play a causal role or merely formed part of the factual background. The Indian courts have, in many cases, used the reasonable-foresight test to resolve these more complicated cases of causation.[62]

C. Defences

1. Types of Defence

The principal defences are contained in the Code. They consist of the "general exceptions" contained in part IV[63] of the Code, which apply to offences found within[64] the Code, as well as without,[65] unless excluded by statute. In addition, there are the "special exceptions" to murder as spelled out in section 300 of the Code. These various exculpatory defences can be categorized into three types. The first denies personal responsibility for what occurred, such as the defences of mistake of fact and accident. The second type is where the offence elements are proved, but the broader context in which the conduct transpired offers a justification or excuse which negates criminal liability. Examples of justificatory defences are consent, self-defence, necessity (choice of evils), and superior orders. Excusatory defences include duress, mistake, and provocation. The third type of exculpatory defences has mental impairment as its core. Although evidence of mental impairment may be used to deny an offence element such as knowledge or intent, such evidence can support an independent defence. For example, mental impairment can prevent a person from having the capacity to judge the rightness or wrongness of his or her conduct or can affect his or her capacity to control conduct. Examples include the defences of unsoundness of mind, intoxication, and infanticide.

2. Burden of Proof

There are a number of broad principles which are applicable to all criminal trials. The first is that it is the responsibility of the prosecution to prove its case beyond a reasonable doubt. If it fails to do so, the defendant is entitled to be acquitted on the basis that he or she is presumed innocent of the crime charged unless proved otherwise. Once the prosecution has proved beyond a reasonable doubt facts which, if unanswered, would establish the charge against the defendant, it is the responsibility of the defendant who seeks to be exculpated to adduce evidence in support of one of the legally recognized defences. The court decides on the case after taking into consideration the evidence as a whole.

The Indian Evidence Act 1872 contains two provisions which endorse these broad principles. The first is section 101, the relevant parts of which provide that "[w]hoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist," and that "[w]hen a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." This section clearly provides that in a criminal trial the legal burden of proving that the defendant is guilty of the crime charged lies throughout with the prosecution.

The second provision is section 105, which stipulates that the defendant bears the burden of proving a full or partial defence. The Supreme Court has interpreted this provision to mean that the defendant bears the burden, as in a civil case, of raising some evidence in

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support of a defence.[66] In other words, the court will presume the absence of circumstances which bring the case under one of the recognized defences, and it will cast the burden on the defendant to rebut this presumption by adducing evidence showing that the preponderance of probabilities is in favor of his or her plea. Should this occur, the prosecution has to rebut the evidence supporting a defence beyond a reasonable doubt, in keeping with the prosecution's obligation to discharge the legal burden of proof that the defendant is guilty of the crime as charged.

D. Justifications

1. Necessity

Section 81 of the Code recognizes a defence of necessity which is available to all offences, including murder. The requirements of the defence are contained in the rather sparsely worded section and the explanation and illustrations accompanying it.

Although no mention is made of a requirement of proportionality, this is evidenced by the illustrations. Illustration (a) is of a ship captain who chooses to run the risk of running down a boat with two passengers on board in order to avoid inevitably colliding with a boat holding thirty passengers. The illustration declares that the captain is not guilty of any offence if he runs down the first boat, provided he satisfies all the requirements of section 81. The "choice-of-evils" doctrine is apparent here, with the defendant justified in risking the lives of a few to save many. To the same effect, illustration (b) is of a defendant who pulls down houses in order to stop a great fire from spreading and causing loss of human life and property.

Besides the requirement of proportionate response, section 81 requires the defendant to have lacked any "criminal intention" to cause the harm. The meaning of this provision is unclear. It is likely to refer to the defendant's objective in committing the proscribed conduct; if the objective was to prevent other harm, the defendant's intention would not have been "criminal." Another requirement is that the defendant must have incurred the risk "in good faith" (i.e., "with due care and attention") for the purpose of preventing or avoiding "imminent"[67] harm. This may be contrasted with the more demanding test of "instant" harm for the closely related defence of duress.[68] It has also been noted that section 81 does not specify the types of threatened harms, leaving them open ended. Third, the defendant must have been "without any fault or negligence"[69] in creating the circumstances of necessity.

2. Self-Defence

The provisions dealing with the defence of person and of property are spelled out in great detail in the Code.[70] Two preconditions have to be met before the right of self-defence arises. The first is that an offence affecting the human body or property was being committed against the defendant or some other person.[71] A supplementary provision specifies circumstances when the law will recognize the right of self-defence even though the act confronting the defendant was not an offence. These circumstances include the aggressor's youth, want of maturity of understanding, unsoundness of mind, intoxication, and mistake of fact.[72] The second precondition is that there must not have been time for the defendant or person threatened to have recourse to the protection of the public authorities.[73]

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If the preconditions are met, there are certain other requirements that have to be satisfied for the defence to succeed. One requirement is that the defendant must have reasonably apprehended the particular danger which he or she claims compelled him or her to take defensive action. In relation to defence of the person, the Code expressly provides that the right to self-defence extends to the causing of death if the defendant reasonably apprehended a threat of death or grievous hurt or, in the case of an assault for the purpose of wrongful confinement, reasonably apprehended that he or she would be unable to have recourse to the public authorities for his or her release.[74] With regard to defence of property, fatal force may be used against certain specified threats, such as where the defendant reasonably apprehended death or grievous hurt to be a consequence of theft, mischief, or house trespass.[75] The duration of the right of self-defence is commensurate with the duration of the danger as reasonably apprehended by the defendant.[76]

A further requirement of self-defence is that the defendant must not have inflicted "more harm than it is necessary to inflict for the purpose of defence."[77] When dealing with this requirement, the courts have held that the force used by the defendant "should not be weighed in golden scales."[78] A person need not wait till the attack has commenced to exercise his or her right of self-defence. Depending on the circumstances, such a preemptive strike could satisfy the requirement of necessary harm.[79] There is also no legal duty to retreat; although having an opportunity to retreat may tell against the defendant in respect of satisfying the requirement of necessary harm, it is not conclusive about that requirement.

3. *Consent*

The Code devotes several sections to outlining different sets of circumstances when consent would be a full defence.[80] The term *consent* is not defined in the Code. The courts have held that for consent to be valid, the giver must have fully understood the nature and consequences of the conduct consented to, and that mere submission or passivity is not consent.[81] Furthermore, section 90 provides that consent is vitiated if it was given by a person under fear of injury or under a misconception of fact, or of unsound mind or intoxicated so as not to understand what he or she consented to, or who was under twelve years of age. The Code adopts the individualistic libertarian stance that the criminal law should intervene only where there was harm to others. Accordingly, where a "victim" consents to harm and no other person is hurt, the criminal law should not intervene, whether on moral, paternalistic, or utilitarian grounds.

The main provisions of the defence of consent are sections 87 and 88. Section 87 embraces most fully the individualistic libertarian philosophy concerning consensual harm. It provides that so long as the consenting party was above eighteen years of age, the doer is not criminally responsible for the harm consented to which the doer intentionally caused or knew he or she was likely to cause to the consenting party. There is no requirement that the harm-causing act have been beneficial in some way to the consenting party. The only restriction imposed by section 87 is that the doer must not have intended or known that death or grievous hurt would be caused.

The other main provision, section 88, differs materially from section 87 in several important respects. First, section 88 applies so long as the consenting party is twelve years of

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age or above,[82] whereas section 87 imposes the eighteen-year age restriction. Additionally, the doer under section 88 can intentionally or knowingly cause harm short of death. The explanation for this wider scope of section 88 is due to yet another difference between them, which is that under section 88, the act causing the harm must have been done for the benefit of the consenting party. The Code does not define the meaning of the term *benefit* other than that it excludes "mere pecuniary benefit."[83] The individualistic libertarian premise of the defence lets the doer and consenting party decide whether the harm-causing act had been done for the consenting party's benefit. However, the doer of the harm-causing act must have "in good faith" (i.e., with "due care and attention") intended the consenting party to benefit from that act.

4. Superior Orders

The defence of superior orders is recognized under section 76 of the Code, the relevant part of which reads: "Nothing is an offence which is done by a person who is . . . bound by law to do it." One of the accompanying illustrations is of a soldier who, in conformity with the law, obeys the order of his superior officer to fire at a mob. The soldier commits no offence by virtue of this provision. For these types of cases, it is immaterial whether the defendant believed that the order was lawful.[84] Such a belief is relevant only where the superior's order was found to have been unlawful, in which event the case will attract the excusatory defence, to be described in section II.E.6 in this chapter, that the subordinate mistakenly believed as a matter of fact that he or she was bound by law to obey the order.

Civil legislation will generally dictate what orders can be lawfully issued by a superior officer. During states of emergency or a period of martial law, the duties and attendant extraordinary powers exercised by police or military personnel will have received the endorsement of the civil law. Accordingly, an order which is authorized by the emergency legislation or martial law will be lawful for the purposes of the defence of superior orders.

A member of the police or armed forces should refuse to obey an order which he or she knows would result in a breach of the criminal law, even if such refusal may render him or her subject to military discipline. The judicial explanation for this stance is that "military discipline, while it regulates the conduct of a soldier in military matters, is made subject to a higher law in favor of public safety, when the act which the military discipline attempts to enforce or to justify is one which affects the person or property of another."[85]

E. Excuses

1. Mistake/Ignorance of Law or Fact

The primary Code provision on mistake is section 79, which concerns a person who, under a mistake of fact, believes that he or she was justified by law in committing an offence. The expression *justified by law* requires only that the actor's conduct have been lawful, while the term *law* denotes the general municipal law of the land. Section 79 expressly declares that mistake of law is not a defence. It imposes a blanket rule preventing mistakes of law from operating as a defence to a criminal charge. The strictness of this exclusionary rule is exemplified by a judicial ruling that a person who had accepted the decision of a court as a guide to his or her conduct was liable for a technical offence if that decision had

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subsequently been held not to express the correct law.[86] Mistake of law is, however, recognized as a mitigating factor in sentencing.[87]

The term *mistake* is not defined in the Code. It has been suggested that a mistake of fact consists of "an unconsciousness, ignorance, or forgetfulness of a fact, past or present, material to the transaction, or in the belief of the present existence of a thing material to the transaction, which does not exist, or in the past existence of a thing which has not existed."[88] Section 79 requires that the defendant's mistake pertain to a factual matter, as opposed to a legal one. A mistake of mixed fact and law has been treated by the courts as a mistake of fact for the purposes of these provisions.[89]

Section 79 requires the defendant to have "in good faith" (i.e., with "due care and attention") believed himself or herself to be bound or justified by law in doing a criminal act. The element "in good faith" under section 79 relates to the defendant's perception of the factual circumstances rather than to his or her performance of the criminal act. Furthermore, that perception must have led the defendant to believe that he or she was justified by law in doing the thing complained of. Certainly a defendant's careful performance of conduct would often support his or her belief that he or she was justified by law in doing it. But the inquiry into "in good faith" under section 79 does not stop at the defendant's conduct but proceeds from there to consider his or her belief. Although the concept "in good faith" is appraised objectively, account will be taken of certain personal characteristics of the defendant, together with the particular circumstances he or she experienced.[90]

2. Insanity/Diminished Capacity

The defence of insanity or diminished capacity, known as "unsoundness of mind," is contained in section 84 of the Code. It has been modeled after the principal rule pronounced in *M'Naghten's Case*,[91] the leading English common law authority on the defence of insanity. The Code does not define the term *unsoundness of mind* contained in section 84, and the courts have not elaborated upon it. The suggestion has been made that the term is wider than "disease of the mind" under the M'Naghten rules. Although *unsoundness of mind* is a legal term with a clinical component, it is finally the responsibility of the court to determine its application in any particular case.

A person is not exempt from criminal liability simply because he or she was of unsound mind at the time of the alleged offence. It must be shown that the unsoundness of mind was of a kind and severity which rendered the defendant "incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law."

The meaning of "nature of an act" is not elaborated in section 84. The courts have interpreted the expression as signifying the mental impairment of either the surface features of the act (such as cutting a person's throat believing it to be a loaf of bread) or the harmful consequences to the victim (such as causing his or her death). Under this interpretation, a defendant who was capable of knowing the surface features of his or her act but was too mentally disordered to be capable of knowing the harmful consequences of that act would be covered by the section 84 defence.

It has been held that the word *wrong* appearing in the phrase "either wrong or contrary to law" in section 84 refers to moral wrongness as opposed to legal wrongness (i.e., contrary to

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law).[92] The defence will apply where the defendant knew that his or her act was contrary to law but thought that it was morally right to do the act, and vice versa.[93]

3. Intoxication

The defence of intoxication is very narrowly circumscribed under section 85 of the Code. For the defence to succeed, the intoxication must have been involuntary; the relevant words of the provision state that "the thing which intoxicated him was administered to him without his knowledge or against his will." The defence is therefore limited to cases where the defendant was mistaken about the nature of the drink or drugs, or else the defendant's drink or medication was spiked or had been forced on him or her.

Even if this was the case, the defendant must go on to prove that his or her intoxicated condition was so severe as to have incapacitated his or her cognitive faculties in the same way and degree as that required for the defence of unsoundness of mind (i.e., insanity). The relevant part of section 85 states that "[n]othing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law." Since the form of incapacity is the same for both the defences of intoxication and unsoundness of mind, what distinguishes them is the cause of the incapacity. In respect of intoxication, it is drink or drugs, whose effect is transient by nature, compared with the cause of unsoundness of mind, which is of a longer-lasting nature.

Section 86 of the Code provides that in cases of voluntary intoxication, the same liability may be imposed on the defendant as could be imposed on a sober person who may have the knowledge to foresee the consequences of his or her conduct. With regard to crimes whose *mens rea* consists of an intention by the defendant to achieve the consequences of his or her conduct, voluntary intoxication could be a defence if the degree of intoxication was so severe as to negate that intention.[94]

4. Duress

The Code provides for the defence of duress under section 94, but murder and offences against the state punishable by death are excluded from its scope of operation. Section 94 unequivocally specifies that nothing short of a threat of instant death to the defendant will suffice. Thus the defence will be unavailable in cases where the threat was of some lesser harm, was not immediate, or was directed at a third party.

Another requirement of the defence is that the threat must have "reasonably cause[d] the apprehension" of instant death, so that it is not simply the defendant's belief but what he or she reasonably believed to be the nature of the threat. There is also a proviso in section 94 which requires that the defendant "did not of his own accord . . . place himself in the situation by which he became the subject" of the threat. The example given in the Code is that of a person who voluntarily joins a gang of robbers with knowledge of their character. He is not entitled to the benefit of the defence should he subsequently be compelled by his associates to do anything which is an offence. The wording of the proviso is also capable of being interpreted so as to require the defendant to have taken a reasonable opportunity to escape from his or her threatener.

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5. *Entrapment*

The Code does not have a provision recognizing entrapment as a defence, and the courts have refused to do so, treating the issue as an evidentiary matter. The courts have drawn a distinction between so-called legitimate and illegitimate traps. The former consists of cases where the offence was going to be committed in any event, and the trap was laid in order for the offence to be detected. The latter involves cases where there was no thought of committing an offence, and a temptation was offered to see if an offence would be committed in succumbing to it.

In respect of a legitimate trap, the law-enforcement officer taking part in the trap and witnesses to the trap are not accomplices in any sense, and their evidence will not require corroboration, although prudence will require that the evidence be carefully scrutinized and accepted as true before a conviction can be secured.[95] With regard to an illegitimate trap, the evidence obtained will be admissible only if it is corroborated. Furthermore, the persons participating in the trap will be guilty of an offence unless such entrapment was authorized by the legislature.[96]

6. *Superior Orders*

The Code recognizes that there may be instances where a subordinate mistakenly believed that he or she was bound by law to obey an order which turned out to be unlawful. This recognition is afforded by section 76, the relevant part of which states that "[n]othing is an offence which is done by a person . . . who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be bound by law to do it." Where the subordinate knew that the order was unlawful, he or she is prevented from pleading section 76.

This defence comes into play only where the subordinate did not know that the order was unlawful. It is crucial to determine just what the subordinate did not know concerning the legality of the order. If the subordinate thought that the superior officer had legal authority to make the order when he or she did not, this is a mistake of law and therefore falls outside the operation of section 76. It is only where the subordinate mistakenly believed that the factual circumstances warranted giving the order and that he or she was therefore bound to obey it that the defence under section 76 is applicable. The defendant will be acquitted of any offence if he or she had "in good faith" (i.e., with "due care and attention") believed that the circumstances were such as to make the order lawful.[97] Although some judgments have described unlawful orders attracting section 76 as being "manifestly unlawful,"[98] this concept should not be regarded separately from the wording and tenor of section 76 with its focus on the reasonableness of the subordinate's mistake concerning the lawfulness of the order.

F. Sanctions

1. *Punishment*

As noted in section II.A, the strong utilitarian underpinnings of the Code gave no room for the theory of rehabilitation. In recent times there has been a move to humanize punishment by considering not only the criminal conduct but the offender as a person. Some

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results of this shift are the abolition of whipping as a type of punishment on account of its brutality, and the introduction of probation as an alternative to imprisonment.

There are five types of punishment available: the death penalty, life imprisonment, imprisonment, forfeiture, and fine. The death penalty is discussed in section II.F.3. Life imprisonment means rigorous (as opposed to simple) imprisonment for the remainder of an offender's life. Although the executive is empowered to commute the sentence, an embargo is imposed on the lifer to serve at least fourteen years of imprisonment.[99] There are two kinds of imprisonment, rigorous and simple. An offender sentenced to rigorous imprisonment is required to perform hard labor, such as digging earth and grinding corn, whereas one who is undergoing simple imprisonment does not have to do any kind of work. A court which imposes a sentence of imprisonment is required to state its reasons for not extending the benefit of probation to the offender.[100]

The punishment of forfeiture used to be available for quite a number of offences but is now confined to three offences in which the offender has to give up specific property. They are depredations on the territories of any power in alliance or at peace with the government of India (s. 126), knowingly receiving property taken by war or depredations under section 126 (s. 127), and a public servant unlawfully buying property which the public servant by virtue of his or her office is prohibited from buying (s. 169). Fines are forfeitures of a sum of money by way of penalty. They may be imposed as the sole punishment, as an alternative punishment, or as an additional punishment.

2. Quantity/Quality of Punishment

The sentencing decision is generally left entirely to the discretion of the judge. In deciding the appropriate punishment, the judge will consider the nature and magnitude of the offence, as well as the need for the penalty to be proportionate to the offence.[101]

Judges are empowered to impose concurrent or consecutive sentences and are inclined to have sentences run concurrently where the ends of justice are met. There are also statutory provisions which limit the amount of punishment. For example, section 71 of the Code protects an offender against multiplicity of punishment by providing that where he or she intended to commit an offence the commission of which involved perpetration of acts which are themselves punishable, the offender shall not be punished for them separately.

Except for a few offences, only the maximum punishments are prescribed for offences; the rationale is that the imposition of minimum punishments unduly restrains the sentencing judge from tailoring the penalty to fit the offender. The practice of the courts has been to impose the maximum punishment, whether of imprisonment or a fine, only in extreme cases.

The Code does not distinguish between positive activity and an omission in specifying the penalty to be imposed on an offender. Persons convicted of abetment are liable for the same penalty as that prescribed for the substantive offence.[102] Those convicted of attempt are generally liable for up to one-half the maximum term of imprisonment provided for the complete offence.[103]

Life imprisonment aside, the maximum term of imprisonment that a court can impose is fourteen years,[104] and the lowest term actually provided for a given offence is twenty

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four hours. The judge has discretion to impose either rigorous or simple imprisonment unless otherwise directed by the law. Some offences, such as armed robbery or attempting such robbery, attract a minimum term of imprisonment. The amount of a fine may be limited or unlimited, depending on the offence. Some provisions specify that the convict "shall be punished with imprisonment and shall also be liable to fine." This has been judicially interpreted to mean that a sentence of imprisonment must be imposed, but that the court has discretion whether to add a fine.[105]

3. *Death Penalty*

The death penalty may be imposed for a small number of offences—murder, robbery accompanied by murder, attempted murder by a person serving a life sentence if hurt is caused, waging war against the government of India, abetting mutiny actually committed, and giving false evidence upon which an innocent person suffers death.

The courts have upheld the constitutionality of the death penalty and have affirmed the view that hanging by the neck until death ensues is scientific and one of the least painful methods of execution.[106] Furthermore, they have striven to confine the imposition of the death penalty to the gravest cases of extreme culpability. In particular, the Supreme Court has declared that life imprisonment is the rule and the death penalty the exception and that any mitigating factors should be given their full weight.[107]

III. SPECIAL PART

A. Structure

The Code has chapters which classify offences according to the interests protected, namely, those of the state, the state apparatus, the public, the person, and property. Offences against the state aim to prevent the state's legal authority from being undermined. They include treasonable offences and seditious conduct causing hatred, contempt, or disaffection toward the state. Offences against the state apparatus protect the processes of justice and prohibit the corruption of public servants. Examples are obstructing public servants in the discharge of their duties, fabricating false evidence, and bribing a public servant. The use of criminal sanctions to protect the state and the state apparatus seeks to preserve the security of the social order.

Offences against the public seek to maintain public tranquility, public health, and public morals. Examples are unlawful assembly, rioting, affray, promoting disharmony between racial or religious groups, selling adulterated food, spreading infectious diseases, and the sale, publication, or distribution of obscene materials with a view to corrupting the morals of susceptible persons.

Offences against the person and property aim to protect the human body and the proprietary interests of individuals. Examples of offences against the person are culpable homicide, causing hurt, rape, criminal force, endangering human life or personal safety, and wrongful confinement. Offences against property include theft, cheating, criminal breach of trust, extortion, robbery, criminal trespass, housebreaking, and receiving stolen property.

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B. Homicide

1. Murder/Manslaughter

The Code uses the term *culpable homicide* to describe killings involving a very high degree of culpability. There are two types of culpable homicide: murder and culpable homicide not amounting to murder. The Code commences with a definition of culpable homicide (s. 299), which is followed by a definition of murder (s. 300). Under this structure, culpable homicide not amounting to murder is what is left of section 299 which does not overlap with murder. The various types of *mens rea* for murder and culpable homicide not amounting to murder can be categorized as intention-based and knowledge-based. These types of *mens rea* fit into a structure where the degrees of fault are carefully graded in comparison with one another.

In relation to intention-based *mens rea*, the Code structure places at the apex the paradigm mental element of murder, that of an intention to cause death (s. 300(1)). Below this is an intention to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused (s. 300(2)). This comes very close to the paradigm mental element for murder, given that the offender intended the bodily harm knowing that it was likely to cause death. Consequently, he or she deserves to be convicted of murder. Next in order of degree of culpability is an intention to cause bodily injury to any person, where the injury intended is sufficient in the ordinary course of nature to cause death (s. 300(3)). This is a hybrid subjective/objective form of *mens rea*, with the offender intending to cause the bodily injury which is objectively appraised to "most probably"[108] cause death. Therefore, it is not as culpable as the offence in section 300(2) but nevertheless comes close to it and therefore warrants liability for murder. Where an offender intends to cause bodily injury which is objectively appraised to be "likely" (that is "probably" as opposed to "most probably") to cause death, he or she is regarded as not displaying the *mens rea* required for murder but for culpable homicide not amounting to murder (s. 299(2)).

With regard to knowledge-based *mens rea*, an offender who does an act knowing that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and who lacks any excuse for incurring the risk is regarded by the Code as displaying the fault for murder (s. 300(4)). Although knowledge is generally not in the same league as intention, knowledge of the virtual certainty[109] of causing death or bodily injury likely to cause death is comparable in degree of culpability with the forms of intentional murder under section 300(3). Where an offender does an act knowing that it is "likely" (i.e., "probable" as opposed to virtually certain) to cause death, this lesser degree of knowledge compared with section 300(4) warrants him or her being convicted of culpable homicide not amounting to murder (s. 299(3)). Where an offender has done an act knowing that it could possibly (as opposed to "be likely to/probably") cause death, he or she has not displayed the *mens rea* required for culpable homicide under the Code. Consequently, such an offender is guilty of the much less serious crime of causing death by a rash act (s. 304A).

Cases of negligent killings do not constitute culpable homicide but the much less seri-

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ous offence of causing death by a negligent act under section 304A of the Code.[110] The *mens rea* for this offence consists of a gross departure from the standard of care expected of a reasonable person.[111]

A defendant charged with murder may seek to have his or her offence reduced to culpable homicide not amounting to murder by relying on one of the "special exceptions" (i.e., partial defences) to section 300. These exceptions are provocation,[112] exceeding the exercise of self-defence,[113] exceeding the exercise of legal powers,[114] sudden fight,[115] and consent.[116] Provocation is dealt with in section III.B.2 in this chapter. Exceeding self-defence is made out in two situations. The first is where the defendant honestly, albeit mistakenly and unreasonably, apprehended that the nature of the attack was of a type[117] against which the Code permitted the use of fatal force. The second situation is where the defendant honestly believed that the fatal force used was necessary when it was not. The Code is also prepared to partially excuse public servants who had exceeded their powers by using fatal force in circumstances which did not warrant their doing so. They would be liable for culpable homicide not amounting to murder if they believed in good faith that their act was lawful and necessary for the due discharge of their duty as a public servant, and without ill will toward the victim.

The partial defence to murder of sudden fight requires that the defendant have killed his or her victim in a sudden fight in the heat of passion upon a sudden quarrel, without premeditation and without the defendant having taken undue advantage or acted in a cruel or unusual manner. With respect to consent, it was noted in section II.D.3 in this chapter that sections 87 and 88 of the Code expressly exclude cases where the doer intended his or her act to cause death to the consenting party or else knew that it was likely to cause death.[118] Exception 5 to section 300 of the Code provides that in such a case the defendant is liable only for culpable homicide not amounting to murder if the victim was above the age of eighteen years and had consented to suffer death or take the risk of death. This defence has been successfully pleaded by survivors of suicide pacts and in cases of mercy killings.

2. Provocation

Provocation is covered in exception 1 to section 300 of the Code and, if successfully pleaded, reduces the offence of murder to culpable homicide not amounting to murder. For the defence to succeed, the offender must have been deprived of his or her power of self-control as a result of grave and sudden provocation offered by the deceased, which caused the offender to kill the deceased. The provocation can constitute conduct or words, and there is case authority which recognizes hearsay provocation provided the defendant had reasonable grounds to believe that the provocation had actually occurred.[119] Furthermore, the provocation need not have been directed at the defendant but could have been aimed at someone else.[120]

Although the exception does not specify an objective test, the courts have read one into the exception by requiring that for the defence to succeed, "a reasonable man, belonging to the same class of society to which the defendant belongs, and placed in the situation in which the defendant was placed, would be so provoked as to lose his self-control."[121] On this basis, there have been cases which have held that a defendant's ethnic background can

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be taken into account when applying the objective test, both in relation to its effect on the gravity of the provocation and with regard to the power of self-control expected of the reasonable person.[122]

A proviso accompanying the exception disallows the defence where the provocation was "sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person." A second proviso renders the defence unavailable where the provocation consisted of conduct performed by a public servant in the lawful exercise of his or her powers, and a third does the same in respect of conduct involving the lawful exercise of the right of self-defence.

C. Sex Offences

The Code recognizes several sex offences, which can be categorized into those based on the victim's lack of consent and those where conduct is criminal irrespective of consent. The major offences under the first category are rape and assault with intent to outrage modesty. Those in the second category include carnal intercourse against the order of nature, incest, and sexual conduct involving children.

Rape occurs when a man penetrates a woman's vagina with his penis without her consent.[123] The offence is therefore gender specific and excludes penetration of other bodily orifices by the penis, as well as penetration of the vagina by another object. The Code does not define the term *consent* but assumes that its meaning is clear and then refers to circumstances when consent is vitiated.[124] The provision on rape supplements these circumstances by stipulating that the victim has not consented when the defendant has put her in fear of bodily injury, and also when the defendant knew that the victim had mistakenly believed him to be her husband.[125] The prosecution does not need to prove that the defendant knew that the victim was not consenting to sexual intercourse with him. Rather, it is for the defendant to contend that he lacked such knowledge by relying on the defence of mistake of fact provided for under the Code.[126] This requires the defendant to show that he had "in good faith" (i.e., with "due care and attention") believed that the victim had consented. Consequently, the defendant's belief must have been reasonable if it is to relieve him of liability. A husband can be convicted of raping his wife only if she was under fifteen years of age. The Code also makes it an offence for a husband to have sexual intercourse with his wife without her consent if she is living separately from him under a decree of separation.[127]

The offence of assaulting or using criminal force with intent to outrage the modesty of a woman can be committed by both men and women.[128] For the charge to be established, the prosecution must prove that the defendant used or threatened to use force on the victim without her consent, and that the defendant intended to outrage modesty or knew that his or her conduct was likely to outrage modesty. The Code does not define the meaning of the term *modesty*; the likely reason is that the concept can vary over time and depends on the context in which the conduct occurs. The Supreme Court has stated that "the quality of being modest in relation to women means 'womanly propriety of behavior, scrupulous chastity of thought, speech and conduct.'"[129] Because of the focus of the offence on the defendant's intention or knowledge, a person charged with outraging modesty

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could contend that he or she lacked the *mens rea* of the offence because he or she honestly (albeit unreasonably) believed that the victim had consented.[130]

The offence of carnal intercourse against the order of nature is committed when the defendant penetrates a person's anus or mouth with his penis.[131] It follows that the offence can be committed only by a male, although the "victim" can be either a male or a female. All such acts are covered by the offence, including those which were consensual and performed in private. If the act was consensual, the "victim" can be charged with abetting the offence.

D. Theft and Fraud

Theft is defined in section 378 of the Code as follows: "Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft." The physical element of the offence is that the defendant must have moved (however slightly) the victim's movable property, and it is unnecessary for the property to have been removed from the victim's possession. The explanations accompanying section 378 show that movement can occur indirectly, such as where the defendant has caused an animal to move so that the item of the alleged theft is also moved, or where the defendant has removed obstacles to the subject matter's movement.[132] The Code defines "movable property" as "corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth."[133] It has been observed that the offence of theft protects possessory rather than ownership interests. Consequently, a person can be held criminally liable for stealing his or her own property, provided that it can be proved that he or she acted dishonestly.

The *mens rea* of theft is that the defendant must have intended to take the property dishonestly out of the victim's possession without his or her consent. The Code defines "dishonestly" in terms of a person "intending to cause wrongful gain or wrongful loss."[134] "Wrongful gain" is in turn defined as "gain by unlawful means of property to which the person gaining is not legally entitled," and "wrongful loss" constitutes "loss by unlawful means of property to which the person losing it is legally entitled."[135] In particular, the courts have held that the concept of wrongful loss is broad enough to cover short-term as well as longer-term deprivations. It is unnecessary to prove any actual loss or gain—what is material is that the defendant intended to cause wrongful loss or gain. Accordingly, other forms of *mens rea*, such as knowledge, rashness, or negligence, will not suffice.

There is some judicial uncertainty whether the issue of consent forms part of the *actus reus* or *mens rea* elements of theft.[136] However, if one takes into account the syntax and punctuation in section 378, it is clear that lack of consent forms part of the *mens rea*. Accordingly, the issue is not whether the victim consented to the taking but whether the defendant intended to take without consent.

Cases of fraud are dealt with under the offence of cheating, which is provided for under section 415 of the Code. For the *actus reus* of cheating to be made out, the prosecution must prove that the defendant deceived the victim and thereby induced him or her (1) to deliver property to any person; (2) to consent to another person retaining property; or (3)

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to do or omit to do something which caused or was likely to cause damage or harm to that person in body, mind, reputation, or property. The *mens rea* for (1) and (2) is "fraudulently or "dishonestly," and for (3) it is "intentionally."

Unlike theft, cheating is not limited to movable property, nor is it an offence against possession or ownership; it relates simply to the delivery or retention of property. Deception and dishonesty are separate elements of the offence, so that it is incumbent on the prosecution to particularize the deception and not merely to allege dishonesty. An explanation accompanying section 415 states that a "dishonest concealment of facts" can constitute deception.

The meaning of "dishonestly" has been dealt with in the discussion of theft. "Fraudulently" is defined unhelpfully by the Code as follows: "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."[137] The courts have held that a person acts with intent to defraud if he or she intends that some person be deceived and that, through such deception, an advantage should accrue to him or her, or that injury, loss, or detriment should befall some other person.[138] Therefore, in contrast to dishonesty, fraudulence can exist even where there was no intention to cause any property gain or loss or a detriment that can be measured in financial terms. It appears to be sufficient that the defendant intended to cause some advantage or to imperil another person's interests in some way.

E. "Victimless" Crimes

Many of the common forms of victimless crimes are also found in India, such as the failure to wear seat belts in motor vehicles or crash helmets when riding motorcycles.[139] It is also an offence to engage in gambling other than the forms of gambling authorized by the state.[140] Another example is the use of prohibited drugs except for medical or scientific purposes.[141] Furthermore, homosexual intercourse between consenting adults is covered by the offence of "carnal intercourse against the order of nature" under the Code.[142] Although engaging in prostitution voluntarily is legal, it is an offence to solicit or loiter in or near public places.[143]

Other offences falling within the description of victimless crimes are those against public order and morals which, by their nature, may annoy or cause affront (as opposed to physical injury) to members of the public in general. One example is the offence of public nuisance, which is committed when a person "does any act which causes annoyance to the public,"[144] such as urinating in a public place. Another is the sale of obscene material, which is defined as "tend[ing] to deprave and corrupt persons who are likely to read, see or hear" the material.[145]

To these offences may be added specifically political offences recognized by the Code which are directed against the body politic, so that no individuals are injured as such. Examples are flag desecration, treason, abuse of political power which does not involve specific persons, and electoral fraud.

F. Offences Involving Cruelty to Wives and Dowry Deaths

The phenomenon of wives in northern Indian communities being killed by their husbands or in-laws, or committing suicide on account of their cruelty, has frequently caught the attention of both the national and the international media. The problem became so acute in

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the 1980s that legislation was enacted creating new offences and making their prosecution easier. Section 498A of the Code makes both physical and mental cruelty by husbands or their relatives for the purpose of obtaining the wife's dowry an offence punishable by three years' imprisonment and a fine. The offence has been designated as cognizable (arrestable without a warrant) and non-bailable to provide the wife immediate relief from such cruelty.

Additionally, section 304B of the Code creates the offence of "dowry death." It provides that where the death of a woman is caused by burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and this occurrence is preceded by cruelty or harassment by the husband or his relatives in connection with the demand for the dowry, the husband or his relatives shall be deemed to have caused the death. Accordingly, the normal rules of causation do not apply; it is sufficient that there was a connection between the death and the cruelty or harassment. The offence is punishable by imprisonment for not less than seven years but may extend to life imprisonment.

Section 498A of the Code and section 113A of the Evidence Act raise a rebuttable presumption that the husband or his relatives have abetted the suicide of his wife if she died within seven years of her marriage under suspicious circumstances.[146] This provision is attracted whenever there is evidence that the deceased woman had been subjected to cruelty by her husband or his relatives, who then have to prove their innocence.

Although these initiatives are commendable, they have been criticized for not going far enough to protect battered wives. In particular, they fail to protect wives who are subjected to beatings and cruelty by their husbands and relatives for reasons unconnected with the obtaining of dowries. For these types of cases, the usual Code offences of causing hurt or grievous hurt apply. A problem with these offences is that they are concerned only with bodily injury and not with mental harm. Also, because they are bailable offences, they enable the offender to be released immediately upon furnishing bail, which poses a grave risk to the wife's personal safety.

G. Voluntary Active Euthanasia and Physician-Assisted Suicide

Suicide is not an offence, but attempted suicide is under section 309 of the Code. The Law Commission of India in its *42nd Report, Penal Code* recommended the repeal of this offence on the ground that it was harsh and unjustifiable to punish a person who had already found life so unbearable.[147] The recommendation was accepted by the government but has yet to become law.[148] Abetting (or assisting) suicide is an offence under section 306 of the Code. So too is abetting attempted suicide by virtue of section 309 read with section 107 (the main provision on abetment) of the Code.

These various provisions criminalize both voluntary active euthanasia and assisted suicide performed by physicians on their patients. What role, if any, does the law give to the patient's consent in such cases? If voluntary active euthanasia and assisting suicide are regarded as acts of mercy killing, reference may be made to section 88 of the Code, which states in part that "nothing . . . is an offence by reason of any harm which it may cause, or be intended by the doer to cause . . . to any person for whose benefit it is done in good faith, and who has given consent . . . to suffer that harm."[149] However, this provision is unavailable to a person performing voluntary active euthanasia or assisting suicide because it expressly

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excludes cases where the accused "intended to cause death." In this regard, it has been observed that section 88 could be relied on by a physician who engages in the accepted medical practice of withdrawing treatment from a terminally ill patient to hasten the process of dying from a disease.[150] The physician does not intend to cause his or her patient's death as such, although he or she knows that the termination of treatment will cause the patient to die more quickly. The same may be said of a physician who administers strong doses of pain-relieving drugs to a patient knowing that a side effect of these drugs is to hasten the patient's death. In both cases the physician could invoke section 88 because he or she had withdrawn the treatment or administered the pain-relieving drugs in good faith for the benefit of the patient, because the patient (who had consented to the medical procedure) was relieved from suffering prolonged and severe pain. Insofar as cases of voluntary active euthanasia by physicians are concerned, consent of the patient is given some significance by reducing what would otherwise be the crime of murder to the lesser offence of culpable homicide not amounting to murder.[151]

There have been several challenges before the Supreme Court to the constitutional validity of the offence of abetting suicide under section 306 of the Code. The leading decision is the Supreme Court case *Gian Kaur v. State of Punjab*,[152] which involved an appeal by the appellants against their convictions for abetting the commission of suicide by one Kulwant Kaur on the basis that the offence under section 306 was unconstitutional. The court held unanimously that section 309 and, consequently, section 306 did not violate article 21 of the constitution, which embodies the fundamental right to "protection of life."[153] The appellants had argued that this right included both the positive and negative aspects so that the right to live includes the right not to live, that is, the right to die or to end one's life.[154] Accordingly, section 309 violated article 21 by criminalizing attempted suicide. The court rejected this argument by noting that "by no stretch of imagination can 'extinction of life' be read to be included in 'protection of life.'"[155]

On the basis of *Gian Kaur*, the constitutional validity of the offence of abetting suicide under section 306 can safely be put to rest. However, this does not in any way prevent the legislature from abolishing or qualifying that offence. Although the constitutional basis for the offence may be sound, it is the prerogative of Parliament to decide whether the offence should remain or be qualified in some way. The beginning of the twenty-first century has witnessed India's economy growing as never before, making an increasingly sizable portion of the society able both to afford and to demand medical treatment and services which will prolong life. It will be a matter of time before this social phenomenon spawns the debate, occurring elsewhere, concerning the prohibition of assisted suicide and voluntary active euthanasia conducted by physicians.

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NOTES

1. *Emperor v. Chhotalal Babar* (1912) ILR 36 Bom 524.
2. For example, the Indian Army Act 1950.
3. For example, the Indian Merchandise Marks Act 1889, s. 15.
4. *Satwant Singh v. State of Punjab* AIR 1960 SC 266.
5. *Rao Shiv Bahadur Singh v. State of Uttar Pradesh* 1953 SCR 1188.
6. The General Clauses Act 1897, s. 8(38), reads: "'Offence' shall mean any act or omission made punishable by any law for the time being in force."
7. Penal Code, s. 41.
8. Ibid., s. 42.
9. Ibid., s. 40.
10. Some of the major ones appear in the selected bibliography in this chapter.
11. *Ram Chander v. State of Haryana* 1981 SCC (Cri) 683.
12. *State v. Bhalchandra Waman Pethe* AIR 1966 Bom 122 at 126.
13. *Dulla v. State* AIR 1958 All 198 at 203.
14. Y. V. Chandra Chud, V. R. Manoher, and Avtar Singh, *Ratanlal and Dhirajlal's The Indian Penal Code*, 31st ed. (Nagpur: Wadha & Co., 2006), 236.
15. *Modiram v. State of Madhya Pradesh* AIR 1972 SC 2438 at 2439.
16. *Emperor v. Bhogilal Chimanal Nanavati* AIR 1931 Bom 409 at [5]. Likewise, s. 3 of the Code states that the word *act* denotes as well a series of acts.
17. *Emperor v. Bhogilal Chimanal Nanavati* AIR 1931 Bom 409.
18. *Emperor v. Kaliappa Goundan* AIR 1933 Madras 798; *Emperor v. Nebal Mahto* (1939) ILR Pat 485.
19. Ramesh Chandra Nigam, *Law of Crimes in India*, vol. 1, *Principles of Criminal Law*, (Bombay: Asia Publishing House, 1965), 43.
20. *D'Souza v. Pashupati Nath Sarkar* 1968 Cri LJ 405.

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21. *Jai Prakash v. State (Delhi Administration)* 1991 2 SCC 32 (Cri) at 42.
22. *Basdev v. State of Pepsu* AIR 1956 SC 488.
23. *In re. Nidarmati Nagabhushanam* (1872) 7 MHCR 119 at 120.
24. *Empress of India v. Idu Beg* (1881) 3 All 776 at 780.
25. Examples are s. 304 (causing death by negligent act); s. 284 (negligent conduct in respect to a poisonous substance); and s. 336 (negligently endangering human life or personal safety).
26. *Empress of India v. Idu Beg* (1881) 3 All 776 at 780.
27. *Bala Chandra v. State of Maharashtra* AIR 1968 SC 1319.
28. *Emperor v. Waryam Singh* 1927 Cri LJ 39.
29. Penal Code, s. 511.
30. For example, Penal Code, s. 307 (attempted murder); s. 308 (attempted culpable homicide not amounting to murder).
31. *Abhayanand Mishra v. State of Bihar* AIR 1961 SC 1698.
32. *State of Maharashtra v. Mohd Yakub* AIR 1980 SC 1111.
33. *Om Prakash v. State of Punjab* AIR 1961 SC 1712.
34. *Asgarali Pradhania v. Emperor* (1933) ILR 61 Cal 54.
35. Penal Code, s. 120A.
36. *Ajay Aggarwal v. Union of India* 1993 SCC (Cri) 961.
37. *Saleem-Ud-Din v. State* (1971) ILR 1 Delhi 432.
38. *Pradumna Shriniwas Auradkar v. State of Maharashtra* 1981 Cri LJ 1873.
39. *Yash Pal Mittal v. State of Punjab* AIR 1977 SC 2433.
40. *Emperor v. Shankaraya Gurushiddhayya Hiremath* AIR 1940 Bom 365.
41. Penal Code, explanation 2 to s. 108.
42. *Jamuna Singh v. State of Bihar* AIR 1967 SC 553.
43. Penal Code, explanation 4 to s. 108.
44. *Girjashankar v. State of Madhra Pradesh* 1989 Cri LJ 242.
45. *Harachan Chakrabarty v. Union of India* 1990 SCC (Cri) 280.
46. Penal Code, explanation 2 to s. 107.
47. *Harji v. State of Rajasthan* 1978 Raj LW 1.
48. *Mohd Jamal v. Emperor* AIR 1930 Sind 64.
49. Penal Code, explanation 3 to s. 108.
50. *Noor Mohammad Mohd Yusuf Momin v. State of Maharashtra* 1971 AIR SC 885. In *Jaikrishnadas Manohardas Desai v. State of Bombay* AIR 1960 SC 899 it was held that physical presence, though evidential of participation, was not invariably required.
51. *Bashir v. State* AIR 1953 All 668.
52. This first situation is subscribed to in several decisions of the Supreme Court, e.g., *Hardev Singh v. State of Punjab* AIR 1975 SC 179. However, there are lower-court case authorities which support the other two situations described in the text.
53. C. K. Thakker and M. C. Thakker, *Ratanlal and Dhirajlal's Law of Crimes*, 26th ed. (New Delhi: Bharat House, 2007), 143.
54. *State of Maharashtra v Syndicate Transport Co Ltd* AIR 1964 Bom 195.
55. First developed from the civil case of *Lennard's Carrying Company Ltd v. Asiatic Petroleum Company Ltd* [1915] AC 705.

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56. *Gopal Khaitan v. State* AIR 1969 Cal 132.
57. *Dharma Pratishtan v. B Mandal* (1988) 173 ITR 487, following the English case *Tesco Supermarkets v. Nattrass* [1972] AC 153.
58. *Girdharilal v. Lalchand* AIR 1970 Raj 145.
59. *Municipal Corporation of Delhi v. JB Bottling Company Private Limited* 1975 Cri LJ 1148.
60. For example, see *Rangawalla v. State of Maharashtra* AIR 1965 SC 1616.
61. *Yohanan v. State* AIR 1958 Ker 207 at 210, cited by several commentators.
62. For example, *Yohanan v. State* AIR 1958 Ker 207; *Nga Moe v. The King* AIR Rang 141; *Nandkumar Natha v. State* 1988 Cri LJ 1313.
63. Constituting ss. 76 to 106 of the Penal Code.
64. Penal Code, s. 6.
65. Ibid., s. 40.
66. *James Martin v. State of Kerala* (2004) 2 SCC 203.
67. This element is found in the explanation to s. 81.
68. Penal Code, s. 94. Duress is discussed in section II.E.4 in this chapter.
69. This requirement is found in illustration (a) of s. 81.
70. Penal Code, ss. 96–106. The term "self-defence" is used here to cover both defence of person and of property.
71. Ibid., s. 97.
72. Ibid., s. 98.
73. Ibid., s. 99(3).
74. Ibid., s. 100.
75. Ibid., s. 103.
76. Ibid., s. 102.
77. Ibid., s. 99(4).
78. *Jai Dev v. State of Punjab* AIR 1963 SC 612 at 617.
79. *Govindan v. State* AIR 1960 Ker 258.
80. Penal Code, ss. 87–92.
81. *Dalip Singh v. State of Bihar* (2005) SCC 88.
82. By virtue of Penal Code, s. 90(d).
83. Penal Code, explanation to s. 92.
84. See *State of West Bengal v. Shew Mangal Singh* AIR 1981 SC 1917.
85. *Niamat Khan v. Empress* (1883) PR No. 17 of 1883 at 29.
86. *State v. Krishna Murari* 1955 Cr LJ 1025.
87. *State of Maharashtra v. Mayer Hans George* AIR 1965 SC 722.
88. Thakker and Thakker, *Ratanlal and Dhirajlal's Law of Crimes*, 276.
89. *State of Bombay v. Jaswantlal Manilal Akhaney* AIR 1956 SC 575.
90. *Chirangi v. State* AIR 1952 Nag 282.
91. (1843) 10 Cl. & Fin. 200.
92. *Shivraj Singh v. State* 1975 Cr LJ 1458.
93. *Ashiruddin Ahmed v. The King* AIR 1949 Cal 182.
94. *Basdev v. State of Pepsu* AIR 1956 SC 488.
95. *PP v. A Thomas* AIR 1959 Mad 166.

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96. *Ramjanam Singh v. State of Bihar* AIR 1956 SC 643.

97. The requirements of mistake of fact and good faith are the same as for the closely related defence under Penal Code, s. 79, discussed in section II.E.1 in this chapter, of mistake of fact that one was justified by law in doing an act.

98. For example, see *Queen Empress v. Subba Naik* (1898) 21 Mad 249 at 251.

99. Criminal Procedure Code 1973, s. 433A.

100. Probation of Offenders Act 1958, s. 361.

101. *Sham Sunder v. Puran* AIR 1991 SC 8.

102. Penal Code, s. 109.

103. Ibid., s. 511.

104. Criminal Procedure Code, s. 31(2)(a).

105. *Emperor v. Durg* AIR 1929 All 260.

106. *Deena v. Union of India* AIR 1983 SC 1155.

107. *Machhi Singh v. State of Punjab* AIR 1983 SC 957.

108. Paraphrasing the words "sufficient in the ordinary course of nature to cause death" appearing in Penal Code, s. 300(3).

109. Paraphrasing the words "so imminently dangerous that it must in all probability cause death" appearing in Penal Code, s. 300(4).

110. The maximum penalty is two years' imprisonment.

111. *State v. Lazarus AW* AIR 1953 All 72.

112. Penal Code, exception 1 to s. 300.

113. Ibid., exception 2 to s. 300.

114. Ibid., exception 3 to s. 300.

115. Ibid., exception 4 to s. 300.

116. Ibid., exception 5 to s. 300.

117. These are specified in Penal Code, ss. 100 and 103.

118. See the discussion under the subheading "Consent," section II.D.3 in this chapter.

119. *Gohra v. Emperor* (1890) PR No. 7 of 1890; *Chanan Khan v. Emperor* 1943 Cri LJ 595.

120. *Indreswar Kalita v. State* 1981 Cri LJ 1887.

121. *Nanavati v. State of Maharashtra* AIR 1962 SC 605 at 630.

122. *Jamu Majhi v. State* 1989 Cri LJ 753; *Atma Ram v. State* 1967 Cri LJ 1697.

123. Penal Code, s. 375.

124. Ibid., s. 90. See the discussion under the subheading "Consent," section II.D.3 in this chapter.

125. Penal Code, s 375, fourth limb.

126. Ibid., s. 79. See the discussion of this plea under the subheading "Mistake/ Ignorance of Law or Fact," section II.E 1 in this chapter.

127. Penal Code, s. 376A.

128. Ibid., s. 354. The offences of assault and criminal force are defined in ss. 351 and 350, respectively, of the Code.

129. *Rupan Deol Bajaj v. KPS Gill* AIR 1996 SC 309 at [14], quoting from the *Shorter English Dictionary*, 3d ed. (Oxford: Oxford University Press, 1944).

130. In contrast to the offence of rape, the difference being that the definition of rape does not include the intention or knowledge of the defendant pertaining to the victim's consent.

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131. Penal Code, s. 377.

132. Ibid., explanations 3 and 4 to s. 378.

133. Ibid., s. 22.

134. Ibid., s. 24.

135. Ibid., s. 23.

136. For a case example favoring the former, see *KN Mehra v. State of Rajasthan* AIR 1957 SC 369; and for a case favoring the latter, see *Packeer Ally v. Svarimuttu* (1926) 2 CWR 216.

137. Penal Code, s. 25.

138. *Dr Vimla v. The Delhi Administration* AIR 1963 SC 1572.

139. Motor Vehicles Act 1988.

140. Public Gambling Act 1867.

141. Narcotic Drugs and Psychotropic Substances Act 1985.

142. Penal Code, s. 377.

143. Immoral Traffic (Prevention) Act 1956.

144. Penal Code, s. 268.

145. Ibid., s. 292.

146. Abetment of suicide is an offence under s. 306 of the Code.

147. Law Commission of India. *42nd Report, Penal Code* (New Delhi: Government of India, 1971), at [16.33].

148. The Law Commission of India has again recently recommended abolition; see *Report No. 210, Humanization and Decriminalization of Attempt to Suicide* (New Delhi: Government of India, 2008).

149. See further the discussion of this provision in the subheading "Consent," section II.D.3 in this chapter.

150. This is a form of passive euthanasia; see *Airedale National Health Authority Trust v. Bland* [1993] AC 789, referred to with approval by the Supreme Court of India in *Gian Kaur v. State of Punjab* AIR 1996 SC 1257 at [40].

151. Penal Code, Exception 4 to s. 300. See further the discussion of this partial defence to murder under the subheading "Murder/Manslaughter," section III.B.1 in this chapter.

152. AIR 1996 SC 1257.

153. Article 21 reads: "*Protection of life and personal liberty*: No person shall be deprived of his life or personal liberty except according to procedure established by law."

154. Relying on the judgment of the Supreme Court of India in *Rathinam* v. *Union of India* AIR 1994 SC 1844, which had held on this basis that s. 309 violated article 21 of the constitution.

155. *Gian Kaur v. State of Punjab* AIR 1996 SC 1257 at [22], thereby overruling *Rathinam* on this issue. See also *State of Maharashtra v. Maruti Shripati Dubal* AIR 1997 SC 411.

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DUE PROCESS AND HUMAN RIGHTS

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8.1 INTRODUCTION

International criminal tribunals are considered important tools for improving the protection of human rights. And rightly so. However, the important mandate of international criminal tribunals should not make us lose sight of the fact that *criminal*

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Unlike the law of the tribunals and the ICC, we make no distinction between the rights of the accused and the rights of suspects. Nor does such distinction exist in human rights law. What matters is an individual's right to liberty and a fair trial, which triggers the applicability of certain rights at different stages of the procedure.

8.5.1 Right to a fair trial in general

The relationship between the specific fair trial rights and the right to a fair trial in a broader sense has yielded two important results. First, the violation of specific rights by definition violates the right to a fair trial in a broader sense, which follows from the reference to them as minimum guarantees.[80] However, the absence of violation of any of the specific minimum guarantees does not automatically warrant the conclusion that the trial as a whole is fair. This brings us to the second point, namely that all the procedural measures bordering on violations of minimum guarantees and elements of a fair trial that have not been translated literally into specific rights may justify the conclusion that there has been no fair hearing. This residual function of the general right to a fair trial serves the useful purpose of making the concept of a fair hearing a dynamic and living reality, capable of adjusting to changing views on fairness and of rectifying omissions that may occur in the law and practice of international criminal courts.[81]

Legal doctrine and practice have given rise to a number of fair trial elements which are not covered by the specific minimum guarantees. In this respect one may mention the right to an adversarial hearing (the principle of *audi alteram partem*), the principle of equality of arms, and the right to a reasoned judgment. In the context of international criminal proceedings the principle of equality of arms deserves our attention.

The very fact that equality of arms does not enjoy the status of a full right, but of a principle is telling of its nature. Full equality between parties to criminal proceedings is an idle aspiration from a practical perspective and not the required standard in the human rights arena. Rather, the principle has a procedural nature and is closely connected to the right to an adequately prepared defence. Thus, the European Court of Human Rights ruled in this respect that 'each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent'.[82] It also observed that there can be no violation of this principle when both sides are denied something that might have been useful.[83] In this light, the defence's claim in *Tadić* that the principle of equality of arms was

[80] Cf. Article 21(4) (*chapeau*) of the ICTY Statute and Article 67(1) (*chapeau*) of the ICC Statute. See also Trechsel, *Human Rights in Criminal Proceedings*, at 86.

[81] An example of the latter is the privilege against self-incrimination, which is part of Article 14 of the ICCPR, Article 21 of the ICTY Statute, and Article 67 of the ICC Statute, but not of Article 6 of the anterior ECHR. The European Court of Human Rights has nevertheless developed progressive case law in respect of this right by considering it a vital element of the right to a fair trial.

[82] *Bulut* v. *Austria*, 17358/90 [1996] ECtHR 10 (22 February 1996), para. 47.

[83] *Jasper* v. *UK*, 27052/95 [2000] ECtHR 90 (16 February 2000), para. 57; *Ekbatani* v. *Sweden*, 10563/83 [1988] ECtHR 6 (26 May 1988), para. 30.

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The mental element in the Rome Statute of the International Criminal Court: a commentary from a comparative criminal law perspective

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***473** For the first time in the sphere of international criminal law, and unlike the Nuremberg and Tokyo Charters or the Statutes of the Yugoslavia and Rwanda Tribunals, Article 30 of the Rome Statute of the International Criminal Court provides a general definition for the mental element required to trigger the criminal responsibility of individuals for serious violations of international humanitarian law. The first paragraph of Article 30 stresses that unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the *ratione materiae* of the International Criminal Court 'only if the material elements are committed with intent and knowledge'. The second paragraph identifies the exact meaning of intent, whereas the third paragraph defines the meaning of knowledge.

At first sight, it appears that the explicit words of Article 30 are sufficient to put an end to a long lasting debate regarding the *mens rea* enigma which has confronted the jurisprudence of the two *ad hoc* Tribunals for the last decade, but this is not true. Scholars disagree ***474** regarding the exact meaning of intent under Article 30. Some view Article 30 as encompassing the three categories of *dolus,* namely, *dolus directus* of the first and second degree and *dolus eventualis.* Others hold the opinion that the plain meaning of Article 30 is confined to *d olus directus* of the first degree (intent in *stricto sensu*) and *dolus directus* of the second degree (indirect or oblique intent).

At present, the only guidance given by the International Criminal Court (ICC) regarding the meaning of 'intent and knowledge' as set out in Article 30 is the decision rendered by Pre-Trial Chamber I (PTC I) of 29 January 2007 in the Lubanga case.1 There, the PTC I asserted that the cumulative reference to 'intent' and 'knowledge' as provided for in Article 30 requires the existence of a volitional element on the part of the accused, and that volitional element encompasses three degrees of *dolus,* namely, *dolus directus* of the first and second degrees and *dolus eventualis.*

This paper examines in depth the elements of culpability as set out in Article 30 from a comparative criminal law perspective as well as the relationship between Article 30 and other provisions of the ICC Statute in light of the Lubanga Decision on the Confirmation of Charges.2 The comparative study undertaken in this paper is significant since the codification of Article 30 - as with other provisions under the Statute - was conducted by several codifiers who brought their own legal cultural experience to the drafting of this provision.3 The paper con-

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cludes with some suggestions regarding the *mens rea* standards which are deemed appropriate to trigger the criminal responsibility of individuals for serious violations of international humanitarian law.

I. ANATOMY OF ARTICLE 30 OF THE ICC STATUTE

1.1 *Elements Analysis - Mental Elements and their Objects*

In order to hold a person criminally responsible and liable for a crime within the jurisdiction of the ICC, it must be established that the ***475** material elements of the offence were committed with intent and knowledge. This is expressly mentioned in paragraph 1 of Article 30 of the ICC Statute:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.4

It is clear that the ICC Statute lacks a general provision regarding the definition of the *actus reus* or the material elements of the crime, and yet leaves the door open with respect to what should be understood by the phrase 'material elements' as it appears in Article 30(1). This deficiency, however, is remedied by paragraphs (2) and (3) of the same Article which set out the relationship between the mental elements and the material elements of an offence - expressly referred to as conduct, consequence and circumstance.5 In so doing, Article 30 sets itself aside from the broad notion of 'materials elements' as presented in the Model Penal Code or German literature.6 The significance of this provision is that it assigns different levels of mental element to each of the material elements of the crime in question. This is a remarkable shift from an ***476** 'offence analysis' approach to an 'element analysis' approach.7 Under 'offence analysis', crimes are defined in general terms; intentional crimes, reckless crimes and negligent crimes, whereas 'element analysis' in contrast, recognizes that a single crime definition may require a different culpable state of mind for each objective element of the offence. This approach is similar to the one adopted by the Model Penal Code, in 1962, by the American Law Institute.8 The Model Penal Code's approach is based on the view that, unless some element of mental culpability is proved with respect to each material element of the offence, no valid criminal conviction may be obtained.9 This is explicitly stated in § 2.02(4) of the Model Penal Code (MPC) which is entitled 'prescribed culpability requirement applies to all material elements'. Section 2.02(4) of the MPC reads as follows: 'When the law defining an offence prescribes the kind of culpability that is sufficient for the commission of an offence, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offence, unless a contrary purpose plainly appears.'10

Under the ICC Statute, 'element analysis', or the 'rule of *mens rea* coverage', has to be applied cautiously since culpability terms (a) are defined in Article 30; (b) are stated in the definition of particular crimes (genocide 'with intent to', war crimes of 'wilful killing') or; (c) are stated in the Elements of Crimes.11

1.2 *Different Culpability Terms Defined in Relation to Each Objective Element*

Article 30 of the ICC Statute - the default rule - assigns different levels of culpability to each of the material elements of the crimes under the subject matter jurisdiction of the Court. Unless otherwise ***477** provided, a person has intent in relation to conduct if 'that person means to engage in the conduct'.12 According to the same provision, a person is said to have intended a consequence not only if 'that person means to cause that consequence' but also if he 'is aware that it will occur in the ordinary course of events'.13 Surprisingly, Article 30 assigns two different culpable states of mind for the consequence element, namely intent and knowledge. Either of these culpable mental states is sufficient to cover the consequence element. Yet, a person who intentionally engages in a proscribed conduct with *awareness* that a consequence will occur in the ordinary course of events may incur criminal liability for any of the crimes within the *ratione materiae* of the Court (unless otherwise provided). Yet, one might argue that *dolus directus* of second degree or oblique intent is sufficient *mens rea* to trigger the criminal responsibility of individuals for serious violations of international humanitarian law under the ICC Statute.

As for the circumstance element - a material element which is related to the knowledge or awareness of a defen-

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dant and not to his intention - the ICC Statute required a culpable state of knowledge (knowing standards). This means the defendant's awareness of the existence of a circumstance.14

Thus, the general rule under Article 30 is the full coverage of the material elements by the corresponding mental elements. Problems may arise regarding special types of material elements (I will name them quasi-material elements) which do not fall under the three categories of the materials elements mentioned above and accordingly may not be covered by the default rule of Article 30 - intent and/or knowledge. There are three different types of these quasimaterial elements. The first type is the quasi-material element of a 'legal character'. For instance, Article 8(2)(a) of the ICC Statute requires that a victim be a protected person under the Geneva Conventions of 1949. According to some commentators the default rule of Article 30 does not apply to such *factual* elements since this provision 'does not require proof that the accused knew the relevant law or that he or she correctly completed such a legal evaluation.'15 Yet, one might argue that Article 32(2) has no role to play in such ***478** situations. It is not clear, however, whether this is considered a mistake of law, or a mistake of fact or a combination of both - mistake of mixed fact and law.16 This issue will be examined later in detail when we discuss the relationship between Articles 30 and 32 of the ICC Statute.

The second type of quasi-material element involves a normative aspect or a value judgement.17 The requirement of '*serious* injury to body' as provided for in Article 7(1)(k) - crimes against humanity of other inhuman acts - and Article 8(2)(a)(iii) - grave breaches of the Geneva Conventions of wilfully causing great suffering, or serious injury to body or health - is an example of a quasi-material element which involve a value judgment. In such case, the prosecution is not entitled to demonstrate that the accused 'correctly completed a normative evaluation.'18 Otherwise, the accused's subjective opinion would be the sole determinative factor in finding whether a crime had been committed.19

The third category includes circumstantial elements; the widespread or systematic attack for crimes against humanity and the existence of an armed conflict for war crimes. This type of element was referred to during the negotiations of the Elements of Crimes as 'contextual elements'.20 If this element is to be considered a material element, it should as a rule - element analysis - be covered by a corresponding mental element. There is a consensus among scholars that such a contextual element is related to the broader context that renders the crime an international crime, and accordingly the default rule - intent and knowledge - does not apply to them.21

***479** II. DIFFERENT DEGREES OF MENTAL ELEMENTS UNDER ARTICLE 30

Article 30 is in line with the Latin maxim *actus non facit reum nisi mens sit rea.* This provision, however, goes further, assuring that the mental element consists of two components: a volitional component of intent and a cognitive component of knowledge. In so doing, Article 30 confirms the evolutionary developments of the law of *mens rea* under the jurisprudence of the *ad hoc* Tribunals which demand that, for the imposition of criminal responsibility for serious violations of international humanitarian law, both a cognitive and volitional component must be incorporated into the legal standard.22

2.1 *The Meaning of Intent*

Generally speaking, in criminal law the word 'intent' or the adjective 'intentionally' have traditionally not been limited to the narrow definition of purpose, aim, or design. According to common law tradition, a person is considered to intend the consequence not only if (i) his conscious objective is to cause that consequence, but also (ii) if he acts with knowledge that the consequence is virtually certain to occur as a result of his conduct.23 The term 'intent' as set out in Article 30 has two different meanings, depending upon whether the material element related to conduct or consequence. A person has intent in relation to conduct, if he 'means to engage in the conduct',24 whereas in relation to consequence, a person is said to have intent if 'that person means to cause that consequence' or 'is aware that it will occur in the ordinary course of events'.25

***480** 2.2 *Intent in Relation to Conduct*

Pursuant to Article 30(2)(a) of the ICC Statute, a person is said to have intent in relation to conduct if that per-

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son means to engage in the conduct. This definition has two aspects. First, the relationship between intent and conduct as set out in Article 30(2)(a), 'seems closer to what common lawyers often think of the "volitional" part of an "act" (deliberately pulling a trigger as opposed to a reflex action, for example).'26 Yet, 'the conduct must be the result of a voluntary action on the part of the perpetrator.'27 Professor Roger Clark, however, noted that knowledge is not defined in relation to conduct and this 'may create some mischief later.'28 It is submitted that unless relevant circumstances are known that qualify the action as illegal it cannot be said that the person intends the conduct.29 Generally, the prosecution must prove that the defendant had knowledge of facts which would make the conduct illegal, but ordinarily is not required to prove the defendant's awareness of the legal consequences of the conduct (e.g. that the conduct was illegal).30

Second, with regard to conduct, the drafting history of the Rome Statute shows that there was a strong will to include within the Statute an article defining conduct as an act or omission.31 The Draft Statute prepared by the Preparatory Committee in 1996 included a provision headed '*Actus reus* ' (act and/or omission)32 which was modified at the February 1997 session and submitted to the Rome ***481** Conference.33 The term 'conduct' was defined under then Article 28 to 'constitute either an act or an omission, or a combination thereof'. The Rome Conference had difficulty reaching agreement on the circumstances in which a person can incur criminal responsibility for an omission. As a consequence, the entire provision was deleted from the Statute 'with the understanding that the question of when and if omissions might constitute or be equivalent to conduct would have to be resolved in future by the Court.'34

Professor Albin Eser holds the view that conduct, as laid down in paragraph 2(a) of Article 30, is only limited to positive action. According to Eser, cases of omissions within the Statute are not covered by the default rule of Article 30 (intent and knowledge), 'but would rather need special regulation according to the opening words of paragraph 1 (unless otherwise provided)'.35 Other commentators noted that

the very definitions of most of the crimes under the *Rome Statute* explicitly provide that they can be committed only by an act. Yet, there are some that can be said to provide room for such interpretation that encompasses omissions as well. Thus, such crime as wilful killing (article 8 para. 2(a)(i)) is capable of being interpreted in such way that includes faults of omission too. In that case it would cover, for instance, failure to feed prisoners of war or to provide medical care to wounded persons or to rescue shipwrecked persons belonging to a hostile armed forces.36

A recent decision, rendered by the ICC PTC I expressly referred to Article 30 as covering acts or omissions.37 In addition, the practice of the Yugoslavia and Rwanda Tribunals is consistent that 'committing', as set out in Articles 7(1)/6(1) of the ICTY/ICTR Statutes, respectively, 'covers physically perpetrating a crime or engendering a *culpable omission* in violation of criminal law'.38

***482** 2.3 *Intent in Relation to Consequence - the First Alternative of Intent*

Pursuant to Article 30(2)(b) of the ICC Statute, a person has intent in relation to consequence if he (i) 'means to cause that consequence' or (ii) 'is aware that it will occur in the ordinary course of events.' Thus, Article 30(2)(b) assigned two different degrees of intent in relation to the consequence element, namely direct intent or *dolus directus* of first degree and indirect intent or *dolus directus* of second degree. The issue whether *dolus eventualis* or subjective recklessness is sufficient to fall within the ambit of Article 30 is highly debatable and is subject to a detailed examination below.

These culpable mental states have to be assessed subjectively and not objectively, meaning that the prosecution must demonstrate that the perpetrator himself, and not a reasonable person in the same situation, was aware of the occurrence of the consequence in question. From a comparative criminal law perspective, the first degree of intent (direct intent/*dolus directus* of first degree) denotes the state of mind of a person who not only foresees but also wills the occurrence of a consequence. This is the actual meaning of intent in common law jurisdictions.

It is also equivalent to the Model Penal Code culpability term 'purposely'. Section 2.02 of the Model Penal Code considers a person acts 'purposely' with regard to a result if it is his conscious object to cause such result.39 In *United States* v. *Bailey et al.*, the Supreme ***483** Court ruled that a 'person who causes a particular

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result is said to act purposefully if he consciously desires that result, whatever the likelihood of that result happening from his conduct.'40*Absicht,* or *dolus directus* of first degree, in German criminal law, is also identical to 'direct intent' as defined in Article 30(2)(b) of the ICC Statute. '*Absicht* ' is defined as a 'purpose bound will'.41 In this type of intent, the actor's will is directed finally towards the accomplishment of that result.42

In the Lubanga case,43 the first test ever of Article 30, PTC I of the ICC asserted that the reference to 'intention' and 'knowledge' in a conjunctive way requires the existence of a 'volitional element' on the part of the suspect.44 This 'volitional element' refers first to situations in which the suspect (i) knows that his acts or omissions will materialize the material elements of the crime at issue; and (ii) he undertakes these acts or omissions with the concrete intention to bring about the material elements of the crime. According to the PTC I, the above-mentioned scenario requires that the suspect possesses a level of intent which it called *dolus directus* of the first degree.45

It is worth stressing that 'direct intent', as defined in Article 30(2)(b) of the ICC Statute, is not identical to the 'special intent' required for particular crimes which in their definitions include the following terms: 'with intent to',46 'with the intent of affecting',47 and ***484** 'with the intention of'.48 The 'special intent' or *dolus specialis* required for these categories of crimes has no material element (consequence or result element) to cover, since the accomplishment of this consequence is not an ingredient element of the crime at issue.49

2.4 *Intent in Relation to Consequence - the Second Alternative of Intent*

Article 30(2)(b) of the ICC Statute assigns a second alternative of intent with regard to the consequence element, providing that even if the perpetrator does not intend the proscribed result to occur, he is considered to intend that result if he 'is aware that [the consequence] will occur in the ordinary course of events'. In the Lubanga case the PTC I asserted that Article 30 encompasses other aspects of *dolus,* namely *dolus directus* of the second degree.50 This type of *dolus* arises in situations in which the suspect, without having the actual intent to bring about the material elements of the crime at issue, is aware that such elements will be the necessary outcome of his actions or omissions.51 Yet, there are three important aspects of this second alternative of intent.

First, this degree of *mens rea* is akin to 'knowledge' or 'awareness' rather than 'intent *stricto sensu* '. This position is supported by the definition given to 'knowledge' in paragraph 3 of Article 30, '[f]or the purpose of this article, "knowledge" means awareness that ... a consequence will occur in the ordinary course of events.' The essence of the narrow distinction between acting intentionally and knowingly with regard to the consequence element is the presence or absence of a positive desire or purpose to cause that consequence. The plain meaning of Article 30(2) makes it clear that once the prosecution demonstrates that an accused, in carrying out his conduct, was aware that the proscribed consequence will occur, unless extraordinary circumstances intervened, he is said to have intended that consequence. Thus, a soldier who aims to destroy a building, while not wishing to kill civilians whom he knows are in the building, is said to ***485** intend the killing of the civilians (Article 8(2)(a)(i) of the ICC Statute) if the building is in fact destroyed and the civilians are killed.52

Secondly, the phrase 'aware that it will occur in the ordinary course of events' is subject to different interpretations. Does it require that the perpetrator foresees the occurrence of the consequence as certain? Or whether mere awareness of the probable occurrence of the consequence is sufficient? Professor Triffterer has suggested that since Article 30(2)(b) explicitly states 'will occur' and not 'might occur', it would not be enough to prove that the perpetrator is aware of the *probability* of the consequence and nevertheless carrying out the conduct which results in the proscribed consequence.53 Rather, the prosecution must demonstrate that the perpetrator foresees the consequence of his conduct as being *certain* unless extraordinary circumstances intervene.54 Interestingly, this second alternative of intent is identical to the Model Penal Code culpability term 'knowingly'. Pursuant to § 2.02(2)(b)(ii) of the Model Penal Code, a person acts knowingly with respect to a result if it is not his conscious objective, yet he is *practically certain* that his conduct will cause that result.55

It is also equivalent to the common law concept of 'oblique intent', which extends the meaning of intention to encompass foresight of a certainty.56 Professor Glanville Williams, who devoted special attention to the notion of 'oblique intention,' argued that the law should generally be the same where the defendant is aware that a consequence in the future is the certain result of what he does, though he does not intend or desire its occurrence.57

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In cases of oblique intention, there are twin consequences of the conduct, *x* and *y* ; the actor wants *x* and is prepared to accept its unwanted twin *y*.58 Oblique intent, in the words of Glanville Williams, is 'a kind of ***486** knowledge or realization.'59 In *Regina* v. *Buzzanga and Durocher,* a case concerned with promoting hatred against the French Canadian public in Essex County, the Ontario Court of Appeal adopted William's notion of 'foresight of certainty' as a second alternative of intent:

as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, none the less, acted so as to produce it, then he decided to bring it about (albeit regretfully) in order to achieve his ultimate purpose. His intention encompasses the means as well as to his ultimate objective.60

It also resembles the German concept of *dolus directus* of the second degree in which the cognitive element (knowledge or awareness) dominates, whereas the volitional element is too weak. As the German Federal Supreme Court of Justice (*Bundesgerichtshof-BGH*) put it more clearly, a perpetrator who foresees a consequence of his conduct as certain is considered to act *wilfully* with regard to this consequence, even if he regrets its occurrence.61 Professor Albin Eser's thoughtful explanation as to the nature and meaning of the phrase 'aware that it will occur in the ordinary course of events' merits lengthy quotation:

Whatever may be meant by 'ordinary course of events', with regard to the awareness thereof this clause is obviously meant to cover *dolus directus in the second degree* in which the volitional component of intention seems to be substituted by the cognitive component in terms of the perpetrators being aware that the action will result in the prohibited consequence (though not desired) with certainty, as in the case of bombing a building inhabited by members of a persecuted ethnical group where some of them will unavoidably be killed, with the further inevitable consequence of ***487** destroying parts of this group. If in this case the genocidal act is considered as 'intentional' although the bomb planter may not have desired to kill any people or does not personally support the ethnical cleansing intentions of his superiors, this conclusion can be supported by attributional as well as evidentiary arguments: with regard to attributing consequences to the causer, it does not matter whether he was directly aiming at them or whether he, in pursuing a different goal, was prepared to let the prohibited result occur, thus using it as means to another end, as in the case where it is the military commander's first priority to destroy the building for strategic reasons while knowing with certainty that this goal could not be reached without killing innocent inhabitants. And from an evidentiary point of view, one could argue that, in acting though aware of the prohibited consequences, the perpetrator was indeed willing to accept them. This position is at least feasible so long as the perpetrator assumes that the prohibited consequences 'will' occur, as required by subparagraph (b).62

While some legal scholars view the second alternative of intent as excluding concepts of *dolus eventualis* or recklessness,63 others advocate the inclusion of recklessness and *dolus eventualis* in the legal standard of Article 30.64 As far as the drafting history is concerned, ***488** Professor Roger Clark noted that '*dolus eventualis* fell out of the written discourse before Rome. Recklessness, in the sense of subjectively taking a risk to which the actor's mind has been directed, was ultimately to vanish also from the Statute at Rome, with again only an implicit decision as to whether it was appropriate for assessing responsibility.'65 Before going further to examine whether recklessness and *dolus eventualis* fall under the realm of Article 30 of the ICC Statute it is desirable to discuss the meaning of these concepts under common and civil legal systems.

2.5 *Recklessness in Common Law Systems*

The law of England, as it currently stands, defines recklessness as the conscious taking of an unjustifiable risk. The term 'recklessly' is used to denote the subjective sate of mind of a person who foresees that his conduct may cause the prohibited result but nevertheless takes a deliberate and unjustifiable risk of bringing it about.66 A modern Canadian writer, Don Stuart, asserted that the proper test to be followed in such situations is to examine whether D, given his shortcomings and strengths, foresaw the consequence or circumstance. He concluded that whether D 'ought', 'could' or 'should' - as a reasonable person - have thought about the occurrence of the consequence or the existence of such circumstances is not the right test to be applied.67 In *Sansregret* v. *The Queen,*68 a case before the Supreme Court of Canada, the subjective approach for recklessness was authorita-

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tively asserted as follows:

In accordance with well established principles for the determination of criminal liability, recklessness, to form a part of the criminal mens rea, must have an element of the subjective. It is found in the attitude of one who, aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is in other words, the conduct of one who sees ***489** the risk and who take the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.69

The term recklessness, as used in the Model Penal Code, involves conscious risk creation, an element which differentiates it from acting either purposely or knowingly. It is a state of mind distinct from intent.70 The Code provides that a person acts 'recklessly' if (1) he 'consciously disregards a substantial and unjustified risk that the material element exits or will result from his conduct.'71 According to the Code, a risk is 'substantial and unjustifiable' if 'considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.'72 In *United States* v. *Albers,*73 it was held that a finding of recklessness may only be made when persons disregard a risk of harm of which they are aware.74 The requirement that the actor consciously disregard the risk is the most significant part of the definition of recklessness. It is this concept which differentiates a reckless actor from a negligent one.75

2.6 *Dolus Eventualis in Romano-Germanic Law Systems*

Dolus eventualis is a well known concept in most of the Romano-Germanic legal systems. This type of *dolus* is recognized under the Italian criminal law as *dolo eventuale.* Pursuant to Article 43 of the Italian *Codice Penale,* all serious crimes require proof of the mental element known as *dolo,* which means that the prohibited result must be both *preveduto* (foreseen) and *voluto* (wanted/willed). According to the Italian criminal law, a result may be *voluto* even though it is not desired, if, having contemplated the possibility of bringing it about by pursuing a course of conduct, the perpetrator is prepared to run the ***490** risk of doing so *dolo eventuale.* Even a small risk may be *voluto* if the accused has reconciled himself to, or accepted it as a part of the price he was prepared to pay to secure his objective.76

Dolus eventualis (*bedingter Vorsatz*) and especially its element of will are still a matter of dispute in German legal system. On the one hand, case law concerning this element is inconsistent. On the other hand, a considerable number of German legal scholars contend that *dolus eventualis* requires only an intellectual element, which most of them define as foresight of 'concrete possibility'.77 German literature, as well as courts, treated *dolus eventualis* differently according to different theories on the subject. The following will examine the "consent and approval theory". This theory is applied by German courts,78 and is usually referred to as the 'theory on consent and approval' (*Einwilligungs - und Billigungstheorie*).79 The majority of German legal scholars who ascribe to this theory use a slightly different definition for *dolus eventualis.* They are of the opinion that the offender must 'seriously consider' (*ernstnehmen*) the result's occurrence and must accept the fact that his conduct could fulfil the legal elements of the offence.80 Another way of putting the point is to say the offender must 'reconcile himself' (*sich abfinden*) with the prohibited result.81

This theory was implicitly adopted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Stakic case.82 In establishing the requisite *mens rea* for the crime of murder as a Violation of the Laws or Customs of War under Article 3 of the ICTY, the Yugoslavia Tribunal had the following understanding regarding the technical definition of *dolus eventualis* : 'if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of ***491** death.'83 If, to the contrary, the offender is 'confident' (*vertrauen*) and has reason to believe that the result - though he foresees it as a possibility - will not occur, he lacks *dolus eventualis* and acts only negligently.84

In principle, and in order to avoid any uncertainties or ambiguities which may shadow the present discussion, we have to concede that *dolus eventualis,* like other types of *dolus,* namely *dolus directus* and *dolus indirectus,* should include the two components of intent: knowledge and wilfulness. Thus, if one of these components is missing, *dolus eventualis* no longer exists on the part of the perpetrator.85

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2.7 *Dolus Eventualis, Recklessness and the Lubanga Decision*

As already mentioned, in the Lubanga case, PTC I of the ICC asserted that the reference to 'intention' and 'knowledge' in a conjunctive way, as set out in Article 30, requires the existence of a 'volitional element' on the part of the suspect.86 Aware that the jurisprudence of the two *ad hoc* Tribunals has recognised other degrees of culpable mental states than that of direct intent (*dolus directus* of the first degree) and indirect intent (*dolus directus* of the second degree),87 the ICC Pre-Trial Chamber went further, assuring that the volitional element mentioned above also encompasses other aspects of *dolus,* namely *dolus eventualis.*88 According to the Pre-Trial Chamber *dolus eventualis* applies in situations in which the suspect '(a) is aware of the risk that the objective elements of the crime *may* result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.'89 The Pre-Trial Chamber found it necessary to distinguish between two types of scenarios regarding the degree of probability of the occurrence of the consequence from which intent can be inferred:

Firstly, if the risk of bringing about the objective elements of the crime is *substantial* (that is, there is a likelihood that it "will occur in the ordinary course of events"), the ***492** fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from:

(i) the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and

(ii) the decision by the suspect to carry out his or her actions or omissions despite such awareness.

Secondly, if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions.90

However, in situations where the suspect's mental state 'falls short of accepting that the objective elements of the crime may result from his or her actions or omissions, such a state of mind cannot qualify as a truly intentional realisation of the objective elements, and hence would not meet the "intent and knowledge" requirement embodied in article 30 of the Statute.'91

There are two important aspects of the PTC's clarification regarding the *mens rea* contours as set out in Article 30 of the ICC Statute. First, it appears that the Chamber adhered to the Romano-Germanic concept of intent which consists of two components, namely, *Wissen* and *Wollen* (Germany), *preveduto* and *voluto* (Italy), or *la conscience* and *la volonté* (France).92

***493** Second, by requiring the existence of a volitional element on the part of the accused - in the sense of accepting the consequence - the ICC Pre-Trial Chamber accepted the civil law concept of *dolus eventualis* and ruled out the common law recklessness, as the latter falls short of meeting the *mens rea* threshold as set out in Article 30.93

The Lubanga PTC I provided further clarification as to the reason of ruling out the notion of recklessness from the realm of Article 30 of the ICC Statute:

The concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result. In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, it is not part of the concept of intention.94

It is significant in this regard to recall Professor Antonio Cassese's concerns, almost eight years prior to the Lubanga decision, regarding the exclusion of the notion of recklessness by the drafters of the Rome Statute:

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While it is no doubt meritorious to have defined these two notions [intent and knowledge in Article 30], it appears questionable to have excluded recklessness as a culpable *mens rea* under the Statute. One fails to see why, at least in the case of war crimes, this last mental element may not suffice for criminal responsibility to arise. Admittedly, in the case of genocide, crimes against humanity and aggression, the extreme gravity of the offence presuppose that it may only be perpetrated when ***494** intent and knowledge are present. However, for less serious crimes, such as war crimes, current international law must be taken to allow for recklessness: for example, it is admissible to convict a person who, when shelling a town, takes a high an unjustifiable risk that civilian will be killed - without, however, *intending,* that they be killed - with the result that the civilians are, in fact, thereby killed.95

Cassese continued his criticism regarding the exclusion of recklessness as a culpable mental element under the Rome Statute in the following words:

Hence, on this score the Rome Statute marks a step backwards with respect to *lex lata,* and possibly creates a loophole: persons responsible for war crimes, when they acted recklessly, may be brought to trial and convicted before national courts, while they would be acquitted by the ICC. It would seem that the draughtsmen have unduly expanded the shield they intended to provide to the military.96

However, it would be a profound mistake to draw from Cassese's hypothetical example that those persons will escape justice by claiming that their main aim was merely shelling a military objective and that they lack any intention regarding the killing of civilians. In such situations, those actors can incur criminal responsibility under the concept of *dolus eventualis* if the prosecution succeeds in demonstrating that in shelling the towns, it was probable that those civilians would be killed and that the actors accept such a result. Triffterer, for instance, has argued that the concepts of recklessness and *dolus eventualis* can be read within the text of Article 30 since the phrase 'will occur' as provided for in Article 30 of the ICC Statute may be interpreted to encompass situations in which 'the perpetrator is aware that a consequence might occur and nevertheless engages in taking action tending in that direction, thereby accepting its consequences'.97 Kai Ambos disagrees:

Certainly, reckless conduct cannot be the basis of responsibility since a corresponding provision was deleted. The same applies for the higher threshold of *dolus eventualis* : this is a kind of "conditional intent" by which a wide range of subjective attitudes towards the result are expressed and, thus, implies a higher threshold than recklessness. The perpetrator may be indifferent to the result or be "reconciled" with the harm as a possible cost of attaining his or her goal... However, [in such situations of *dolus eventualis*] the perpetrator is not, as required by Article 30(2)(b), aware that ***495** a certain result or consequence will occur in the ordinary course of events. He or she only thinks that the result is possible. Thus, the wording of Article 30 hardly leaves room for an interpretation which includes *dolus eventualis* within the concept of intent as a kind of "indirect intent."98

The exclusion of recklessness as a culpable mental element within the meaning of Article 30 runs in harmony with the basic principles of Islamic law (*Shari* 'a) that no one shall be held criminal responsible for *hudud* crimes (offences with fixed mandatory punishments) or *qisas* crimes (retaliation) unless he or she has wilfully or intentionally (*'amdan*) committed the crime at issue.99

2.8 *The Meaning of Knowledge*

Paragraph three of Article 30 provides two definitions of knowledge. The first applies to consequences, whereas the second pertains to attendant circumstances. Under the ICC Statute, the distinction between acting 'intentionally' and 'knowingly' is very narrow. Knowledge that a consequence 'will occur in the ordinary course of events' is a common element in both conceptions.'100 A result is 'knowingly' caused if the actor is aware that 'a consequence will occur in the ordinary course of events'.101 With 'attendant circumstances', one acts 'knowingly' if he is aware 'that a circumstance exists'.102

2.9 *Knowledge in Relation to the Circumstance Element*

Logically speaking, there is no offence which requires the prosecution to prove that the accused, in the true

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sense, intends a particular circumstance to exist at the time he carries out his conduct. If the accused intends a circumstance to exist, it means that he hopes it exists or will exist. According to the ICC Statute, knowledge as to the circumstance element arises in various situations. It can relate to circumstances forming part of the definition of the crime, i.e. the requirement of knowledge of the widespread or systematic attack ***496** directed against any civilian population as provided for in the chapeau element of Article 7.103 The same can be said regarding the crime of rape, punishable as a crime against humanity104 or as a war crime,105 where the non-consent of the victim and the perpetrator's knowledge thereof is considered as constitutive element of the offence.106 The wording of Article 30 makes it clear that 'knowingly' refers to the actor's subjective state of mind and not the state of mind of a reasonable person.

Additionally, in defining 'knowledge' to mean the perpetrator's '*awareness* that a circumstance exists', Article 30(3) limits the meaning of knowledge to 'actual knowledge' as opposed to 'constructive knowledge'. Even knowledge of 'high probability' of the existence of a particular fact does not pass Article 30's culpability test.107 There is reason to question whether the doctrine of 'wilful blindness' or 'wilfully shutting one's eyes to the obvious' satisfies the *mens rea* threshold of Article 30(3). The answer can be in the affirmative if the doctrine is understood to apply only in situations where the perpetrator is virtually certain that the fact exists, or, as stated by Glanville Williams:

A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This and this alone, is wilful blindness.108

Any attempts to stretch the wilful blindness doctrine by accepting some lesser degree of knowledge instead of actual knowledge would ***497** blur the distinction between wilful blindness and recklessness. There are, however, exceptions to the application of the 'actual knowledge' standard with regard to the factual elements of particular crime. The Elements of Crimes of the 'war crime of using, conscripting or enlisting children' under the age of fifteen years into the national armed forces, or using them to participate actively in hostilities,109 allow for a lower level of knowledge than that of 'actual knowledge'.110 According to paragraph three of the Elements of Article 8(2)(b)(xxvi) the perpetrator can incur criminal responsibility if he 'knew' or 'should have known' that the child concerned was under the age of 15. Thus, the Elements of Crimes made it clear that 'constructive knowledge' is a sufficient *mens rea* standard with regard to the circumstance element of this crime. As a consequence, this crime falls into the realm of 'negligence crimes' where conviction depends upon proof that the perpetrator had 'reasonable cause' to believe or suspect some relevant fact, in the present case, that the child concerned was under the age of 15.

The vital point is that constructive knowledge differs from the two other degrees of knowledge, namely, actual knowledge and wilful blindness, in requiring neither awareness nor purposive avoidance of the means of learning the truth. Another way of putting the point is to say that the perpetrator may incur criminal liability for being negligent with regard to a circumstance when, as reasonable person, he ought to know that such 'circumstance exists or will exist and fails to do so, whether he has given thought to the question or not.'111

Another example of lowering the actual knowledge standard to reach the one of constructive knowledge appears at the third paragraph of the Elements of the "war crimes of improper use of a flag of truce"112 and the "war crime of improper use of a flag, insignia or ***498** uniform of the hostile party".113 According to the third paragraph common to both provisions, it is sufficient to hold the perpetrator criminally liable if he 'knew or should have known of the *prohibited nature* of such use.'114 The term 'prohibited nature' denotes the illegality of the conduct.

It is obvious that such a negligence standard is inconsistent with the *mens rea* threshold as set out in Article 30 of the Rome Statute - that all the materials elements of a crime be committed with intent and knowledge.

III. THE RELATIONSHIP BETWEEN ARTICLE 30 AND OTHER PROVISIONS OF THE ICC STATUTE

3.1 *Article 30 vis-à-vis the Culpability Requirements Stated in an Offence Definition*

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As noted by Professor Schabas, several crimes within the subject matter jurisdiction of the ICC have their 'own built-in *mens rea* requirement.'115 The crime of genocide, punishable under Article 6 of the ICC Statute, is defined as a proscribed act committed 'with intent to destroy' a protected group.116 The chapeau element of crimes against humanity requires a subjective element of knowledge that the attack was carried out in a widespread or systematic manner against a civilian population.117 Extermination, a crime against humanity, 'includes the intentional infliction of conditions of life ... calculated to bring about the destruction of part of a population.'118 Several war crimes punishable as grave breaches of the 1949 Geneva Conventions, or serious violations of the laws and customs of war under Article 8 of the ICC Statute, have their own built-in *mens rea* such as the adjectives 'wilful', 'wilfully', 'wantonly', 'intentionally', or 'treacherously'.119

***499** The first question which arises is whether the *mens rea* threshold of Article 30 would automatically apply to cover the material elements of such offences, even if the crime at issue contains in its language a mental element. The second question is an outcome of the first. If the crime at issue required a lower or a higher threshold than the one provided for in Article 30, which threshold should then prevail? In other words, does Article 30 allow a departure from the *mens rea* standard laid down in it? Another difficulty appears in applying the rule of '*mens rea* coverage' to particular crimes which require a proof of 'special intent' (e.g. the intent to destroy a group in the crime of genocide). In such types of offences, this 'ulterior intent' has no material element to cover, since the actual destruction of a group is not an ingredient element of the offence.

'Unless otherwise provided', a proviso which is set out in the very beginning of the first paragraph of Article 30, appears to come as the Prince who redeems Cinderella from her poor circumstances. According to this proviso, ICC judges have to consider Article 30 as a default rule that is applied to all crimes and modes of participation in criminal conduct, as long as there are no specific rules on the mental element expressly stated in these provisions,120 and hence paving the road to the application of the *lex specialis* principle. Donald Piragoff, who was the first to comment on Article 30, has a different opinion regarding the relationship between Article 30 and particular crimes which requires that the material elements be 'intentional' or be committed 'intentionally'. He noted that given the general rule in Article 30, the inclusion of these adjectives in the definition of particular crimes 'is likely unnecessary surplusage'.121 He pointed out that '[t]he specific presence of these terms is likely a product of the negotiations process whereby certain delegations wished to make clear the intentional nature of the crimes before they agreed to their inclusion in article 7 and 8.'122 It was said that the only significance of ***500** Article 30 to these provisions is that it imports the element of knowledge into those definitions of crimes.123

But the subjective elements included in the definition of the crime against humanity of extermination are not merely redundant. Article 7(2)(b) of the ICC Statute defines extermination to include 'the intentional infliction of conditions of life ... *calculated* to bring about the destruction of part of a population.' The term 'calculated' as it appears in Article 7(2)(b) can be interpreted as requiring a higher threshold of *mens rea* than that provided for in the default rule of Article 30. It can be interpreted as requiring an element of premeditation, a subjective mental state which requires that the accused, at a minimum, held a deliberate plan to exterminate prior to the act causing the destruction of part of a population, rather than forming the intention simultaneously with the act.

By including the 'unless otherwise provided' in the provision of Article 30, the codifiers of the ICC Statute have achieved several goals. On the one hand, Article 30, for the first time in the sphere of international criminal law, sets a general requirement for international criminal liability which is based on intent and knowledge. On the other hand, 'unless otherwise provided' enables the Statute to absorb the corresponding rules of international humanitarian law (the definition of war crimes under Article 8) without having to modify the definitions of these crimes. It also enables the Statute to adopt *verbatim* the definition of the crime of genocide, as defined in the 1948 Genocide Convention, without having to change any of its subjective elements.

3.2 *Article 30 vis-à-vis the Elements of Crimes*

Article 30 of the ICC Statute has to be read together with several provisions set out in the ICC Statute. Article 21, which constitutes the first codification of the sources of international criminal law, establishes a hierarchy of applicable law to be applied by judges of the International Criminal Court.124 According to Article 21(1)(a) of

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the ICC Statute, the Court shall apply in the first place (i) its Statute, (ii) Elements of Crimes and (iii) its Rules of Procedure and Evidence.125

***501** It is worth stressing that the general introduction to the Elements of Crimes126 which consists of ten paragraphs has great significance to the interpretation and the application of Article 30. Paragraph one of the general introduction reiterates the provision laid down in Article 9(1) of the ICC Statute and reaffirms that the Elements of Crimes 'shall assist the Court in the interpretation and application of articles 6, 7, and 8.'

Paragraph 2 states that 'where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e. intent, knowledge, or both, set out in Article 30, applies. Exceptions to the Article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.'

According to paragraph 3, 'existence of intent and knowledge can be inferred from relevant facts and circumstances.' Paragraph 4 provides that 'with respect to mental elements associated with elements involving value judgment, such as those using the terms "inhumane" or "severe", it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated'.

Paragraph 2 of the general introduction will come into play in situations where the Elements of Crimes for particular crimes, provide for a lower threshold of *mens rea* (negligence standard) than that of Article 30. For instance, while Article 30(3) of the ICC Statute assigns a knowledge standard with regard to the circumstance element of the crime of genocide by 'forcibly transferring children of the group to another group' (the age of the victim concerned),127 the Elements of Crimes introduce a negligence standard (should have known) with regard to the same circumstance element of this offence. Addressing this point Professor Claus Kress had this to say:

It is impossible to reconcile this standard [negligence] with Article 30(1) [intent and knowledge] of the *ICC* Statute so that the question arises as to whether the deviation can be justified on the basis of the words "unless otherwise provided" in Article 30(1) of the *ICC* Statute. As there is no "colourable support" for the deviation in prior ***502** case law the answer would appear to depend on whether the *ICC* Elements of Crimes can *by themselves* "provide otherwise". It is submitted that they cannot, though a sentence in the Elements' "General introduction" may be read to suggest the contrary.128

In Lubanga, the PTC I affirmed that the ICC Elements of Crimes can by themselves 'provide otherwise'.129 Lubanga was charged with conscripting and enlisting children under the age of fifteen years into armed forces, and using them to participate actively in hostilities, a crime punishable under articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Statute. The third element of the Elements of Crimes assigns a negligent standard (should have known) with regard to the circumstance element (the age of the victim concerned) of these offences.130 Relying on the "unless otherwise provided" clause, the Pre-Trial Chamber considered this element of negligence, as set out in the Elements of Crimes of the above mentioned provisions, an exception to the 'intent and knowledge' standard provided in Article 30(1).131

As for the fifth element of the Elements of the Crimes for the crime under consideration, the Pre-Trial Chamber noted that this 'Element' requires only that 'the perpetrator was aware of the factual circumstances that established the existence of an armed conflict', without going as far as to require that the accused conclude, on the basis of a legal assessment of the said circumstances, that there was an armed conflict.'132 The same applies *mutatis mutandis* to the crime of genocide by forcibly transferring children. It would be sufficient to demonstrate that the perpetrator was negligent regarding the ***503** circumstance element, namely the fact that the victims forcibly transferred were under the age of 18 years.133

One might wonder whether such a lower standard of culpability (negligence) is sufficient for crimes that have a very specific object. "Forcibly transferring children of the group to another group", "using, conscripting or enlisting children into armed forces" and "compelling a prisoner of war to serve in the forces of a hostile power" are crimes, the very definition of which explicitly state the object against which certain acts are directed (i.e. children and prisoners of war).134 One might suggest that in such categories of crimes which have a very specific object, knowledge, as opposed to mere negligence, has to be assigned to the circumstance element. There is

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no provision in the Rome Statute which *obliges* the honourable judges of the ICC to apply the Elements of Crimes. The plain text of Article 9 states that these Elements of Crimes '*shall* assist the Court in the interpretation and application of articles 6, 7, and 8.' However, the application of these Elements might infringe upon one of the most fundamental rights of the accused, namely, the presumption of innocence. It is up to the honourable judges of the ICC to decide on that issue and not to adhere to the approach adopted by the Pre-Trial Chamber I in the Lubanga case.

Furthermore, the Elements of Crimes includes the following 'alien element' as an element of the crime of genocide: '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'135 If one considers this element as a 'circumstance element', it has to be covered by the default rule of Article 30 of the ICC Statute and, as consequence, the prosecution must prove that the perpetrator is aware that his proscribed conduct (i.e. of killing members of the group) 'took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'136

***504** 3.3 *Article 30 vis-à-vis Individual Criminal Responsibility - Article 25*

Article 25 of the ICC Statute which is entitled 'individual criminal responsibility' provides for various forms of perpetration and participation in a criminal conduct. Sub-paragraph (a) of paragraph 3 refers to three forms of perpetration. Yet, under the ICC Statute a person shall incur criminal responsibility if he or she commits any of the crimes within the jurisdiction of the ICC 'whether as (i) an individual, (ii) jointly with another, or (iii) through another person, regardless of whether that other person is criminally responsible'.137

From a German criminal law perspective, element (i) speaks about *unmittelbarer Täter* (the direct perpetrator who physically carried out the material elements of the offence in person); element (ii) deals with *Mittäterschaft* (co-perpetration); and the third form of perpetration is concerned with *mittelbarer Täter* or *Hintermann* (indirect perpetrator, a person who acts through the agency of another). This latter form of perpetration was defined by the 1996 Preparatory Committee in the following words, '[a] person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or person acting under mistake of fact or otherwise acting without *mens rea.* '138

3.3.1 *Co-perpetratorship*

The first test of the notion of co-perpetratorship as provided for in Article 25(3)(a) of the ICC Statute was made by Pre-Trial Chamber 1, in the Lubanga case.139 There the Chamber agreed with scholarly opinions that the concept of co-perpetration

is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to whole crime.140

***505** The Chamber noted that 'the definitional criterion of the concept of co-perpetration is linked to the distinguishing between principles and accessories to a crime where a criminal offence is committed by a plurality of persons.'141 The Chamber realised that there are three different approaches to differentiate between principals and accessories to a crime, namely: (1) the objective approach (only those who physically carry out one or more of the objective elements of the offence can be considered principles to the crime)142 ; (2) the subjective approach adopted by the two *ad hoc* Tribunals through the concept of joint criminal enterprise which places the focus on the state of mind in which the contribution to the crime was made;143 and (3) the third approach - the one adopted by the Pre-Trial Chamber for distinguishing between principals and accessories - which relies on the concept of 'control over the crime'.144

According to the Pre-Trial Chamber 'this approach involves an objective element, consisting of the appropriate

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factual circumstances for exercising control over the crime, and a subjective element, consisting of the awareness of such circumstances.'145 The Chamber asserted that the main feature of this concept is that 'principals to a crime are not limited to those who physically carry out the objective element of the offence, but also include those, who, in spite of being ... [remote] from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will committed.'146 They are principals and not accomplices because they have, along with others, control over the offence by reason of essential tasks assigned to them.147

From a German criminal law perspective, the ICC Pre-Trial Chamber adhered to the notion of *Mittäterschaft* (co-perpetration) based on *funktionelle Tatherrschaft* (functional control over the crime). The Chamber, however, deviated from Professor Roxin's theory which restricted the notion of co-perpetration based on functional control over the crime for those who contribute to the commission of the crime at its execution stage.148 According to the ***506** Chamber, those who contribute at the preparatory stage as well as at the execution stage fall within the ambit of co-perpetration as set out in Article 25(a) of the ICC Statute as long as the following objective and subjective elements are met:

(i) the existence of an agreement or common plan between two or more persons (objective element)149 ;

(ii) co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime (objective element)150 ;

(iii) the fulfilment of the subjective element of the crime in question by the coperpetrators including any requisite *dolus specialis* or ulterior intent for the type of crime involved151 ;

(iv) the co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime;

(v) the co-perpetrator must be aware of the factual circumstances enabling him to jointly control the crime.152

As far as the subjective elements are concerned, element (iii) can be satisfied if the co-perpetrator acted with any of the following mental states *dolus directus* of the first degree, *dolus directus* of the second degree, or *dolus eventualis.* These *mens rea* standards - as already discussed above - satisfy the threshold of the mental element embodied in Article 30 of the ICC Statute. However, in situations where the definition of the crime requires a specific intent, such as the case of persecution as a crime against humanity or genocide, the prosecution has to demonstrate that each co-perpetrator possesses such a specific intent.153

Element (iv) requires proof of 'double intent' on the part of the co-perpetrators, namely, a 'cognitive component' and a 'volitional component'. As to the former, it must be shown that all co-perpetrators, at the time when they agreed to start the implementation of their common plan, were mutually *aware* of the risk that such implementation may result in the realisation of the objective elements of the crime.154 As for the volitional component, it has to be proved ***507** that all co-perpetrators 'mutually accept[ed] such a result by reconciling themselves with it or consenting to it.'155

The requirement of such a subjective element for the notion of co-perpetration based on joint control over the crime will inevitably stand against the application of any lower threshold than that of *dolus eventualis.* That is to say the negligence standard (should have known) assigned to the circumstance element (the age of the victim concerned) of the war crime of enlisting or conscripting children will not be applicable in the instant case.156

Element (v) is the third and last subjective element required for the notion of co-perpetration based on joint control of the crime. According to the Pre-Trial Chamber this element requires the accused to be aware

(i) that his or her role is essential to the implementation of the common plan, and hence in the commission of the crime, and

(ii) the he or she can - by reason of the essential nature of his or her task - frustrate the implementation of the

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common plan, and hence the commission of the crime, be refusing to perform the task assigned to him or her.157

3.3.2 *Aiding and Abetting*

Sub-paragraph (c) of Article 25(3) of the ICC Statute assigns a high threshold of *mens rea* for the aiders and abettors, 'which goes beyond the ordinary *mens rea* requirement within the meaning of Article 30.'158 Accordingly, Article 25(3)(c) limits the accomplice liability to instances in which there exists the *purpose* of promoting or facilitating the commission of the offence. If that is the case, the prosecution must demonstrate that the aider and abettor's conscious objective is to facilitate the commission of the crime.

It is worth pointing out that the phrase 'for the purpose of facilitating', as it appears in the very beginning of sub-paragraph (c), is borrowed from § 2.06(3)(a) of the Model Penal Code. The issue, whether a lower culpable mental state than that required for the ***508** principal perpetrator should be assigned to the aider and abettor, was heavily criticised by the commentators of the Model Penal Code as 'incongruous and unjust'.159 They reaffirmed that 'the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.'160

Reading Article 25(3)(c) together with Article 30, it was questioned whether the conjunctive formulation (intent and knowledge) provided in the latter provision runs directly counter to international jurisprudence that an aider and abettor 'need not share the same *mens rea* of the principal perpetrator (*e.g.* intent to kill), and that a "knowing participation in the commission of an offence" or awareness of the act of participation coupled with a conscious decision to participate" is sufficient.'161 The problem could be approached in two ways. The first approach is proposed by Piragoff in his commentary on Article 30 of the ICC Statute:

It is submitted that the conjunctive formulation has not altered this jurisprudence, but merely reflects the fact that aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation. Even if a strict literal reading of the conjunctive in paragraph 1 were made such that an accomplice must intend the consequence committed by the principal, the same interpretative result would occur. Article 30 para. 2(b) makes it clear that "intent" may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of "knowledge", as defined in Article 30 para. 3. Therefore, if both "intent" and "knowledge" are required on the part of an accomplice, these mental elements can be satisfied by such awareness. Therefore, article 30 confirms the existing international jurisprudence.162

The second approach relies on recent judgments delivered by the two *ad hoc* Tribunals in which the Appeals and Trial Chambers demand some sort of volitional element in addition to the knowledge requirement.163 Yet, in the *Oric* case, it was held that aiding and ***509** abetting must be intentional in the sense that 'the aider and abettor must have *double intent,* namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator.'164

As far as the objective elements of aiding and abetting are concerned, Schabas noted that Article 25(3)(c) 'does not provide any indication as to whether there is some quantitative degree of aiding and abetting required to constitute the *actus reus* of complicity.'165 In sum, while sub-paragraph (c) provides for relatively low objective requirements of aiding and abetting, it assigns a relatively high subjective threshold.166

3.3.3 *Common Purpose*

Unlike the Statutes of the two *ad hoc* Tribunals, the Rome Statute of the International Criminal Court makes explicit reference to the theory of 'group criminality' (common purpose). Sub-paragraph (d) of Article 25(3) of the ICC Statute introduces the concept of 'common purpose', as a punishable mode of criminal conduct in the following words:

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In any other way contributes to the commission or attempted commission of such crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime.167

The first words of Article 25(3)(d) have been subject to different interpretations. The words '[i]n any other way contributes to the commission or attempted commission of such crime' was viewed by Professor Albin Eser as well as the Lubanga PTC as providing for a ***510** 'residual form of accessory liability'.168 Aware that Article 25(3)(d) of the ICC Statute provides for secondary participation as opposed to perpetration, the ICC Prosecutor, in the Document Containing the Charges in the Lubanga case, submitted that 'common purpose' could properly be considered as a third applicable mode of criminal liability.'169 Yet if that is the case, 'common purpose' as provided for in Article 25(3)(d) will always be the last resort for the ICC Prosecutor and will not be his "darling notion" as in the case of joint criminal enterprise in the jurisprudence of the Yugoslavia and Rwanda Tribunals. Whether the International Criminal Court will adhere to such interpretation by its PTC I, or whether it will interpret "common purpose" in the same way as it is interpreted under the jurisprudence of the two *ad hoc* Tribunals, is yet to be ascertained.

It might be held that 'common purpose' as a mode of criminal participation under Article 25(3)(d) will be appropriate to apply in situations which Professor Cassese named 'liability for participation in an institutionalized common criminal plan'.170 He states:

Plainly, in an internment camp where inmates are severely ill-treated and even tortured, not only the head of the camp, but also his senior aides and those who physically inflict torture and other inhumane treatment are responsible. Also those who discharge administrative duties indispensable for the achievement of the camp's main goals (for example, to register the incoming inmates, record their death, give them medical treatment or provide them with food) may incur criminal liability. They bear this responsibility so long as they are aware of the serious abuses being perpetrated (knowledge) and willingly take part in the functioning of the institution. That they should be held responsible is only logical and natural; by fulfilling their administrative or other operational tasks, they contribute to the commission of crimes. Without their willing support, crimes could not be perpetrated. Thus, however marginal their role, they constitute an indispensable cog in the murdering machinery.171

As noted above, Article 21 of the ICC Statute establishes a hierarchy of applicable law to be applied by judges of the International Criminal Court. According to Article 21(1)(a) of the ICC Statute, the Court shall apply in the first place its Statute,172 and in the second ***511** place 'applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict.'173 It is undeniable that the International Criminal Court will resort to the symmetric jurisprudence of the Yugoslavia and Rwanda Tribunals in order to shape this mode of 'group criminality' under Article 25(3)(d). However, the ICC will encounter a legal dilemma if it adopts literally the three categories of joint criminal enterprise as developed in the case law of two *ad hoc* Tribunals.174 This difficulty stems from the fact that the subjective elements provided for in Article 25(3) sub-paragraphs (d)(i) (aim of furthering the criminal activity of the group) and (d)(ii) (knowledge of the intention of the group) will stand up against any application of the 'extended form' of joint criminal enterprise (JCE III).175

3.4 *Article 30 vis-à-vis Superior Responsibility - Article 28*

Article 28 of the ICC Statute sets forth two different levels of culpability regarding military and civilians commanders. As for the military commanders, or persons effectively acting as military commanders, Article 28(a)(i) of the ICC Statute assigns both actual knowledge (knew) or constructive knowledge (should have known).***512** The term 'should have known' which is akin to negligence - a type of legal fault not necessarily involving a mental state - differs from the language employed in Articles 7(3)/6(3) of the ICTY/ICTR Statutes. There, the term 'had reason to know' is set out as a second alternative of knowledge which has to be proved on the part of the commander. It appears that the drafters of the ICTY/ICTR Statutes unlike those of the ICC Statute have

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carefully read the *travaux préparatoires* of Article 86 (then Art. 76 - Failure to Act) of Protocol I to the 1949 Geneva Conventions. During the preparatory work of the first Additional Protocol many delegations expressed their concerns regarding the inclusion of the phrase 'should have known' in then Article 76.176 Syria submitted an amendment suggesting the deletion of the phrase 'should have known'.177 This was endorsed by the delegation of Argentina who drew the working group's attention to the fact that 'penal responsibility should be interpreted in a very clear sense' and that the phrase 'should have known', as it appears in the ICRC draft, 'introduced a lack of clarity with regard to the conduct of superiors'.178 He concluded by saying that the phrase 'would be tantamount to reserving the responsibility for submitting proof, which would be incompatible with the presumption of innocence common to all Latin American legal systems'.179

At the Rome Conference, and as far as the requisite *mens rea* for command responsibility was concerned, the United States submitted a proposal in which it distinguished between the levels of culpability required for military commanders and civilian superiors:

An important feature in military command responsibility and one that was unique in a criminal context was the existence of *negligence* as a criterion of *knew or should have known* that the forces under his control were going to commit a criminal act. ... The negligence standard was not appropriate in a civilian context and was basically contrary to the usual principles of criminal law responsibility.180

***513** Israel supported the United States' proposal in principle, but suggested the insertion of the words 'or ought to have known' after 'knew' in subparagraph (b)(i) of article 25 as set out in the Preparatory Committee's 1998 draft statute.181 In the view of the Israeli delegate, this would establish 'the principle that a superior not only had actual knowledge but also what he would term "constructive"' knowledge, in other words, being equally responsible for failing to appreciate facts which he or she was in a position to know.'182

Recent jurisprudence of the Yugoslavia and Rwanda Tribunals has stressed that 'criminal negligence is not a basis of liability in the context of criminal responsibility.'183 These evolutionary developments in the law of command responsibility were endorsed by PTC I in Lubanga. In discussing the Elements of war crime of using, conscripting or enlisting children, the Pre-Trial Chamber considered the jurisprudence of the two *ad hoc* Tribunals and concluded that the expression 'had reason to know' is stricter than the one of 'should have known' because the former 'does not criminalize the military superior's lack of due diligence to comply with their duty to be informed of their subordinates' activities.'184 Rather the 'had reason to know' requirement 'can be met only if military superiors have, at the very minimum, specific information available to them to the need to start an investigation.'185 Accordingly, 'a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him in notice of offences committed by subordinates.'186 Thus, one might discern that neglect of a duty to acquire such knowledge, does not feature in the provision of Article 28(1) as a separate offence, and a superior is not therefore liable under ***514** the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.187

In light of the aforementioned, and reading Article 28(a) together with Article 30(3), it appears that while the first alternative of knowledge assigned to the military commander would meet the knowledge standard, the second alternative (should have known) would not. In such a situation the proviso 'unless otherwise provided' will come into play and the second alternative of Article 28(a) 'should have known' would prevail.

Paragraph 2 of Article 28 assigns a recklessness standard (consciously disregard information) with regard to the civilian superiors. This language is akin to the Model Penal Code § 2.02(2)(c). It is observed that the requirement that the actor *consciously disregard* the risk is the most significant part of the definition of recklessness under the Model Penal Code. It is this concept which differentiates a reckless actor from a negligent one.188 The negligent actor is a person who fails to perceive a risk that he ought to perceive. The reckless actor is a person who perceives or is conscious of the risk but disregards it.189 Hence, in many offences where the law provides that recklessness is the minimum level of culpability, negligence will not suffice. Accordingly, 'the distinction between 'conscious disregard' and 'failure to perceive' will often signify the difference between conviction and acquittal.'190

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3.5 *Article 30 vis-à-vis Mistake of Law and Mistake of Fact*

Article 32 of the Rome Statute is the first provision ever in the sphere of international criminal law which expressly recognises mistakes either of fact or law as grounds of excluding criminal responsibility. It is worth noting that the Nuremberg and Tokyo Charters, as well as the Statutes of the two *ad hoc* Tribunals, lack a general provision on the subject.

Paragraph 1 of Article 32 recognises the well-established principle *ignorantia facti excusat.* It provides that 'a mistake of fact shall be ground for excluding criminal responsibility only if it negates the mental element required by the crime.'191 While the first sentence of the second paragraph of Article 32 reiterates the Latin maxim *ignorantia juris non excusta,* the second sentence of the same ***515** paragraph assures 'a mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element ...'192 In his commentary on Article 32 Triffterer had this to say:

The difference between mistake of fact and *mistake of law* is that *in principle* in the latter case the perpetrator is not mistaken about the existence of a (purely) material element of fact; therefore, mistakes about *legal* aspects of a crime *in general* do not touch the material elements or material prerequisites for justification or excuse.'193

On closer inspection, one might consider Article 32(1) to be superfluous as long as the default rule of Article 30(1) of the ICC Statute stands as a safeguard for excluding the criminal responsibility in situations where the material elements of a particular crime are not committed with intent and knowledge. But in situations where the factual or circumstantial elements of a particular crime are satisfied by a lower threshold than that of intent and knowledge (i.e. negligence) a defence of mistake of fact will not come into play. That is to say that all crimes within the subject matter jurisdiction of the International Criminal Court which in their elements contain the phrase 'should have known' (i.e. Elements of Crimes of article 8(2)(b)(xxvi) and 8(2)(e)(vii)) will stand against the defence of mistake of fact. This might be the reason why Lubanga refrained from claiming error regarding the age of the victim concerned, and instead raised the defence of mistake of law.

The first test of Article 32(2) - mistake of law - was conducted by the PTC I in the Lubanga case. There the Defence argued that Lubanga was unaware that voluntarily or forcibly recruiting children under the age of fifteen years entailed his criminal responsibility under the ICC Statute since the law was not 'accessible' or 'foreseeable' for Lubanga by that time.194 Schabas noted that 'although the argument was framed as one of retroactivity, it looks more like a claim of ignorance of the law.'195

The PTC I observed that 'the scope of a mistake of law within the meaning of Article 32(2) is relatively limited.'196 The Chamber went ***516** further asserting that in the absence of a plea under Article 33 of the ICC Statute, 'the defence of mistake of law can succeed under Article 32 of the Statute only if Thomas Lubanga Dyilo was unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning).'197 Professor Thomas Weigend disagreed with PTC I. His fruitful explanation on the subject merits lengthy quotation: 'Normative terms, such as 'conscripting or enlisting', by definition have no 'everyday meaning' that some one could 'realise'. To have the required intent, all the actor needs to understand is what the normative term in question signifies. In *casu,* if Lubanga knew that 'conscripting or enlisting', although referring to a body of military law that he may or may not have been aware of, covers all forms of accepting the military service of young persons, then he knew enough to commit the offence with intent.'198 He continued: 'All that Article 32(2) ICC Statute does is to equate the misconception of a normative element (such as 'conscripting or enlisting') of an offence with the misconception of a factual element (such as 'under the age of 15 years').' In either case, Weigend continued, 'the defendant cannot be convicted if he was unaware that his conduct met the definition of the offence, either because he thought that the young recruits were 16 years old (factual mistake) or that he did not 'conscript or enlist' anyone because these technical terms, in his mind, only covered forcible recruitment (normative mistake).199

IV. CONCLUSION

This study reveals the dominant character of the mental element - Article 30 - within the Statute of the International Criminal Court. Since its integration into the Rome Statute of the International Criminal Court, Article 30

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has been subject to different interpretations by legal scholars and commentators. However, one of the major advantages of Article 30 is that it assigns different levels of culpability to each of the material element of the crimes under the subject matter jurisdiction of the Court - element analysis as opposed to offence analysis. Thus, the general rule under this provision is the full coverage of the material elements by the corresponding mental elements.

At present, the only decision rendered by the International Criminal Court on substantive issues, since its creation on 1 July ***517** 2002, shed some light on the meaning of intent (dolus) despite some shortcomings.200 As for the *mens rea* standards under Article 30 of the ICC Statute, the Lubanga PTC I interpreted that provision to include the three categories of *dolus,* namely *dolus directus* of the first and second degrees and *dolus eventualis.*

Our examination also reveals that there are exceptions regarding the application of the default rule of intent and knowledge to the crimes within the *ratione materiae* of the International Criminal Court. The *Lubanga* Pre-Trial Chamber has affirmed that the ICC Elements of Crimes can by themselves "provide otherwise". The Chamber considered that the fault element of negligence, as set out in the Elements of Crimes for particular offences, can be an exception to the intent and knowledge standard provided in Article 30(1) of the ICC Statute.201 In such situations, where conviction depends upon proof that the perpetrator had 'reasonable cause' to believe or suspect some relevant fact, the prosecution has not much to do and the burden of proof, arguably, will lie upon the defendant. Such practice will inevitably infringe one of the most fundamental rights of the accused, namely the presumption of innocence. One might recall paragraph 3 of Article 66 of the ICC Statute which stipulates: 'In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt'.202 Denying such a fundamental principle which is well founded in Islamic law nearly 1400 years ago is considered one step backward for the future of international criminal justice. The Prophet once said: 'eliminate the prescribed punishments whenever it is possible: and if you can manage a dismissal of a Muslim [the accused] do it. It is better for Imam [judge] to be mistaken in pardon than to be mistaken in penalty.'203 Islamic jurists (scholars) gave this rule a great importance, as it is corresponding to the spirit of the Islamic Shari'a regarding protection of a person from harm and observation of his interest.204

***518** At present, *mens rea* or the mental element - the most significant factor in determining criminal responsibility - is still one of the most complex areas of international criminal law, in most part because so many imprecise and vague terms have been used to define this fault element. Suffice to say that in many cases the conviction or acquittal of an accused appearing before the ICC will depend on the interpretation of Article 30 and its relationship with other provisions in the ICC Statute. At present, numerous judgments rendered by national and international courts have paved the way for a better understanding of the complex notion of *mens rea* in the sphere of international criminal law.205 It is now up to the International Criminal Court to illuminate it.

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1. *Prosecutor* v. *Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06-803, Décision sur la confirmation des charges, (*Lubanga* Décision sur la confirmation des charges), 29 January 2007.
2. *Ibid.*
3. For the drafting history of Article 30 of the ICC Statute see Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences,* 12 CRIM L. FORUM 291 (2001).
4. Rome Statute, Article 30.

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5. See Erkin Gadirov and Roger Clark, *Article 9 - Elements of Crimes,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 505-529 (Otto Triffterer, ed., 2nd edn., 2008) at 513. As a result of the omission of the earlier draft of then Article 28 on *actus reus* 'causation' can hardly be seen as a requisite material element in the Statute (*ibid*). For more details on the element of causation *see ibid* at 521-522. See also Otto Triffterer, *Causality, as a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute* ?, 15 *LJIL* 179 (2002). See also Donald k. Piragoff and Darryl Robinson, *Article 30 - Mental Element,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 849 (Otto Triffterer, ed., 2nd edn., 2008) at 851-852.
6. Section 1.13(10) of the Model Penal Code. For more information on the Model Penal Code, *see* Herbert Wechsler, *Codification of the Criminal Law in the United States: The Model Penal Code,* 68 COLUM L. REV. 1425 (1968); Herbert Wechsler, *The Challenge of A Model Penal Code,* 65 HARV. L. REV. 1097 (1952). See also Jerome Hall, *The Proposal to Prepare a Model Penal Code,* 4 JOURNAL OF LEGAL STUDIES 91 (1951-1952). For the recent work by the American Law Institute on the MPC, *see* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, (The American Law Institute, 1985). As for the definition of material elements in the German literature particularly, what so called the theory on negative legal elements of the offence or '*Lehre von den negativen Tatbestandsmerkmalen* ', *see* VOLKER KREY, *Deutsches Strafrecht Allgemeiner Teil,* Vol. 2, (2003) at 15, 17.
7. Kelt and von Hebel used the phrase 'material elements and the principle of mens rea coverage' instead of 'element analysis', see Maria Kelt and Herman von Hebel, *General Principles of Criminal Law and the Elements of Crimes,* in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, 19-40 (Roy Lee ed., 2001).
8. See the AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, Vol. 1, (The American Law Institute, 1985). It is worth pointing out that within United States there are fifty-two American criminal codes, and it is often difficult to state 'the American rule on any point of criminal law'.
9. *Model Penal Code and Commentaries,* § 2.02, *supra* note 6, at 229, n. 1.
10. Model Penal Code, § 2.02(4).
11. Elements of Crimes, U.N. Doc. ICC-ASP/1/3, 1st Sess., Official Record (adopted by the Assembly of States Parties on September 9, 2002).
12. Rome Statute, Article 30(2)(a).
13. Rome Statute, Article 30(2)(b).
14. Rome Statute, Article 30(3).
15. Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 852-853.
16. See the very recent and challenging discussion on the subject by Kevin Jon Heller, *Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute, A Critica Analysisl,* 6 *JICJ* 419 (2008).
17. See footnote 15.
18. *Ibid.,* at 853.
19. *Ibid.*
20. See footnote 11.
21. Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 853. Maria Kelt and Herman von Hebel, *What Are the Elements of Crimes?,* in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, 13-18 (Roy Lee ed., 2001): 'there was considerable debate [during the negotiations of the elements of crimes] as to whether they [the contextual elements] really were "material elements" - and if so whether they were (fully) covered by the mental element of article 30 - or whether they formed a separate type of element. Some participants thought, for example, that there might be a category of elements that are neither material nor mental, but which should be considered "jurisdictional" or "merely jurisdictional". Ultimately, however, an explicit decision as to whether these elements were "material elements" became unnecessary, as for each contextual element some corresponding mental element [however, lower than that provided for under Article 30] was specified in most cases, which, as a result, [...] rendered the other question moot'.
22. See *Prosecutor* v. *Tihomir Bla%24skic,* (Case No. IT-95-14-A) Judgment, July 29, 2004, para. 41. See also *Prosecutor* v. *Naser Oric,* Case No. IT-03-68-T, Trial Judgment, 30 June 2006 (*Oric* Trial Judgment), para. 279.
23. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, (3rd edn., 2001) at 119; See also GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART, §§ 16, 18 (2nd edn., 1961).
24. See footnote 12.
25. See footnote 13.

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26. Clark, *The Mental Element in International Criminal Law, supra* note 3, at 303, n. 38.
27. As suggested by Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 859; Gerhard Werle and Florian Jessberger, *'Unless Otherwise Provided' - Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law,* 3 *JICJ* 35 (2005) at 41; Albin Eser, *Mental Elements,* in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese *et al.* eds., 2001) at 913.
28. Clark, *The Mental Element in International Criminal Law, supra* note 3, at 303, n. 39.
29. Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 859.
30. *United States* v. *Hilliard,* 31 F.3d 1509 (10th Cir. 1994).
31. See Michael Duttwiller, *Liability for Omission in International Criminal Law,* 6 *ICLR* 1 (2006) at 56-58.
32. Report of the Preparatory Committee on the Establishment of an International Criminal Court, (*Proceedings of the Preparatory Committee During March-April and August 1996*), U.N. GAOR 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) Vol. I, p. 45, and Vol. II, at 90.
33. Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 53rd Sess., U.N. Doc. A/AC.249/1998/CRP.7 (1998), pp. 64-65 (article) 28.
34. Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 858-859.
35. Eser, *Mental Elements, supra* note 27, at 912; See also footnote 29.
36. Gadirov and Clark, *Article 9 - Elements of Crimes, supra* note 5, at 515.
37. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 351-355. In the present case, Pre-Trial Chamber I employed the phrase 'omissions' eight times while discussing Article 30 of the ICC Statute.
38. Judgment, *Limaj* (IT-03-66-T), Trial Chamber, 30 November 2005, § 509 (emphasis added); Judgment, *Krstic* (IT-98-33-A), Appeals Chamber, 19 April 2004, § 188; Judgment, *Kunarac* (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, § 390; Judgment, *Gacumbitsi* (ICTR-2001-64-T, Trial Judgment, 17 June 2004, § 285 ("Committing" refers generally to the direct and physical perpetration of the crime by the offender himself"); Judgment, *Kayishema* (ICTR-95-1-A), Appeals Chamber, 1 June 2001, § 187; Judgment, *Vasiljevic* (IT-98-32-T), Trial Chamber, 29 Nov. 2002, § 62 ('The Accused will only incur individual criminal responsibility for committing a crime under Article 7(1) where is it is proved the he personally physically perpetrated the criminal acts in question or personally omitted to do something in violation of international humanitarian law'); Judgment, *Kamuhanda* (ICTR-99-54A-T), Trial Chamber, § 595 ('To commit a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation in a manner punishable by penal law.'); See also Judgment, *Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 188; Judgment, *Kunarac* (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, § 390; Judgment, *Krstic* (IT-98-33-T), Trial Chamber, 2 August 2001, § 601; Judgment, *Krnojelac* (IT-97-25-T), Trial Chamber, 15 March 2002, § 73. Judgment, *Blagoje Simic* (IT-95-9-T) Trial Chamber, 17 October 2003, § 137 ('Any finding of commission requires the personal or physical, direct or indirect, participation of the accused in the relevant criminal act, or a finding that the accused engendered a culpable omission to the same effect, where it is established that he had a duty to act, with requisite knowledge.').
39. Model Penal Code, § 2.02(2)(a)(i).
40. *United States* v. *Bailey et al.,* 444 U.S. 394; 100 S. Ct. 624; 62 L. Ed. 2d 575; U.S. Lexis 69, November 7, 1979, Argued, January 21, 1980, Decided, at 632; See also *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 445 (1978).
41. KREY, DEUTSCHES STRAFRECHT: ALLGEMEINER TEIL, *supra* note 6, at 109.
42. Cramer, in STRAFGESETZBUCH: KOMMENTAR, (Schönke and Schröder eds., 1997) at 263. (*Absicht ... liegt nur dann vor, wenn der Handlungswille des Täters final gerade auf den vom Gesetz bezeichneten Handlungserfolg gerichtet war*); LACKNER, *Strafgesetzbuch,* (München: Beck, 1991) 95. For more details on *Vorsatz* in German criminal law in the English language *see* Mohamed Elewa **Badar**, *Mens Rea - Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals,* 5 *ICLR* 203 (2005).
43. *Lubanga* Décision sur la confirmation des charges, *supra* note 1.
44. *Ibid.,* para. 351.
45. *Ibid.*
46. Rome Statute, Chapeau element of Article 6: '... genocide means any of the following acts committed *with intent to* destroy ...'
47. Rome Statute, Article 7(2)(f): "'Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with intent of affecting the ethnic composition of any population ...'
48. Rome Statute, Article 7(2)(h): "'Enforced disappearance of persons" means the arrest, detention or abduc-

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tion ... with the intention of removing them from the protection of the law for a prolonged period of time.'
49. See Mohamed Elewa **Badar**, *Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia,* 6 *ICLR* 313 (2006) at 317-328.
50. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, para. 352.
51. *Ibid.*
52. As suggested by Werle and Jessberger, *Unless Otherwise Provided, supra* note 27, at n. 34.
53. See Otto Triffterer, *The New International Criminal Law - Its General Principles Establishing Individual Criminal Responsibility,* in THE NEW INTERNATIONAL CRIMINAL LAW, 639-727 (Kalliopi Koufa ed., 2003) at 706.
54. Eser, *Mental Elements, supra* note 27, at 915: "... the perpetrators being aware that the action will result in the prohibited consequence ... with certainty..."
55. Model Penal Code, § 2.02(2)(b)(ii).
56. For a thorough analysis of the notion of 'oblique intent' in the criminal law of England see Glanville Williams, *Oblique Intention,* 46 CAMBRIDGE LJ (1987) 417.
57. *Ibid.,* at 420.
58. *Ibid.*
59. *Ibid.*
60. *Buzzanga* (1979) 49 C.C.C. (2d) 369 (Ont.C.A), per Justice Martin, quoted in DON STUART, CANADIAN CRIMINAL LAW: A TREATISE (2001) at 218-219. The relevant facts of the case as summarised by Stuart were as follows: The accused had been convicted ... of wilfully promoting hatred against the French Canadian public in Essex County. They had circulated an inflammatory handbill entitled 'Wake Up Canadians Your Future is At Stake'. The two accused, who identified with French Canadian aspirations and culture, denied intent to promote hatred. They were involved with a movement to establish a French language high school in Essex County. Their purpose was to dramatise how ridiculous the opposition had been and to prompt the government into quick intervention.
61. *BGHSt* 21, 283 (Vol. 21, at 283).
62. Eser, *Mental Elements, supra* note 27, at 914-915.
63. Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections,* 10 *EJIL* 158 (1999), at 153: 'While it is no doubt meritorious to have defined these two notions [intent and knowledge in Article 30], it appears questionable to have excluded recklessness as a culpable *mens rea* under the Statute.'; Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law,* 12 MIAMI INT'L & COMP L. REV. 57-149 (2004), at 64-65: 'Antonio Cassese has criticized the ICC Statute for not recognizing "recklessness" as the basis of liability for war crimes. However, if one takes into account the resolve to confine the jurisdiction of the ICC to "the most serious crimes of concern to the international community as a whole," it is reasonable to accept that crimes committed without the highest degree of *dolus* ought as a general rule not to be prosecuted in the ICC.'; Werle and Jessberger, *Unless Otherwise Provided, supra* note 27, at 41-42: 'This interpretation of Article 30(2)(b) and 3 ICCSt., which appears to be shared by most commentators, results in the establishment of a standard of mens rea apparently stricter than that usually applied by both domestic and international courts.' Werle and Jessberger, 'Unless Otherwise Provided', *supra* note 27, at 53: 'the requirements of the perpetrator's being aware that the consequence will occur in the ordinary course of events or of the perpetrator's meaning to cause that consequence (Article 30(2)(b) ICCSt.) excludes both forms of subjective accountability. It thus follows from the wording of Article 30(2)(b) that recklessness and *dolus eventualis* do not meet the requirement.'
64. Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 533-544; Hans H. H. Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute,* 2 *JICJ* 38-55 (2004), at 45. Ferrando Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer,* 1 *JICJ* 26-38 (2003), at 32: '...the ICC Statute's provision on the mental element (Article 30) appears to limit itself to intent (dolus) alone, thereby excluding negligence (culpa). Using ambiguous and psychologically imprecise wording ... It ... does include intent and recklessness (*dolus eventualis*) ...';
65. Clark, *The Mental Element in International Criminal Law, supra* note 3, at 301.
66. See *R.* v. *G and Another* [2004] 1 AC 1034 (HL).
67. DON STUART, CANADIAN CRIMINAL LAW, A TREATISE, *supra* note 60, at 224.
68. *Sansregret* v. *The Queen,* [1985] 45 C.R. (3d) 193, 203-204 (S.C.C.).
69. *ibid.*
70. *U.S.* v. *Trinidad-Aquino,* 259 F.3d at 1146.

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71. Model Penal Code, § 2.02(2)(c).
72. *ibid.*
73. *United States* v. *Albers,* 226 F. 3d 989, 995 (9th Cir. 2000).
74. *United States.* v. *Albers,* 226 F. 3d 989, 995 (9th Cir. 2000), *citing Farmer* v. *Brennan,* 511 U.S. 825, 836-37 (1994) (emphasis added); see also *United States.* v. *Trinidad-Aquino,* 259 F.3d 1140, 1146 (9th Cir. 2001).
75. David M. Treiman, *Recklessness and the Model Penal Code,* 9 AM J CRIM LAW 281 (1981), at 351.
76. See FINBARR MCAULEY AND J. PAUL MCCUTCHEON, CRIMINAL LIABILITY (2000) 301-303.
77. Heribert Schumann, *Criminal Law,* in INTRODUCTION TO GERMAN LAW, (Werner F. Ebke and Matthew W. Finkin eds., 1996), at 389-390.
78. BGHSt 36, 1; 44, 99; BGH NStZ (Neue Zeitschrift fuer Strafrecht) 1999, p. 507; BGH NStZ 2000, 583.
79. JOHANNES WESSELS AND WERNER BEULKE, STRAFRECHT: ALLGEMEINER TEIL 76 (2002).
80. CLAUS ROXIN, STRAFRECHT: ALLGEMEINER TEIL, 376 (1997).
81. *Ibid.*
82. *Prosecutor* v. *Milomir Stakic,* Case No. IT-97-24-T, Trial Judgment, 31 July 2003 (*Stakic* Trial Judgment), para. 587.
83. *Ibid.*
84. *Ibid.*
85. The perpetrator could still be held criminally responsible and liable for being consciously negligent.
86. *Ibid.,* para. 351.
87. Elewa **Badar**, *Drawing the Boundaries of Mens Rea, supra* note 49, at 313.
88. See footnote 50.
89. *Ibid.,* para. 352 (emphasis added, footnotes omitted).
90. *Ibid.,* paras. 353-354.
91. *Ibid.,* para. 355.
92. In French criminal law, a distinction is made between two forms of intent, namely, *dol général* (general intent - to act unlawfully) and *dol spécial* which must be proved for certain offences. The term 'dol' in French criminal law means the deliberate intention to commit a wrong and involves both 'knowledge' that something is prohibited and the 'deliberate willingness' to carry out the proscribed conduct. The classic definition of *dol général* is provided by Emel Garçon, the eminent nineteenth century French criminal law scholar: "L'intention, dans son sens juridique, est la volonté de commettre le délit tel qu'il est déterminé par la loi; c'est la conscience, chez le coupable, d'enfreindre les prohibitions légales..." According to Garçon, *dol général* encompassed two mental elements: la conscience (awareness) and la volonté (willingness/desire). This definition of dol général was accepted by subsequent French legal scholars. The element of conscience, in French criminal law, simply refers to the accused's knowledge that he or she is breaking the law. This implies a similarity between the facts as understood by the perpetrator and as described in the criminal code. With regard to the element of 'desire', it is interpreted as simply referring to the accused's willingness to commit the wrongful act and not the desire to accomplish the result of the act in question. On French criminal law *see* JOHN BELL, SOPHIE BOYRON AND SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW, (1998); BRICE DIKSON, INTRODUCTION TO FRENCH LAW, (1994); EMILE GARÇON, CODE PÉNAL ANNOTÉ (1st ed., 1901); Catherine Elliot, *The French Law of Intent and Its Influence of the Development of International Criminal Law,* 11 CRIM L. FORUM 36 (2000). R. MERLE AND A. VITUE, TRAITÉ DE DROIT PÉNAL (1997).
93. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, at n. 438. For different opinions on the concept of *dolus eventualis see* GEORGE FLETCHER, RETHINKING CRIMINAL LAW, (2000) at 445-446: (*dolus eventualis* entails 'a particular subjective posture towards the result'); See also Mihajlo Acimovic, *Conceptions of Culpability in Contemporary American Law,* 26 LA. L. REV. 28 (1965), at 48 (describing a Romanist law test according to which the perpetrator acted intentionally if he could have said to himself: It may be either so or different, it may happen either so or differently; anyhow I shall act.) For a different opinion see Paul T. Smith, *Recklessness in Dolus Eventualis,* 96 SOUTH AFRICAN LAW JOURNAL 81 (1979): (criticizing South African law to the extent that it interprets *dolus eventualis* as indifference rather than foresight).
94. *Lubanga* Décision sur la confirmation des charges, *Supra* note 2 above, fn. 438.
95. Cassese, *The Statute of the International Criminal Court, supra* note 63, at 153-154.
96. *Ibid.,* at 154.
97. Triffterer, 'The New International Criminal Law', *supra* note 53, at 706.
98. Kai Ambos, *General Principles of Criminal Law in the Rome Statute,* 10 CRIM. L. FORUM 1-32 (1999), at 21-22.
99. For an in depth analysis of the criminal intent in Islamic criminal law *see* MOHAMED ELEWA **BADAR**,

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THE CONCEPT OF MENS REA IN INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH (Hart Publishing, June 2009).

100. Compare Rome Statute, Article 30 (2) (b) and Article 30 (3).

101. See footnote 14.

102. *Ibid.*

103. Rome Statute, Article 7(1): 'For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack.'

104. Rome Statute, Article 7(1)(g).

105. Rome Statute, Articles 8(2)(b)(xxii), and Article 8(2)(e)(vi).

106. *Contra* see *Prosecutor* v. *Sylvestre Gacumbitsi,* Case No. ICTR-2001-64-A, Appeal Judgment, 7 July 2006, (*Gacumbitsi* Appeal Judgment) in which the prosecution argued that non-consent of the victim and the perpetrator's knowledge thereof should not be considered as constitutive elements of the offence that must be proved by the Prosecution.

107. *Contra* see the Model Penal Code § 2.02(7) which stretched the definition of knowledge with regard to the attendant circumstance to encompass 'awareness of *high probability* of the existence of a particular fact'.

108. Glanville Williams, *Criminal Law: The General Part, supra* note 23, at 159.

109. Rome Statute, Article 8(2)(b)(xxvi); Article 8(2)(e)(vii). It is to be noted that the latter Article incriminate the enlisting of children into "armed forces or groups". The reason is that this Article applied to war crimes committed in armed conflicts not of an international character.

110. Elements of Crimes, U.N. Doc. ICC-ASP/1/3, 1st Sess., Official Record (adopted by the Assembly of States Parties on September 9, 2002) reprinted in WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, (2004) 310. Article 8(2)(b) (xxvi) War Crime of using, conscripting or enlisting children. See Kelt and von Hebel, *General Principles of Criminal Law and the Elements of Crimes, supra* note 7, at 31.

111. Smith & Hogan, Criminal Law, (2005) at 109-110.

112. Elements of Crimes, Article 8(2)(b)(vii)-1, reprinted in Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, *supra* note 110, at 299.

113. Elements of Crimes, Article 8(2)(b)(vii)-2., reprinted *ibid* at 299.

114. Elements of Crimes, Article 8(2)(b)(vii)(3)-1, and Article 8(2)(b)(vii)(3)-2, reprinted *ibid* at 299 (emphasis added).

115. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, *supra* note 110, at 108.

116. Rome Statute, Article 6(1).

117. Rome Statute, Article 7.

118. Rome Statute, Article 7 (2)(b), (emphasis added).

119. Rome Statute, Article 8. Other crimes provided for in the ICC Statute contains in their definition a subjective element, see Article 7(2) (e), (f) and (h); Article 8 (2) (b) (i), (ii), (iii), (iv), (ix), (xxiv) and (xxv), and Article 8 (2) (e) (i), (ii), (iii) and (iv).

120. See in general Werle and Jessberger, *Unless Otherwise Provided, supra* note 27. Piragoff hold the same opinion: 'The major significance of Article 30, however, is its affect on definitions that do not expressly specify a mental element. Although a particular definition of a crime may be silent as to the requisite mental element, Article 30 would import the mental elements of "intent and knowledge" as being the mental elements require in order to render an accused criminally responsible and liable for punishment for that particular crime.' See Donald D. Piragoff, *Article 30 - Mental Element,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 527-535 (Otto Triffterer ed., 1999) at 531.

121. *Ibid.*, at 531.

122. *Ibid.*

123. *Ibid.*

124. Margaret McAuliffe deGuzman, *Article 21 Applicable Law,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 435 (Otto Triffterer ed., 1999) at 436-438.

125. Rome Statute, Article 21.

126. Adopted by the Preparatory Commission of the International Criminal Court in June 2000, see Report of the Preparatory Commission for the International Criminal Court. Finalized draft text of the Rules of Procedure

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and Evidence (PCNICC/2000/1/Add.1); and Finalized draft text of the Elements of Crimes (PCNICC/2000/1/Add.2).
127. Rome Statute, Article 6 (e).
128. Claus Kress, *The Crime of Genocide under International Law,* 6 *ICLR* 461 (2006) at 485 (emphasis in original, footnotes omitted).
129. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, para. 356.
130. *Ibid.,* para. 358. The Pre-Trial Chamber I observed that: 'The "should have known" requirement set forth in the Elements of Crimes - which is to be distinguished from the "must have known" or constructive knowledge requirement - falls within the concept of negligence because it is met when the suspect: i. did not know that the victims were under the age of fifteen years at the time they were enlisted, conscripted or used to participate actively in hostilities; and ii. lacked such knowledge because he or she did not act with due diligence in the relevant circumstances one can only say that the suspect" should have known" if his or her lack of knowledge results from his or her failure to comply with his or her duty to act with due diligence).'
131. *Ibid.,* paras. 356-359.
132. *Ibid.,* para. 360.
133. See the sixth element of the Elements of Crimes of Article 6(e) Genocide by forcibly transferring children. For more information on this specific crime see Kurt Mundorff, 2008, *Working Paper: Other Peoples'* Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e), The Selected Works of Kurt Mundorff, available at http://works.bepress.com/kurt_mundorff/3/, last visited June 22, 2008.
134. Erkin Gadirov, *Article 9 - Elements of Crimes,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, (Otto Triffterer ed., 1999) at 301-302.
135. See footnote 11, pp. 113-115.
136. ICC-ASP/1/3, Article 6(a) Genocide by killing.
137. Rome Statute, Article 25(3)(a), (letters added).
138. BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE, (2005) at 200.
139. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 322-367.
140. *Ibid.,* para. 326.
141. *Ibid.*
142. *Ibid.,* para. 328.
143. *Ibid.,* para. 329.
144. *Ibid.,* para. 330.
145. *Ibid.,* para. 331.
146. *Ibid.,* para. 330.
147. *Ibid.,* para. 332.
148. CLAUS ROXIN, TÄTERSCHAFT UND TATHERRSCHAFT, (2000) at 294, 299.
149. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 343-345.
150. *Ibid.,* paras. 346-348.
151. *Ibid.,* paras. 349-360.
152. *Ibid.,* paras. 366-367.
153. *Ibid.,* para. 349.
154. *Ibid.,* para. 361.
155. *Ibid.*
156. *Ibid.,* para. 365.
157. *Ibid.,* paras. 366-367.
158. Kai Ambos, *Article 25 - Individual Criminal Responsibility,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 435 743-769 (Otto Triffterer ed., 2008) at 757.
159. *Model Penal Code and Commentaries, supra* note 6, § 2.06 Comment at 312, at n. 42.
160. *Ibid.*
161. Piragoff and Robinson, *Mental Element - Article 30, supra* note 5, at 855.
162. *Ibid.*
163. *Bla%24skic* Appeal Judgment, *supra* note 22, para. 41.
164. *Oric* Trial Judgment, *supra* note 22, para. 288 (emphasis added, footnotes omitted).
165. William A. Schabas, *General Principles of Criminal Law in the International Criminal Court Statute (Part*

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III), 6 EUR J CRIME CR L CR J 84 (1998), 95-98.
166. Ambos, 'Individual Criminal responsibility', *supra* note 158, 757. Eser arrived to the same conclusion, see Eser, *Individual Criminal Responsibility,* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, (Cassese *et al.* eds., 2002) at 801.
167. Rome Statute, Article 25(3)(d).
168. Eser, *Individual Criminal Responsibility, supra* note 166, at 802-804.
169. *Prosecutor* v. *Thomas Lubanga Dyilo,* case No. ICC-01/04-01/06-356, Document Containing the Charges, Article 61(3)(a), August 28, 2006, para. 20.
170. Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,* 5 *JICJ* 109 (2007), at 112.
171. *Ibid.*
172. See footnote 125.
173. *Ibid.*
174. The notion of joint criminal enterprise as adopted by the two ad hoc Tribunals has been a source of endless fascination for commentators, generating an enormous amount of literature: Allen O'Rourke, *Joint Criminal Enterprise and Br##anin: Misguided Over-Correction,* 47 HARV INTL L. J. 307 (2006); Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,* 5 *JICJ* 109 (2007); Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Law,* 93 CAL L. REV. 75 (2005); Kai Ambos, *Joint Criminal Enterprise and Command Responsibility,* 5 *JICJ* (2007) 159; Mohamed Elewa **Badar**, *"Just Convict Everyone!" 'Joint Perpetration: From Tadic to Stakic and Back Again,* 6 *ICLR* 293 (2006); Kai Hamdorf, *The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law,* 5 *JICJ* 208 (2007); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,* 5 *JICJ* 69 (2007); Nicola Piacente, *Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy,* 2 *JICJ* 446 (2004); Katrina Gustafson, *The Requirement of an 'Express Agreement'* for Joint Criminal Enterprise Liability: A Critique of Br##anin, 5 *JICJ* 134 (2007); Harmen van der Wilt, *Joint Criminal Enterprise, Possibilities and Limitations,* 5 *JICJ* 91 (2007); Elies van Sliedregt, *Pathway to Convicting Individuals for Genocide,* 5 *JICJ* 184 (2007).
175. For critical analysis of the third category of JCE, see Elewa **Badar**, *supra* note 174.
176. The *travaux préparatoires* of the first Additional Protocol is reproduced in four volumes and one supplement in the work of HOWARD S. LEVIE, PROTECTION OF WAR CRIMES: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS, (1981). The Supplement appears in year (1985).
177. Proposed Amendment to Article 76 by Syrian Arab Republic, CDDH/1/74, 20 March 1974, *Official Records,* Vol. III, p. 328, in Levie, *Protection of War Crimes, ibid.,* at 302.
178. Mr. Cerda (Argentina), CDDH/I/74, in Levie, *ibid.,* at 306.
179. *Ibid.*
180. Proposal submitted by the United States (A/CONF.183/C.1/L.2) (emphasis added) reprinted in M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: SUMMARY RECORDS OF THE DIPLOMATIC CONFERENCE, (2005) paras. 67-68.
181. UN Doc. A/CONF 183/C.1/SR.1 (16 June 1998), Mr. Nathan (Israel), reprinted in Bassiouni, *Summary Records of the Diplomatic Conference, ibid.,* at 78, para. 73.
182. *Ibid.*
183. *Prosecutor* v. *Sefer Halilovic,* Case No. IT-01-48-T, Trial Judgment, 16 November 2005, (*Halilovic* Trial Judgment) para. 71; *Bla%24skic* Appeal Judgment, *supra* note 22, para. 63; *Prosecutor* v. *Ignace Bagilishema,* Case No. ICTR-95-1A-A, Judgment 3, 3 July 2002, (*Bagilishema* Appeal Judgment), paras. 34-35.
184. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, n. 439.
185. *Ibid.*
186. *Ibid.*
187. *Bla%24skic* Appeal Judgment, *supra* note 22, para. 62.
188. David M. Treiman, *Recklessness and the Model Penal Code, supra* note 75, at 351.
189. *Ibid.*
190. *Ibid.*
191. Rome Statute, Article 32(1).
192. Rome Statute, Article 32(2).
193. Otto Triffterer, *Article 32 - Mistake of Fact or Mistake of Law,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY

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ARTICLE, 895-914 (Otto Triffterer, ed., 2nd edn., 2008) at 902 (italics in the original).
194. *Lubanga Décision sur la confirmation des charges, supra* note 1, para. 304. See also Transcript, 26 November 2006.
195. WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, (3rd edn., 2007) at 230.
196. *Lubanga Décision sur la confirmation des charges, supra* note 1, para. 305.
197. *Ibid.*, paras. 315-316 (footnotes omitted).
198. Thomas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges,* 6 *JICJ* 471 (2008) at 476.
199. *Ibid.*
200. *Ibid.*, at 482.
201. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 356-359.
202. According to paragraph 2 of Article 66 'the onus is on the Prosecutor to prove the guilt of the accused.'
203. Sunan Al Tirmizi, Vol. 4, p. 25.
204. Abd El-Khaleq Ebn Al Mofaddal Ahmaddon, Qa'edat dar'e al hedood bel-Shobehat wa atharoha fi al fiqh al gena'ei al islami (The Rule of Eliminating Penalty on Suspicion Criterion and Its Role in Islamic Penal Jurisdiction), 7 CONTEMPORARY JURISPRUDENCE RESEARCH JOURNAL 7-75 (1995), at 9.
205. See MOHAMED ELEWA **BADAR**, THE CONCEPT OF MENS REA IN INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH (Hart Publishing, June 2009).

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by the Germans in 1943. Many of the victims had been reported by the Soviets as exiled to Siberia.

Ukraine has its Lidice too, in the town of Zavadka, destroyed by the Polish satellites of the Kremlin in 1946.[13] Three times, troops of the Polish Second Division attacked the town, killing men, women and children, burning houses and stealing farm animals. During the second raid, the Red commander told what was left of the town's populace: 'The same fate will be met by everyone who refuses to go to Ukraine. I therefore order that within three days the village be vacated; otherwise, I shall execute every one of you.'[14]

When the town was finally evacuated by force, there remained only 4 men among the 78 survivors. During March of the same year, nine other Ukrainian towns were attacked by the same Red unit and received more or less similar treatment.

What we have seen here is not confined to Ukraine. The plan that the Soviets used there has been and is being repeated. It is an essential part of the Soviet programme for expansion, for it offers the quick way of bringing unity out of the diversity of cultures and nations that constitute the Soviet Empire. That this method brings with it indescribable suffering for millions of people has not turned them from their path. If for no other reason than this human suffering, we would have to condemn this road to unity as criminal. But there is more to it than that. This is not simply a case of mass murder. It is a case of genocide, of destruction, not of individuals only, but of a culture and a nation. If it were possible to do this even without suffering we would still be driven to condemn it, for the family of minds, the unity of ideas, of language and of customs that form what we call a nation that constitutes one of the most important of all our means of civilization and progress. It is true that nations blend together and form new nations — we have an example of this process in our own country — but this blending consists in the pooling of benefits of superiorities that each culture possesses.[15] And it is in this way that the world advances. What then, apart from the very important question of human suffering and human rights that we find wrong with Soviet plans is the criminal waste of civilization and of culture. For the Soviet national unity is being created, not by any union of ideas and of cultures, but by the complete destruction of all cultures and of all ideas save one — the Soviet.

13 On 10 June 1942, 172 males over the age of 16 years were liquidated, the women and children deported and the village of Lidice razed to the ground in reprisal for the assassination of the Nazi dictator of Moravia, Reinhard Heydrich. Zavadka Morokhivs'ka, Sianits'kyi povit, Lemkivshchyna, now Zawadka-Morochowska, in Poland.

14 From W. Dushnyck, *Death and Devastation on the Curzon Line* (note by R.L).

15 Lemkin had in mind the United States.

Modes of Participation in Crimes Against Humanity

The *Hechingen and Haigerloch* Case

We present here the English translation of two decisions of German courts in a case involving various defendants (one decision at the level of first instance, the other at that of appeal). Both decisions deal primarily with the issue of participation in crimes against humanity.

These decisions are among the many interesting judgments delivered by German courts between 1945 and 1966 on crimes allegedly committed by Germans during the World War II. The decisions we are presenting discuss many points: (a) the compatibility of Control Council Law No. 10 with the nullum crimen *principle; (b) the value of superior orders; (c) the notion of persecution as a crime against humanity; (d) necessity as a defence. However, the most interesting feature of the judgments resides in their discussion of the possible criminal responsibility of those participants in mass criminality who are neither at the top (in that they plan, order, instigate, etc. or else fail to prevent and punish crimes) nor at the bottom (in that they materially perpetrate the killing, raping, extermination, etc.) but are rather intermediate participants who operate in a grey area. For these participants, it normally proves difficult to establish whether they are culpable and therefore bear criminal liability.*

The Tribunal of Hechingen (a small town in Baden-Württemberg, about 60 kms south of Stuttgart) had to pronounce on the criminal liability of those implicated in the deportation of Jews in 1941–1942 from two towns in Germany (Hechingen and Haigerloch) to Theresienstad and then Auschwitz. The Tribunal found that a medical doctor, who had been charged with ascertaining whether the deportees were fit to travel, was not culpable. It found instead that the four other defendants were guilty of crimes against humanity. The major accused was a senior administrative and police official, who had passed on the deportation orders issued by the Gestapo and seen to it that they were implemented; the Tribunal found that he had aided and abetted the crime of persecution on racial or religious grounds (a crime against humanity under Control Council Law No. 10). The three remaining defendants (German women without any official status who, upon orders from the administrative authority, had searched Jewish women being deported, to find out whether they were holding valuables) were also found guilty as accessories to the same crime against humanity. Strikingly, the Court of appeal held instead that the three women were not guilty, both because they had played a subordinate role and because they were not aware of the illegality of what they were doing. Also, with regard to the main defendant, after

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his conviction by the Tribunal, the Court of appeal remitted the case to a lower court, issuing legal instructions clearly destined to lead to acquittal. In this respect, the appellate decision is part of a post-World War II trend of German superior judicial bodies to insist on circumstances excluding criminal responsibility and thereby acquit defendants convicted by lower courts. The same trend can also be seen in the 1946–1950 case law of the Italian Court of cassation; this court tended to find on many occasions that a number of justifications or excuses made non-punishable the war crimes that according to lower courts — normally assize courts pronouncing between 1946 and 1948 — Italians siding with the Germans had committed against Italian civilians or members of resistance movements.

a.c.

Tribunal (*Landgericht*) Hechingen, Judgment of 28 June 1947, Kls 23/47[1]

[. . .] On the basis of the trial and the hearing of the evidence, the following is established:

(a) The accused S., as then *Landrat* ['county president', senior administrative and police official of a *Kreis*, i.e. County, District] of Hechingen, received the order of 14 Augnst 1942 of the Stuttgart Head Office of the Gestapo [abbreviation of *Geheime Staatspolizei*, Secret State Police — the German text uses the full form throughout]. On 17 August 1942, he gave the mayors of Haigerloch and Hechingen the necessary instructions in writing for carrying out this order, in particular to have the Jews directed to 'deportation' and their luggage searched in the prescribed manner, and to ready these persons for transport on 19 August 1942. He further instructed persons officially subordinate to him to cooperate in the physical search of the persons to be deported; he gave this instruction to, among others, co-defendant Ms Ho., who carried it out on 19 August 1942 together with Mrs M., appointed for the purpose by the mayor of Haigerloch, in relation to the Jewish women concerned. These findings are based, to the extent that they relate to the accused Mr S., on his own statements; otherwise they result from the statements of co-defendant Ms Ho. The detail of how the physical search of the Jewish women by Ms Ho. occurred will be presented below in another context.

(b) A total of 138 people, 136 from Haigerloch and 2 from Hechingen, were affected by this fourth deportation. These 138 people were transported under police escort on 19 August 1942 from Haigerloch to Stuttgart, nine of the particularly infirm in road vehicles, the rest by rail. In Stuttgart they were

1 A. Cassese (ed.), Iain L. Fraser (trans.), *Justiz und NS-Verbrechen – Sammlung deutscher strafurteile wegen Nationalsozialistischer Tötungsverbrechen 1945-1966* (In German), Vol. 1 (Amsterdam: University Press Amsterdam, 1968) 471–493 (Lfd. Nr. 022). The pages of the original German text are indicated in square brackets.
On this case, see B. Burghardt, 'S and Others (the *Hechingen and Haigerloch Deportation* case)', in A. Cassese *et al.* (eds), *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 896–897, where reference is also made to a third judgment by the district court of Tübingen.

brought to the Gestapo collecting point, and from there transported to Theresienstadt. Of the 138 people departed, only a single victim remained alive and returned to Haigerloch; all the others, it must be regarded as certain, either died or were killed during the deportation. Information on the circumstances in Theresienstadt has been provided by the testimony of Senior State Attorney Mr D. of Stuttgart.

Since during the deportation no consideration was given to age or illness or infirmity of those deported (from *Kreis* Hechingen, as already mentioned, nine severely ill people were deported to Theresienstadt, and among the other deportees, no less than 10 were over 80), some of the deportees were already dead by the time they reached Stuttgart, and others during the transport to Theresienstadt. Theresienstadt was a small town with a normal population of some 7,000 inhabitants; at times up to 60,000 Jews were accommodated there, in a way, as is obvious from these facts alone, that bespeaks contempt for any humanity. From Theresienstadt transports regularly went to the extermination camp at Auschwitz; of those who avoided the death camp, a large proportion died from diseases. Not even National Socialism, by the way, dared to admit the truth to the German people. To deceive the people, those deported to Theresienstadt were allowed to write postcards, the contents of which were admittedly under SS censorship, so as to create the false impression that things were bearable for the Jews in Theresienstadt. It is noteworthy, however, that Jews deported to the so-called *Reichskommissariat Ostland* [the Baltic States, plus part of eastern Poland and the western Soviet Union] or to the so-called *Generalgouvernement* [the bulk of occupied Poland] were allowed no mail, so that it is not the case that written communications from Jews deported there [479] ever reached Germany. It was still more despicable that it was faithfully misrepresented to some of the Jews deported to Theresienstadt that it was intended to set up a Jewish old people's home there, and that they were induced to use their illquid resources to conclude 'residential-care contracts'. In reality no such old people's home was ever created; nor, even, was the objective of concluding the 'residential-care contracts' to deprive those Jews in a seemingly harmless way of the residue of their assets; instead, all that was wanted was a way to deceive the German people about the true aim of the deportation and lie to them that there was humane treatment for the Jews, which neither took place nor was intended.

II. Overall Appraisal in Criminal Law[2]

(1) For the appraisal in criminal law of the Gestapo orders mentioned in the first section of the grounds of judgment and at the same time for the criminal appraisal of all those actions serving to execute those orders, Law No. 10 issued by the Allied Control Council on 20 December 1945 on the punishment of

2 'The judgments against S., Ho., K. and B. were not conclusive, being overruled by the judgment of 20 January 1948 by the Tübingen Court of Appeal (see below); the final verdict on S. was given by the Tribunal of Hechingen, see Lfd 089, the other three being freed by Tübingen Court of Appeal. [Note: the names were already abbreviated in the transcripts made available for publication.]

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persons guilty of war crimes, crimes against peace and against humanity is applicable (*Journal Officiel du Commandement en Chef Français en Allemagne* No. 12 p. 84 ff), and in particular Article II of this Law, clause 1(c) which says 'Est considéré comme crime chacun des actes ci-après énumérés: Crimes contre l'Humanité- Atrocités et délits comprenant, sans que cette énumération soit limitative, l'assassinat, l'extermination, l'asservissement, la déportation, l'emprisonnement, la torture, le viol ou tous autres actes inhumains commis contre toute population civile et les persécutions pour des motifs d'ordre politique, racial ou religieux, que lesdits crimes aient constitué ou non une violation de la loi nationale du pays où ils ont été perpétrés.' ['Each of the following acts is recognized as a crime: Crimes against Humanity: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.']

The Allied Control Council's power to enact such a law follows, according to the generally recognized rules of international law, from the fact that with the unconditional surrender of the German Armed Forces the entire State power, as regards both administration and legislation, on the territory of the German Reich passed unrestrictedly to the Allied Control Council. The provisions of the Third Section of the Hague Convention on the Laws and Customs of War of 18 October 1910 [*sic*] and of all the principles of international law that regulate the authority of the occupying power for the case where lawful authority has only *de facto* fallen into the hands of the occupier (*'l'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant . . .'*), are not applicable where this transition has, following general and unconditional surrender, come about not only *de facto* but also *de jure*.

Nor can it be objected against application of Law No. 10 passed by the Allied Control Council that this Law rendered punishable actions that at the time they were committed did not face punishment under German law. Since the essential object of punishment is retribution, the threat of punishment before commission of an act is not a requirement for imposing the punishment that necessarily follows from the concept and essence of punishment. The principles *nullum crimen sine lege* and *nulla poena sine lege* are merely maxims of law of the State [*Maximen des Staatsrechts*] and in particular of constitutional law based on considerations of equity and expediency [*Billigkeits- und Zweckmässigkeitserwägungen*]. Where these principles were incorporated in a country's constitution, as in the so-called Weimar Constitution of the German Reich of 11 August 1919 (Article 116), [480] this has no other significance than that an enactment of a criminal law conflicting with them must be regarded as a constitutional amendment and accordingly subjected to the impediments put in the way of constitutional amendments. The fact that even the Constitution of Württemberg-Hohenzollern currently in force provides (Article 17(1)) that 'punishments may be imposed only on the basis of laws that were in force during the time the act was committed' is no bar to the application of Law No. 10 passed by the Allied Control Council, if only because this constitution

had neither the power nor the intention to set aside the acts of the Allied Control Council.

(2) Law No. 10 passed by the Allied Control Council is not only the applicable but also the sole and exclusive legal basis for the punishment of those actions which that Law designates as crimes.

(a) The provisions of the German penal code would not, if Law No. 10 passed by the Allied Control Council were not available, suffice to atone for crimes in need of atonement which are, according to the Allied Control Council's will, to be punished. There are numerous cases of mistreatment committed on political or racial grounds and therefore to be considered as acts of persecution for political or racial reasons, which can however be prosecuted under German law only on petition (§232 of the German Penal Code); these cases would remain unpunished were the injured party — perhaps because no longer alive — no longer able to petition for a prosecution. There are numerous cases of property damage committed for political or racial reasons and therefore to be considered as acts of persecution on political or racial grounds that can similarly be prosecuted under German criminal law only on petition (§303(3) of the German Penal Code); these cases too would often go unpunished failing a petition. Gross outrages would be unprosecutable as civil disorder (§125 of the German penal code) because they were committed with the knowledge and desire of the State authorities, whereas civil disorder presupposes acts of violence committed against the will of the State authorities. The taking by violence of property would not always fit the offence of robbery (§249 of the German Penal Code) because the perpetrators did not have the intention of appropriating the things taken for themselves but were acting in favour of the State. To fill these lacunae, Law No. 10 passed by the Allied Control Council was accordingly necessary. It follows, therefore that even in those cases where punishment on the basis of German criminal law would in itself be possible, Law No 10 replaces the relevant provisions of German criminal law.

(b) The axiomatic character of Law No. 10 adopted by the Allied Control Council in relation to German penal laws leads to the further conclusion that the provisions contained in the first (general) part of the German Penal Code are also not directly applicable to crimes falling under Control Council Law No. 10. Control Council Law No. 10 is not merely a law amending or supplementing the second (special) part of the German Penal Code, but even the general provisions of criminal law are, where Control Council Law No. 10 is to be applied, to be taken either from the Control Council Law itself (e.g. as regards aiding and abetting — Article II(2)(c); as regards denial or acceptance of certain grounds of mitigation — Article II(3)) or else, where there are no explicit provisions, to be supplemented from the meaning and purpose of the Law and having regard to generally recognized principles of criminal law (e.g. as regards assessment of the so-called plea of necessity).

(3) It is a fact of course but should, however, all the same be explicitly stated, that the accused S. cannot — as he has attempted — appeal to the fact that popular

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opinion at the time did not regard him as guilty or punishable, [481] and that even today popular opinion does not regard him as guilty or punishable.

The then popular opinion [*Volksmeinung*] was, and, since the wording and contents of the Gestapo orders were unknown to it, could only be, formed on the basis of very imperfect knowledge of the facts and circumstances. Additionally, popular opinion mostly assesses not by rational but by irrational criteria; feelings replace the intellect. By contrast, it is the right and duty of the Court to base its decision on objective considerations and not subjective associations. Anyone making much allowance for his feelings usually runs the danger of exonerating himself from observing the general and customary guilt and blurring the boundaries of law and morality; there must be no other access to the heart than through the intellect.

Today's popular opinion is, moreover, a poor and unsuitable judge simply because the German people, when it comes to National Socialism, is largely a judge in its own cause. It has rightly been said that we Germans all too readily withdraw into fate and tragedy (Ernst Robert Curtius), and it is admittedly always easier to present oneself as a victim of circumstances and seek the blame outside us instead of within us, to flee from reality into illusion. But it is a dangerous illusion to believe that the guilt that affects not just the seducer but the seduced can be avoided by the easy recourse of an appeal to sympathy, and anyone who promotes this illusion is doing the German people poor service in the court of humanity.

(4) The accused cannot justify themselves on the ground that they were following orders either. This is explicitly excluded by Article II(4)(b) of Control Council Law No. 10, and it should be noted that the legal idea contained in the Article has always had validity in German law. While officials, like the accused S., K. and Ho., are obliged to obey, they are not obliged to blind obedience. Even the German Civil Service Act of 26/1/1937 provides, in § 7(II), second sentence: 'An official must not follow an order the execution of which would recognizably to him run counter to the criminal laws.' It follows that officials must not follow a criminal order or criminal instruction. They are not only entitled but also obliged to test whether the order or instruction runs counter to the criminal laws. This regulation even applied to the former German Armed Forces, although every unit is very specially built upon discipline and obedience. For § 47 of the Military Penal Code (RGBl. 1926, p. 275) requires: 'If the execution of an order in service matters infringes a criminal law, then the superior giving the order is solely responsible. However, a subordinate obeying it is to be punished as an accessory where: 1) he exceeded the order as issued, or 2) it was known to him that the superior's order concerned an action that was aimed at a civil or military crime or misdemeanour.'

Even a soldier, then, ought not to execute an unlawful order; where he nonetheless followed it, he is answerable as a participant [*Teilnehmer*]. As already set out, the orders on the deportation of the Jews lacked all legal basis. The relevant Gestapo orders were thus unlawful and constituted the ordering of a criminal action, so that these instructions ought not, even according to the law then in force, to have been followed by the accused. Since they nonetheless executed these orders, the accused are punishable as participants [*Teilnehmer*] if it was known to them that the order concerned an action aimed at a crime or misdemeanour. [482]

III. The Accused S.

(1) The 'deportation' of the Jews resident in Kreis Hechingen ordered by the Gestapo and the simultaneous confiscation and seizure of those Jews' assets ordered by the Gestapo was persecution on racial grounds (*persécution pour des motifs d'ordre racial*) and thus a crime against humanity within the meaning of Article II(1)(c) of Control Council Law No. 10. They constituted that crime even if at the time the 'deportation' was ordered the intention did not yet exist to kill the deported Jews or allow them to perish.

The wording of the Gestapo orders allows no doubt as to this. The first order already stresses in its introductory words that the deportation is happening 'as part of purging all Europe of Jews'; a compulsory 'purge of Jews' and a 'persecution on racial grounds' directed against Jews are obviously only different terms for the same thing. The Gestapo's second order calls the 'deportation' ordered 'the start of the Final Solution to the Jewish question' and 'the last opportunity for the moment to purge the individual districts of Jews'. The reference to the 'final solution to the Jewish question' was totally accurate if we recall that National Socialism had from the outset taken the fight against Jewry as its task and carried on this fight with measures which grew harsher by the year.

Control Council Law No. 10 explicitly defines persecution on racial grounds as a crime against humanity irrespective of whether the persecution measures infringe the national law of the country in which the act was committed. It needs no proof as such whether the measures ordered by the Gestapo were covered at least formally by provisions of German law. Nonetheless, it is appropriate to state that those measures were objectively unlawful even under German law. For the 'deportation' of the Jews and the associated deprivation of their freedom there was not even apparent legal basis. While the seizure of assets was allegedly on a legal basis, namely in part the 11th Order under the Reich Citizenship Act, and in part the statutory provisions on the seizure of communist assets and on the seizure of assets of enemies of the people and of the State in the Acts of 26 May 1933 and 14 July 1933, the reference to these provisions was purely arbitrary. While the 11th Order under the Reich Citizenship Act provided that the assets of a Jew who 'took up ordinary residence abroad' were forfeit to the German Reich, this could according to the wording of those orders apply only to Jews who voluntarily shifted their ordinary residence abroad, but not also to Jews who were deported abroad against their will. The application of the Acts on the seizure of communist assets and the assets of the enemies of the people and the State to the deported Jews would have presupposed a trial and finding, for each individual deportee, that they had acted in a communist or 'hostile to people and State' fashion; no such trial or finding was even attempted, far less carried out.

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Finally, the measures ordered by the Gestapo would not lose their nature as 'persecution on racial grounds' even if they were aimed at serving military ends, in particular, the defence of the country. There is a difference between what motivates an act and what end the act serves. Even if the 'deportation' of the Jews were supposed to have had military ends (something for which there is no established supporting fact), the fact remains that as an element in the fight against the Jews it constituted persecution on racial grounds. How far the seizure of assets may be supposed to have served military ends cannot moreover be seen at all. [483]

(2) The accused S., by executing himself in part the orders that reached him from the Gestapo and in part having them executed by people under him, participated in persecution on racial grounds and thus in a crime against humanity.

(a) Accused S. objectively, to be sure, acted neither as perpetrator (*Täter*) nor co-perpetrator (*Mittäter*) but as accessory (*Gehilfe*), since his participation was confined to executing the orders of the Gestapo in his capacity as *Landrat* of *Kreis* Hechingen, to the detriment of the Jews concerned, without departing from these orders on the basis of decisions of his own.

The consideration that the Gestapo orders would have been executed even if accused S. had not been involved in their execution, that is, the consideration that his participation was not causal for their success, does not exonerate the accused. The causality concept (*Ursachenbegriff*) in legal science is not — unlike that in natural science — mechanistically oriented, but teleologically, in the sense of the purpose of the legal system. Accordingly, no accessory can escape penal responsibility by showing that the main perpetrator (*Haupttäter*) could have carried out the act even without his assistance. In the great mechanism of the persecution of the Jews, every single cog was interchangeable at all times. Were one, given that fact, to seek to exclude the criminal responsibility of each interchangeable participant because of the absence of causality of his participation, then ultimately only the main perpetrators would be liable; all accessories would get off scot-free, even if they had acted on racial grounds, for even in the latter case their participation would, on a mechanistic view, not have been causal.

The accused S. has further appealed to the fact that it could not be within the intention of Control Council Law No. 10 to punish absolutely all participation in the carrying out of persecution of the Jews; for instance, a typist typing out the Gestapo deportation orders and posting them, or the driver of a locomotive pulling the train the deported Jews were to be transported by, could not be punishable. This consideration is just as wrong as the previous one, though in the opposite direction; while the previous consideration couched the concept of causality too narrowly, it is now too broad. From the impunity of participation by a typist or train driver, the impunity of the *Landrat*'s participation does not follow; to that extent, his argument does not prove what it is supposed to prove. The range of duties (*Pflichtenkreis*) of a typist or train driver is quite different from a *Landrat*'s. A typist's official duty is fulfilled in her accurately and punctually typing what she is asked to; a train driver's in

bringing the rail transport punctually and safely to its destination; neither the one nor the other commits a breach of duty if their activity happened to be part of the persecution of the Jews. Things are quite different with a *Landrat*. As the senior administrative and police official of the *Kreis*, he is entrusted with the administrative and police protection of its population against unlawful interference with their liberty and property; he infringes his set of duties if he participates in interference with the very legal goods he is called on to protect.

The question whether accused S. committed a continuous action or is punishable for four separate actions is one the Court felt it need not go into in its guilty verdict. It here followed the Nuremberg judgment of 30 September/1 October 1946, which for those accused (for instance accused X [*sic*]) found guilty on several counts applied a single punishment, and did not act pursuant to § 74 of the German Penal Code.

(b) In subjective respects, the punishability of accused S. depends on [484] his having acted intentionally as an accessory. Intent as an accessory (*Gehilfenvorsatz*) requires, first, that the accused knew what act he was furthering by his participation; he must have been aware that the actions ordered from him by the Gestapo served persecution on racial grounds. He had this awareness, as the Court hereby finds, as the outcome of the trial and taking of evidence, on the basis of the wording and content of the Gestapo orders he received, even if, as he has credibly assured, he did not reckon on the possibility that the deported Jews might be killed. The accused may also be believed to have assumed that the forced deportation of the Jews was in the interest of the defence of the Reich, and that he formed a too favourable conception of the fate awaiting the Jews after deportation ('resettlement') and was strengthened therein by hopes expressed by some of the Jews concerned themselves. The fact nonetheless remains that the forced deportation of the Jews as such, taken together with the confiscation and seizure of their assets, was seen by the accused as 'persecution on racial grounds'. The accused himself stated at the trial that he regarded the Gestapo measures as 'unjust' to the Jews, and struggled with himself whether to carry out the measures or not; these statements by the accused himself enable and support the finding made above.

Intent as an accessory (*Gehilfenvorsatz*) requires, second, that the accused knew that through his participation he was furthering the principal act. He had this awareness too, as the Court hereby finds, as an outcome of the trial and taking of evidence. This awareness is not excluded by the consideration brought up by the accused that if he himself had refused to execute the Gestapo measures someone else would have carried them out in his place, but on the contrary shown to be present; for this consideration shows that the accused took it upon himself, for reasons the scope of which is still to be discussed, to carry out the Gestapo orders himself instead of leaving it to someone else.

Intent as an accessory does not, by contrast, require the accused himself to have acted from racial considerations or from inhumane attitudes at all. Nor is it required that the accused had an awareness of the illegality of his action, since Control Council Law No. 10 declares persecution on racial grounds

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punishable irrespective of whether it infringes the national law of the country in which it was committed; it is thus immaterial what notion the person had as to the legality of his actions. That, finally, the fact that the accused was acting on orders does not exclude penal responsibility as an accessory is explicitly stated in Article II(4)(b) of Control Council Law No. 10.

(3) It remains to be discussed whether accused S. can appeal to grounds excluding guilt or punishment.

(a) Accused S. has asserted that he weighed against each other the facts that he could not prevent the carrying out of the Gestapo measures; that these measures would be carried out all the same even if he refused to do so; that his participation in these measures would accordingly not spare any of the Jews concerned the evils threatening them; and on the other the facts that his participation in these measures enabled him to remain in his post as *Landrat*, that his remaining in office was both in the interest of the Jewish population to the extent that he could mitigate some things, and in the interest of the non-Jewish part of the population with a negative attitude to National Socialism, in so far as he could uphold or procure facilitations for this part of the *Kreis* population too; from this weighing up, he had arrived at the conclusion that preponderant interests justified his carrying out, in order to remain in office, the orders [485] of the Gestapo; he was strengthened in this view by the fact that his remaining in office was desired both on the Jewish side and by respectable figures in the non-Jewish part of the *Kreis* population, and even explicitly asked for; if in this weighing up he had based himself on inaccurate expectations or if the weighing up as such was incorrect, this was at most a political error, not a criminal fault.

That accused S., and with him the circles supporting him in his resolution, were making a severe political mistake in this consideration, even if the premises of the weighing up be supposed to be correct, is plain. During the rule of National Socialism, the temptation was — it may be admitted — indeed great to come to terms with the unbearable, whether out of fear of worse yet to come or in the hope of being able to maintain for oneself and others a 'party-free' reservation — however small. This fear and this hope, both of these elements in the thinking of accused S., were very well recognized by National Socialism, which used them and abused them as a psychological and political factor. Inside the official apparatus, in general only the key positions were occupied by ideologically committed and reliable party comrades. That was quite enough. The rest of the officials could be left with the illusion of freedom in little things, indeed even a certain actual freedom; that was a cheap price to pay for their compliance in all important matters, and they were willing to pay it for they knew very well that all those who — like accused S. — pursued opportunist policies in order to maintain their freedom of action ultimately became prisoners of their own policies.

Thus it could not fail to happen, and, as this case showed actually did happen, that part of the civil service bowed to immoral and illegal impositions; what began as a political error ended as moral and criminal guilt. When

politics comes into conflict with law and morality, this conflict can be solved only in the sense that law and morality must never be adjusted to politics, but politics must always be to law and morality. This principle applies to the State as a whole; it applies to every official as an individual. Each citizen has a right to have an official, from whom an immoral and illegal action is demanded, refrain from that action; each citizen must be protected against officials, irrespective of the considerations they base themselves on, committing such acts. An official who fails to see this is acting not simply unwisely politically because he is undermining trust in the lawfulness of the administration, but at the same time unlawfully. That is why accused S. must be refused the appeal to the balancing of interests he did; an error as to the admissibility of this balancing of interests counts against him.

It should further be added that it is only times of such general spiritual wrong as we have just lived through, and of exaggerated legal positivism and utilitarianism, that could have enabled such a balancing of interests to be considered admissible. According to Christian teaching, it is presumption to risk the certain sacrifice of one moral good against the uncertain gaining or preservation of another moral good and thus replace divine providence with one's own providence. Every moral precept is binding unconditionally and regardless: 'No man, having put his hand to the plough, and looking back, is fit for the Kingdom of God' (Luke 9: 62).

(b) The question still has to be tested whether accused S. in carrying out the Gestapo orders was in a genuine or at least presumptive [*vermeintlicher*] state of necessity [*Notstand*], whether he was determined in his decisions by this necessity and whether if this were to be the case his punishability would be ruled out on that plea. [486]

Control Council Law No. 10, Article II(4)(b), contains the following provision: '*Le fait, qu'une personne ait agi conformément aux ordres de son gouvernement ou d'un supérieur, ne la dégage pas de la responsabilité d'un crime, mais peut être considéré comme une cause de circonstances atténuantes.*' ['The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.']

The Nuremberg Judgment of 30 September/1 October 1946 states the following on Article 8 of the Statute, which corresponds in content to the provision of Control Council Law No. 10 just stated: '*Les dispositions de cet article sont conformes au droit commun des Etats. L'ordre reçu par un soldat de tuer ou de torturer, en violation du Droit international de la guerre, n'a jamais été regardé comme justifiant ces actes de violence. Il ne peut s'en prévaloir, aux termes du Statut, que pour obtenir une réduction de la peine. Le vrai critérium de la responsabilité pénale, celui qu'on trouve, sous une forme ou sous une autre, dans le droit criminel de la plupart des pays, n'est nullement en rapport avec l'ordre reçu. Il réside dans la liberté morale, dans la faculté de choisir, chez l'auteur de l'acte reproché.*' ['The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here

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provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.']

This establishes on the one hand that acting on orders cannot be recognized as a ground excluding guilt or punishment, and why this is so, but on the other clarifies that a so-called state of necessity, in which the person acting lacks *liberté morale*, the *faculté de choisir*, is in some circumstances to be taken into account, and that it may be important whether — as the English text of the Nuremberg Judgment puts it — 'moral choice was in fact possible'.

The Court assumes that accused S., had he refused to carry out the order from the Gestapo, would have been removed from office and punished, and that the possibility cannot be rejected out of hand that such a refusal might have brought with it other severe drawbacks (such as consignment to a concentration camp) for him. This is equally true for all four deportations.

But this fact does not rule out guilt and punishability of accused S., for several reasons.

(aa) First, the accused was not determined in his carrying out the Gestapo orders by the situation he found himself in, i.e. by fear or cowardice, but exclusively by the balancing of interests he carried out, which has already been assessed. The accused explicitly and unambiguously stated this at the trial, and this statement is credible. It shows that the accused, on the basis of the balancing of interests he undertook, would have carried out the Gestapo orders even had he not found himself in the position mentioned. Under these circumstances, the accused cannot benefit from a plea of necessity excluding punishment or guilt, irrespective of any influence it may have on the calculation of penalty. Where somebody, despite a state of necessity, resolves on criminal action irrespective of the reasons, it cannot then be said that he could rely on the consideration that justifies the plea of necessity as a ground of exclusion of punishment or guilt, namely that the person did not have *liberté morale*, the *faculté de choisir*. On the contrary, the decision taken by him proves precisely that he did have freedom to decide, that 'moral choice was in fact possible' for him, and that he also made use of this freedom of choice.

(bb) Second, consideration should be given to the fact that not every state of necessity can excuse every crime. It is acknowledged and also justified that the plea of necessity fails in cases where official and professional duties establish the legal obligation to resist the state of necessity. But this was the very situation the accused S. was in: what was being expected of him was a gross infringement of his official duty, not merely an infringement of a general duty of citizens; despite the state of necessity that existed, he had to refuse this expectation. The attempt to take a lax view here can be countered by the apposite statement of a Swabian [487] publicist of the 18th century (Moser, *Von der deutschen Reichsstände Landen*, Frankfurt, 1769, p. 1157):[3] 'What, though, if a

3 J.J. Moser, *Von der Teutschen Reichs-Stände Landen, deren Landständen, Unterthanen, Landes-Freyheiten, Beschwerden, Schulden und Zusammenkünfften* (Frankfurt, 1769).

sovereign orders some collective body, councillor, official, officer or whomever something that is known to be against the country's Constitution? Whoever fears God more than man, or merely only is a truly honourable man in other respects, will modestly decline and not do it, preferring to suffer over what he cannot change. But because few think thus, things happen as they do; but things will also so happen on the great Day of Judgment to those who ordered it, and to those who complied.'

What was said then in the age of feudal absolutism must apply *a fortiori* to the age of democracy.

A distinction between judges and administrative officials, say on the basis of the consideration that the judge is 'independent and subject only to the laws' while the administrative official is dependent and bound by instructions from his superior, cannot be drawn here. The citizen has just as much of a claim to lawful administration as to lawful adjudication, and if the judge 'is subject only to the law', the administrative official is also bound only by legal instructions.

Finally, it should be borne in mind that under the rule of National Socialism almost every official ordered to carry out an illegal or immoral order was in a situation of necessity in the event of disobedience. If the Head of the Stuttgart Head Office of the Gestapo, who after all was also acting only on higher instruction in the deportation of the Jews, had refused to act then he would have been exposed to at least the same reprisals as the accused S. had to fear. Were all higher officials who collaborated in the deportation of the Jews to be allowed the plea of necessity then probably no one could be punished for their participation; the provision of Control Council Law No. 10 that acting on orders does not remove criminal responsibility would then be rendered invalid in practice in an indirect way.

(cc) Third, it is acknowledged that the plea of necessity fails where the situation of necessity is caused by one's own fault, in particular, where the perpetrator could foresee he might come into a situation of necessity, and had not exploited a possibility of avoiding this situation. The accused S., however, arrived at this position, where in refusing to execute the Gestapo's orders he could have expected severe detriment, through his own fault. From the whole development of policy against the Jews as presented above, the accused had to draw the conclusion that he as a *Landrat* would also be likely to have to carry out further immoral measures against the Jews if he remained in office. In particular, the deportation of Jews from Baden to France, by then generally known, was to be regarded as a harbinger of further persecutions of the Jews. But a leading political official like the accused, as a *Landrat*, must be expected, given such a development, to draw the consequences early and render his post vacant. He could have had himself moved inconspicuously to a politically neutral post. It is still clearer with the second, third and fourth transport that the position that the Gestapo orders brought him into was entirely his own fault. On the one hand, it was foreseeable that the first deportation would be followed by still others, since the order of 18 November 1941 stated that Kreis Hechingen would be involved in the announced 'purge of all Europe from Jews'.

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initially only with the number of the Jews communicated therein, and thereby hinting at further deportations; further, one had to expect the possibility, nay likelihood, that in these further deportations the *Landrat* would have to participate in more or less the same way as in the first one. [488] On the other hand, the accused S. would in the period between the first and second deportations, a period of some 4 months, have had the possibility of resigning his post, which would probably have had detrimental effects on his wealth or earnings, but at any rate not have resulted in a situation of necessity.

[. . .] Sentencing of S. [. . .]

IV. The Accused Ho., K. and B.

(1) The accused Ho., K. and B., as already stated in the first section of the grounds of judgment, undertook the body-searching of the Jewish women for deportation ordered by the Gestapo immediately before their departure; all three of them undertook this body-search together with the absconding Mrs M. of Heigerloch on 27 November 1941; additionally the accused Ho. made this body-search together with Mrs M., again on 19 August 1942.

These findings are to be supplemented by the following findings based on the trial and taking of evidence.

(a) The accused Ho. received her instructions from the accused S., to whom she was officially subordinate as a welfare nurse, and was informed initially by him and then further by Mayor R. of Haigerloch as to the content of this task. She carried out the task on 27 November 1941 by having some of the Jewish women — the rest of them being processed partly by the accused K., partly by accused B., partly by Mrs M. — hand over their jewellery; the Jewish women had then to open their clothing so as to expose places where there might be necklaces or brooches. She also body-searched some of the Jewish women. That the accused Ho. used violence has not been shown; the use of force was in the given situation not necessary, since the Jewish women were left with no choice but to succumb to their fate and hand over their jewellery to the accused, whether after special demand for it or without such demand. The jewellery the accused Ho. took in this fashion was then handed over to Mayor R. These findings are based on the statements by the accused herself; they are confirmed by the statement of witness Ms W., who had like her sister Mrs L. been searched by the accused Ho., and of witness Ka., who was among the deportees at the time, along with his wife.

The accused Ho. acted similarly in the search on 19 August 1942, at which, as already mentioned, she was associated with M. in carrying out the tasks. This finding is based on the accused's own statements.

(b) The accused K. similarly received her instructions from the accused S., to whom she too as a welfare nurse was subordinate, though not directly but through mediation of the accused Ho., who initially told her only that she had to be at the station in Haigerloch on 27 November 1941 for the transporting of the Jews. Further instructions were received by the accused K. only at

the station in Haigerloch, shortly before the search began. The accused carried out her task in the same way as co-defendant Ho., by having the Jewish women hand over their jewellery; that she also body-searched those Jewish women was credibly denied by her. These findings are based on the accused's own statements.

(c) The accused B. received her instructions from Mayor R. of Haigerloch, who approached her on 27 November 1941 and ordered her to go to the station in Haigerloch. The accused, who was not in public service and accordingly would have been entitled to refuse to act, while initially resisting compliance with Mayor R.'s orders finally did comply, after Mayor R. had searched her out repeatedly and [489] insisted on his order being carried out. The accused reached the station in Haigerloch only after the search of the Jewish women had already begun, and was there instructed on what she had to do. She then participated in the search in the same way as co-defendant Ho., by having the Jewish women hand over their jewellery; she too has convincingly denied having body-searched the Jewish women. These findings are based on the accused's own statements. When before the fourth deportation the accused again received the order from Mayor R. to participate in searching the Jewish women, she successfully refused to comply with the order.

(2) The accused Ho., K. and B., by undertaking the search of the Jewish women for deportation, objectively took part, specifically as accessories (*Gehilfen*), in a persecution on racial grounds and thus in a crime against humanity within the meaning of Article II(1)(c), (2)(b) and (3) of Control Council Law No. 10. Their involvement was admittedly, considered in the context of the whole, only of a subordinate nature, and the three accused did not, by contrast with co-defendant S., infringe any special set of duties. What nonetheless makes their involvement punishable is the fact that the body search taken together with the removal of the valuables found thereby was particularly degrading for the Jewish women affected.

In subjective respects, the punishability of the three accused depends on whether they deliberately (*vorsätzlich*) acted as accessories (*Gehilfen*). This condition is met for all three of these accused.

The accused recognized (accused K. and B. at the latest by the time they were at the station in Haigerloch and accused Ho. earlier, when she received the order given to her) that they were being called on to take part in a persecution on racial grounds; this finding is hereby made on the basis of the oral proceedings. That these three accused did not know the contents of the Gestapo decrees and could not therefore fully perceive what measures of persecution the Jews would individually be exposed to is irrelevant; what they did know, namely that Jews were being forcibly deported and in this connection searched and made to hand over jewellery, suffices to establish intention in their cases. This knowledge (*Wissen*) was also inevitably associated with the insight that through their actions the accused were furthering the principal offence.

Intentionality as accessory (*Gehilfenvorsatz*) did not require that the accused acted from racial motives and further did not require that they had an

awareness of the illegality (*Bewusstsein der Rechtswidrigkeit*) of their actions, as has already been explained in the judgment on accused S. It is similarly irrelevant that if an individual accused or all the accused had refused their participation, the search would still have been carried out by the remaining accused, or by other persons.

Nor can these three accused appeal to lawful excuses from guilt or from punishment. Though they acted on orders, with accused B., moreover, acting on an order with no formal basis, this does not make them exempt from punishment. None of the three accused were in a genuine or even only presumptive state of necessity and none of the three accused has pleaded such necessity. None of the three accused, as is hereby found on the basis of the trial, were governed by fear that their refusal would or could bring danger to life or limb for them.

The accused Ho. has stated as a motive for her decision to take part in the search that co-defendant S. had given the order to her and to accused K. because he desired and expected that she and accused K. would proceed with particular lenience, and because he expected that the search, if not undertaken by a person determined by Mayor R., [490] would be carried out intolerantly, if not indeed vexatiously. This is credible and has been confirmed by co-defendant S., and it is further credible that accused Ho. agreed with accused K. before the start of the search that they would carry it out only formally, and not take anything away from the Jewish women. But both accused Ho. and accused K. abandoned this intention again when they noted that co-defendants B. and Mrs M. were also taking part in the search, and they did not feel they could believe they would not take anything away from the Jewish women. The initial motive that decided accused Ho. and possibly also accused K. in taking on the order was replaced before carrying it out by a different and definitive motive which was in turn also decisive for the nature of its execution. [. . .]

(c) [. . .] Determination of penalty in relation to Ho.

The fact that accused Ho., by contrast with the prosecution assumption, took part not in four but only in two searches needed no explicit emphasis in the judgment; it suffices, on the model of the Nuremberg Judgment of 30 September/1 October 1946, for this finding to be contained in the grounds of judgment, as it is.

(bb) [. . .] Determination of penalty in relation to K.

The fact that accused K., by contrast with the prosecution assumption, took part not in four but only in two searches needed no explicit emphasis in the judgment; it suffices, on the model of the Nuremberg Judgment of 30 September/1 October 1946, for this finding to be contained in the grounds of judgment, as it is.

(cc) [. . .] Determination of penalty in relation to B.
[. . .]

V. The Accused H.

(1) Accused H. in his capacity as official doctor of *Kreis* Hechingen and following an order given him by the *Landrat* of *Kreis* Hechingen on the occasion of the first, second and third deportations of the Jews gave expert reports on whether particular Jews to be deported were capable of being transported or of travelling; in the third deportation, he also partly extended his report to whether the Jews concerned required continuous care and attention and whether they were capable of work. The prosecution challenged this testimony in the following seven cases: [491] [. . .]

The Gestapo ordered the Jews named to be transported, with the exception of Julius Baer, who was deferred from the third transport and affected only by the fourth deportation.

The facts have been found as the outcome of the trial, on the basis of the accused's own statements together with the testimony read out at the trial: in the cases listed under (a) through (c) above, the attending physicians confirmed as witnesses that they had pronounced as stated.

(2) That accused H. in his capacity as official physician pronounced as to the state of health of the Jews to be deported although he knew that this was a deportation and accordingly persecution on race grounds does not make him punishable, because in giving the expert opinions, as long as these were objectively true, he did not infringe his duties. The Prosecution has accordingly rightly confined itself to those cases in which it felt it could assume infringement of those duties by accused H.

Accused H. would certainly have committed a breach of duty had he given knowingly false reports, in particular had he, with the intention of furthering the deportations, applied excessively strict criteria. This did not occur. According to the report by the expert Dr He., the official medical certificates made out by the accused were an objectively accurate answer to the questions submitted to him. To be sure, the questions to the accused were wrong to the extent that it was not merely the fitness of the Jews in question to be transported but additionally for deportation that was involved, i.e. whether it were not necessary to exclude these Jews from the deportation in the light of their illness or frailty, from considerations of a similar nature as had initially excluded Jews over 65. But that the question put to him was wrong was something the accused did not know, since he did not know the wording of the Gestapo decrees and was at any rate not acting intentionally (*vorsätzlich*) when he omitted to procure knowledge of the wording of those decrees.

The accused H. would have committed a breach of duty also if, in the cases in which he affirmed transportability only conditionally and with certain criteria, he had been aware that the conditions stated by him were not in fact present; in that case by stating these conditions he would have merely been seeking to maintain the outward appearance of an objective assessment. It would have been obvious for the accused to ascertain whether these conditions [492] could be met, but it cannot be shown against the accused that he

omitted this enquiry with the intention of thereby furthering the deportation (*der Deportation Vorschub leisten*).

The accused H. has accordingly been acquitted, and the costs incurred from the criminal prosecution against him are to be met from public funds (§467 StG B), whereas the other costs of the proceedings are to borne by the four accused convicted (§465 StPO) [493] [. . .].

Dr. H. was acquitted, whereas Landrat *S. and the three female defendants (Ho., K. and B.) were convicted of crimes against humanity; S. and defendants Ho. and K. appealed.*

Court of Appeal (*Oberlandesgericht*) Tübingen, Judgment of 20 January 1948, ss 54/47[4]

[. . .]

V. The Appeal of Accused S. on the Merits

The verdict challenged deals in its first part, the general findings of fact, with the Gestapo order of 18 November 1941 on the 'deportation of the Jews to the General-Kommissariat Ostland'. The Decree ordering the first deportation lists what the Jews to be deported could take with them. The judgment says the following on this: 'These orders were explained in a letter of 19 November 1941 which the Jewish religious community of Württemberg, had sent, with the authorization and on the orders of the Gestapo, [496] to the individual participants in the transport.' As the trial record shows, on the basis of a court decision this letter had been read out in full verbatim at the hearing by the Criminal Division on 23 June 1947. This reading made it an object of the trial and it has therefore to be taken into account.

This circular letter informed those concerned that they had been assigned to an evacuation transport to the East, and obliged them to be ready at their current accommodation and not to leave this without special permission from the Authorities, even temporarily. Employment, even in important enterprises, did not exempt them from the evacuation. It explicitly warned the Jews not to oppose or avoid the evacuation. Any attempt in this direction was pointless and could lead to severe consequences for those concerned. A list was also given of what could be taken with them. Mention was made here of the particular importance of construction tools. The attached declaration of assets was to be filled in precisely. With delivery of the letter, as was stated therein, a general prohibition to dispose of their assets was placed on the recipients by explicit instruction of the authorities. The letter explained the instructions in this restraining order in more detail.

The finding of the judgment in the sentence cited earlier accordingly conveyed the content of the circular by no means exhaustively, but only inexactly and imperfectly. No further mention is made of it in the rest of the grounds of judgment. In their letter, the heads of the Jewish religious community termed

4 Cassese, *supra* note 1, 494–502.

the carrying out of the measures indispensable and called all resistance against it meaningless, and stated that it was an evacuation to the East. The content of this letter could have been of significance for the position of accused S. on the Gestapo order and his own decision. The Court had accordingly to test whether the accused was influenced in his decision by knowledge of this letter, and what importance he attributed to it. No finding or assessment to this effect is contained in the judgment.

This bench holds to the consistent case law of the *Reichsgericht* that an unclear or incomprehensible and therefore insufficient statement of the facts constitutes a contravention of material law. Such a contravention may also be present 'where a criminal court's judgment, while finding facts that may be capable of influencing the assessment of the facts in the accused's favour or otherwise, has not discussed them in the concluding assessment' (Löwe-Rosenberg, StPO 2. Nachtrag 1940 zu § 337 A. 159, with references to the judgments given).

There is such a contravention here. On the basis of the general objection of infringement of material law, accordingly, the judgment against the accused S. is by § 353(1) StPO to be set aside. Also to be set aside, by § 353(2) are the findings underlying the judgment where affected by this flaw. On the basis of § 353(4) StPO the matter is to be referred back for further hearing and decision.

VI. The Appeal by the Accused Ho. and K.

The quashing of the judgment against accused S. does not affect the verdicts on accused Ho. and K. For them, the error noted above is irrelevant, since as is evident from the judgment of the Criminal Division they had no knowledge of the letter from the religious community.

The Criminal Division tested the actions of all the accused from the viewpoint of a crime against humanity within the meaning of Article II(1)(c) of Control Council Law No. 10 and found that this Law is valid law for Germany [497] and is binding on German courts. There is no contravention of law here. The Württemberg-Hohenzollern military government has pronounced the German courts competent to judge in the instant case (Article III(1)(2) of the Law).

The Criminal Division goes on to correctly state that the ban on retroactivity does not stand in the way of applying the Law. For the actions made punishable by the act offended against the generally recognized legal and moral principles of all civilized peoples even at the time they were committed and thus constitute a wrong (*Unrecht*), a crime (*Verbrechen*). It is therefore consonant with justice that such severe misdeeds be punished. Thus, legal certainty is also satisfied, and that is what the ban on retroactivity is intended to serve. Were such deeds to remain unpunished, then legal certainty and justice would be undermined.

Crimes against humanity are inhuman and cruel actions directed against elementary human rights, against human beings in their dignity and value. They arise from a political ideology that despises these human rights; they are committed out of an inhumane mindset (cf. also LG Konstanz DRZ 1947 at 267.

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OLG Cologne NJW 1947, at 70, KG DRZ 1947 at 308; cf. also the judgment of the Supreme Court of Justice in *Rastatt* of 1.2.1947, JO 1947 at 662).

Persecution on political, racial and religious grounds is listed in Article II(1)(c) of the Law as the last explanatory example of a crime against humanity. This crime too must accordingly be carried out inhumanely. The perpetrator must have acted out of an inhumane mindset, derived from a politically, racially or religiously determined ideology (cf. also LG Konstanz MDR 1947 at 305, OLG Kiel MDR 1947 at 307; cf. also KG DRZ 1947 at 309).

[Control Council] Law No. 10, in Article II(2)(a)-(e), equates all conceivable forms of commission or participation. It does not distinguish between perpetration (*Täterschaft*) and participation (*Teilnahme*). The accessory (*Gehilfe*) to a crime against humanity is 'regarded as guilty of a crime against humanity, without regard to the capacity in which he acted' (Clause 2 of the Introductory Act). From this complete equation with the perpetrator it follows that the accessory must have acted from the same mindset as the perpetrator himself, that is, from an inhumane mindset and in persecutions under politically, racially or religiously determined ideologies. The Criminal Division rightly took it that as regards the punishability of participation, Law No. 10 is of plain interpretation.

For intention (*Vorsatz*), awareness of illegality (*Bewusstsein der Rechtswidrigkeit*) is a requisite (cf. also KG DRX 1947 at 310, OLG Frankfurt/M. SJZ 1947 at 626). The accused had to have the awareness of having infringed a law or otherwise doing wrong. If they did not have this awareness, they cannot plead that ignorance if it is based on an attitude that is in contradiction to the generally recognized moral law (cf. also OLG Frankfurt/M. SJZ 1947, at 626, KG DRZ 1947, at 198). Nor can the accused appeal to the National Socialist legislation against Jews as an excuse. For it is in contradiction with the general legal consciousness and moral law, and was a wrong only camouflaged, not justified, by legalization.

The deportation of Jews in 1941 and 1942 had as its object the systematic extermination of the deportees, was conceived from hatred of the Jews and cruelly executed, and marked by the anti-Semitism, the extent and the nature of the extirpation qualified unmistakably as a crime against humanity. The men who suggested, ordered or otherwise performed as their work these deportations are guilty as principal offenders (*hauptsächliche Verbrecher*) of the persecution of the Jews. They had the decisive power, particularly in the offices of the Gestapo. They would also be punishable for grave deprivation of liberty while in office, extortion and murder to the extent [498] that German law were to be applied. In order to carry out these crimes, legalized in form, a comprehensive, highly structured organization was partly built up and partly brought in, the organization of the State authorities also being abused for the purpose. An uncountable number of assistants (*Hilfskräften*) acted in it. Their conduct is to be assessed according to their position, their insight into the criminal objectives and the extent of their collaboration.

The holders of higher official posts and offices, among them those of *Landrat*, were able in view of their office, their general and specialized education, their knowledge of law and political life and their other experience of life to recognize and evaluate the factual and legal position. That they did not have an awareness of the illegality can be recognized only in individual cases on proof of special circumstances. Ordinary people (*Einfache Menschen*) by contrast, who were involved only on the margins of the events and carried out only subordinate activities, who very frequently had a limited field of view so that they could not perceive the connections, will, according to general experience of life, have acted culpably only in special cases.

The accused Ho. and K. were, according to the Criminal Division's findings, involved only in a subordinate manner in the deportations. In doing so they behaved particularly leniently and sympathetically, i.e. humanely. Their attitudes were not anti-Jewish. Moreover, as the judgment also explicitly finds, they did not have an awareness of the illegality (*Bewusstsein der Rechtswidrigkeit*) of what they were doing. They are accordingly not guilty, whether under Law No. 10 or in German criminal law. By § 353(1) StPO the [Tribunal's] judgment is to be set aside. Both these accused are to be acquitted.

VII. The Verdict on Accused B.

Co-defendant B. lodged no appeal. The judgment found that accused B. was involved in the same manner as accused Ho. in searching the Jewish women to be transported, that her involvement was, like that of the accused Ho. and K., of a subordinate nature and that it had not been shown that she acted out of National Socialist ideology or from racial motives. She too lacked awareness of the illegality. The conviction of accused B. is accordingly based on the same contravention of law as the conviction of the accused Ho. and K. For this reason, accused B. is according to § 357 StPO to be treated in the same way as if she had lodged an appeal. Her conviction is accordingly to be set aside and accused B. is to be acquitted.

VIII. Viewpoints for the new trial and decision in the case of accused S.

(1) The accused cannot appeal to the Gestapo decrees as binding orders from his superior authorities, to justify or excuse his actions. This is explicitly provided by Article II(4)(b) of Law No. 10 and has not been misjudged by the judgment challenged.

(2) Even in so far as these decrees had the outward appearance of legal orders they were illegal, since their content constituted a gross wrong (IV above).

(3) On the state of necessity over and above the law (*übergesetzlicher Notstand*) The judgment challenged finds that the accused was an inward opponent of National Socialism (*innerlich ein Gegner des Nationalsozialismus*), had also confirmed this attitude in his conduct in office and was not an anti-Semite. That meant, however, that there existed a possibility that he was brought by the Gestapo orders into great internal anxiety that compelled him to weigh up the conflicting duties and choose between them. In dealing with the balance of duties and interests asserted by the accused the judgment challenged

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states: 'It should further be added that [499] it is only times of such general spiritual wrong as we have just lived through, and of exaggerated legal positivism and utilitarianism, that could have enabled such a balancing of interests to be considered admissible.' It cannot clearly be seen whether an inadmissible balance between moral duties and allegedly political considerations is being criticized, or the appeal to the state of necessity over and above the law is being termed inadmissible as such. If the former was the intention, there was a failure to see that even in political considerations moral principles must find application. Were the accused to be charged with taking an immoral stance in a political decision, this would have to be unambiguously established. If however the state of necessity over and above the law itself was meant, then the Court fell into an error. For the viewpoint favourable to the balancing of legal goods and duties has asserted itself precisely against an exaggerated legal positivism. It is taken from the unwritten law above the law that forms the basis of any legal system. Nor does a mere utility viewpoint find expression in it. Where duties conflict and different legal goods are in conflict with each other, then the conflict has to be resolved, the balancing carried out, according to the basic idea of the legal system and the value relationships expressed in it. Especially in extraordinary circumstances of life under abnormal circumstances of government and law, when traditional standards fail, the question whether an action was criminal or was aimed at protecting particular legal goods must be tested in detail and the contradiction between duties and legal goods carefully weighed up.

The legal idea of the state of necessity over and above the law was already brought forth in case law of the *Reichsgericht* in a judgment of 11 March 1927 — RGSt. 62 p. 242 ff. — and has since then been applied continually. There is no reason here to depart from this generally recognized case law. The Criminal Division will accordingly have to test whether the accused acted in such a state of necessity over and above the law.

The question of the moral admissibility of the action is not affected by this principle. This was already stated by the *Reichsgericht* in the above-mentioned judgment. To this extent too the Criminal Division has made a legally inadmissible evaluation. It states, following on from the above-cited sentence, that according to Christian teaching it is presumption to risk the certain sacrifice of one moral good against the uncertain gaining or preservation of another moral good. Every moral precept is binding unconditionally and regardless. It need not be gone into whether the content of Christian moral doctrine is correctly given here. For the accused's act was to be evaluated not from the viewpoint of morality, still less a rigorist moral doctrine, but by the criterion of law. Law and morality intersect, but do not overlap.

The Criminal Division will, in testing the question whether the accused was in a state of necessity as regards his duties, out of which there was in fact or in his opinion no other way than to carry out the Gestapo decrees, in particular also have to take account of the circular (*Rundschreiben*) emanating from the Jewish religious community.

(4) On the state of necessity (*Notstand*) as a ground for exclusion of guilt

If the accused acted without a justifying ground, the Criminal Division will have to go on to test whether the accused's guilt was excluded by a state of necessity.

The judgment challenged, following the judgment of the Nuremberg International Military Tribunal of 30/9-1/10/1946 (JO 1946 p. 378), did not fail to see that such a state of necessity is in some circumstances to be taken into account. It also sees that the accused, had he refused obedience, would have been removed from office and punished, and the possibility cannot be ignored that such refusal would have had still other severe detriment as a consequence (such as the concentration camp). [500] This applies in the same way to all the four deportations the accused took part in.

The Criminal Division's further analyses are however not without legal error. The judgment finds that accused S. did not plead necessity and accordingly refrains from a test from this point of view. The Court ought however, if there is occasion, to do the test *ex officio*, and decide whether a state of necessity was present for the accused or whether he erroneously saw a state of necessity as present. If the accused did not plead necessity, the Criminal Division was entitled to take it that the accused himself did not believe that there was a state of necessity for him, even were it otherwise. That did not however mean finding that in fact no state of necessity existed for the accused.

It is further stated in the judgment that the accused allowed himself to be guided exclusively by a balancing of interests; it would then be impossible that for him to have been determined by a state of necessity in his decision. This view conflicts with one's experience of life. A balancing of duties and compulsion are not mutually exclusive, but can act on the person deciding as motives alongside each other or successively and compel him to a particular action.

The Criminal Division stresses that the state of necessity was the fault of the accused. It is first to be tested whether there was a state of compulsion (*Nötigungsstand*) within the meaning of § 52 StGB, that is, whether the accused was constrained to the act under accusation by a third party through irresistible force or through a threat associated with a present and not otherwise resistible danger to his own life and limb or that of a relative. Such action exerted by a third party through coercion can remove the freedom of the will and compel one under someone else's will. The person deciding cannot, irrespective of how he came to be in this position, be accused of culpable action, because of the constraint exercised upon his will. For the area of application of § 52 StGB, accordingly, the question whether the accused culpably arrived in a position of compulsion of this nature is excluded. Whether the threat postulated by § 52 StGB was contained in the Gestapo orders for the event of refusal to obey or whether in general such a position of terror existed for the accused is to be tested. The Criminal Division's considerations as to whether the accused had culpably come into a position of necessity could have been formulated only within the framework of § 54 StGB.

The Criminal Division says that the accused was by his office and occupation legally obliged to resist the state of necessity. If however his free will was

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excluded within the meaning of § 52 StGB through constraint by someone else then there is no room for such a consideration.

The question would however also have to be answered negatively for the case of § 54 StGB in relation to the accused. The law recognizes for the state of necessity in general the mental pressure that may bear down on someone taking a decision and takes account here of the human urge for self-preservation and thus also of general human weakness. These principles cease to apply only where there is a special legal duty to sacrifice life and limb. Such a duty is set for, say, police officials and firemen by the nature of their professional tasks. But the judgment challenged assumes such a professional duty for the accused too, but wrongly. Setting his own life and limb and that of his relatives at risk in performing his administrative duties was not necessarily legally required of the accused in his exercise of the office of *Landrat*. Special circumstances that might allow some other legal evaluation to be admissible were not found by the Criminal Division.

Where the judgment challenged refuses the accused the plea of necessity then here too it has confused law and morality and placed too high requirements on the accused's conduct. It is certainly morally necessary for resistance to be offered to wrong and criminality without regard to harm to life and soul. [501] Yet in law one has to do not with what one may expect from a hero or a saint, but with what can and must be demanded of the average morally inclined legal subject. [. . .] [502]

Thus the Court of appeal acquitted Ho. and K., cancelled the conviction of B., and remitted the case concerning Landrat *S. to a lower court, instructing it to rely upon the notion of necessity, as defined by the Court of appeal.*

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*325 THE MENTAL ELEMENT REQUIRED FOR ACCOMPLICE LIABILITY: A TOPIC NOTE

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I. Introduction

To be guilty of a crime the offender must meet the act requirement (actus reus) and have the specific state of mind (mens rea) necessary to commit the offense. [FN1] In the realm of accomplice liability, one is liable as an accomplice to the crime of another if he gave assistance with the required mental state. [FN2] Yet, for an accomplice the act requirement is much less stringent, as the primary actor's act is imputed to the accomplice as long as the accomplice gave some assistance. [FN3] Moreover, there has been considerable debate about the level of intent required for accomplice liability. [FN4]

This article will focus on the second element of accomplice liability-the mental element. [FN5] Its purpose is to give a general analytical survey of the law of accomplice liability regarding the requisite mental element. Usually the courts' substantive analysis as to these decisions is confusing. Nevertheless, since the actions of the primary actor are imputed to the accomplice and the degree of assistance of the accomplice minimal, a clear rule about the sufficiency of the mental element of the accomplice is needed to limit the theory within justifiable bounds. [FN6]

First, this article will explore the origins and competing policies behind accomplice liability. Second, it will review what theories other jurisdictions and *326 the Model Penal Code have imposed on accomplice liability. Third, it will address the theories that Louisiana has employed in fashioning accomplice liability. Fourth, the theory of accomplice liability with regard to recklessness/negligence crimes will be discussed. In conclusion, the author will review suggestions for clarifying the law.

II. Origins and Policies of Accomplice Liability

Under the common-law, parties to crime were divided into different degrees. [FN7] An aider and abettor who was actually or constructively present at the crime was classified as a principal in the second degree. [FN8] This party either had to act with the intent required for the underlying crime or with guilty knowledge. [FN9] Thus, at common law, an accomplice that assisted the perpetrator with knowledge of the perpetrator's criminal purpose could be held liable for the substantive offense.

The two major policies which underlie accomplice liability are deterrence and personal culpability. [FN10] Reasons given for holding an accomplice liable are 1) to punish him for his actions and 2) to prevent/deter him from committing this type of crime again. [FN11] Since the aider and abettor lends his assistance to the perpetrator, his actions help to bring about the prohibited result. Society recognizes that this dangerous aider and abettor's conduct should be deterred and that he or she should be punished. [FN12] Some suggest the deterrence policy applies better to accomplices than to perpetrators because "[w]hen the crime is . . . committed by a third person, the usual strain and immediacy involved in the decision-making is not present." [FN13] Therefore, the "accomplice . . . [can] calculate deliberately the consequences of his actions." [FN14]

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However, critics of the deterrence policy argue that "[n]ot all accomplices should be treated alike." [FN15] Not all accomplices present as much danger as the *327 perpetrator. [FN16] Since "accomplices [vary] in their type of involvement in group crime, a model based on specific deterrence or rehabilitation is unlikely to be generally effective." [FN17]

The interest of society in deterring criminals must be balanced against the "interest of the individual in being free unless found legally blameworthy." [FN18] In criminal law, a "deeply rooted" principle exists that one should be liable only for one's personal guilt. [FN19] Accomplice liability "skirts the boundaries" of this principle. [FN20] Thus, theorists have endeavored to reconcile accomplice liability and personal liability. [FN21] Two rationales for holding the accomplice liable even though he did not commit the act are: (1) the rules of agency, and (2) the forfeited personal identity doctrine. [FN22]

Under civil agency theory, the principal "agrees" to be bound by the acts of the agent and to be personally liable for those acts. [FN23] Similarly, "the accomplice authorizes the primary actor's conduct . . . [and] accepts it as her own." [FN24] However, civil agency "requires a party to consent to being subjected to the control of another, whereas criminal liability does not." [FN25] In criminal law there is no requirement of consent between the principal and the accomplice. The lack of consent in criminal agency theory ignores the fundamental premise upon which civil agency is based, and for this reason, the analogy has its limits.

The second theory underlying accomplice liability, the forfeited personal identity doctrine, provides that a person who chooses to aid in a crime forfeits his or her personal identity and that his or her identity becomes bound up in that of the principal. [FN26] Under this theory, "[w]e pretend the accomplice is no more than an incorporeal shadow" of the main perpetrator. [FN27] However, critics have argued that by molding one person's identity into another's as justification for accomplice liability, this doctrine "permits society to ignore the potentially numerous levels of personal culpability and personal involvement of wrongdoers," [FN28] thus punishing one for harm that he may not have intended or caused. *328 Moreover, accomplice liability may not be linked to causation. [FN29] Even though the accomplice may not have caused the harm, he can be treated as severely as the perpetrator who did. [FN30]

These theories may help explain the rationale behind accomplice liability to some extent; however, there are moral problems with treating the accomplice as a "mere incorporeal shadow." [FN31] It would be better to recognize that "moral intuition" tells society that those who "[willfully participate] in crime should be punished." [FN32] Then, instead of molding the accomplice's identity into that of the perpetrator, the accomplice's own personal culpability could be examined to determine the degree of punishment he deserves.

III. Knowledge v. Intent-The Search for the Proper Standard

There has been a long, ongoing debate about the requisite mental standard for an accomplice. An accomplice must really have two mental states: 1) to assist the principal, and 2) to commit the substantive offense. [FN33] The difficulty lies in determining the standard for the mental element that the accomplice must have with respect to the core offense. Historically at common law, knowledge of the perpetrator's criminal intent was sufficient to hold the accomplice liable for the underlying crime. [FN34] Today, many argue that the accomplice must himself have the intent required for the substantive crime so as not to subvert the principle of criminal law that one should be punished only to the extent of one's personal culpability. [FN35] Thus, standards range from 1) mere knowledge that the accomplice's assistance will help in the commission of the offense, to 2) the accomplice's own intent to commit the offense. These standards are not merely theoretical. The Model Penal Code provides examples of difficult situations in which the standard will make a difference in determining the liability of the accomplice. For example: "[a] lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in the commission of the crime. A doctor *329 counsels against an abortion during the third trimester but, at the patient's insistence, refers her to a competent abortionist." [FN36] In all of these situations, if the knowledge standard were used the accomplices would be liable for the substantive crime as they knew of the principal's intent to commit the core offense and assisted the principal in committing the offense. However, as none of the accomplices intended to commit the substantive offense, they would not be liable if the intent standard is used.

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These different standards also affect the policies behind accomplice liability. As previously mentioned, one of the major policies behind accomplice liability is deterrence. [FN37] The proponents of the knowledge standard argue that this standard better serves this policy concern. [FN38] They argue that crime prevention should be the main consideration in determining the mens rea requirement under accomplice liability. [FN39] One big problem with this argument is the determination of what degree of knowledge and assistance will be sufficient to deter criminal conduct. [FN40] The drafters of the Model Penal Code rejected the theory of knowing facilitation by requiring "that the actor have a purpose to promote or facilitate the offense in question." [FN41] Only when the accomplice has as his true purpose the advancement of the criminal end will he face punishment for the substantive offense. [FN42] Therefore, courts face the dilemma of either holding the accomplice liable on a mere knowledge standard, or letting the accomplice go free because he did not intend to commit the underlying crime. This either/or situation does not always provide a just outcome and has led to confusing decisions among the courts, including the federal courts.

IV. Federal Cases

Federal statute 18 U.S.C. § 2 provides: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." [FN43] There is no clear federal standard for the mental element of an accomplice, and the circuits are split on this issue. However, the prevailing view is that the accomplice must have the intent to commit the underlying offense. [FN44]

*330 A. The Knowledge Standard

One early case suggested that a seller with knowledge of the buyer's criminal purpose would be liable as an aider and abettor. [FN45] In Backun v. United States, the seller sold stolen goods (that he had hidden in his closet) to a buyer for an extremely low price knowing that the buyer would transport the goods across the state line to find a better market. The seller was convicted of the "crime of transporting stolen merchandise of a value in excess of $5,000 in interstate commerce, knowing it to have been stolen, in violation of the National Stolen Property Act, 18 U.S.C.A. § 415." [FN46] The court distinguished the facts of this case from "an ordinary sale made with knowledge that the purchaser intends to use the goods purchased in the commission of a felony" because there was "evidence of direct participation of [the seller] in the criminal purpose." [FN47] However, strong language in dicta suggested that an ordinary sale made with knowledge of the buyer's intent would be sufficient to hold the accomplice liable because of one's "moral obligation to prevent the commission of a felony." [FN48] "The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise." [FN49]

The Fourth Circuit in United States v. Eberhardt, [FN50] also suggested that knowledge of the primary actor's crime would be a sufficient standard under which to hold the accomplice liable. In protest of the Vietnamese war, a group of four men mixed part of their blood with animal blood. Then, while one man remained in the lobby, the three other men poured the blood over selective service files. The nonparticipating accomplice was charged as an aider and abettor and convicted of willfully mutilating records in a public office of the United States. Although this accomplice's acts of giving blood and accompanying the others to the building were sufficient to indicate that he had the requisite intent for the crime, the court went even further in dicta suggesting that: "[the accomplice's] mere giving of blood with the knowledge that it would *331 be used for an unlawful purpose would be enough to convict him as an aider and abettor." [FN51]

These cases found that the societal goals of crime prevention and deterrence outweighed the negative aspects of the knowledge standard. Although the court found that the aiders and abettors possessed the requisite intent, underlying these cases is the idea that people were "under [a] moral obligation to prevent the commission of felony"; [FN52] and thus guilty knowledge may be enough to satisfy the mens rea requirement. These courts found societal safety more important than: (1) the possibility of subverting personal culpability, or (2) interference with business practices of a merchant.

B. Intent Required for Underlying Crime

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Another line of cases has held that the accomplice must possess the required mental element for the substantive offense. The Second Circuit's decision in United States v. Peoni [FN53] is one case decided before Backun which many opinions cite as supporting the idea that the accomplice must intend to promote or facilitate the offense. In Peoni, Judge Learned Hand, after interpreting common law definitions of accomplice liability, stated:

> It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used-even the most colorless, "abet"-carry an implication of purposive attitude towards it. [FN54]

This "purposive attitude" standard is the prevailing view of the federal courts today. [FN55] However, modern federal courts continue to recognize the ambiguity that still exists with respect to the requisite mental element; they have commented that new complex statutory crimes are "causing disparate results based on conflicting ideas of accomplice liability." [FN56] In fact, many courts have encountered difficulty in interpreting the federal "aiding and abetting" statute, [FN57] and while purporting to follow Peoni, use terminology that suggest that their analysis is based on a knowledge standard.

***332** One case where it seems clear that the accomplice had the intent for the substantive offense is United States v. Raper. [FN58] Here, Raper was convicted for aiding and abetting in the possession of heroin with the intent to distribute. In this case, Raper and a friend had a scheme by which Raper would collect money for drugs from the buyer. The buyer would then collect the drugs from Raper's friend, who had the drugs concealed in his underwear. It was clear that the two men had a plan, and that both acted with the required intent. However, before citing the "purposive attitude" language from Peoni, the court listed as one of the elements for aiding and abetting the offense "guilty knowledge on the part of the accused." [FN59] This dicta, like that of Backun, [FN60] is very confusing and could potentially mislead others in their search for the correct mental element required for an accomplice.

In United States v. Andrews, [FN61] Ivan Andrews' conviction under the aiding and abetting statute for a murder committed by his sister was reversed by the court. Ivan himself shot a man named Lowery. Then, Ivan's sister killed a passenger who was in Lowery's car. Ivan was convicted as an aider/abettor to the murder committed by his sister. This court listed as a necessary element under the aiding and abetting statute "that Ivan 'had the requisite intent' for [the crime]." [FN62] The court found that the jury could not infer the necessary intent from these circumstances as Ivan's mere presence and agreement to "get" Lowery was insufficient. The court then concluded that the jury could not have inferred Ivan's intent "under the natural and probable consequences doctrine," [FN63] which holds the accomplice liable for all natural and probable consequences that flow from the commission of the crime, as his sister's actions were impulsive and "went beyond that scope." [FN64] By recognizing the natural and probable consequences doctrine, it appears that the court was willing to apply a lesser standard for the mental element, although it listed as one of the elements for aiding and abetting the intent to commit the underlying crime. Even so, the court was unwilling to find that Ivan's intent could be inferred under the circumstances.

Courts have struggled with the requisite mental element for an accomplice. Federal courts moving from requiring knowledge to a greater degree of intent may signify that a higher degree of personal responsibility should be required to convict an accomplice. [FN65] However, the accomplice's lesser degree of culpability ***333** should be balanced with the fact that an accomplice who assists with guilty knowledge should be deterred (even if to a lesser extent than one who intends the crime be committed). [FN66]

V. Other Jurisdictions

Much like the federal courts, states have struggled with accomplice liability and split along the same lines. Few states have kept the knowledge standard. [FN67] A majority of states, in line with the Model Penal Code, require that the accomplice have the "intent to promote or facilitate the offense." [FN68]

In the 1980's, California courts were split on what the mental element for an accomplice should be. During

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this period, the courts divided over jury instructions which defined principals as those who aided the crime with knowledge of the perpetrator's criminal purpose. [FN69] One line of cases made it clear that the test for aider/abettor liability was the accomplice's knowledge of the perpetrator's intent. [FN70] These courts found that the accomplice's "intent is implicit in the act of aiding with knowledge of the perpetrator's guilty state of mind." [FN71]

An opposite line of authority developed requiring "that [the accomplice] share the intent of the perpetrator," [FN72] and disagreeing with the "implicit intent" standard. They argued that instead of setting up a presumption where knowledge equals intent, the jury should be given the facts to decide if the prosecution had proven the accomplice's criminal intent. [FN73] One justice gave an example of a situation illustrating how inequity could result under the knowledge standard:

> A abducts a young woman with the intent to rape her, forces her into a car and starts to drive off. B, the woman's brother, rushes to his car intending to rescue his sister. C, the woman's boyfriend, jumps into ***334** the passenger seat of B's automobile, pulls out a gun and says to B, "Hurry up, I'm going to kill A." B's car pursues A's vehicle with C shooting through the window at A. Clearly, B has knowledge of C's intent to murder A and is aiding in the commission of the offense by driving C. Can he be convicted of aiding and abetting in the attempted murder when his only intent is to rescue his sister? I think not. [FN74]

Rejection of the implicit intent approach was necessary to assure just results under all circumstances.

A few states still find knowledge to be sufficient. [FN75] In Washington, the mens rea required for an accomplice is "general knowledge that the principal intends to commit a crime." [FN76] In Michigan, the courts explicitly recognize "two types of aiding and abetting: (1) where the aider and abettor himself possesses the requisite specific intent for the underlying crime and (2) where the aider and abettor knows that the principal has the requisite intent." [FN77] In these states, the legislature made a determination that one who assists with guilty knowledge should be punished as a principal. [FN78] The courts express this element as "merely a general intent requirement imposed to prevent an innocent participant from becoming an aider and abettor." [FN79]

Most states however, follow the scheme of the Model Penal Code. The Model Penal Code specifies that one becomes an accomplice if he aids "with the purpose of promoting or facilitating the offense." The commentary states that this language "requires that the actor . . . have as his conscious objective the bringing about of conduct . . . [which is] criminal." [FN80] Although this definition does not explicitly state that an accomplice must have the intent for the underlying crime, a majority of states adopting this language interpret this to be the meaning. [FN81]

In finding the proper standard to apply, the state courts face the same dilemma as the federal courts. [FN82] Most states are concerned about protecting those less culpable from facing the same penalty as the actual perpetrator. [FN83] ***335** This rule is more in line with general principles of criminal law. [FN84] This intent requirement aids in the fact finder's determination, as once intent is found, courts do not have to quibble over the level of assistance rendered. Today, most jurisdictions prefer this rule, and Louisiana falls in line with these jurisdictions.

VI. Louisiana

A. Generally

In Louisiana, the legal standard is that the accomplice have the intent for the underlying crime. An early Supreme Court decision which addressed the problem of setting the standard for the mental element of the accomplice was State v. Holmes. [FN85] In Holmes, the defendant, Holmes, assisted in the planning and execution of a robbery by providing the car for his threesome of criminals and helping to obtain a shotgun and shells. Holmes and a friend (with the shotgun under his coat) entered a store wearing ski masks. As Holmes tried to remove the security guard's pistol, the guard reached for his gun. Holmes' friend shouted, "[d]on't try it," and then shot the guard in the face. Holmes unholstered the pistol, retrieved the money from the store safe, and pistol whipped a customer. They then escaped and split the money.

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At trial, the court first had to define the legal requirement for an accomplice's mental state. The court found that the prosecution misstated the law when it intimated that "all that was necessary to establish the defendant's guilt of first degree murder was proof that the defendant was knowingly involved in the armed robbery." [FN86] The court found that "an individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state." [FN87] Since the mental element for first degree murder is "specific intent to kill or to inflict great bodily harm [[[,]" [FN88] Holmes himself must have had the specific intent to kill the guard, and his friend's intent could not be transferred to him. The court then concluded that the factual circumstances were sufficient to find that Holmes had the specific intent required. [FN89] Later cases state that ***336** they are following the same standard. Since the mental requirement of a given crime affects the analysis, these cases will be divided by looking at those crimes which, under Louisiana law, require "specific intent," and those which require "general intent."

B. Specific Intent Crimes

"Specific intent" is defined in Louisiana Revised Statutes 14:10(1) as "that state of mind which exists when . . . the offender actively desired the prescribed criminal consequences to follow his act or failure to act." [FN90] Therefore, "specific intent is present when from the circumstances the offender must have subjectively desired the prohibited result. . . ." [FN91] In order to determine the defendant's mental state his actions will have to be scrutinized, thereby making this a fact-intensive inquiry.

In State v. Pierre, [FN92] the Supreme Court reversed the defendant's conviction for manslaughter after finding that he did not have the specific intent to kill the victim. Here, defendant was tried for the second degree murder of a thirteen year old boy. [FN93] The facts surrounding the victim's rape and murder were sketchy, and contradictory testimony was given about the defendant's involvement. All that could be proven was that defendant was at the scene (there was contradictory testimony about whether defendant was in the house where the victim was raped or remained in a van), and there was no evidence that he aided in the murder (he did not participate in the victim's beating death). The court found there were no acts from which intent could be inferred, ***337** and that the "jurors could only speculate about the defendant's role" in the murder. [FN94]

Compare Pierre to State v. Meyers. [FN95] This case involved the drive-by shooting of a street corner drug dealer. The driver and the backseat passenger appealed their convictions of second degree murder, claiming that they lacked the specific intent to kill. The court once again defined the legal standard as the intent required for the underlying crime. Next, the court looked at the circumstances surrounding the crime and determined that the defendants did have the specific intent to kill. However, given the facts of the case the court's holding might be questioned.

In analyzing the case, the court found the following facts sufficient to infer the defendants' intent:

> neither [the driver] nor [the passenger] tried to assist the victim . . . after the shooting. They did not call the police to report the shooting or give any statement regarding the murder to anyone. [The driver] drove the Cutlass to the scene and [the passenger] watched the incident [through] the car window. [FN96]

The court acknowledged that there was "no direct evidence presented that either [man] knew that [the perpetrator] was armed"; however, it found that in the life of drug dealers this was a common event and that "the participants here all knew that [the perpetrator] intended to shoot [the victim]." [FN97]

In affirming the jury's decision, the court emphasized the fact that the defendants did not offer the victim assistance after the shooting as evidence of the defendants' intent. Such an inference of intent from nonaction could lead to troubling results, given that other inferences can also be drawn from the facts. For example, the defendants could have neglected to make a report for fear of prosecution. The state presented no evidence that either Meyers or Davis knew that the shooter was armed. Meyers and Davis could have merely intended to participate in a drug deal. Even if they knew of the perpetrator's intent to kill this is different from having the intent themselves. As the court itself stated, "it is not enough to find merely that [the perpetrator] had the necessary mental state, since this intent cannot be imputed to the accused." [FN98] However, the court found the circumstantial evidence sufficient to support the jury's finding of guilt.

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The mere presence of a passenger in Meyers is especially similar to Pierre in which the defendant's mental state was not sufficient to hold him liable as an aider and abettor. There, the crime committed was just as heinous, but the court did not consider the defendant's failure to assist the victim or file a report. In *338 Meyers, the court offers little justification for its failure to reverse the jury's determination. This is another example of a court confusing the legal standard by suggesting that knowledge of the perpetrator's intent is sufficient, while giving contradictory statements about requiring intent for the underlying crime. The court was willing to allow the jury to infer the defendant's "implicit intent" from his knowledge of the perpetrator's conduct. In Meyers, the court used the defendant's knowledge as a factor in determining intent, an analysis which would be more appropriate in finding accomplice liability for a general intent crime.

C. General Intent Crimes

Different proof of the mental state of the accomplice is required for general intent crimes. General intent is defined as the state of mind which exists "when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act." [FN99] Therefore, "general intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result." [FN100] Since the consequences only have to be "reasonably certain" to occur in general intent crimes, it will be less difficult to find that an accomplice has the requisite mental state for these types of crimes.

Two cases which illustrate how accomplice liability works with general intent crimes are State v. Smith [FN101] and State v. Hebert. [FN102] In Smith, the court reversed the defendant's conviction for armed robbery. [FN103] Two brothers were robbing a shoe store when one found a hammer behind a counter and used it to threaten the clerks. The brother who did not wield the hammer was convicted by the lower court as a principal to armed robbery. The appellate court focused on the fact that this brother did not aid or abet the other's use of the hammer.

However, in Hebert, the court upheld the defendant's conviction for armed robbery, finding the defendant did have the requisite mental element. There, the second circuit found the perpetrator's use of a gun was planned or reasonably expected to follow from the plan to rob the store. As Smith and Hebert illustrate, as long as some act points towards assistance given by the accomplice *339 to the perpetrator, courts will generally hold that the accomplice has the requisite mental element.

VII. Suggestions/Solutions

A. Type of Knowing Aid Given by the Accomplice

Many solutions have been given for providing a balance between deterrence and personal culpability. One solution would involve taking into account the degree to which the accomplice knowingly aided in the criminal scheme. [FN104] The initial drafters of the Model Penal Code made this suggestion, but it was rejected. [FN105] The benefit of taking into account the amount of aid given by the accomplice would be to limit the liability of the minor actor. [FN106] However, critics of this standard have argued that it is too vague. [FN107] Dressler argues that it will be hard for a jury to determine what "substantial" help is and thus, the intent requirement for the accomplice will remain a hazy one. [FN108]

B. Sentencing Guidelines

One way to avoid penalizing the less culpable accomplice to the same degree as the principal is through sentencing guidelines. [FN109] The jury must find the elements of the core offense present. Yet, the judge in his discretion applies the sentencing guidelines to determine the defendant's punishment.

Federal courts follow the Federal Sentencing Guidelines Manual promulgated by the United States Sentenc-

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ing Commission. [FN110] Under these guidelines, "each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward." [FN111] A judge begins with the offense level, and then adds or subtracts points from it according to the aggravating or mitigating circumstances in order to determine the punishment. Under the guidelines, an aider and abetter's ***340** "offense level is the same level as that for the underlying offense." [FN112] However, the judge may consider as a mitigating factor whether the defendant was a minimal or minor participant in determining whether to decrease the offense level. [FN113]

In Louisiana, the trial judge must consider Louisiana Code of Criminal Procedure article 894.1, which contains general sentencing guidelines, before imposing a sentence. [FN114] Where there is no mandatory minimum sentence, "[t] he trial judge is to be afforded wide discretion in the imposition of the sentences within statutory limits, and the sentence imposed should not be set aside in the absence of a manifest abuse of his discretion." [FN115] "The purpose of this article is to provide the trial court with standards so that it may individualize the sentence to fit the particular defendant . . . ." [FN116] Therefore, the judge may consider the mitigating fact that the defendant was only an accomplice.

A major criticism of accomplice liability is that the accomplice is being punished to the same extent as the actual perpetrator. [FN117] Under the sentencing guidelines, the judge in his discretion may determine that the accomplice was less blameworthy and therefore should receive a lesser punishment. One problem with sentencing guidelines may be that they allow the judge too much discretion if no mandatory minimum sentence exists. However, such guidelines give standards for sentencing "through a system that imposes appropriately different sentences for criminal conduct of differing severity." [FN118]

C. Criminal Facilitation Statutes

Some states make "assistance" a distinct criminal offense by promulgating facilitation statutes. [FN119] "These extend accessorial liability to persons who engage in conduct with the awareness that it will aid others to commit serious crimes, but treat such facilitation as a less grave offense than the crimes that are aided." [FN120] A statute such as this would "have the advantage of providing means whereby such persons, clearly less culpable than those directly participating in the crime, could be subjected to lesser and different penalties, just as has long been the case for the accessory after the fact." [FN121] Also, the Final Report of the National Commission on Reform of Federal Criminal Laws recognized the ***341** difficulty that the courts were facing by drafting a criminal facilitation statute and commenting that: "This section . . . would provide a legislative solution to the dilemma faced by a court which has to choose between holding a facilitator as a full accomplice or absolving him completely of criminal liability." [FN122] The standard adopted under this statute is that of the "knowing substantial assistance" of the accomplice. Thus, there is still the problem of determining when assistance has reached a "substantial" level. [FN123] However, this statute provides a standard that will produce just results by recognizing that the accomplice in this situation should be punished for his guilty knowledge and assistance, but to a lesser degree than the actual perpetrator.

VIII. Assisting Reckless/Negligent Conduct

A. In General

Whether to punish someone who assists the perpetrator in committing a criminally negligent crime is another problem that the courts have faced in the context of accomplice liability. [FN124] This situation often arises in the context of drunken driving offenses where the owner of a car gives the keys to someone obviously intoxicated. [FN125] Most courts hold that one can be charged as an accomplice to a recklessness/negligence crime; [FN126] however, a few courts find that this is a legal impossibility and refuse to allow accomplice liability. [FN127] In a negligence crime, such as negligent homicide, the drunk driver (the principal) ***342** does not necessarily intend to commit the crime, therefore the requirement that the accomplice have the intent to commit the underlying crime seems inconsistent in this type of scenario.

B. Other Jurisdictions

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1. Legal Impossibility

In State v. Etzweiler, [FN128] the New Hampshire court found that Etzweiler could not be charged as an accomplice to negligent homicide. [FN129] Etzweiler loaned his car to a co-employee whom he knew to be drunk. Ten minutes later, the co-employee who was driving recklessly struck a car, killing its two passengers. In rejecting the indictment charging Etzweiler as an accomplice to negligent homicide, the court recognized that the New Hampshire statute is based upon the Model Penal Code. [FN130] This court read Section III and Section IV of the New Hampshire statute together to find that under the code, "an accomplice's liability ought not to extend beyond the criminal purposes that he or she shares." [FN131] The court found that it would be a legal impossibility for Etzweiler to be an accomplice to negligent homicide:

> To satisfy the requirements of RSA 626:8 III, the State must establish that Etzweiler's acts were designed to aid [the co-employee] in committing negligent homicide. Yet under the negligent homicide statute, [the principal] must be unaware of the risk of death that his conduct created. . . . We cannot see how Etzweiler could intentionally aid [the ***343** principal] in a crime that [the principal] was unaware that he was committing. [FN132]

So, although Etzweiler loaned his car to an intoxicated person, he faced no consequences for those actions. [FN133]

2. Permissible Result

Other states take a differing view and hold that one can be convicted as an accomplice to negligence crimes. The Colorado Supreme Court in People v. Wheeler [FN134] reversed the trial court's finding that criminally negligent homicide by an accomplice is not a cognizable crime. [FN135] The trial court found that since the accomplice must know that the principal intended to commit the crime, it would be impossible for the complicitor to know that the "principal intended to perpetrate an unintentional killing." [FN136] However, the supreme court recognized that the complicity statute does not prescribe a separate crime, but is a definitional statute, and that the "intent to promote or facilitate the commission of the offense" of which the statute speaks is the intent to promote or facilitate the act or conduct of the principal. [FN137]

> Therefore, for a person to be guilty of criminally negligent homicide through a theory of complicity, he need not know that death will result from the principal's conduct because the principal need not know that. However, the complicitor must be aware that the principal is engaging in conduct that grossly deviates from the standard of reasonable care and poses a substantial and unjustifiable risk of death to another. In addition, he must aid or abet the principal in that conduct and, finally, death must result from that conduct. [FN138]

***344** New York was faced with a similar case in People v. Abbott. [FN139] Here, two men were drag racing down a public road when one of their cars struck a nonparticipating vehicle, killing all of its occupants. The driver of the car that avoided the collision was convicted of criminally negligent homicide. As in Wheeler, the state argued that this driver was liable because he "intentionally aided . . . in the criminally negligent conduct which resulted in the deaths . . . ." [FN140] The court found that to hold one liable as an accomplice for the crime of criminally negligent homicide, the State must prove: (1) that the accomplice "shares the requisite culpable mental state for the crime" (here criminal negligence), and (2) that he "intentionally [aided] in its commission." [FN141] Here, the speed of the driver's vehicle and the fact that his conduct allowed the events to take place were sufficient to show that the legal standard was met.

C. Louisiana

In State v. Martin, [FN142] a case factually similar to Abbott, the Louisiana Supreme Court upheld a drag-racing defendant's conviction for negligent homicide. The court found that the state must prove that the accomplice was: "1) criminally negligent and thereby had the requisite mental state; and 2) 'concerned' in the commission of a negligent homicide." [FN143] The court further found no error with the jury's conclusion that the requirement of both prongs had been met. [FN144] Louisiana courts have analyzed this situation by holding the "accomplice" liable for his own conduct. Therefore, the accomplice's liability lies in his own reckless mental

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state and action.

Thus, in a case of loaning a car to a drunk driver, the issue would apparently be whether one was grossly negligent in engaging in that conduct. Another factor in the independent liability analysis is causation. The Martin opinion, in an apparently favorable reference to State v. Petersen, [FN145] suggests that the defendant might not be liable for negligent homicide if a co-racer were killed, rather than a third person. [FN146] Similarly, one could determine whether the supplier of the car or the weapon was a substantial cause in producing the result.

*345 D. Solutions

Many of the same policies for and against finding accomplice liability previously discussed apply to negligence crimes. [FN147] Crime deterrence policies suggest that the accomplice should be held liable. The owner of the car will think twice before recklessly handing over his or her car keys to a drunk. However, there has been criticism that "[b]ecause aiding and abetting so clearly requires knowing and willful participation in an offense with an intent that the offense succeed, expanding the doctrine to reach an offense based on negligence marks a radical departure from precedent." [FN148]

Some states look to the actual statute on accomplice liability to find that the accomplice must intend the commission of the offense. [FN149] However, that statute alone does not impose liability. This analysis leads to the anomalous conclusion that the accomplice must intend an unintentional crime-a legal impossibility. The better rule will require courts to examine the underlying crime to define the mental element for the accomplice. The prosecution will have to prove that the accomplice was negligent in aiding the conduct of the perpetrator. In a negligence crime, the state of mind of the accomplice must be a gross deviation from the standard of care of a reasonable man under similar circumstances. [FN150] Another approach would be to bypass the complicity theory and to hold the "accomplice" liable for his own conduct. [FN151]

IX. Conclusion

A person may be convicted of a crime he or she did not physically commit or intend to commit. The standard of knowledge versus intent of the accomplice towards the core offense is determinative of accomplice liability in some scenarios. The example in which a merchant sells goods to a buyer knowing that the buyer intends to use the goods to commit a crime can be analyzed under different theoretical bases for imposing accomplice liability. The seller cannot be seen as a consenting party under an agency theory. Neither has the seller "forfeited" his or her personal identity. Nevertheless, the seller has, however remotely, caused harm to society. This harm and the deterrence needed to prevent it has to be balanced with the seller's own personal culpability.

Punishing the less culpable accomplice to a lesser degree could be achieved by legislative enactment of a facilitation statute. With such a statute, the jury *346 would get to determine if the accomplice met the elements of this lesser offense. The same result would be achieved through the use of sentencing guidelines where the accomplice's minor role could be considered a mitigating factor. However, with this solution, it is within the discretion of the judge to determine the defendant's punishment. Either method would achieve the goals of deterrence without compromising the principle of personal culpability.

With respect to negligence crimes, the best result would be to hold the accomplice liable if he or she aided the perpetrator's conduct with a reckless state of mind. This solution would have the consequence of holding liable those whose actions show disregard for life but who do not actually commit the crime. As some commentators have argued, this is like holding the person liable for the substantive crime. [FN152] When these changes are implemented, both policies of deterrence and holding one liable only for one's own personal culpability will be met.

[FN1]. See William Lawrence Clark and William L. Marshall, A Treatise on the Law of Crimes § 5.00, at 260-67 (7th ed. 1967). Note that there is no mens rea requirement for a strict liability offense or felony murder. Id. § 5.10, at 303-13. See also Rollin M. Perkins, Criminal Law § 1, at 67-72 (3d ed. 1982).

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[FN2]. See 2 Wayne R. Lafave & Austin W. Scott, Jr., Criminal Law § 6.7, at 576 (2d ed. 1986).

[FN3]. See Grace E. Mueller, Note, The Mens Rea of Accomplice Liability, 61 S. Cal. L. Rev. 2169, 2169-70 (1988).

[FN4]. Id. at 2172.

[FN5]. The Louisiana Criminal Code does not use the term "accomplice." The Code provides: "All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals." La. R.S. 14:24 (1997). Similarly the federal statute provides: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." 18 U.S.C. § 2 (1994). In other states and in the Model Penal Code, the term "accomplice" is defined by statute, and for the purposes of this paper the term "accomplice" will be used to identify an aider or abettor to a crime (a person who in Louisiana would be a "principal").

[FN6]. See Mueller, supra note 3, at 2172.

[FN7]. Parties were divided into four categories: "(1) principal in the first degree, (2) principal in the second degree, (3) accessory before the fact, and (4) accessory after the fact." Perkins, supra note 1, at 727.

[FN8]. Id. at 738.

[FN9]. Id. at 743. (Perkins states: "If the charge is first degree murder based upon an alleged deliberate and premeditated killing, the abettor is not guilty of this degree of the crime unless he either acted upon a premeditated design to cause the death of the deceased or knew that the perpetrator was acting with such an intent, and the same may be said of an assault with an intent to kill." (emphasis added) (footnotes omitted)).

[FN10]. See Louis Westerfield, The Mens Rea Requirement of Accomplice Liability in American Criminal Law-Knowledge or Intent, 51 Miss. L.J. 177, 177-79 (1980).

[FN11]. Id.

[FN12]. See Joshua Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions To An Old Problem, 37 Hastings L.J. 91, 111 (1985).

[FN13]. Westerfield, supra note 10, at 178.

[FN14]. Id.

[FN15]. Dressler, supra note 12, at 113.

[FN16]. Id. at 112-13. For example, in a juvenile gang, the leader may be the most dangerous, and therefore "less easily deterrable than other accomplices." This type of accomplice may need "greater punishment" than his or her followers in order to be deterred.

[FN17]. Id. at 113.

[FN18]. Westerfield, supra note 10, at 177.

[FN19]. Dressler, supra note 12, at 108.

[FN20]. Westerfield, supra note 10, at 176.

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[FN21]. Id. See also Dressler, supra note 12; Mueller, supra note 3.

[FN22]. See Dressler, supra note 12, at 111. See also Glanville Williams, Criminal Law: The General Part § 126, at 381-83 (2d ed. 1961).

[FN23]. Warren A. Seavey, Handbook of the Law of Agency § 8, at 11 (1964).

[FN24]. Dressler, supra note 12, at 110.

[FN25]. Id. (footnotes omitted).

[FN26]. Id. at 111.

[FN27]. Id.

[FN28]. Id. at 116 ("Yet, it is precisely because the criminal justice system stigmatizes the guilty and metes out punishment for wrongdoing that the common law usually rejects forfeiture, and instead evaluates legal guilt and apportions punishment based on the degree of personal responsibility . . . . Rejection of the forfeiture doctrine makes it less likely that criminals will be treated inhumanely, or that rights perceived as fundamental will be denied.").

[FN29]. Id. at 102.

[FN30]. Id. at 108. See also Sanford H. Kadish, Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine, 73 Calif. L. Rev. 323, 329-36 (noting that causation cannot be used to blame the accomplice as the perpetrator's free will is the cause of the harm).

[FN31]. Dressler, supra note 12, at 111.

[FN32]. Dressler, supra note 12, at 108.

[FN33]. Mueller, supra note 3, at 2174-76.

[FN34]. See supra text accompanying notes 7-9.

[FN35]. Mueller, supra note 3, at 2173-74; Westerfield, supra note 10, at 172-73; see also Model Penal Code § 2.06 commentary at 312 n.42 (1985) ("if anything, the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.").

[FN36]. Model Penal Code § 2.06 commentary at 316 (1985).

[FN37]. See supra text accompanying notes 10-18.

[FN38]. Westerfield, supra note 10, at 177.

[FN39]. Id.

[FN40]. Model Penal Code § 2.06 commentary at 315-16 (1985).

[FN41]. Model Penal Code § 2.06(3)(a) commentary at 314 (1985).

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[FN42]. Model Penal Code § 2.06 commentary at 318 (1985) (The Institute favored this narrow formulation over a broad standard of knowledge "in order not to include situations where liability [would be] inappropriate.").

[FN43]. 18 U.S.C. § 2 (1994).

[FN44]. See, e.g., infra text accompanying notes 53-66.

[FN45]. Backun v. United States, 112 F.2d 635 (4th Cir. 1940). See also Bacon v. United States, 127 F.2d 985 (10th Cir. 1942) (affirming Bacon's conviction for transporting intoxicating liquor). Bacon was the owner of a liquor store which sold whiskey to Fox, a bootlegger. The court specified the degree of knowledge required of the seller by stating that: "Mere possibility or suspicion that goods lawful in themselves might be used unlawfully is not enough to make one an aider and abettor. More is required than that. He must know or have reason to know that the goods which he sells are and will be used in an unlawful venture." Id. at 987.

[FN46]. Id. at 636.

[FN47]. Id. at 638.

[FN48]. Id. at 637.

[FN49]. Id. at 637. See also Borgia v. United States, 78 F.2d 550, 555 (9th Cir. 1935); Vukich v. United States, 28 F.2d 666, 669 (9th Cir. 1928); Anstess v. United States, 22 F.2d 594, 595 (7th Cir. 1927); Pattis v. United States, 17 F.2d 562, 566 (9th Cir. 1927).

[FN50]. United States v. Eberhardt, 417 F.2d 1009, 1013 (4th Cir. 1969).

[FN51]. Id. at 1013.

[FN52]. Backun, 112 F.2d at 637.

[FN53]. 100 F.2d 401 (2d Cir. 1938).

[FN54]. Id. at 402 (emphasis added).

[FN55]. See Lafave, supra note 2, at 583 (stating that other courts "have tended to accept the Peoni limitation on accomplice liability").

[FN56]. United States v. Hill, 55 F.3d 1197, 1200 (6th Cir. 1995).

[FN57]. 18 U.S.C. § 2 (1994).

[FN58]. 676 F.2d 841 (D.C. Cir. 1982).

[FN59]. Id. at 849 (citing United States v. Staten, 581 F.2d 878, 886-87 (D.C. Cir. 1978)) (emphasis added).

[FN60]. See supra text accompanying notes 45-49.

[FN61]. 75 F.3d 552 (9th Cir. 1996).

[FN62]. Id. at 555.

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[FN63]. Id. at 556. Under the natural and probable consequences doctrine the accomplice is liable for all natural and probable consequences of the criminal scheme which he encouraged or aided. Lafave, supra note 2, at 590.

[FN64]. Id.

[FN65]. See supra text accompanying notes 45-63. This move takes place chronologically from earlier cases such as Backun and Eberhardt (which suggested that knowledge of the accomplice would be sufficient) to later cases like Raper (where accomplice had to intend the crime).

[FN66]. See Westerfield, supra note 10, at 182.

[FN67]. Wash. Rev. Code Ann. § 9A.08.020(3)(a)(ii) (West 1988) provides that "a person is an accomplice of another person in the commission of a crime if: With knowledge that it will promote or facilitate the commission of the crime, he . . . aids or agrees to aid such other person in planning or committing it." See also 17 Cal. Jur. 3d (Rev.) Part 1, Criminal Law § 105.

[FN68]. See Ala. Code § 13A-2-23 (1994); Ark. Code Ann. § 5-2-403 (Michie 1997); Colo. Rev. Stat. Ann. § 18-1-603 (West Supp. 1997); Del. Code Ann., tit.11, § 271 (1995); Haw. Rev. Stat. Ann. § 702-222 (Michie 1994); N.D. Cent. Code § 12.1-03-01 (1997); Ore. Rev. Stat. § 161.155(2) (1990); Pa. Stat. Ann. tit. 18, § 306(c)(1) (West 1998).

[FN69]. People v. Green, 181 Cal. Rptr. 507, 509-10 (Cal. Ct. App. 1982).

[FN70]. Id. at 510; People v. Standifer, 113 Cal. Rptr. 653 (Cal. Ct. App. 1974); People v. Germany, 116 Cal. Rptr. 841 (Cal. Ct. App. 1974).

[FN71]. Green, 181 Cal. Rptr. at 510-11 (emphasis added).

[FN72]. People v. Yarber, 153 Cal. Rptr. 875 (Cal. Ct. App. 1979); People v. Petty, 179 Cal. Rptr. 413 (Cal. Ct. App. 1981); People v. Brown, 172 Cal. Rptr. 221 (Cal. Ct. App. 1981).

[FN73]. Green, 181 Cal. Rptr. at 515 (Miller, J., concurring).

[FN74]. Id. at 515 (Miller concurring).

[FN75]. State v. Mas, No.33802-1-I, 1997 WL 258450 (Wash. Ct. App. May 19, 1997); State v. Bockman, 682 P.2d 925 (Wash. Ct. App. 1984); People v. King, 534 N.W.2d 534 (Mich. Ct. App. 1995); People v. Partridge, 535 N.W.2d 251 (Mich. Ct. App. 1995).

[FN76]. Mas, 1997 WL 258450 at 7.

[FN77]. King, 534 N.W.2d at 536-37.

[FN78]. Mas, 1997 WL 258450 at 8.

[FN79]. King, 534 N.W.2d at 538 (citing People v. Karst, 360 N.W.2d 206 (Mich. 1984)).

[FN80]. Model Penal Code § 2.06, Comments, at 310 (1985).

[FN81]. See State v. Easton, 577 S.W.2d 953 (Mo. Ct. App. 1979); State v. Soares, 815 P.2d 428, (Haw. 1991); Robinson v. State, 665 S.W.2d 890 (Ark. Ct. App. 1984). See also Mueller, supra note 3, at 2177-82 (giving

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examples of problems with interpreting the Model Penal Code).

[FN82]. See supra text accompanying notes 43-66.

[FN83]. See supra text accompanying notes 72-74.

[FN84]. See supra text accompanying note 19.

[FN85]. State v. Holmes, 388 So. 2d 722 (La. 1980). See also State v. McAllister, 366 So. 2d 1340 (La. 1978). In State v. McAllister the court affirmed the defendant's conviction of manslaughter and disagreed with the defendant's challenge that Louisiana Revised Statutes 14:24 was vague, over broad, and denied equal protection and due process. The court reiterated the fact that the person is not charged with violating Louisiana Revised Statutes 14:24 as this statute merely defines principals; however, the person is charged with the substantive offense. The statute defining the substantive offense determines the mental element.

[FN86]. Holmes, 388 So. 2d at 725.

[FN87]. Id. at 726.

[FN88]. La. R.S. 14:30 (1997).

[FN89]. Holmes, 388 So. 2d at 728 ("[S]pecific intent is a state of mind and, as such, it need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant." (citing State v. Williams, 383 So. 2d 369 (La. 1980)). La. R.S. 15:438 (1992) provides: "The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."

Holmes, 388 So. 2d at 728 (Marcus, J., concurring in the result) (Marcus, without reasoning, questioned the legal standard imposed by the majority of requiring the principal to have the intent of the substantive statute.) (Dennis, J., dissenting) (Dennis agreed with the legal standard imposed by the majority but found that under the facts Holmes did not have the requisite specific intent. He found that Holmes' act of "attempting to unholster the guard's pistol" was more consistent with sparing his life. Also, Holmes had no time to object to his friend's actions. Lastly, Holmes would not have wanted the shot fired since Holmes was standing right beside the guard.). The disagreement between the majority and the dissent show just how difficult it can be to infer a person's mental element from the surrounding circumstances even if one agrees with the legal standard.

[FN90]. La. R.S. 14:10(1) (1997) (emphasis added).

[FN91]. Holmes, 388 So. 2d at 726 (quoting State v. Daniels, 109 So. 2d 896, 899 (La.1959)).

[FN92]. State v. Pierre, 631 So. 2d 427 (La. 1994). Compare to State v. Jasper, 677 So. 2d 553 (La. App. 2d Cir. 1996), writ denied, 688 So. 2d 521 (1997), reh'g denied, 693 So. 2d 790 (1997), where court found that the defendant did have the specific intent to kill required for second degree murder. The court distinguished Pierre by finding that there, the defendant grabbed a weapon and went looking for the victim. More importantly, witnesses saw defendant shooting into the car in which the victim was a passenger.

[FN93]. La. R.S. 14:30.1(1) (1997).

[FN94]. Pierre, 631 So. 2d at 429.

[FN95]. State v. Meyers, 683 So. 2d 1378 (La. App. 5th Cir. 1996).

[FN96]. Id. at 1384.

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[FN97]. Id. at 1384 (emphasis added).

[FN98]. Id. at 1382 (citing State v. Holmes, 388 So. 2d 722 (La. 1980)).

[FN99]. La. R.S. 14:10(2) (1997) (emphasis added).

[FN100]. Holmes, 388 So. 2d at 726 (quoting State v. Daniel, 109 So. 2d 896, 899 (La. 1959) (overruled on other grounds)).

[FN101]. 450 So. 2d 714 (La. App. 4th Cir. 1984),

[FN102]. 688 So. 2d 612 (La. App. 2d Cir. 1997).

[FN103]. Smith, 450 So. 2d at 716. State v. Battieste, 597 So. 2d 508 (La. App. 1st Cir. 1992), vacated in part on other grounds, 604 So. 2d 960 (La. 1992) (stating that armed robbery is a general intent crime, citing State v. Payne, 540 So. 2d 520 (La. App. 1st Cir., writ denied, 546 So. 2d 169 (La. 1989)).

[FN104]. See Dressler, supra note 12, at 121-24.

[FN105]. Model Penal Code § 2.04(3)(b), Tentative Draft No. 1 (1953).

[FN106]. Id. at cmt. 3. See also Lafave, supra note 2, at 583.

[FN107]. See Lafave, supra note 2, at 584 (citing Model Penal Code § 2.06, cmt. 6(c) n.58 (1985)).

[FN108]. Dressler, supra note 12, at 122. However, difficult determinations are left to the common sense of the jury all of the time. Dressler instead has suggested that the test should be whether the accomplice caused the crime. Id. at 140. "A causal accomplice is one but for whose acts of assistance the social harm would not have occurred when it did." Id. at 124-25. If the accomplice did not cause the crime, then he would receive a lesser punishment. Dressler proposes that the element of causation be added to the test in order to "make persons guilty of the harm they cause." Id. at 125-26. However, this formulation does not clarify the requisite mental element of the accomplice as the degree of culpability must still be determined.

[FN109]. See U.S. Sentencing Guidelines Manual (1997).

[FN110]. Id.

[FN111]. Id. at Ch. 2, intro. comment (1995).

[FN112]. Id. at § 2X2.1.

[FN113]. Id. at § 3B1.2.

[FN114]. La. Code Crim. P. art. 894.1.

[FN115]. State v. Stoner, 438 So. 2d 1275, 1276 (La. App. 2d Cir. 1983), writ denied, 444 So. 2d 118 (1984) (citing State v. Abercrumbia, 412 So. 2d 1027 (La. 1982).

[FN116]. Id. at 1277.

[FN117]. See Mueller, supra note 3, at 2172.

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[FN118]. U.S. Sentencing Guidelines Manual Ch. 1, Pt. A, intro. comment (1995).

[FN119]. Ky. Rev. Stat. Ann. § 506.080 (Banks-Baldwin 1995); N.Y. Penal Law §§ 115.00-115.15 (McKinney 1998).

[FN120]. Model Penal Code § 2.06, cmt. 6(c) (1985).

[FN121]. Lafave, supra note 2, at 584.

[FN122]. National Commission on Reform of Federal Criminal Laws, Final Report-Proposed New Federal Criminal Code § 1002 commentary at 68 (1971). Section 1002 defines criminal facilitation as requiring: (1) knowing substantial assistance to a person intending to commit a felony; (2) that the other person commit the contemplated crime or a like or related felony; and (3) that the assistance provided be in fact employed in committing the crime.

[FN123]. See supra text accompanying notes 104-108.

[FN124]. La. R.S. 14:12 (1997) reads in full: "Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances."

[FN125]. See Mueller, supra note 3, at 2189.

[FN126]. State v. Garza, 916 P.2d 9 (Kan. 1996); People v. Wheeler, 772 P.2d 101 (Colo. 1989); People v. Abbott, 445 N.Y.S.2d 344 (N.Y. App. Div. 1981).

[FN127]. Echols v. State, 818 P.2d 691 (Alaska Ct. App. 1991); State v. Etzweiler, 480 A.2d 870 (N.H. 1984). The Model Penal Code section 2.06(4) purports to provide for this situation by "[making] it clear that complicity in conduct causing a particular criminal result entails accountability for that result so long as the accomplice is personally culpable with respect to the result to the extent demanded by the definition of the crime." Model Penal Code § 2.06, cmt. 7 (1985) (emphasis added). Model Penal Code section 2.06(4) states: "When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."

[FN128]. 480 A.2d 870, 875 (N.H. 1984).

[FN129]. See also Echols v. State, 818 P.2d 691 (Alaska Ct. App. 1991) where the court reversed the defendant's conviction of assault in the first degree. The defendant was charged under Alaska's complicity statute for soliciting the assault. Alaska Stat. § 11.16.110(2) (Michie 1996) requires the accomplice have the intent to promote the commission of the offense. The mental element for the substantive offense of the assault required "that [the] person recklessly causes serious physical injury . . . ." Alaska Stat. § 11.41.200 (a)(1) (Michie 1996). The court started with the premise that "the accomplice must intend the commission of the particular crime charged." Echols, 812 P.2d at 692. The court then pointed out that although the Model Penal Code is one of the sources of the Alaska criminal code that their code had no provision similar to the Model Penal Code section 2.06(4). The court admitted that if such a provision was enacted it would support the State's position that the defendant need only act with recklessness towards the conduct causing the result. Echols, 818 P.2d at 695.

[FN130]. N.H. Rev. Stat. Ann. § 626:8 III (Michie 1996) provides: "A person is an accomplice of another person in the commission of an offense if: (a) With the purpose of promoting or facilitating the commission of the offense, he . . . aids . . . such other person in planning or committing it." Etzweiler, 480 A.2d at 873. N.H. Rev. Stat. Ann. § 626:8 IV (Michie 1996) states: "When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with

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the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense." Etzweiler, 480 A.2d at 874.

[FN131]. Etzweiler, 480 A.2d at 874.

[FN132]. Id. at 874-75.

[FN133]. Other Justices found that the accomplice liability statute could be interpreted differently. Justice Souter, concurring, found that Section IV of the statute should be read separately from Section III, therefore providing for liability in a situation where the "accomplice in 'conduct' causing a particular result is also an accomplice in the commission of the offense defined by reference to that result." However, he found that Section IV was too unclear as to "give . . . notice of its intended effect and is thus unenforceable." 480 A.2d at 876. Chief Justice King, dissenting, found that Section IV was sufficiently clear and that it would permit the State to charge Etzweiler as an accomplice to negligent homicide. He stated that the provision required the accomplice to act "purposefully with respect to the principal's criminal conduct," and that the accomplice must have the same state of mind as the principal towards the result (here, criminal negligence). 480 A.2d at 881 (emphasis in original). This Justice felt that this interpretation was the only way to give meaning to both Section III and Section IV.

[FN134]. 772 P.2d 101 (Colo. 1989).

[FN135]. Id. at 104-05.

[FN136]. Id. at 105.

[FN137]. Id. at 104 (emphasis added).

[FN138]. Id. at 105.

[FN139]. People v. Abbot, 445 N.Y.S.2d 344 (N.Y. App. Div. 1981). See also State v. Garza, 916 P.2d 9 (Kan. 1996). Garza and another man were shooting at each other when a bullet from the other man's gun hit the victim. Garza was charged with aggravated battery. The court found that "[g]iving assistance or encouragement to one who it is known will thereby engage in conduct dangerous to life is sufficient for accomplice liability as an aider or abettor as to crimes defined in terms of recklessness or negligence." Id. at 15.

[FN140]. Abbott, 445 N.Y.S.2d at 346.

[FN141]. Id. at 346-47.

[FN142]. 539 So. 2d 1235 (La. 1989).

[FN143]. Id. at 1238.

[FN144]. Id.

[FN145]. 526 P.2d 1008 (Or. 1974) (manslaughter conviction reversed where victim was a knowing and voluntary participant in drag race).

[FN146]. Martin, 539 So. 2d at 1239.

[FN147]. See supra text accompanying notes 7-32.

[FN148]. Major Frank W. Fountain, Aiding and Abetting Involuntary Manslaughter and Negligent Homicide:

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An Unprincipled Extension of Principald Liability, Army Law. 3, 5 (Nov. 1991).

[FN149]. Especially those with complicity statutes that have language requiring that the accomplice have the intent to promote/facilitate the commission of the crime. See Echols v. State, 818 P.2d 691, 692 (Alaska Ct. App. 1991).

[FN150]. La. R.S. 14:12 (1997).

[FN151]. Fountain, supra note 148, at 9.

[FN152]. See supra note 151.

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Mental elements under article 30 of the Rome Statute of the International Criminal Court: a comparative analysis

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Prosecutor v Bemba Gombo (Jean-Pierre) (Decision on Confirmation of Charges) Unreported June 15, 2009 (ICC)

***325 Abstract** The Rome Statute of the International Criminal Court is the first international instrument that includes a general provision on the mental element required before criminal responsibility for an international crime attaches (Article 30). This article analyses that provision from a comparative perspective, drawing on common law and civil law understandings of intent. It analyses the jurisprudence and commentary concerning Article 30 in detail, and attempts to draw some conclusions as to what aspects of the common law and civil law concepts of intent are covered by it.

I. INTRODUCTION

Prior to the Rome Statute of the International Criminal Court (Rome Statute),1 no international statute, code or charter included a general provision on the mental element required before criminal responsibility for an international crime would attach. The Nuremberg and Tokyo Charters,2 which governed the trials of the major German and Japanese war criminals following the Second World War, contained no such provision. Nor did Control Council Law No 10,3 which governed the subsequent trials of war criminals in post-war occupied Germany. The Statutes of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR)4 did not contain such a provision, nor did the various Draft Codes of Crimes against the Peace ***326** and Security of Mankind prepared by the United Nations International Law Commission.5 This omission was not repeated with the Rome Statute, which includes a specific provision (Article 30) on the mental element required for crimes within the jurisdiction of the International Criminal Court (ICC). This makes Article 30 the first of its kind.

Article 30 of the Rome Statute provides that:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

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(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

Thus, Article 30 represents an ambitious attempt at codification of the rules relating to the mental element in international criminal law. As Pisani states, it is 'designed to bring some consistency into this area of the law'.6 First, it aims to set a default rule that applies, in principle, to all crimes included in the Rome Statute. It therefore requires that, unless otherwise provided, the material elements of a crime be committed with 'intent and knowledge'. Second, it seeks to provide a comprehensive definition of these concepts of 'intent' and 'knowledge' in the two subsequent paragraphs.

While the mere presence of Article 30 in the Rome Statute is a step forward compared to previous international statutes, codes and charters that did not include any such provision, the article has been subject to criticism from all corners of academia. Cassese describes it as 'confusing and ambiguous',7 while Werle and Jessberger state that it 'raises more questions than answers'.8 Satzger describes it as 'an extremely complex rule' that is 'quite clearly a ***327** compromise between continental and Anglo-American criminal law'.9 Eser, on the other hand, while recognizing that Article 30 'can certainly not be called a masterpiece of legal architecture', considers that 'it provides sufficient building blocks for a meaningful construction of "intention"'.10

This article analyses Article 30 of the Rome Statute from a comparative perspective, by drawing on the different approaches taken by two broad groupings of States: the common law grouping, and the civil law grouping. The primary systems drawn on as examples of the common law grouping are the United States, the United Kingdom and Australia,11 while that drawn on as an example of the civil law grouping is Germany.12 The article begins with a general introduction to the concept of intent, as it is understood in both civil law and common law domestic legal systems. This is necessary in order to understand the approach taken at Rome because, as Kelt and von Hebel explain, Article 30 'necessarily consisted of compromises between different concepts or norms from various legal systems'.13 Part III examines the provisions of Article 30 in detail, and attempts to draw some conclusions as to what aspects of the common law and civil law concepts of intent are covered by it. Part IV discusses the exceptions to Article 30, and the article concludes with some opinions on the appropriate direction of future jurisprudence and a possible amendment to the Rome Statute.

***328** II. THE CONCEPT OF INTENT IN COMMON LAW AND CIVIL LAW

A. Gradations of Intent

In all domestic criminal law systems, the general rule (although it is not without exceptions) is that conduct must be committed with 'intent' in order for it to constitute a crime.14 Conduct that is unintentional, or that is committed negligently, will constitute a crime only in limited circumstances (usually, but not always, where specifically provided for by statute). While all systems require 'intent', the definition of intent varies widely depending on the particular domestic system in question. Furthermore, it is rare for a single definition of intent to be applied to every crime. Rather, domestic criminal law systems recognize different *gradations* or *degrees* of intent. The same goes for international criminal law. Each gradation or degree has two components: a cognitive component (the element of awareness) and a volitional component (the element of desire).15 What sets each gradation or degree of intent apart is the relative level of each component.

Generally speaking, common law systems recognize three gradations of intent: direct intent, oblique intent and recklessness. In addition, certain crimes can be committed negligently, or even unintentionally (eg strict or absolute liability offences). Civil law countries similarly recognize three gradations of intent: *dolus directus* in the first degree, *dolus directus* in the second degree and conditional intent (generally referred to as *dolus eventualis).* In addition, civil law countries recognize two forms of negligence (advertent and inadvertent). Furthermore, both common law and civil law systems recognize some form of special (or additional) intent for particular crimes.16

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Table 1 represents my attempt to provide a visual comparison of the different gradations of intent recognized in the domestic criminal justice systems of common law and civil law countries, in descending order of culpability.17 Inevitably, it only gives a broad outline of these gradations, as there is no one 'common law' or 'civil law' approach to intent. In fact, approaches differ considerably among civil law countries (and, to a lesser extent, between common

Table 1. Gradations of intent under common law and civil law

Common law	**Civil law**
Special (additional) intent	Special (additional) intent (besondere Absicht or dolus specialis)
Direct intent	Direct intent in the first degree (Absicht or dolus directus in the first degree)
V = Very High C = Low %Y(45)27	V = Very High C = Low %W6D
Oblique intent	Direct intent in the second degree (direkter Vorsatz or dolus directus in the
V = Low C = High	second degree)
	V = Low C = Very High %W6D
%W6D	Conditional intent (bedingter Vorsatz or dolus eventualis)
Recklessness V = Low C = Low/Moderate	V = Low C = Moderate %W6D
	Advertent (conscious) negligence (bewusste Fahrlässigkeit)
%W6D (Inadvertent/unconscious) negligence V = None C = None	V = Low C = Low %W6D Inadvertent (unconscious) negligence V = None C = None

*329 law countries).18 While some countries recognize every gradation listed, others do not recognize them all.19 Similarly, while some countries define certain gradations in a particular way, other countries adopt very different definitions.20 Therefore, the borders between each gradation should not be viewed as clear *330 lines, but rather as boundaries that move, depending on the particular domestic legal system one is examining and the time at which it is examined.

In the same way, there is no one view on how the various gradations of intent recognized by common law and civil law systems line up when compared directly. Commentators disagree, for example, on whether recklessness (in common law) and *dolus eventualis* (in civil law) are really different, and in what way. Thus, the placement of certain common law gradations next to (or above or below) certain civil law gradations should not be viewed as definitive, but rather as a starting point for the following discussion. In fact, it is questionable whether it is even possible to compare the different gradations directly, as the concepts are so different. Instead of comparing *concepts,* it may therefore be more accurate to view the following table as comparing the likely *outcomes;* in other words, comparing whether an individual in a particular

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case would be considered to fulfil the definition of the relevant gradation if that same individual was to come before each domestic criminal justice system.

Before examining Table 1, a few more explanations are required. First, in addition to the English terms for each of the civil law gradations of intent, I have provided both the German and Latin terms, which are more commonly used by commentators and courts. Second, beneath the name of each gradation, an indication has been given of the relative level of the volitional (V) and cognitive (C) components required for each. As will be seen, both the volitional and cognitive components are present for all gradations, except for (inadvertent) negligence.

B. Direct Intent (in the First Degree)

Putting aside the question of special or additional intent, the highest gradation or level of intent for both civil law and common law systems is characterized by the perpetrator's *purposeful will* to bring about the prohibited result. This gradation is captured by the following example:

P (the perpetrator) is a sniper who wishes to kill *V* (the victim). *V* is standing inside a building a significant distance away. *P* shoots in the direction of *V* when *V* passes in front of the window of the building. The bullet shatters the window, and hits *V*. *V* dies as a result of the gunshot wound.

In this example, *P* has a strong desire to kill *V;* thus, the volitional component is very high. He is not sure whether, by his conduct, he will succeed in killing *V* (that is, whether he can hit his target at such a distance), but this does not matter, as this gradation of intent is still satisfied even where the cognitive component is low.

This gradation is generally known in civil law systems as direct intent (or *dolus directus)* in the first degree. In German law, direct intent in the first degree *(Absicht)* requires that the perpetrator 'have the completion of the ***331** offence (element) as his purpose'.21 The perpetrator will be deemed to have this level of intent 'also with regard to any fact that is a necessary or indispensable interim or ulterior consequence of his primary purpose' (eg shattering the window in the example above).22 As to the cognitive component, in German law it is not necessary that the perpetrator be certain that the prohibited result will occur (that is, it is not necessary that the perpetrator be certain that he will succeed in killing *V*).23

This gradation is known in some common law systems (eg the US) as acting 'purposely', while other common law countries (eg the UK and Australia) refer to it simply as acting 'intentionally'. To avoid confusion, I have adopted the more academic title for this gradation: direct intent. As to the content of this gradation in common law, the US Model Penal Code provides that a person acts 'purposely' when it is his or her 'conscious object' to engage in conduct or cause a result.24 Similarly, the Commonwealth Criminal Code in Australia provides that a person acts with 'intention' if he or she 'means to' engage in conduct or to bring about a result.25 Under English common law, this gradation covers cases where an individual acts 'in order to bring about a result'.26 As with the same gradation under civil law, where a person acts in order to achieve a particular purpose, knowing that this cannot be done without causing another result (eg shattering a window), he or she must be held to intend to cause that other result (whether it be a pre-condition for, or a necessary concomitant of, the first result).27

C. Oblique Intent, or Direct Intent in the Second Degree

The second gradation or level of intent for both civil law and common law systems does not require the same purposive degree as the first gradation. This gradation is captured by the following example:

P wishes to kill *V* by bombing the building in which *V* is located. *P* is aware that there are other individuals in the building, and that they will almost certainly be killed as well. While *P* does not want these other individuals to be killed (and in fact he hopes fervently that they will somehow escape death), he nevertheless bombs the building. Both *V* and a number of other individuals are killed in the blast.

***332** In this case, *P* will be held to have fulfilled the second gradation or level of intent with respect to the deaths of the *other* individuals who were in the building with *V*. So, with this second gradation of intent, the volitional component is weaker (*P* did not *wish* to kill these other individuals); it is the cognitive component that dominates (*P* was almost certain

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that these individuals would die as a result of his conduct in bombing the building).

This gradation is generally known in civil law systems as direct intent (or *dolus directus*) in the second degree. In such cases, the perpetrator foresees *as a certainty* or *as highly probable* that certain consequences will flow from his or her conduct.28 As Van der Vyver explains, despite the perpetrator not having any desire for those consequences to occur, the perpetrator nevertheless engages in the conduct.29 According to **Badar**, he or she acts indifferently with regard to the consequences, and is therefore *deemed* to have desired those consequences.30 Similarly, the German Federal Supreme Court of Justice states that 'a perpetrator who foresees a consequence of his conduct as certain is considered to act *will-fully* with regard to this consequence, even if he regrets its occurrence'.31

This gradation is known in some common law systems (eg the US) as acting 'knowingly', although in others (eg the UK and Australia) it is still referred to as acting 'intentionally'.32 Again, I have adopted the more academic title of oblique intent in Table 1. The US Model Penal Code provides that a person acts 'knowingly' with respect to a result when he or she is 'practically certain' that his or her conduct will cause such a result.33 Similarly, under English common law, the concept of oblique intent covers cases where a consequence is 'virtually certain'.34 According to Williams, '[t]here are twin consequences of the act, *x* and *y;* the doer wants *x,* and is prepared to accept its unwanted twin *y* '.35 In other jurisdictions, the test is not as high. For example, in the Australian Commonwealth Criminal Code, a person acts with this type of intention with respect to a result where he or she 'is aware that it will occur in ***333** the ordinary course of events'.36 This provision was based on37 clause 18(b)(ii) of the Draft Criminal Code Bill prepared by the English Law Commission.38 The Law Commission intended this phrase to cover cases where a result was 'a virtual certainty' (ie a result that would occur 'in the absence of some wholly improbable supervening event').39 It admitted in its report, however, that it was possible, under this definition, that 'juries will, in a few cases, find intention to be proved where, under the existing law [which required foresight of the *virtual certainty* of the result], they might not have done so'.40 For this reason, in Table 1 the 'oblique intent' category (in the common law column) extends lower than the 'direct intent in the second degree' category (in the civil law column). This is an attempt to demonstrate that depending on the jurisdiction (for example, in Australia), this category may capture more cases (on the lower end of the scale) than the equivalent civil law category. This is because the test for acting with oblique intent in a common law system may require only that the result occur in the ordinary course of events, whereas the test for acting with 'direct intent in the second degree' in a civil law system will require that a consequence be foreseen as a certainty or as highly probable. Nevertheless, in both common law and civil law systems, this gradation of intent is characterized by a low volitional component, and a high cognitive component.

D. Recklessness and Dolus Eventualis

In the third gradation or level of intent, the volitional component remains weak and the cognitive component still dominates; however, the cognitive component is weaker than in the second gradation. Let us consider a slightly modified version of the last example:

P wishes to kill *V* by bombing the building in which *V* is located. This building is in a busy street. *P* is aware that there is a risk that, in the explosion, other individuals may be injured or even killed. While *P* does not want these other individuals to be injured or killed, he nevertheless bombs the building. Both *V* and a number of other individuals are killed in the blast.

In this example, while *P* is not certain that other individuals will be killed in the blast, he is aware of a *risk* that this might occur. Thus, the cognitive component ***334** is weaker than in the last example. Again, *P* does not wish to kill the other individuals, so the volitional component is low.

In civil law systems, this gradation is occupied by the concept of *dolus eventualis* or conditional intent. There is no one test or definition for *dolus eventualis.* Different tests or definitions have been put forward by commentators and adopted by courts at different times and in different jurisdictions.41 Broadly speaking, *dolus eventualis* exists where a person 'is aware that a material element included in the definition of a crime ... may result from his conduct and "reconciles himself" or "makes peace" with this fact'.42 As Bohlander explains, the major schools of thought generally agree that the perpetrator must have been aware of the fact that his or her actions *might* lead to particular consequences; the disagreement centres mainly on the volitional component.43 Some theories do not require any volitional component (but differ as to the required level of awareness of the possibility or probability of the result occurring), while others do require a voli-

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tional component (but differ as to whether this should constitute approval/mental consent to the result, or whether an attitude of indifference would suffice).44 According to Bohlander, the German courts have adopted a 'watered-down approval theory'.45 By this theory, a perpetrator will act with *dolus eventualis* where he or she foresees the consequences of his or her actions as possible (but not inevitable), and approves of them (in the sense that he or she has reconciled him- or herself to those consequences for the sake of achieving his or her goal).46 The approval of the perpetrator does not need to be explicit, and the perpetrator need not morally approve of the result; it is sufficient if he or she nevertheless accepts it in order to reach his or her ulterior goal.

The broad equivalent of *dolus eventualis* in common law systems is recklessness. Essentially, recklessness is a form of 'conscious risk-taking',47 as it involves a person taking an unreasonable and unjustifiable risk, of which he or she is aware. Under the Australian Commonwealth Criminal Code (which is based on the US Model Penal Code),48 a person will be found to have acted ***335** recklessly if that person was aware of a substantial risk that his or her conduct would cause a particular result, and, having regard to the circumstances known to him or her at the time, it was unjustifiable to take that risk.49 Under Australian common law, the test for recklessness is foresight of probability in cases of murder, and foresight of possibility for all other crimes. Recklessness is defined in the Code in terms of a 'substantial' risk rather than in terms of probability or possibility because those terms 'invite speculation about mathematical chances'.50 Regardless of the exact formulation, the cognitive element for recklessness is low. Unlike *dolus eventualis,* recklessness does not specifically require that a person reconcile him- or herself to, or accept the outcome of, his or her risk-taking. It simply requires a decision to take a substantial and unjustifiable risk.

Commentators disagree as to whether there is any real difference between the concepts of recklessness and *dolus eventualis.* Generally, those who believe there is a difference argue that *dolus eventualis* sets a 'higher threshold' than recklessness, because recklessness does not require as high a volitional component.51 This appears to be the position taken by the ICTY Trial Chamber in the *Stakc* case,52 as well as ICC Pre-Trial Chamber I in the ***336** *Lubanga* case.53 However, while the test for recklessness does not *explicitly* require as high a volitional component as the test for *dolus eventualis,* because the individual does not have to be shown to have 'accepted' or 'been reconciled with' the outcome, the fact that the individual decides to proceed with the relevant conduct despite knowledge of the substantial risk is evidence of some level of volition.54 Whatever the differences may be between the two concepts, as Werle suggests, these gradations of the mental element would 'usually cover the same factual constellations'.55 Nevertheless, in recognition of the fact that recklessness does not *specifically* require that a person reconcile him- or herself or accept the outcome of his or her risk-taking, recklessness is given a lower volitional element than *dolus eventualis* in Table 1.

Having introduced the concept of intent in common law and civil law domestic criminal justice systems and identified the various gradations of intent recognized in those systems, the next part of this article turns to Article 30 of the Rome Statute, and attempts to situate the concepts covered by it in relation to the gradations of intent set out in Table 1.

III. ARTICLE 30 OF THE ROME STATUTE

A. Intent and *Knowledge*

Paragraph 1 of Article 30 sets out the general rule that the material elements of an international crime must be committed with intent and knowledge. However, prior to the February 1997 session of the Preparatory Committee for the Rome Conference, there was debate as to whether these two terms should be disjunctive ('or') or conjunctive ('and').56 Ultimately, a decision was made to use the conjunctive formulation. As both Pisani and Eser explain, it was felt that this formulation was necessary in order to emphasize, from a psychological-analytical point of view, the necessary coexistence of the cognitive and volitional components of intent, both of which can vary in different degrees for the different gradations (as depicted in Table 1 ***337** above).57 However, as is noted below, this does not mean that each particular material element must be committed with both 'intent' and 'knowledge', as those terms are defined in the subsequent two paragraphs of Article 30.

B. Element Analysis Approach

Unlike the statutes and codes that came before it, the Rome Statute takes an 'element analysis' approach, rather than a 'crime analysis' or 'offence analysis' approach.58 'Elements' are the basic 'building blocks' of a crime.59 The Rome Statute recognizes two types of element: material elements (also known variously in domestic systems as the *actus reus,*

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physical elements or objective elements) and mental elements (also known variously in domestic systems as the *mens rea* or subjective elements). The material elements represent the 'external side of criminal conduct', while the mental elements represent the 'internal side'.60 As **Badar** explains:

Under 'offence analysis', crimes are defined in general terms; intentional crimes, reckless crimes and negligent crimes, whereas 'element analysis' in contrast, recognizes that a single crime definition may require a different culpable state of mind for each objective element of the offence.61

The jurisprudence of previous military and international tribunals tended to take an offence analysis approach, and did not distinguish the various material elements of a crime and apply different mental elements to each. The ICC, however, is required by its Statute to analyse crimes in terms of their different types of material elements, which are each assigned a different mental element.

***338** The Rome Statute contemplates three types of material element: conduct elements, consequence elements and circumstance elements;62 it does not define the terms 'conduct', 'consequence' or 'circumstance'.63 According to commentators:

• Conduct includes 'a prohibited action or prohibited omission that is described in the definition of a crime'.64 As Werle notes, 'every international crime presumes some conduct that is more precisely delineated in the definition of the crime'.65

• Consequences 'can refer either to a completed result, such as the causing of death, or the creation of a state of harm or risk of harm, such as endangerment, for example'.66

• Circumstances 'qualify the conduct and consequences. They may, for example, describe the requisite features of the persons or things mentioned in the conduct and consequence elements'.67 According to Heller, a circumstance element is 'an additional state of affairs that must exist for the prohibited conduct and consequence to be criminal' (which may be either factual or legal).68

Because the mental element is defined differently for different kinds of material elements, the classification of a material element as a conduct, consequence or circumstance element is critical: the relevant mental element cannot be determined until each material element of a crime is properly characterized.69 However, as a number of commentators have pointed out, the dividing line between these types of material elements is not always ***339** clear.70 Robinson and Grall argue that most of these difficulties can be avoided if 'conduct' elements are

defined literally, and thus narrowly, to mean pure conduct, that is, to mean the actual physical movement of the actor. Thus, objective elements of an offense definition that might otherwise be classified as conduct elements, but which actually describe characteristics of the conduct--i.e., elements concerning the 'nature of conduct'--should be treated as circumstances.71

In a way, this would involve breaking down what would normally be considered one element (eg transferring, directly or indirectly, parts of the population of an Occupying Power into occupied territory)72 into two or more separate elements (thus, in this example, transferring parts of a population into a territory as a conduct element, and the status of the territory as occupied territory and of the population as that of an Occupying Power as circumstance elements). According to this argument, whenever a phrase combines a conduct element with a circumstance element in the Rome Statute, the elements should be separated out.

Similarly, material elements that might otherwise be classified as conduct elements but that actually describe *results* following the conduct, should be treated as consequence elements. Again, this involves breaking down what would normally be considered one element (eg inflicting great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act)73 into two or more separate elements (in this example, committing the inhumane act as a conduct element, and the requisite effect of the act, such as great suffering, as a consequence element). Again, according to this argument, whenever a phrase combines a conduct element with a consequence element in the Rome Statute, the elements should be separated out.

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Robinson and Grall also note the fact that distinguishing circumstance elements from consequence elements can be difficult.74 To resolve such problems, they suggest defining a consequence as 'a circumstance changed by the actor'.75 All elements that do not fit this definition would be 'independent circumstance elements'.76 Let us take the example of the war crime of starvation as a method of warfare, and the particular element of that crime of 'depriving civilians of objects indispensable to their survival': the actor creates the deprivation (a consequence element), but he or she cannot alter the status ***340** of the objects as indispensable to the survival of the civilians (a circumstance element).77

In conclusion, Robinson and Grall's suggestions create the following situation:

> In every offense, the conduct element, although perhaps linguistically merged with other elements, would simply perform the function of the act requirement. [Consequence] elements would be easy to detect; they would be circumstances changed by the actor. All other elements would be circumstance elements.78

Once a material element has been properly characterized as a conduct, consequence or circumstance element, paragraphs (2) and (3) of Article 30 provide the applicable definition of the mental element. For a conduct element, only intent is required, as knowledge is not defined with respect to conduct. Similarly, for a circumstance element, only knowledge is required, because intent is not defined with respect to circumstances. For a consequence element, however, both intent and knowledge must be proven, because Article 30 defines both those terms with respect to consequence elements. The definitions of 'intent' and 'knowledge' provided in Article 30, as they apply to the three different material elements, are set out in Table 2.79

Therefore, depending on whether a particular element is a conduct, consequence or circumstance element, the required mental element will be *either* intent *or* knowledge *or* both. This position is supported by the Elements of Crimes, which states that

> where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, for example, intent, knowledge *or both,* set out in article 30 applies.80

For this reason, although Article 30(1) provides that a person shall be criminally responsible only if the material elements are committed with intent and knowledge, as Werle and Jessberger explain, this part of the article 'cannot be interpreted as requiring that *all* material elements have to be committed with intent and knowledge'.81

Nevertheless, as all crimes under the jurisdiction of the ICC involve conduct and at least one other type of material element (whether it be a consequence element or a circumstance element), when the various elements of the crime are combined, one will end up with proof of both intent *and* knowledge.82

Table 2. Definitions of 'intent' and 'knowledge' in Article 30

	Intent	**Knowledge**
Conduct	means to engage in the conduct: Article 30(2)(a)	None
Consequence	means to cause the consequence OR aware that it will occur in the ordinary course of events: Article 30(2)(b)	aware that it will occur in the ordinary course of events: Article 30(3)
Circumstance	None	aware it exists: Article 30(3)

***341** *C. Definitions of 'Intent'*

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Article 30(2) defines two different levels or gradations of 'intent'. A person has 'intent' with respect to conduct or a consequence if he or she 'means to' engage in the conduct (Article 30(2)(a)) or cause the consequence (Article 30(2)(b) (first alternative)). A person also has 'intent' with respect to a consequence if he or she 'is aware that it will occur in the ordinary course of events' (Article 30(2)(b)(second alternative)).

1. 'Means to'

The first level or gradation of intent ('means to' engage in conduct or cause a consequence) is defined using language identical to the wording found in the Australian Commonwealth Criminal Code, which was based on the English Draft Criminal Code Bill. In those Codes, this language was used to codify the concept of 'direct intent'. I submit, therefore, that this language covers what is known in the common law as direct intent, and what is known in civil law countries as *dolus directus* in the first degree (that is, the highest gradation or level of intent).83 In my view, it should therefore be interpreted as covering cases characterized by the accused's *purposeful will* to engage in the conduct or bring about the prohibited consequence (ie where the volitional component is very high). In the language of the US Model Penal Code, engaging in the conduct or causing the result should be the perpetrator's 'conscious object'. This interpretation of the language 'means to' is supported by the jurisprudence of Pre-Trial Chambers I and II of the ICC, which have held that this language requires that the accused act with the 'concrete intent',84 'purposeful will'85 or 'express intent'86 to bring about the material elements of the crime. ***342** As is the case for this level or gradation of intent in domestic law, the perpetrator should also be taken to have this level of intent with regard to any fact that is a necessary or indispensable interim or ulterior consequence of his or her primary purpose (such as shattering the window in the example given above).

There will, in my view, be one significant difference between the 'means to' concept in Article 30 and the concept of direct intent or *dolus directus* in the first degree in common law and civil law systems respectively. That difference relates to the required cognitive component. In common law and civil law systems, the law relating to this gradation of intent generally does not require anything more than a low cognitive component to accompany the very high volitional component. Thus, it is not required that the perpetrator be certain that he or she will succeed in engaging in the conduct, or in bringing about the prohibited result. In fact, it would be sufficient for the perpetrator to believe that it is very unlikely that he or she will succeed. Take, for example, the case of an individual who shoots at a target that is some distance away. In this case, the perpetrator believes it unlikely that he or she will successfully kill the victim at such a great distance, but, if he or she succeeds, he or she will be considered to have fulfilled this gradation of intent, so long as it was his or her conscious object to kill the victim.

Under Article 30, however, for a person to be held criminally responsible for a crime, the material elements must be committed with intent *and* knowledge. From the discussion above, we know that both intent and knowledge will only be required in relation to a consequence element, because this is the only element for which 'intent' *and* 'knowledge' are defined.87 Therefore, with respect to a consequence element, it must be proven not only that the perpetrator 'meant to' cause a consequence, but that he or she also fulfilled the definition of 'knowledge' (that is, that he or she was aware that the consequence would occur in the ordinary course of events). Therefore, while only a low cognitive component is necessarily required by the definition of intent, the cognitive component for a consequence element is raised by the requirement that consequence elements be committed with knowledge. The effect of this is that whereas a perpetrator need not be certain that he or she will succeed in engaging in conduct (because there is no knowledge requirement for a conduct element), a perpetrator must be aware that he or she will succeed in bringing about a consequence 'in the ordinary course of events'. Therefore, this gradation of mental element in Article 30 of the Rome Statute is much more difficult to fulfil than the equivalent gradation in common law and civil law systems.

This position regarding the necessary cognitive component when applied to a consequence element is supported by ICC Pre-Trial Chamber I's decision in *Lubanga,* where the Chamber noted that Article 30 covered 'first and ***343** foremost' the concept of '*dolus directus* of the first degree'. It defined this concept as covering situations where the perpetrator:

... (i) *knows* that his or her actions or omissions *will* bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime ...88

Thus, the Chamber viewed this gradation of intent as requiring that the perpetrator 'know' that his or her conduct would bring about a certain consequence (a very high cognitive component).

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In conclusion, while at first it might appear that the language 'means to' in Article 30(2)(a) and (b)(first alternative) incorporates the concept of direct intent or *dolus directus* in the first degree (as those concepts are defined in domestic law), the requirement that consequence elements also be committed with 'knowledge' means that this gradation in Article 30 is in fact much higher than its equivalent in domestic law. Unlike in domestic law, where this gradation is normally characterized by a very high volitional component and only a low cognitive component, under Article 30 the gradation is characterized by very high volitional *and* cognitive components (when it is applied to consequences).

To give an example of the practical impact this may have, consider the case of an accused who plants an improvised explosive device (or 'IED', which have a notoriously low success rate), which he or she intends to initiate remotely when civilians come within range. It is the perpetrator's conscious object to kill those civilians; however, unless it could be shown that he or she *knew* (at the time the device was initiated) that the device would explode successfully and thereby result in the death of those civilians, the perpetrator would not satisfy this gradation of intent. Regardless of how much he or she might desire to kill those civilians, and how much he or she might hope that the IED will initiate properly, this would not be sufficient if it could not also be shown that he or she had the required knowledge. This obviously represents an unexpected and undesired consequence of the conjunctive 'intent and knowledge' wording of Article 30.

2. 'Aware it will occur in the ordinary course of events'

The second level or gradation of intent defined in Article 30(2) exists where a person 'is aware that [a consequence] will occur in the ordinary course of events' (Article 30(2)(b)(second alternative)). As with the first level, this language is identical to the wording used in the Australian Commonwealth Criminal Code and the English Draft Criminal Code Bill. In those Codes, it was used to codify the concept of oblique intent. I submit, therefore, that this language broadly covers what is known in the common law as oblique intent, ***344** and what is known in civil law countries as *dolus directus* in the second degree.89 In such cases, the perpetrator foresees *as practically certain* or *as highly probable* that certain consequences will flow from his or conduct. While the perpetrator does not have any desire for these consequences to occur, he or she nevertheless engages in the conduct, and is therefore deemed to have desired them. This gradation does not require the same purposive degree as the first gradation defined in Article 30 (that is, it does not require the same high volitional component), but the cognitive component is high (that is, the perpetrator must see the relevant consequence as virtually certain or highly probable).90 Therefore, as with the interpretation of the phrase 'in the ordinary course of events' under the English Draft Criminal Code Bill, I submit that this phrase in Article 30 should be interpreted to mean that the result would occur *in the absence of some wholly improbable supervening event.*91 This is also the position taken by Werle and Jessberger and by **Badar**, who interpret the language to mean that the consequence would occur 'unless extraordinary circumstances intervened'.92

It is relatively clear that the language of Article 30(2)(b)(second alternative) covers the concept of oblique intent or *dolus directus* in the second degree. This has been confirmed by the jurisprudence of the Court to date. For example, in *Bemba,* ICC Pre-Trial Chamber II described this gradation as requiring that the accused be 'aware that [the material] elements will be the *almost inevitable outcome* of his acts or omissions'.93 The more important question, however, is whether such language includes anything lower than this. In other words, do the words 'will occur in the ordinary course of events' also cover cases that would fall within the categories of *dolus eventualis* or recklessness, as they are understood in their respective domestic criminal law systems?

Provisions giving definitions of *dolus eventualis* and recklessness were present early on in the negotiations of a draft statute prior to Rome. According to **Badar**, the notion *of dolus eventualis* 'was last discussed in the 1996 Report of the Preparatory Committee and since then had vanished from all the subsequent reports and Statute drafts',94 whereas, as Clark explains, the provision on recklessness 'was ultimately to vanish also from the Statute at ***345** Rome'.95 In both cases, there was no formal decision to drop the relevant provisions,96 leading commentators to speculate now with respect to the intentions of the drafters. For example, Clark explains that his understanding of the terms of the debate among States at the Rome Conference 'was that most of the players ... were generally uncomfortable with liability based on recklessness or its civil law (near) counterpart *dolus eventualis* '.97 Pisani argues that, while a formulation that clearly included *dolus eventualis* did not appear in the final formulation of Article 30, 'this consideration *on its own* would not constitute an obstacle to the application of international criminal responsibility based on *[dolus] eventualis* '.98 She concludes, however, that:

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[t]he extensive debate amongst the various points of view as well as the preparatory drafts and the definitive choice adopted by the Statute to exclude recklessness as a form of responsibility are all unequivocal indications that those who drafted the Statute wanted to limit the subjective element to ... direct intent ... [and] oblique intent ... It seems clear, then, that the word 'intent' must be interpreted as excluding recklessness as well as ... *dolus eventualis.*99

Werle and Jessberger argue that 'the fact that a definition of recklessness provided for in the Draft Statute was removed during the negotiations at Rome does not militate against including recklessness as a basis for criminal responsibility under the ICC Statute'.100 Other authors, such as Ambos, have interpreted this deletion as meaning exactly that.101

It is possible that a provision defining *dolus eventualis* was dropped early on because drafters viewed it as being already covered by the terms of Article 30. On the other hand, it is arguable that the fact that the provision defining recklessness was retained up until Rome suggests that this concept was *not* already covered by the terms of Article 30 (that is, the definitions of 'intent' and 'knowledge' contained therein); in other words, if the wording 'will occur in the ordinary course of events' left room for such a concept, there would have been no need for a separate provision defining it.

***346** With the drafting history providing little help, the dispute over whether recklessness and *dolus eventualis* are included within the meaning of Article 30 comes down to differing interpretations of the specific wording of that provision. With respect to recklessness, academics generally agree that this concept is not covered by Article 30, because it does not have the necessary volitional component required by the conjunctive use of 'intent and knowledge' in Article 30(1).102 This was also the position adopted by ICC Pre-Trial Chamber I in the *Lubanga* case.103 As the Chamber explained:

The concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result. In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, it is not part of the concept of intention.104

Thus, recklessness, which the Court regards as having a lower volitional component than *dolus eventualis,* is not, in the view of Pre-Trial Chamber I, covered by the terms of Article 30. Pre-Trial Chamber II also took the view in *Bemba* that recklessness is not captured by Article 30 of the Statute.105

As for the concept of *dolus eventualis,* the dispute comes down to the interpretation of the wording 'will occur'. On the one side, there are those who argue that such wording cannot be interpreted to include *dolus eventualis.* They argue that mere probability that a consequence may occur is insufficient, and that the wording requires that the perpetrator foresee the occurrence of the consequence as *certain.* For example, according to Werle and Jessberger, *dolus eventualis* is excluded by the wording 'will occur'; in their view, *dolus eventualis* (which requires only a *risk* that a consequence may occur, rather than a practical *certainty)* would only be covered if the language were 'may occur'.106 This is also the view taken by Eser,107 Ambos,108 Heller109 and van Sliedregt.110

***347** On the other side, those in favour of the inclusion of *dolus eventualis* argue that this phrase requires only that the perpetrator be aware of the *probable* occurrence of the consequence. However, as Werle and Jessberger note, '[r]emarkably, the few commentators who advocate the inclusion of ... *dolus eventualis* ... hardly ever give any reasons for their position'.111 Examples include Jescheck,112 Mantovani,113 Knoops,114 Triffterer115 and Cassese.116 One exception is Piragoff and Robinson, who argue that if the concept *of dolus eventualis* is defined in terms of a substantial or high degree of probability (as opposed to merely a risk) that the consequence will occur, then it is covered by the terms of Article 30(2)(b)(second alternative); only those definitions of *dolus eventualis* that require merely a risk that a consequence will occur would be excluded.117 Ambos seems to agree with Piragoff and Robinson, stating that 'there are other, more cognitive concepts of *dolus eventualis* (requiring awareness or certainty as to a consequence) and these may indeed be included in Article 30'.118

Some of those commentators who argue *against* inclusion of *dolus eventualis* in Article 30(2)(b)(second alternative) have recognized that it would be possible for the ICC to interpret the phrase 'in the ordinary course of events' in a way that would include recklessness or *dolus eventualis,* but consider that such an interpretation may well conflict with the principle of strict construction.119 Indeed, this is exactly what has occurred: Pre-Trial Chamber I, in the first substantive decision of a Chamber of the ICC to interpret Article 30, found that the wording 'will occur in the ordinary course of events'

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does include the concept of *dolus eventualis.* It stated that the concept of intention in Article 30 covers

situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).120

***348** The Chamber went on to state:

if the risk of bringing about the objective elements of the crime is substantial (that is, there is a likelihood that it 'will occur in the ordinary course of events'), the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from:

i. the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realization of the objective elements of the crime; and

ii. the decision by the suspect to carry out his or her actions or omissions despite such awareness.

... Where the state of mind of the suspect falls short of accepting that the objective elements of the crime may result from his or her actions or omissions, such a state of mind cannot qualify as a truly intentional realization of the objective elements, and hence would not meet the 'intent and knowledge' requirement embodied in article 30 of the Statute.121

Thus, it appears that Pre-Trial Chamber I viewed the definition of intent with respect to consequences (ie that a consequence 'will occur in the ordinary course of events') as being fulfilled where: (a) there is a 'substantial' risk that the consequence will occur; and (b) the accused is shown to have been aware of this risk, and to have proceeded with the conduct regardless. While the Chamber was devoted to the idea that a volitional element must be shown in the form of acceptance of the outcome, however, this definition does not appear all that different from the definition of recklessness. In reality, therefore, there may not be any difference in terms of outcome. In Weigend's view, whether or not Pre-Trial Chamber I is correct in its interpretation of the wording of Article 30(2)(b), 'the Court's more expansive interpretation of that clause certainly makes theoretical and political sense'.122 While he does not explain what he means by this, it is likely that he is referring to the fact that both domestic legislation implementing provisions of the Rome Statute and the jurisprudence of the ICTY and ICTR have recognized liability for international crimes in cases where the perpetrator has only recklessness or *dolus eventualis.*123

More recently, in the *Bemba* case, ICC Pre-Trial Chamber II took the opposite position to Pre-Trial Chamber I regarding *dolus eventualis,* holding that the concept is *not* captured by Article 30.124 The Chamber made this ***349** finding on the basis that the wording 'will occur' 'does not accommodate a lower standard than the one required by *dolus directus* in the second degree (oblique intention)'.125 Pre-Trial Chamber II stated further:

by way of a literal (textual) interpretation, the words '[a consequence] will occur' serve as an expression for an event that is 'inevitably' expected. Nonetheless, the words 'will occur', read together with the phrase 'in the ordinary course of events', clearly indicate that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as 'virtual certainty' or 'practical certainty', namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent[s] its occurrence.

This standard is undoubtedly higher than the principal standard commonly agreed upon for *dolus eventualis* --namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility. Hence, had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words 'may occur' or 'might occur in the ordinary course of events' to convey mere eventuality or possibility, rather than near inevitability or virtual certainty.126

Pre-Trial Chamber II found that this interpretation was supported by the *travaux préparatoires* of the Statute, which suggested that 'the idea of including *dolus eventualis* was abandoned at an early stage of the negotiations' of the Statute.127

No decision has yet been made by the Appeals Chamber of the ICC to resolve the contradictory conclusions reached by

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Pre-Trial Chambers I and II with regard to *dolus eventualis*. Thus, it remains unclear whether this concept is covered by Article 30. In my view, however, the detailed analysis conducted by Pre-Trial Chamber II of the language and *travaux préparatoires* of the Statute lends greater weight to its finding that *dolus eventualis* is not covered by the language of Article 30. Furthermore, as a matter of policy, given the ICC's nature as a court of last resort and the principle of strict construction, an interpretation of Article 30 that does not include *dolus eventualis* is appropriate.

D. Definitions of 'Knowledge'

Article 30(3) provides two definitions of 'knowledge'. A person has 'knowledge' with respect to a circumstance if he or she has 'awareness that [it] exists', while a person has 'knowledge' with respect to a consequence if he or she has 'awareness that ... [it] will occur in the ordinary course of events'.

***350** *1. 'Awareness that a circumstance exists'*

The first definition ('awareness that a circumstance exists') appears to require *positive* or *actual* knowledge of the relevant circumstance. The question is whether this requirement could be satisfied by proof of 'wilful blindness', as it is understood under the common law.128 In other words, would it be sufficient to prove that an accused *suspected* that a circumstance existed, but *avoided* actual knowledge by deliberately shutting his or her eyes to an obvious means of knowledge.129

Piragoff and Robinson recognize that the specific definition in Article 30(3) may exclude such a concept and that actual awareness or cognizance may be required. They also recognize, however, that 'it may be open to the Court to interpret "awareness" to include wilful blindness in some situations'.130 Eser seems to have come to the same conclusion, submitting that while a draft clause covering wilful blindness had been considered prior to Rome but was ultimately abandoned,131 this does not necessarily mean that the language of Article 30 could not be interpreted to cover cases of 'implied' or 'constructive' knowledge.132 **Badar** argues, on the other hand, that the wording of Article 30(3) 'limits the meaning of knowledge to "actual knowledge" as opposed to "constructive" knowledge'.133 He states that '[e]ven knowledge of "high probability" of the existence of a particular fact" is insufficient.134 He therefore concludes that the doctrine of 'wilful blindness' would only be covered by Article 30 'if the doctrine is understood to apply only in situations where the perpetrator is *virtually certain* that the fact exists'.135 Thus, in his view, Article 30 could be argued to cover cases where the accused realized the high probability that the circumstance existed, but purposely refrained from obtaining the final confirmation because he or she wanted to be able to deny knowledge.136

In my view, in the context of international crimes, where criminal conduct is widespread and ongoing, actual knowledge will be extremely difficult to prove if some concept of wilful blindness is not permitted as a method of proof. For ***351** this reason, Article 30(3) should be interpreted as allowing proof by at least a limited form of wilful blindness, as put forward by **Badar**. As such, proof that an accused was virtually certain that a circumstance existed should be taken to satisfy the definition of knowledge in that provision.

2. 'Awareness that ... a consequence will occur in the ordinary course of events'

The second definition of knowledge is formulated in exactly the same terms as the second gradation of intent defined in Article 30(2)(b)(second alternative). The issue of whether *dolus eventualis* is covered by this wording therefore applies equally to this definition of knowledge.

Having examined the default rule in Article 30 and the meaning of the terms intent and knowledge, the final substantive part of this article considers exceptions to that default rule.

IV. EXCEPTIONS TO ARTICLE 30 OF THE ROME STATUTE

A. Interpretation of 'Unless otherwise provided ...'

As indicated by the phrase '[u]nless otherwise provided' in Article 30(1), there are exceptions to the rule that the material elements of all crimes must be accompanied by knowledge and intent. Article 30 merely sets out a general or default rule

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that applies unless another rule provides for a departure from the general rule by requiring a different mental element.137

The issue of what sources of law may provide for a deviation from Article 30 in accordance with paragraph (1) was not settled at the Rome Conference, and commentators also hold differing opinions. Some argue that only provisions of the Rome Statute can provide an alternative mental element to that required by Article 30. For example, Weigend submits that the principle of legality means that 'expansions of the definition of the mental element in art. 30 of the ICC statute would have to be found in the statute itself, not in outside sources'.138 Eser is more specific: he argues that a deviation from Article 30 'may be found elsewhere in the Statute, for instance within the specific definition of crimes or general principles of criminal law'.139 Ambos goes further, however, arguing that 'deviations from Art. 30 can only arise directly from Art. 6-8' (the provisions which set out the crimes within the ICC's jurisdiction).140 This view is untenable, because Article 28, which relates to superior responsibility, is ***352** clearly a provision within the Statute that provides an alternative (and less strict) mental element. Schabas argues that '[i]t would seem to be going too far to suggest that the Article 30 standard in the Statute could be amended if an exception is provided for in the Elements of Crimes', although he notes that this is exactly what they have done.141 Similarly, Kreß has stated his opinion that the Elements of Crimes cannot '*by themselves* "provide otherwise"'.142

Others argue that the terms of Article 30(1) may encompass rules arising from the Elements of Crimes and other sources of international law under Article 21 of the Statute.143 According to Article 21(1) (which sets out the applicable law that governs the Court), the Court shall apply, in the first place, the Statute and the Elements of Crimes. In the second place, it may apply, 'where appropriate', applicable treaties and rules of customary international law. A final subsidiary source of law is 'general principles of law derived by the Court from national laws of legal systems of the world'.

The argument that sources outside the Statute may 'otherwise provide' for a mental element is based on a literal interpretation of the language of Article 30. As this argument goes, the wording of Article 30(1) does not specify that the default rule requiring intent and knowledge applies 'unless otherwise provided for *in this Statute'*; rather, a comparison of that wording with other wording in the Statute suggests, according to Werle and Jessberger, 'that the range of norms referred to in this case is much wider':144

When other provisions in the Statute itself are referenced, the reference is generally made explicit; thus, a comparable clause in Article 31(1) ICCSt. on the grounds for exclusion from punishment explicitly refers to 'other grounds for excluding criminal responsibility *provided for in this Statute* '.145

While Werle and Jessberger recognize the argument that the principle of legality requires that any expansion of the definition of the mental element in Article 30 'would have to be found in the Statute itself and not in outside sources', they view the 'uniform interpretation and application of the ICC ***353** Statute and customary international law' as a more important objective in the context of international criminal law.146

Debate on this issue continued at the negotiations by the Preparatory Commission of the Elements of Crimes.147 As Piragoff and Robinson explain:

Some delegations were of the view that the Elements could not call for a deviation from article 30, as the Elements document is subsidiary to the Statute. Other delegations, while conceding that the Elements could not override the Statute, argued that some deviations were necessary to make the crimes workable and to faithfully reflect the intent of the Statute as well as the jurisprudence.148

The latter view was eventually accepted, and the General Introduction to the Elements of Crimes indicates that any exceptions to the standard of Article 30 that are found in the Elements of Crimes are based 'on the Statute, *including applicable law under its relevant provisions'* .149 Piragoff and Robinson further state that:

This formulation recognizes the primacy of the Statute, and indicates that exceptions must directly or indirectly flow from the Statute, but also recognizes that the Statute itself, through article 21 (applicable law), allows reliance on other sources, including treaties, general principles and the Elements. Thus, the approach seems to avoid suggesting that States Parties could *legislate* a deviation through the Elements, but allows them to *codify* a deviation where necessary to reflect their intent when drafting the Statute or to reflect the relevant treaties and jurisprudence.150

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This position is consistent with rules of interpretation applicable to treaties, whereby a subsequent agreement among all treaty parties (eg the Assembly of States Parties to the Rome Statute) concerning the application or interpretation of a treaty (in this case, the Statute) may be taken into account in interpreting the treaty (ie may be taken into account by the Court itself when it interprets its Statute).151

While the ICC Pre-Trial Chambers have thus far accepted that the Elements of Crimes can provide for a deviation from the Article 30 standard,152 it ***354** remains unclear whether, in the absence of a clear indication in the Elements of Crimes, the Court can have reference to sources of law outside the Statute to found a deviation from that standard. For example, when determining what mental element is applicable to the modes of liability set out in Article 25(3) of the Statute (the elements of which were not elaborated in the Elements of Crimes), could the Court rely on customary international law to found a deviation from the Article 30 standard?

The argument put forward by Werle and Jessberger--that uniform interpretation and application of the Rome Statute and customary international law is a more important objective than strict adherence to the principle of legality--is compelling.153 While it is desirable to have clarity and precision in codification in order to give fair notice of the scope of prohibitions, it is perhaps more desirable for the law that is to be applied by a newly established and permanent international criminal court to be consistent with customary international law, as has been developed over a significant period of time prior to its establishment. Therefore, in my view, Article 30(1) should be interpreted to allow the Court to balance the potentially competing aims of the principle of legality and consistency with customary international law, by allowing the Court to have recourse to sources outside the Statute when determining the applicable mental element in a particular case, where the Elements of Crimes are silent (or where there are no Elements of Crimes, as in the case of modes of liability under Article 25 of the Statute).

B. Types of Exceptions to Article 30

Determining whether the language of a provision establishes an exception to the general rule set out in Article 30 must be done on a case-by-case basis.154 According to both Eser and to Werle and Jessberger, provisions that 'otherwise provide' for a mental element can do one of three things:

(i) impose a mental element that is *less* stringent than that provided for in Article 30;

(ii) impose a mental element that is *more* stringent than that provided for in Article 30; or

(iii) impose a mental element *in addition to* that provided for in Article 30 (ie a *special* or *additional* mental element).

Examples from the first category broaden or expand criminal responsibility, by requiring anything from recklessness or *dolus eventualis* to negligence.155 The second and third categories narrow criminal responsibility.

***355** *1. Less stringent mental elements*

In addition to examples of the Statute itself providing for a less stringent mental element than that imposed by Article 30,156 there are various examples of the Elements of Crimes providing for a less stringent mental element with respect to one of the crimes it considers.157 These less stringent mental elements were imposed because, in the view of the Preparatory Commission that drafted the Elements of Crimes (and the Assembly of States Parties that adopted them), a less stringent mental element was justified in those cases (perhaps on the basis of a rule under some other 'applicable law'). It will be up to the Court to decide whether it agrees with this assessment, and whether it will therefore uphold the imposition of a less stringent mental element than that required by Article 30.158

2. More stringent mental elements

It is not entirely clear what the difference is between the second and third categories of provisions that 'otherwise provide' for a mental element (ie the category that imposes a mental element that is *more stringent* than that provided for in Article 30, and the category that imposes a *special* or *additional* mental element). In fact, Eser cites some of the same

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examples (eg aiding and abetting) for both categories,159 and Werle and Jessberger do not provide any example of the category of more stringent mental requirements.160 It is perhaps for this reason that Piragoff and Robinson recognize only two categories (the first (less stringent mental elements) and the third (special or additional mental elements).161

In my view, because Article 30 incorporates what is understood to be the highest gradation of mental element in both common law and civil law systems (direct intent or *dolus directus* in the first degree), there is simply no room for other provisions to impose a more stringent mental element. There is, of course, room to impose *additional* mental elements (as is the case with genocide). However, in order to impose a *more stringent* mental element, the only possibility would be to require, for example, that the accused 'meant to' cause a consequence (thereby removing the lesser alternative included in ***356** Article 30(2)(b) of being aware that a consequence 'will occur in the ordinary course of events'). There are no such examples of a *more stringent* mental element in the Statute or the Elements of Crimes.

3. Additional mental elements

As Piragoff and Robinson explain, an additional mental element exists where the Statute states that conduct must be committed for an ulterior purpose, or in pursuance of a specific goal (ie 'with intent to', 'with the intention of' or 'for the purpose of' achieving certain ends).162 This special intent, they state, is an element that must be proved *in addition* to any intent imposed by Article 30: 'It is a separate mental element that is not linked to any material element that must be proved or to which ... article 30 would apply'.163 Similarly, Werle and Jessberger view an additional mental element as one that does 'not necessarily refer to a material element of the crime, such as conduct, consequence or circumstance'.164 This may be where the difference lies between this category and the second category discussed above: where a more stringent mental element is required *with respect to* a particular material element, such a case would fall within category (ii) above;165 where an additional mental element is required that is *not* linked to any material element, such a case would fall within category (iii) above.

The fact that an additional mental element is not linked to any material element means that the accomplishment of the consequence that is the focus of that additional mental element--because the additional mental element is almost always directed at a particular consequence, rather than a circumstance or conduct--does not have to be proven.166 According to Triffterer, it does not even have to be proven that the particular consequence could *ever* be achieved.167

Examples of additional mental elements that are commonly cited are: the intent to inflict pain or suffering for such purposes as 'obtaining information or a confession, punishment, intimidation or coercion or for any reason based on ***357** discrimination of any kind' for the war crime of torture under Article 8(2)(c)(i);168 the intent to maintain the 'institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups' for the crime against humanity of apartheid under Article 7(1)(j); the intent to destroy 'in whole or in part, [a] national, ethnical, racial or religious group, as such' for the crime of genocide under Article 6;169 the intent to discriminate on 'political, racial, national, ethnic, cultural, religious, gender ... or other grounds' for the crime of persecution under Article 7(1)(h);170 the intent to 'deprive the owner of the property and to appropriate it for private or personal use' for the war crime of pillaging under Article 8(2)(b)(xvi) or 8(2)(e)(v);171 and the intent to 'facilitat[e] the commission of ... a crime' for the purposes of aiding and abetting under Article 25(3)(c).

One interesting question is whether the definitions of 'intent' and 'knowledge' contained in Article 30 apply to *additional* mental elements, or whether a higher or lower gradation of intent or definition of knowledge might apply. As an additional mental element is, by definition, a mental element that has no corresponding material element, it would appear that Article 30 does *not* apply, as Article 30's definitions of 'intent' and 'knowledge' are required only with respect to the material elements of a crime. If it is accepted that Article 30 does not regulate the mental element with respect to *additional* mental elements (that is, that there is a gap in the Statute), then the Court would be permitted to turn to *other* sources of law to provide the necessary contents of those mental elements. For example, the Court would be permitted to turn to customary international law (and the rich jurisprudence of the ICTY and ICTR before which that law has developed) in order to determine the meaning of the 'intent to destroy' requirement for genocide. Thus, it would be possible for the Court to adopt a different gradation of intent (ie one that includes the concept *of dolus eventualis)* or a different definition of knowledge (ie one that includes a more expansive concept of wilful blindness) for the purposes of such additional mental elements, if there is a basis to do so in another source of law to which the Court can have reference under Article 21.172

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***358** V. CONCLUSION

This article has demonstrated that some of the criticisms of Article 30 made by academics may be well founded. Article 30 does establish an extremely complex rule,173 requiring that material elements be classified as conduct, consequence or circumstance elements, and then requiring that a different definition of 'intent' or 'knowledge' or both be applied to each. Certain aspects of Article 30 are indeed confusing and ambiguous.174 For example, the lack of any definition of the terms 'conduct', 'consequence' and 'circumstance' (given the critical importance of accurately classifying material elements in order to determine what definition of 'intention' or 'knowledge' applies) is a clear failure on the part of the drafters of the Statute. Furthermore, the provision's attempt to define the concept of intent in Article 30(2)(a) is not entirely satisfactory, as the requirement that consequence elements be committed with intent and knowledge means that the gradation of mental element established under this sub-paragraph is higher than that of direct intent or *dolus directus* in the first degree under common law and civil law systems respectively. As noted above, this obviously represents an unexpected and undesired consequence of the conjunctive 'intent and knowledge' wording of Article 30. Moreover, the use of the phrase 'will occur in the ordinary course of events' in Article 30(2)(b) and (3) clearly 'raises more questions than answers',175 as it has led to conflicting opinions among both academics and the different Pre-Trial Chambers of the Court with respect to *dolus eventualis*. Finally, the definition of knowledge with respect to a circumstance in Article 30(3) appears to set too high a standard.

Nevertheless, I agree with Eser that Article 30 'provides sufficient building blocks for a meaningful construction of "intention"'.176 Some creative jurisprudence from the Chambers of the Court (in particular, from the Appeals Chamber on the issue of *dolus eventualis)* would go a significant way towards addressing these failures of drafting. In my view, the Court should:

1. Adopt definitions of the different types of material elements along the lines of those suggested by Robinson and Grall. Thus, conduct elements would be defined literally and narrowly to mean pure conduct; consequence elements would be defined as circumstances changed by the actor; all elements that do not fit these definitions would be independent circumstance elements.

2. Clearly exclude *dolus eventualis* from the definition of intent under Article 30(2)(b) and (3), along the lines of the decision in *Bemba.*

***359** 3. Allow for knowledge of a circumstance to be satisfied by proof of 'wilful blindness' (that is, by proof that the accused was virtually certain that a circumstance existed, but avoided actual knowledge by deliberately shutting his or her eyes to an obvious means of knowledge).

4. Interpret Article 30(1) to allow for recourse to sources outside the Statute when determining whether the applicable mental element in a particular case is 'otherwise provided', in circumstances where the Elements of Crimes are silent.

Finally, in my view it would be desirable for Article 30(1) of the Rome Statute to be amended by the Assembly of States Parties to replace the conjunctive 'and' with the disjunctive 'or', to avoid the difficulties involved with requiring both knowledge *and* intent with respect to consequence elements (and to prevent the perpetrator who plants an unpredictable IED from escaping liability).

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1. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.
2. Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted 8 August 1945) 82 UNTS 279 (Nuremberg Charter); Charter of the International Military Tribunal for the Far East (adopted 19 January 1946, amended 26 April 1946) TIAS 1589, 4 Bevans 20

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(Tokyo Charter).
3. Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity (adopted 20 December 1945) in Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946, 50-5 (Control Council Law No 10).
4. Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993, annexed to UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (ICTY Statute); Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994, annexed to UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (ICTR Statute).
5. See, eg, International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries' in 'Report of the International Law Commission to the General Assembly on the Work of its Forty-eighth Session' (6 May-26 July 1996) UN Doc A/51/10.
6. N Pisani, 'The Mental Element in International Crime' in F Lattanzi and WA Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Il Sirente 2004) 125.
7. A Cassese, '*Mens Rea* and the International Criminal Tribunal for the Former Yugoslavia' (2003) 37 New England LR 1015, 1025.
8. G Werle and F Jessberger, '"Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 J Int'l Crim Justice 35, 37.
9. H Satzger, 'German Criminal Law and the Rome Statute: A Critical Analysis of the New German Code of Crimes against International Law' (2002) 2 Int'l Crim LR 261, 269.
10. A Eser, 'Mental Elements: Mistake of Fact and Mistake of Law' in A Cassese, P Gaeta and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary,* vol 1 (OUP 2002) 907.
11. Despite the US not being a State Party to the Rome Statute, it has nevertheless had a great influence on the drafting of the statute, and on the development of international criminal law more generally. The US made a significant contribution to the early development of international criminal law through its influence on the Nuremberg and Tokyo Trials, and the trials before the US Nuremberg Military Tribunals. With respect to the Rome Statute specifically, the Model Penal Code prepared by the American Law Institute had considerable impact on the drafting of Article 30 of the Rome Statute and on the 'purposive' element of aiding and abetting under Article 25(3)(c). This article also draws on domestic criminal law principles derived from the United Kingdom and Australia, as the text of Article 30 bears striking resemblance to the equivalent provisions of the English Law Commission's Draft Criminal Code Bill and the Australian Commonwealth Criminal Code.
12. Like US law, German law has had a great influence on the development of international criminal law, with a number of German criminal law professors establishing themselves in the field, and acting as judges of international courts or tribunals (for example, Albin Eser and Hans-Peter Kaul). More importantly, German criminal law theory 'enjoys widespread influence in the civil law world': M Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 Amer J Comp L 679, 679. Dubber notes, however, that criminal law in common law countries has, until fairly recently, developed largely independently of German influence (ibid). German law therefore provides a good example against which to compare general principles of law that are recognized across common law systems.
13. M Kelt and H von Hebel, 'General Principles of Criminal Law and the Elements of Crimes' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 22.
14. The term 'intent' is used here in the broad sense, to refer to any mental state that is higher than negligence. Negligence is excluded from the concept of 'intent' in this context, because it is characterized by the absence of any volitional or cognitive component (see Table 1 below). On this point, see G Williams, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 31. See also GP Fletcher, *Rethinking Criminal Law* (OUP 2000) 508-10.
15. See, eg, *Prosecutor v Bemba Gombo* (Confirmation Decision) ICC-01/05-01/08, PT Ch II (15 June 2009) para 357 (Bemba Confirmation). See also Eser (n 10) 905; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 475.
16. The concept of special or additional intent is discussed below in Part IV.
17. I have not been able to find any similar visual representation of the differences between the gradations recognized in common law and civil law countries. The hope is that a visual representation will assist the reader in understanding how the different gradations in these two systems roughly compare.
18. As Clark has put it, 'the civil law is not a monolith; the common law is not a monolith': RS Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 Crim L Forum 291, 294.
19. For example, according to van Sliedregt, France does not recognize *dolus eventualis* as a form of intent: E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press 2003) 46. See also ME **Badar**, 'Dolus Eventualis and the Rome Statute Without It?' (2009) 12 New Crim LR 433, 455-6;

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C Elliott, 'France' in K Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford Law Books 2010) 218.

20. This is particularly the case for *dolus eventualis,* where even scholars *within* some countries hotly debate the definition of this gradation of intent (eg in Germany).

21. M Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 63-4. See also Pisani (n 6) 126 ('The accused must have acted with the precise scope or desire to bring about that particular result...').

22. Bohlander (n 21) 64.

23. ibid. See also ME **Badar**, '*Mens Rea:* Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals' (2005) 5 Int'l Crim LR 203, 222. See also Pisani (n 6) 126-7, 128.

24. US Model Penal Code § 2.02(2)(a)(i).

25. Criminal Code Act 1995 (Australia) s 5.2(1).

26. See A Ashworth, *Principles of Criminal Law* (6th edn, OUP 2009) 171-2.

27. See, eg, Law Commission (England), *A Criminal Code for England and Wales: Volume 1, Report and Draft Criminal Code Bill* (Report No 177, 1989) 192.

28. **Badar**, *'Mens Rea'* (n 23) 224.

29. Van der Vyver describes this form of intent as *'dolus indirectus'*, rather than 'direct intent in the second degree': J Van der Vyver, 'The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law' (2004) 12 Univ Miami Int'l & Comp LR 57, 63. I would submit, however, that he is referring to the same concept.

30. **Badar**, *'Mens Rea'* (n 23) 224.

31. ME **Badar**, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 Crim L Forum 473, 486 (emphasis in original).

32. While civil law systems make a clear distinction between the two degrees of direct intent (direct intent in the first degree and direct intent in the second degree), this distinction is not as clear when it comes to common law systems. Generally, the first two gradations are referred to simply as 'intention', a category that covers two possible instances: where an individual acts purposely (direct intent) and where an individual acts knowingly (oblique intent). It is for this reason that the dividing line between the two concepts on the common law side of Table 1 is indicated with a dotted line.

33. US Model Penal Code § 2.02(2)(b)(ii).

34. See Ashworth (n 26) 174, discussing the House of Lords decision in *R v Woolin* [1999] AC 82.

35. G Williams, 'Oblique Intention' (1987) 46 CLJ 417, 421.

36. Criminal Code Act 1995 (Australia) s 5.2(3).

37. Criminal Law Officers Committee of the Standing Committee of Attorneys-General (Australia), *Model Criminal Code: Chapters 1 and 2, General Principles of Criminal Responsibility: Report* (December 1992) 25.

38. See Law Commission (England), *Criminal Code, Volume 1* (n 27). Clause 18(b)(ii) provided that a person acts intentionally with respect to a result 'when he acts either in order to bring it about or being aware that *it will occur in the ordinary course of events'* (emphasis added). This Draft Bill was never enacted into law.

39. See Law Commission (England), *A Criminal Code for England and Wales: Volume 2, Commentary on Draft Criminal Code Bill* (Report No 177, 1989) 192.

40. ibid 193.

41. Fletcher, *Rethinking Criminal Law* (n 14) 445-6; Bohlander (n 21) 64. For example, Weigend states that '[w]ords such as *dolus eventualis* have, at different times and in different legal systems, acquired different connotations, and it is thus far from clear that speakers from different backgrounds mean the same thing when they use the same Latin expression': T Weigend, 'Intent, Mistake of Law and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges' (2008) 6 J Int'l Crim Justice 471, 482.

42. Werle and Jessberger (n 8) 51-2.

43. Bohlander (n 21) 64.

44. For a detailed discussion of the various schools of thought, see **Badar**, *'Mens Rea'* (n 23) 228-32; **Badar**, 'Dolus Eventualis' (n 19) 458-62. See generally G Taylor, 'The Intention Debate in German Criminal Law' (2004) 17(3) Ratio Juris 346. For an analysis of the concept of *dolus eventualis* in Egypt, France, Italy and South Africa and under Islamic law, see **Badar**, 'Dolus Eventualis' (n 19) 452-64.

45. Bohlander (n 21) 65.

46. ibid. See also Taylor (n 44) 348; **Badar**, 'The Mental Element' (n 31) 490.

47. See Law Commission (England), *Criminal Code, Volume 2* (n 39) 194.

48. Criminal Law Officers Committee (Australia) (n 37) 27. The US Model Penal Code provides in § 2.02(2)(c): 'A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard

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involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.' The Australian Model Criminal Code (which became the Commonwealth Criminal Code) did not adopt the requirement of a 'gross deviation'.

49. Criminal Code Act 1995 (Australia) s 5.4(2).

50. Criminal Law Officers Committee (Australia) (n 37) 27. For a discussion of the law relating to recklessness in England, Canada and the US, see **Badar**, 'The Mental Element' (n 31) 488-9.

51. This is the position taken by Ambos, who situates recklessness somewhere between *dolus eventualis* and conscious negligence: K Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 Crim L Forum 1, 21. Similarly, Triffterer situates recklessness between *dolus eventualis* and negligence: O Triffterer, 'The New International Criminal Law: Its General Principles Establishing Individual Criminal Responsibility' in K Koufa (ed), *The New International Criminal Law* (Sakkoulas Publications 2003) 709. This is also the position taken by Eser, who views recklessness as being more the equivalent of conscious negligence. In his view, the volitional element in recklessness is entirely lacking: Eser (n 10) 906. Van Sliedregt (n 19) 46 views recklessness as being 'broader' than *dolus eventualis*. See also Wise, who states that '*dolus eventualis* demands that the accused have a particular subjective posture toward the possible consequences of his conduct, where common law terminology minimizes the relevance of the accused's desires, wishes, or wants': E Wise, 'General Principles of Criminal Law' (1998) 13 *Nouvelles Études Pénales: Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text to the Diplomatic Conference, Rome, June 15-July 17 1998* 39, 53.

52. As **Badar** notes, the ICTY Trial Chamber has held that the common law concept of recklessness is not equivalent to the civil law concept of *dolus eventualis,* because of the lack of any volitional component for recklessness. **Badar** states that the trial judgment in the *Stakic* case 'clearly shows that mere common law recklessness is not equivalent to the continental law *dolus eventualis*. The latter requires a cognitive element of awareness and a volitional element of acceptance of the risk, whereas mere recklessness lacks such a volitional element': ME **Badar**, 'Drawing the Boundaries of *Mens Rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2006) 6 Int'l Crim LR 313, 332, citing *Prosecutor v Stakic* (Judgment) IT-97-24-T, T Ch II (31 July 2003) para 642. While I do not agree that there is *no* volitional component required for the gradation of recklessness, I do consider that this volitional component is lower than that which exists in cases of *dolus eventualis*.

53. See *Prosecutor v Lubanga Dyilo* (Confirmation Decision) ICC/01/04-01/06, PT Ch I (29 January 2007) at fn 438 (Lubanga Confirmation).

54. Cassese seems to take this view, as he equates the two concepts and also states that recklessness requires a volitional act: A Cassese, *International Criminal Law* (2nd edn, OUP 2008) 66-7.

55. G Werle, *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009) 153 (fn 90). See also Taylor (n 44) 348 (who describes *dolus eventualis* as 'tak[ing] the place of the missing concept of recklessness' in German criminal law) and Wise (n 51) 53 (who states that '[r]ecklessness and *dolus eventualis* are not identical, although, as a practical matter, they are likely to produce similar results in most cases').

56. D Piragoff and D Robinson, 'Article 30: Mental Element' in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2008) 854. See also Eser (n 10) 905.

57. Pisani (n 6) 129; Eser (n 10) 905, 907. However, the terms 'intent' and 'knowledge' as used in Article 30 do not themselves equate to 'volition' and 'cognition'. Rather, they are *legal* terms defined in paragraphs (2) and (3) of Article 30 respectively, while the terms 'volition' (ie desire) and 'cognition' (ie awareness) are the two *components* that must both be present in each of the gradations of 'intent'/'knowledge'.

58. See, eg, Bemba Confirmation (n 15) para 355. This 'element analysis' approach was designed by the drafters of the US Model Penal Code: see US Model Penal Code § 1.13(9); P Robinson and J Grall, 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond' (1983) 35 Stanford LR 681. In fact, Heller states that Article 30's element analysis approach 'is similar to, and almost certainly based on, the approach taken by the Model Penal Code': KJ Heller, 'The Rome Statute of the International Criminal Court' in KJ Heller and MD Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford Law Books 2010) 603. See also **Badar**, 'The Mental Element' (n 31) 476. The element analysis approach has also been adopted by a number of model or draft criminal codes prepared in common law countries, for example, the English Law Commission's Draft Criminal Code Bill and the Australian Commonwealth Criminal Code: Law Commission (England), *Criminal Code, Volume 1* (n 27) 51-2 (clause 18); Criminal Code Act 1995 (Australia) Div 5.

59. M Kelt and H von Hebel, 'What Are Elements of Crimes?' in RS Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 14.

60. GP Fletcher, *The Grammar of Criminal Law* (OUP 2007) 43.

61. **Badar**, 'The Mental Element' (n 31) 476. See also Robinson and Grall (n 58) which states (at 683) that under an 'of-

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fence analysis' 'one spoke of intentional offenses, reckless offenses, and negligent offenses... [whereas an 'element analysis'] recognize[s] that a single offense definition may require a different culpable state of mind for each objective element of the offense'.

62. This follows the approach of the US Model Penal Code, which recognizes 'conduct', 'result[s] of conduct' and 'attendant circumstances' as the possible elements of a crime: see US Model Penal Code § 2.02.

63. The US Model Penal Code similarly did not provide any usable definitions for these terms, an omission that Robinson and Grall have described as having 'severely undercut' the usefulness of the defined mental elements: Robinson and Grall (n 58) 707.

64. Piragoff and Robinson (n 56) 852. See also Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 14. Similarly, Heller describes a conduct element as 'the positive act or omission prohibited by the crime in question': Heller (n 58) 602. According to Cassese, '[t]he conduct is described by the international rule that imposes a certain behaviour... and therefore criminalizes any act or omission contrary to such a rule': Cassese, *International Criminal Law* (n 54) 55.

65. Werle (n 55) 144.

66. Piragoff and Robinson (n 56) 852. Similarly, Heller describes a consequence element as 'the required result of the prohibited conduct' (which may involve 'either actual harm ... or simply the possibility of harm'): Heller (n 58) 602. Werle describes a consequence as including 'all effects of the criminal conduct' and explains that they can consist of 'harm that has actually occurred ... or merely of danger to a protected right': Werle (n 55) 144. See also Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 15.

67. Piragoff and Robinson (n 56) 852.

68. Heller (n 58) 602. Werle explains that '[o]bjective circumstances can be of a factual nature ... or they can concern normative characteristics': Werle (n 55) 145. See also Eser, who defines circumstances as 'any objective or subjective facts, qualities, or motives with regard to the subject of the crime (such as the perpetrator and any accomplices), the object of the crime (such as the victim or other impaired interests) or any other modalities of the crime (such as means or time and place of commission)': Eser (n 10) 919. See also Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 15.

69. Robinson and Grall (n 58) 707.

70. Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 15. As Clark notes, there is often overlap between 'conduct' and 'circumstances', and many of those involved in the drafting of the Rome Statute 'thought of conduct as including causation and results': Clark, 'The Mental Element' (n 18) 306. The difficulty in drawing the dividing line between 'conduct' and 'circumstances' was also recognized in the Commentary to the Australian Model Criminal Code: Criminal Law Officers Committee (n 37) 7.

71. Robinson and Grall (n 58) 719-20.

72. See ICC, Elements of Crimes, Article 8(2)(b)(viii), Element 1(a).

73. See ibid, Article 7(1) (k), Element 1.

74. Robinson and Grall (n 58) 723.

75. ibid 724 (emphasis omitted).

76. ibid.

77. See ICC, Elements of Crimes, Article 8(2)(b)(xxv), Element 1.

78. Robinson and Grall (n 58) 724.

79. As is the case with Table 1, Table 2 is my attempt to visually represent the definitions contained in Article 30, arranged with respect to the relevant material element.

80. ICC, Elements of Crimes, General Introduction, 2 (emphasis added).

81. Werle and Jessberger (n 8) 38. See also Werle (n 55) 151.

82. See Triffterer (n 51) 704.

83. This is also the position taken by **Badar**, 'The Mental Element' (n 31) 482-3.

84. Lubanga Confirmation (n 53) para 351.

85. Bemba Confirmation (n 15) para 358.

86. *Prosecutor v Katanga and Ngudjolo Chui* (Confirmation Decision) ICC-01/04-01/07, PT Ch I (30 September 2008) para 529 (Katanga Confirmation).

87. See Table 2 above.

88. Lubanga Confirmation (n 53) para 351 (emphases added).

89. This is the position taken by Eser (n 10) 914-15.

90. See Bemba Confirmation (n 15) para 358 (stating that 'the volitional element decreases substantially and is overridden by the cognitive element'), and para 369 (stating that the standard is that of 'virtual certain[ty]').

91. This was the meaning intended by the English Law Commission, which was the first body to use the phrase: see Law Commission (England), *Criminal Code, Volume 2* (n 39) 192.

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92. Werle and Jessberger (n 8) 41; **Badar**, 'The Mental Element' (n 31) 484-5; **Badar**, 'Dolus Eventualis' (n 15) 440. See also Pisani (n 6) 131.
93. Bemba Confirmation (n 15) para 359 (emphasis added). See also Lubanga Confirmation (n 53) paras 351-2; Katanga Confirmation (n 86) para 530.
94. **Badar**, 'Dolus Eventualis' (n 15) 452. Clark similarly states that the 1996 Report of the Preparatory Committee was 'the last time that the words *dolus eventualis* appear in any draft': R Clark, 'Elements of Crimes in Early Confirmation Decisions of Pre-Trial Chambers of the International Criminal Court' (2008) 6 NZ YB Int'l L 215.
95. Clark, 'The Mental Element' (n 18) 301. Clark has stated elsewhere that *'dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus [at Rome]. If it is to be read into the Statute, it is in the teeth of the language and history': R Clark, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations of the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the *Lubunga Dyilo* Confirmation Proceedings' (2008) 19 Crim L Forum 519, 529; Clark, 'Elements of Crimes' (n 94) 220.
96. The provision defining recklessness was ostensibly dropped because the term did not appear anywhere in the final text of the Statute, so there was no need to define it. See W Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute' (Pt III) (1998) 6 EJ Crime, Crim L & Crim Justice 409, 420; W Schabas, *Introduction to the International Criminal Court* (3rd edn, CUP 2007) 224; Clark, 'Elements of Crimes' (n 94) 216; Werle and Jessberger (n 8) 52; Wise (n 55) 52.
97. Clark, 'Drafting a General Part' (n 95) 525. See also Clark, 'Elements of Crimes' (n 94) 212, 216.
98. Pisani (n 6) 132 (emphasis added).
99. ibid. However, note that, in other places, Pisani seems to suggest that Article 30 *includes dolus eventualis* and recklessness (ibid 125, 134).
100. Werle and Jessberger (n 8) 52.
101. Ambos, 'General Principles' (n 51) 21.
102. See, eg, Piragoff and Robinson (n 56) 860 (fn 67). See also Eser (n 10) 906. Despite this recognition, some academics clearly view the failure to allow for recklessness as a standard gradation of mental element in Article 30 as 'questionable', given its status under customary international law (and, in particular, the heavy reliance on recklessness as a sufficient gradation of mental element for serious crimes in the jurisprudence of the ad hoc Tribunals): see, eg, A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 EJIL 158, 153.
103. Lubanga Confirmation (n 53) fn 438.
104. ibid.
105. Bemba Confirmation (n 15) para 360.
106. Werle and Jessberger (n 8) 41, 53.
107. Eser (n 10) 932-3 (and see also 915).
108. Ambos, 'General Principles' (n 51) 21-2. See also K Ambos, 'Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes' in LC Vohrah and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 20-1. However, note Ambos' more recent statement below, which seems to contradict this position: see text accompanying n 118.
109. Heller (n 58) 604.
110. Van Sliedregt (n 19) 51-2.
111. Werle and Jessberger (n 8) 41 (fn 36).
112. H-H Jescheck, 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute' (2004) 2 J Int'l Crim Justice 38, 45.
113. F Mantovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer' (2003) 1 J Int'l Crim Justice 26, 32.
114. G-J Knoops, *Defenses in Contemporary International Criminal Law* (2nd edn, Martinus Nijhoff 2007) 5.
115. Triffterer (n 51) 706.
116. Cassese, *International Criminal Law* (n 54) 73.
117. Piragoff and Robinson (n 56) 860.
118. K Ambos, 'Critical Issues in the *Bemba* Confirmation Decision' (2009) 22 Leiden J Int'l L 715, 718. However, Ambos also states that he concurs with the exclusion *of dolus eventualis* from Article 30.
119. Werle and Jessberger (n 8) 42. The 'principle of strict construction' refers to Article 22(2), which provides that '[t]he definition of a crime shall be strictly construed and shall not be extended by analogy'. See also T Weigend, 'The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR and the ICC: An Overview' (2004) 19 *Nouvelles Études Pénales: Quo Vadis?* 319, 327 (fn 19).
120. Lubanga Confirmation (n 53) para 352.
121. ibid paras 353-5.

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122. Weigend, '*Lubanga* Decision' (n 41) 482-3.
123. See Werle and Jessberger (n 8) 42, 53-4.
124. In the Katanga Confirmation, which was handed down between the Lubanga Confirmation and the Bemba Confirmation, Pre-Trial Chamber I stated that the majority of the Chamber (Judge U%24sacka dissenting) 'endorse[d]' the previous finding in the Lubanga Confirmation that Article 30 incorporates *dolus eventualis:* Katanga Confirmation (n 86) fn 329. It stated, however, that '[f]or the purpose of the present charges in the present Decision, it is not necessary to determine whether situations of *dolus eventualis* could also be covered by this offence, since, as shown later, there are substantial grounds to believe that the crimes were committed with *dolus directus* ': ibid, fn 329. See also at para 531, where the Chamber stated that it need not take a position on 'whether the concept of *dolus eventualis* has a place within the framework of article 30', because it did not intend to rely on this concept for the mental element in relation to the crimes charged.
125. Bemba Confirmation (n 15) para 360.
126. ibid paras 362-3.
127. ibid paras 364-8.
128. As Piragoff and Robinson explain, in domestic legal systems that recognize the concept of 'wilful blindness', it is treated as tantamount to actual knowledge: Piragoff and Robinson (n 56) 861.
129. See, eg, Law Commission (England), *Criminal Code, Volume 2* (n 39) 191-2. See also Piragoff and Robinson (n 56) 861.
130. Piragoff and Robinson (n 56) 861.
131. A proposal for a draft provision on mental elements submitted to the Preparatory Committee in 1996 provided that: 'For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means: ... (b) [To be aware that there is a substantial likelihood that a circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists] [to be wilfully blind to the fact that a circumstance exists or that a consequence will occur]': *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* UN Doc A/51/22 (13 September 1996) Volume II: Compilation of Proposals, art H(3)(b). This paragraph did not appear in any later draft provisions on the mental element.
132. Eser (n 10) 931-2.
133. **Badar**, 'The Mental Element' (n 31) 496.
134. ibid.
135. ibid (emphasis added).
136. ibid, citing Williams, *Criminal Law* (n 14) 159.
137. See, eg, Bemba Confirmation (n 15) paras 136, 353 (describing the language of Article 30(1) as establishing a 'default rule').
138. Weigend, 'Harmonization' (n 119) 327.
139. Eser (n 10) 898. Triffterer also appears to favour this line of reasoning: Triffterer (n 51) 699-700.
140. K Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 789, cited in Werle and Jessberger (n 8) 43.
141. Schabas, *Introduction* (n 96) 225. In light of the recent jurisprudence of the Court (see below n 152), Schabas appears to have changed his position in his more recent book, where he states that 'article 21 lists [the Elements] as a source of applicable law, and to the extent that [alternative mental elements] are "provided" by such a source, they may be deemed "otherwise provided"': Schabas, *Commentary* (n 15) 475.
142. C Kreß, 'The Crime of Genocide under International Law' (2006) 6 Int'l Crim LR 461, 485 (emphasis in original).
143. See, eg, Clark, 'The Mental Element' (n 18) 321 (submitting that an alternative mental element 'might be based on the general law, and in particular applicable treaties, customary law and general principles of law'); **Badar**, 'The Mental Element' (n 31) 500 (stating that Article 30(1) 'enables the Statute to absorb the corresponding rules of international humanitarian law'); Cassese, *International Criminal Law* (n 54) 74. For an explanation of the approach taken by the Preparatory Commission in the Elements of Crimes, see Mauro Politi, 'Elements of Crimes' in Cassese, Gaeta and Jones (n 10) 461; Kelt and von Hebel, 'General Principles' (n 13) 29.
144. Werle and Jessberger (n 8) 45.
145. ibid 46 (emphasis in original).
146. ibid.
147. See Piragoff and Robinson (n 56) 856.
148. ibid.
149. Elements of Crimes, General Introduction, 2 (emphasis added).
150. See Piragoff and Robinson (n 56) 856.
151. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3).

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152. See Lubanga Confirmation (n 53) paras 356-9, where Pre-Trial Chamber I of the ICC accepted that the Elements of Crimes--which required only negligence with respect to the age of the victims in the case of Article 8(2)(b)(xxvi) (War crime of using, conscripting or enlisting children)--represented 'an exception to the "intent and knowledge" requirement embodied in article 30 of the Statute': at para 359. However, as Clark notes, '[w]hether the negligence exception is consistent with the Statute, as understood in Article 9(3), is a question that will no doubt be argued by the defence [in the *Lubanga* case] at a later stage': Clark, 'Elements of Crimes' (n 94) 222. See also Bemba Confirmation (n 15) paras 136, 353, where Pre-Trial Chamber II stated that 'it must be established that the material elements of the respective crime were committed with "intent and knowledge", unless the Statute *or the Elements of Crimes* require a different standard of fault' (emphasis added).
153. Although it is heavily criticized by Clark: Clark, 'Drafting a General Part' (n 95) 525 (fn 18); Clark, 'Elements of Crimes' (n 94) 214 (fn 14).
154. Werle and Jessberger (n 8) 44, 46-7. See also Eser (n 10) 901.
155. For an example of recklessness, see, eg, Article 8(2)(a)(iv), where the use of the term 'wantonly' reduces the level of the required mental state to recklessness. For an example of negligence, see, eg, Article 28(a)(i), which provides that a commander shall be criminally responsible for crimes committed by forces under his or her command not only when that military commander knew but also where the commander 'should have known' that such crimes were being committed. See also the Elements of Crimes for Article 8(2)(b)(xxvi) (the war crime of using child soldiers), which provides that the Prosecution need only prove that an accused 'should have known' that a soldier was a minor.
156. See the example of Article 28 cited in n 155 above.
157. See above n 155.
158. Pre-Trial Chamber I has accepted such an example in Lubanga Confirmation (n 53) paras 356-9 (concerning the war crime of using child soldiers).
159. Eser (n 10) 899, 900.
160. Werle and Jessberger (n 8) 48.
161. Piragoff and Robinson (n 56) 856-8.
162. ibid 857. See also Cassese, *International Criminal Law* (n 54) 65.
163. Piragoff and Robinson (n 56) 858. Kelt and von Hebel also agree that such additional mental elements have no particular material element connected to them: 'General Principles' (n 13) 31, 32. See also Triffterer (n 51) 703.
164. Werle and Jessberger (n 8) 48. On the concept of additional mental elements, see Commonwealth Attorney-General's Department (Australia), *The Commonwealth Criminal Code: A Guide for Practitioners* (March 2002) 61. The Guide refers to these additional mental elements as 'ulterior intentions', and explains that they 'characteristically take the form of a prohibition against engaging in conduct *with intention to* achieve some further objective' (emphasis in original). It further explains that while liability in these crimes 'is determined by the offender's objective, the achievement of that objective is not itself a physical element of the offence.'
165. However, as noted above, given that Article 30 imposes such a demanding test for both intent and knowledge, it is unlikely that there is any room left for this category.
166. **Badar**, 'The Mental Element' (n 31) 484; Cassese, *International Criminal Law* (n 54) 66.
167. Triffterer (n 51) 703.
168. This was identified as a 'specific intent' requirement in Bemba Confirmation (n 15) paras 293-4.
169. This was identified as an 'additional subjective element', 'specific intent' or *'dolus specialis'* requirement in *Prosecutor v Al Bashir* (Decision on Application for an Arrest Warrant) ICC-02/05-01/09, PT Ch I (4 March 2009) para 139.
170. This was identified as a 'specific intent' or *'dolus specialis'* requirement in ibid para 141.
171. This was identified as a *'dolus specialis'* requirement in Katanga Confirmation (n 86) para 332, and a 'specific intent' or 'additional special intent' requirement in Bemba Confirmation (n 15) paras 320, 331.
172. For an example of the approach taken by a domestic legal system on this point, see Commonwealth Attorney-General's Department (Australia), *The Commonwealth Criminal Code: A Guide for Practitioners* (March 2002) 61. The Guide explains that, since 'ulterior intentions' are not defined in the Code, the content of the mental element in these contexts 'is determined by ordinary usage and common law'. The Guide notes, however, that the definition of 'intent' provided in the Code, while not directly applicable, would provide a 'persuasive analogy' (at 63).
173. Satzger (n 9) 269.
174. Cassese, *'Mens Rea'* (n 7) 1025.
175. Werle and Jessberger (n 8) 37.
176. Eser (n 10) 907.

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Individual Criminal Responsibility before the International Criminal Court
A Comparison with the *Ad Hoc* Tribunals

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Abstract
For more than 15 years the two *ad hoc* Tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), have interpreted the requirements of different forms of individual criminal responsibility. It is thus helpful to look at whether and to what extent the jurisprudence of the ICTY/ICTR may provide guidance to the International Criminal Court (ICC). To this end, this article compares the requirements of individual criminal responsibility at the ICTY/ICTR and the ICC. The article concludes that, applied with caution, the jurisprudence of the ICTY/ICTR – as an expression of international law – can assist in interpreting the modes of liability under the ICC Statute. ICTY/ICTR case law seems to be most helpful with regard to accessorial forms of liability, in particular their objective elements. Moreover, it may assist in interpreting the subjective requirements set out in Article 30 ICC Statute.

Keywords
individual criminal responsibility; modes of liability; International Criminal Court (ICC); International Criminal Tribunal for the former Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR)

1. Introduction

The most serious crimes of international concern are rarely committed by one individual alone but usually involve larger numbers of persons. International criminal law as applied by the ICC and the *ad hoc* Tribunals, the ICTY and ICTR,[2] mostly focuses on the organisers or masterminds of such atrocities.

[1] The views expressed herein are those of the author alone and do not necessarily reflect the views of the ICTY, the Office of the Prosecutor of the ICTY or the United Nations in general. The author wishes to thank especially Helen Brady, Reinhold Gallmetzer, Fergal Gaynor and Steffen Wirth for their helpful comments.

[2] The judges of the ICTY Appeals Chamber are the same as those of the ICTR Appeals Chamber, thus the decisions of one Appeals Chamber are highly persuasive with the other, *Prosecutor* v. *Miroslav Kvočka et al.* (IT-98-30/1-A), Judgement, Appeals Chamber, 28 February 2005, Separate Opinion of Judge Shahabuddeen, para. 41.

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be certain which crime will ultimately be committed. Rather, it is sufficient if he or she is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed.[439]

Consistent with the subjective requirements for ordering, instigating and planning, the awareness of a probability/substantial likelihood should be sufficient with regard to both, the assistance and the crime of the principal.[440] In this sense, a Trial Chamber at the Special Court for Sierra Leone in *Brima et al.* held:

> The *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator.[441]

6.2. *ICC*

Article 25(3)(c) ICC Statute provides for aiding, abetting or otherwise assisting in the commission or attempted commission of a crime, including providing the means for its commission.[442]

While at the ICTY/ICTR aiding and abetting are used as one concept,[443] it has been suggested that at the ICC each term has its own meaning, and that 'assistance' serves as an umbrella term.[444]

The ICC Statute does not specify how strongly the assistance must impact on the principal's commission of the crime. According to one view, the use of the word 'facilitating' confirms that direct and substantial assistance is not required and that the act of assistance need not be a *conditio sine qua non* for the commission of the crime.[445] Other legal scholars take the view that – as at the ICTY/ICTR – the assistance has to have a substantial effect on the commission of the crime.[446] The latter seems to be consistent with the structure of Article 25(3) ICC

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439) *Haradinaj et al.* Appeal Judgement, *supra* note 438, para. 58; *Blaškić* Appeal Judgement, *supra* note 6, para. 50; *Simić* Appeal Judgement, *supra* note 51, para. 86.

440) *See also* submissions of the prosecution in the ICTY case of *Blagojević & Jokić,* summarized in *Blagojević & Jokić* Appeal Judgement, *supra* note 424, paras. 219-220 and footnote 577.

441) *Prosecutor* v. *Alex Tamba Brima et al.* (SCSL-04-16-T), Judgement, Trial Chamber II, 20 June 2007, para. 776; confirmed on appeal: *Prosecutor* v. *Alex Tamba Brima et al.* (SCSL-2004-16-A), Judgement, Appeals Chamber, 22 February 2008, para. 243.

442) Art. 25(3)(c) ICC Statute provides: "For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".

443) *The Prosecutor* v. *Laurent Semanza* (ICTR-97-20-T), Judgement and Sentence, Trial Chamber III, 15 May 2003, para. 385; *Orić* Trial Judgement, *supra* note 5, para. 280; for the distinction between the two concepts *see The Prosecutor* v. *Sylvestre Gacumbitsi* (ICTR-2001-64-T), Judgement, Trial Chamber III, para. 286 and *Semanza* Trial Judgement, para. 384.

444) Eser, Individual Criminal Responsibility, *supra* note 377, p. 798.

445) Ambos, Article 25, *supra* note 254, p. 760.

446) Werle, Individual Criminal Responsibility, *supra* note 9, p. 969; Eser, Individual Criminal Responsibility, *supra* note 377, pp. 800-801.

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Statute, which can be understood as listing modes of liability in order of seriousness:[447] Article 25(3)(a) ICC Statute, 'committing', contains the highest degree of criminal liability, since it constitutes a principal form of liability. Committing jointly requires an essential contribution in order to enable the co-perpetrators to jointly control the crime.[448] The 'substantial effect' which is suggested here to be required for Article 25(3)(c) ICC Statute requires less than the 'essential contribution'.[449] This is consistent with aiding and abetting being an accessorial form of liability. Accordingly, the contribution does not have to be essential so as to render control over the crime.

Although the wording "or otherwise assists" could suggest that no particular threshold is required, the structure of Article 25(3) ICC Statute speaks in favour of a certain threshold. Article 25(3)(c) ICC Statute is followed by Article 25(3)(d) ICC Statute which foresees contributions "[i]n any other way". This suggests that the assistance required for Article 25(3)(c) ICC Statute is more than that required by (d). A way to distinguish between the contributions required for Article 25(3)(c) and (d) ICC Statute is to require a *substantial* contribution for (c) and a *significant* one (which does not have to be substantial) for (d), applying the distinction used in the ICTY jurisprudence for JCE contributions.[450]

While the jurisprudence of the ICTY/ICTR can be used to interpret the objective elements, particularly the type of conduct and the causal connection required, the ICC Statute has its own subjective requirements.

According to Article 25(3)(c) ICC Statute, the assistant must act "for the purpose of facilitating the commission of the crime". This introduces a subjective threshold which goes beyond the subjective elements required by Article 30 ICC Statute.[451] It also goes beyond the subjective requirements for aiding and abetting applied at the ICTY and ICTR. This purpose requirement means that mere knowledge that the assistant aids the commission of the offence is not sufficient. Rather, the assistant must want that his or her assistance facilitates the commission of the crime.[452] On the other hand, it is not required that the assistant possesses the *mens rea* required for the crime, such as the genocidal intent.[453] "For the purpose of facilitating" could be read as relating only to the act of assistance, so that regarding the crime of the principal Article 30 ICC Statute would apply.[454]

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447) *See also* Werle, *Principles*, *supra* note 55, p. 169.
448) *See supra* 3.3.2.1.
449) Werle, Individual Criminal Responsibility, *supra* note 9, p. 969.
450) *See Brđanin* Appeal Judgement, *supra* note 62, para. 430; *see also* Cryer, *supra* note 313, p. 247.
451) *See also* Ambos, Article 25, *supra* note 254, p. 760.
452) Eser, Individual Criminal Responsibility, *supra* note 377, p. 801 refers to "wish".
453) Werle, Individual Criminal Responsibility, *supra* note 9, p. 969; *see however* Clark, *supra* note 384, p. 547.
454) Eser, Individual Criminal Responsibility, *supra* note 377, p. 801; Van Sliedregt, *Criminal Responsibility*, *supra* note 156, p. 88.

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THE AMERICAN MODEL PENAL CODE: A BRIEF OVERVIEW

Paul H. Robinson and Markus D. Dubber***

If there can be said to be an "American criminal code," the Model Penal Code is it. Nonetheless, there remains an enormous diversity among the fifty-two American penal codes, including some that have never adopted a modern code format or structure. Yet, even within the minority of states without a modern code, the Model Penal Code has great influence, as courts regularly rely upon it to fashion the law that the state's criminal code fails to provide. In this essay we provide a brief introduction to this historic document, its origins, and its content.

INTRODUCTION

Within the United States, there are fifty-two American criminal codes, with the federal criminal code overlaying the codes of each of the fifty states and the District of Columbia. Under the U.S. Constitution, the power to impose criminal liability is reserved primarily to the states, with federal authority limited to the prohibition and punishment of offenses specially related to federal interests (including crimes committed on property of exclusive federal jurisdiction such as military bases, crimes against certain federal officers, and crimes that involve conduct in more than one state that is difficult for a single state to effectively prosecute, such as drug

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and organized crime offenses).[1] The vast bulk of crimes and essentially all "street" crimes—homicide, rape, robbery, assault, and theft—fall under jurisdiction of one of the fifty state criminal codes or the code of the District of Columbia.

There is much diversity among the fifty-two American criminal codes and, therefore, it is often difficult to state "the" American rule on any point of criminal law. But there also are many similarities among the codes, in large part due to the influence of the American Law Institute's Model Penal Code. Promulgated in 1962, the code prompted a wave of state code reforms in the 1960s and 1970s, each influenced by the Model Penal Code.

Some of the Model Penal Code provisions have not been widely accepted. For example, while the Model Penal Code generally rejects the common law's "felony murder" rule, which in its broadest form holds all killings in the course of a felony to be murder, most states have retained the rule. Similarly, a majority of states have rejected the Model Penal Code's innovation in prescribing the same punishment for inchoate offenses, such as attempt, and consummated offenses.

Nonetheless, the Model Penal Code is the closest thing to being an American criminal code. The federal criminal code is too unsystematic and incomplete in theory and too irrelevant in practice to function as a national code. Where states have not followed the Model Penal Code, the divergences locate points of controversy that often continue today. And the code and its commentaries have been the intellectual focus of much American criminal law scholarship since the code's promulgation.[2]

I. THE HISTORY OF THE MODEL PENAL CODE

The Model Penal Code was not the first or the most ambitious, but far and away the most successful attempt to codify American criminal law. To appreciate the Model Penal Code's significance, it must be placed within the

1. More specifically, the states' criminal law power derives from their "police power." The federal government has no police power and therefore must rest its criminal-law making on other grounds, most notably the power to regulation interstate commerce. See Markus D. Dubber & Mark G. Kelman, American Criminal Law: Cases, Statutes, and Comments 2–3 (2005); see generally Markus D. Dubber, The Police Power: Patriarchy and the Foundations of American Government (2005).

2. See generally Markus D. Dubber, Criminal Law: Model Penal Code §§ 1–2 (2002); Paul H. Robinson, Criminal Law § 2.1 (1997).

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spotty history of American criminal codification.[3] Unlike the development in continental Europe, modern criminal law in the United States did not arrive in the form of criminal codes. Rather than concern themselves with the threat of punishment, American reformers pragmatically proceeded directly to reform the punishment itself. In the new field of corrections, Americans led the way. As a French resident of Philadelphia noted admiringly in 1796, "the attempt at an almost entire abolition of the punishment of death, and the substitution of a system of reason and justice, to that of bonds, ill-treatment, and arbitrary punishment, was never made but in America."[4] As early as 1776, Thomas Jefferson had drafted a bill for the Virginia legislature that called for punishment based on the theory of prevention outlined by Cesare Beccaria and developed by Jeremy Bentham.[5] The final two decades of the eighteenth century brought the establishment of solitary confinement prisons in Philadelphia and then in New York and other states, including Virginia. 1823 saw the opening of the prison in Auburn, New York, to which visitors flocked from around the world, including Alexis de Tocqueville.[6]

American criminal codes were first compiled by Edward Livingston and later David Dudley Field. Livingston's elaborate drafts for a federal criminal code and a Louisiana criminal code, completed in 1826, were both the most ambitious and the least successful efforts at criminal law codification in the United States. Livingston's penal code was Benthamite both in scope and in substance. The penal code was divided into four separate codes comprising all aspects of penal law, from the definition of penal norms in a "Code of Crimes and Punishments," to the imposition of those norms in a "Code of Procedure" and a "Code of Evidence," and eventually

3. For a more detailed treatment of the history of Anglo-American criminal codification, see Sanford H. Kadish, Codifiers of the Criminal Law, in Blame and Punishment: Essays in the Criminal Law 205 (1987).

4. François-Alexandre-Frédéric La Rochefoucauld-Liancourt, On the Prisons in Philadelphia 33 (1796) (quoted in Louis P. Masur, Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865, at 71 (1989)).

5. For a critical appraisal of Jefferson's draft, see Markus D. Dubber, "An Extraordinarily Beautiful Document": Jefferson's Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment, in Modern Histories of Crime and Punishment (Markus D. Dubber & Lindsay Farmer eds., 2007).

6. See Gustave de Beaumont & Alexis de Tocqueville, On the Penitentiary System in the United States and Its Application in France (1833).

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to the actual infliction of sanctions in a "Code of Reform and Prison Discipline."[7] Each aspect of the penal law, and each corresponding code, was individually, and as a system, designed to rationalize penal law on the utilitarian principle that Bentham had derived from Cesare Beccaria's famous treatise *On Crimes and Punishments: la massima felicità divisa nel maggior numero.*[8]

David Dudley Field was both far less ambitious, and far more successful, as a criminal codifier. A successful New York lawyer, Field's codification efforts extended beyond the penal law and reflected pragmatic concerns about the accessibility of law, most importantly to lawyers.[9] Field's codes were designed to simplify legal practice by sparing attorneys the tedium of having to sift through an ever rising mountain of common law opinions. As a result, Field was more concerned with streamlining than he was with systematizing or even reforming New York penal law. Field's New York Penal Code was submitted to the legislature in 1865, and passed into law in 1881.[10] It remained in force until it was replaced by the New York Penal Law of 1967.

That New York Penal Law, like the revised criminal codes of many other states, was based in large part on the American Law Institute's Model Penal Code, which had been published in 1962. In fact, Herbert Wechsler, the Chief Reporter of the Model Penal Code, served on the legislative commission that drafted the New York code.[11]

The Model Penal Code combined Livingston's systematic ambition and integrated utilitarian approach with Field's pragmatism and legislative success. When the Model Penal Code project was launched in 1951, the vast majority of American criminal codes were in a sorry state. Only Louisiana had undertaken a serious effort to reform its criminal code since

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7. See Edward Livingston, The Complete Works of Edward Livingston on Criminal Jurisprudence (1873).

8. Cesare Beccaria, Dei delitti e delle pene (1764). On the relation between Bentham and Beccaria, see H.L.A. Hart, Bentham and Beccaria, in Essays on Bentham: Studies in Jurisprudence and Political Theory 40 (1982).

9. New York Field Codes (1850–1865).

10. 4 New York Field Codes (1850–1865).

11. See generally Richard Bartlett, Criminal Law Revision Through a Legislative Commission, 18 Buff. L. Rev. 213 (1968–1969); Richard Denzer, Drafting a New Penal Law for New York, 18 Buff. L. Rev. 251 (1968–1969).

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the nineteenth century.[12] A typical American criminal code at the time was less a code and more a collection of ad hoc statutory enactments, each enactment triggered by a crime or a crime problem that gained public interest for a time. What passed for a major "reform" in that period was the federal criminal code in 1948 putting the offenses in alphabetical order. Faced with this state of affairs, the American Law Institute's decision to draft a Model Penal Code was an ambitious undertaking.

The American Law Institute (ALI) is a nongovernmental organization of highly regarded judges, lawyers, and law professors in the United States. The institute typically drafts a "restatement" of an area of law, which articulates and rationalizes the governing rules in American jurisdictions. When published, the ALI "Restatement of the Law" for a particular area often becomes persuasive authority for courts and legislatures and commonly is relied upon by courts in interpreting and applying the law.

When the institute undertook its work on criminal law, however, it judged the existing law too chaotic and irrational to merit "restatement." What was needed, the institute concluded, was a model code, which states might use to draft new criminal codes.

The institute's criminal law work was started in 1931, a year after the institute completed a model code of criminal procedure. But the work was stalled during the depression years by lack of adequate funding and later by the events surrounding World War II. It was renewed in 1951 with a grant from a private foundation and proceeded at full speed for more than a decade.

From the beginning, the project bore the imprint of the Chief Reporter, Herbert Wechsler, a law professor at Columbia University who also had participated in the Nuremberg trials of Nazi war criminals.[13] Wechsler assembled a distinguished and remarkably diverse advisory committee of law professors, judges, lawyers, and prison officials, as well as experts from the fields of psychiatry, criminology, and even English literature.[14] In addition, a number of drafting groups tackled various

12. See La. Crim. Code (1942).

13. On Wechsler's approach to criminal law codification, see Herbert Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097 (1952).

14. Jerome Hall, the leading American criminal law theorist of the time, did not meaningfully participate in the drafting of the code. Cf. Jerome Hall, The Proposal to Prepare a Model Penal Code, 4 J. Legal Stud. 91 (1951); see also Markus D. Dubber, Penal Panopticon: The Idea of a Modern Model Penal Code, 4 Buff. Crim. L. Rev. 53, 63–64 (2000) (discussing Wechsler's rejection of Hall's retributivism).

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specific topics, such as the treatment of insane offenders or the death penalty. After much debate within the drafting group and the advisory committee, tentative drafts of parts of the code with detailed commentary were presented to and debated by the entire membership of the institute at its annual meetings. This process of annually considering tentative drafts continued until 1962, when the institute finally approved a complete *Proposed Official Draft*. The original drafters' commentaries contained in the various tentative drafts were consolidated, revised, and finally republished along with the 1962 text as a six-volume set in 1985.[15]

The diversity of its advisory committee indicates the almost Livingstonian scope of the Model Penal Code's ambition. The Model Penal Code is not merely a criminal code, but rather extends to the law governing the infliction of punishment. In fact, the code refers to itself as a "Penal and Correctional Code" or P.C.C., with its first two parts dedicated to substantive criminal law and the other two parts addressing "treatment and correction" and "organization of correction," respectively.[16] No part of the Model Penal Code is explicitly devoted to the remaining aspect of penal law, the law of criminal procedure and evidence. Nonetheless, the code is littered with procedural provisions, including sections that determine the method and propriety of prosecution in particular cases;[17] address the defendant's competency to stand trial;[18] define, assign, and shift the burden of proof;[19] establish evidentiary presumptions;[20] and deal with the appointment of expert witnesses.[21] These provisions complement the ALI's 1930 Model Code of Criminal Procedure. Ten years after the completion of the Model Penal Code, the ALI also published a Model Code of Pre-Arraignment Procedure.

While the Model Penal Code acknowledged the importance of retributional concerns, it commonly gave prominence to more utilitarian

15. Model Penal Code (Official Draft and Revised Comments 1985).

16. Id. § 1.01(1).

17. Id. §§ 1.07-.11, 2.12.

18. Id. § 4.04.

19. Id. §§ 1.12, 2.04(4), 2.08(4), 2.09(1), 2.10, 3.01-.11, 212.4(1), 212.5, 213.6, 221.2(3), 223.1(1), 223.4, 223.9, 230.3, 242.5.

20. Id. §§ 1.03(4), 1.12(5), 5.03(7), 5.06(2) & (3), 5.07, 210.2(b), 211.2, 212.4, 223.6(2), 223.7(1), 223.8, 224.5, 251.2(4), 251.4.

21. Id. § 4.05.

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functions: to deter criminal conduct and, in the event this failed, to diagnose the correctional and incapacitative needs of each offender.[22] The Model Penal Code in this way laid the foundation for the Correctional Code.[23] For example, the Model Penal Code prescribes the same peno-correctional treatment for a person who attempts to commit an offense as for a person who manages to consummate the offense, because both undeterred offenders have displayed the same symptom of dangerousness.[24]

Still, it cannot be said that the Model Penal Code systematically worked out the implications of any particular theory of punishment (or treatment). Adopting an approach that has been characterized as "principled pragmatism,"[25] the code drafters never lost sight of the code's ultimate goal, the reform of American criminal law. Instead of rewriting criminal law in strict consequentialist terms, the code drafters took care to ground the code firmly in existing law and frequently sacrificed theoretical consistency for pragmatic expediency. To continue with the example of attempt, the Model Penal Code carved out an exception for serious offenses, to blunt the otherwise radical impact of its new principle of equal treatment for attempted and consummated offenses.[26] Similarly, the code did not condemn capital punishment, the one sanction that could not fit into its law of "treatment and correction." Instead, it addressed the question in a bracketed section that imposes many serious restrictions on the imposition of capital punishment.[27] Ironically, this conflicted provision later became the foundation for several death penalty statutes and, eventually, the United States Supreme Court's effort to place capital punishment on a constitutional foundation.[28]

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22. The purposes of the code's various parts are defined in id. § 1.02(1) & (2). See generally Dubber, supra note 14; Robinson, supra note 2, § 1.2.

23. Model Penal Code pts. III & IV (Proposed Official Draft 1962).

24. Model Penal Code § 2.05 cmt. at 293–95 (Official Draft and Revised Comments 1985).

25. Herbert L. Packer, The Model Penal Code and Beyond, 63 Colum. L. Rev. 594 (1963).

26. Model Penal Code § 5.01(1) (Proposed Official Draft 1962).

27. Id. § 210.6.

28. See, e.g., McGautha v. California, 402 U.S. 183, 202 (1971); Gregg v. Georgia, 428 U.S. 153, 158, 190–91, 194 (1976); Proffitt v. Florida, 428 U.S. 242, 247 (1976); California v. Ramos, 463 U.S. 992, 1009 (1983).

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II. THE INFLUENCE OF THE MODEL PENAL CODE

As a pragmatic document, the Model Penal Code enjoyed great success in American legislatures. The code's impact on American criminal law far exceeded that of even the most successful earlier codification project, the Field code. But it was the criminal law portion of the code—the statement of general principles of liability in part I and the definition of specific offenses in part II—that gained historic significance. The sentencing, treatment, and corrections portions, in parts III and IV, saw little acceptance and were soon left behind as American punishment theory and practice moved on to other approaches.

Even before the Model Penal Code was finished, its tentative drafts were used as models for criminal code reform. The two decades following the 1962 promulgation saw a host of state recodifications. New codes were enacted in Illinois, effective in 1962; Minnesota and New Mexico in 1963; New York in 1967; Georgia in 1969; Kansas in 1970; Connecticut in 1971; Colorado and Oregon in 1972; Delaware, Hawaii, New Hampshire, Pennsylvania, and Utah in 1973; Montana, Ohio, and Texas in 1974; Florida, Kentucky, North Dakota, and Virginia in 1975; Arkansas, Maine, and Washington in 1976; South Dakota and Indiana in 1977; Arizona and Iowa in 1978; Missouri, Nebraska, and New Jersey in 1979; Alabama and Alaska in 1980; and Wyoming in 1983. All of these thirty-four enactments were influenced in some part by the Model Penal Code. Draft criminal codes produced in other states, such as California, Massachusetts, Michigan, Oklahoma, Rhode Island, Tennessee, Vermont, and West Virginia, did not pass legislative review and may yet be revived.

Of the states that have not yet adopted a modern criminal code, the federal system is the most unfortunate example. The U.S. Congress has tried on and off to reform the federal criminal code since 1966, when Congress established a code revision commission at the urging of President Johnson.[29] In 1971, the Brown Commission produced a comprehensive and systematic Proposed New Federal Criminal Code.[30] Later code proposals, built upon the Brown Commission model, were introduced as legislative bills. One of these bills even passed the Senate but died

29. See generally Ronald L. Gainer, Federal Criminal Code Reform: Past and Future, 2 Buff. Crim. L. Rev. 45 (1998).

30. National Commission on Reform of Federal Criminal Laws, Final Report: A Proposed New Federal Criminal Code (1971).

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in the House of Representatives. Criminal code reform is always difficult because it touches highly political issues, but the lack of a modern federal criminal code is considered a matter of some embarrassment among criminal law scholars in the United States. The present federal criminal code is not significantly different in form from the alphabetical listing of offenses that was typical of American codes in the 1800s.

The Model Penal Code's influence has not been confined to the reform of state codes. Thousands of court opinions have cited the Model Penal Code as persuasive authority for the interpretation of an existing statute or in the exercise of a court's occasional power to formulate a criminal law doctrine. (As is well known, while American courts have authority to interpret a code's ambiguous provisions, they generally are bound to follow what they know to be the legislative intention, and bound by interpretation decisions of a higher court.)

Even the Model Penal Code's official commentaries have been influential. Many states have little legislative history available for their courts to use in interpreting a state code provision. Where the state code provision was derived from or influenced by a Model Penal Code provision, the Model Penal Code's commentary often is the best available authority on the reasoning behind the provision and its intended effect.

The code's official commentaries also have become an important research source for criminal law scholars. The commentaries generally give a thoughtful and detailed explanation of the reasoning underlying a code provision as well as the scholarly debates concerning it. Also, because the official commentaries were not published until 1980 (Special Part) and 1985 (General Part), the commentary drafters had available to them information on how each of the Model Penal Code provisions fared during the previous two decades of state criminal code reform. The extent of a code provision's reception or rejection by the states often is detailed in the official commentaries.

The code's provisions for sentencing[31] and treatment[32] have not been influential.[33] They reflect a rehabilitative approach that has since passed out

31. Model Penal Code arts. 6 & 7 (Proposed Official Draft 1962).

32. Id. pts. III & IV.

33. The American Law Institute is currently considering a revision of the code's sentencing provisions. See Symposium, Model Penal Code: Sentencing, 7 Buff. Crim. L. Rev. 1–306 (2003); see also Kevin R. Reitz, American Law Institute, Model Penal Code: Sentencing, Plan for Revision, 6 Buff. Crim. L. Rev. 525 (2003).

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of favor. The code has many fewer grading categories than most modern American codes, thereby allowing greater sentencing discretion within each offense grade.[34] Its sentencing system generally relies upon the exercise of broad discretion by judges to individualize an offender's sentence.

In contrast, current American practice is to limit sentencing discretion.[35] That change in approach comes in part from a belief that discretion undercuts the virtues of the legality principle: Discretion increases the likelihood of disparate sentences for similar offenders committing similar offenses.[36] Discretion increases the potential for abuse by a biased decision maker. Discretion undercuts predictability, which is important for both effective deterrence and fair notice. Finally, discretion shifts the criminalization and punishment decisions away from the legislative branch and to the less democratic judicial and executive branches of government.

The code's discretionary sentencing system also is of little current influence in the U.S. because of a change in the underlying theory of liability and punishment.[37] The code's use of discretion was consistent with its interest in using the criminal justice system to promote rehabilitation and to incapacitate dangerous offenders who could not be rehabilitated. With that purpose, the length of an offender's incarceration logically depended upon how the person changed during his criminal commitment. An actual release date could only be determined when an offender appeared to be ready for release.

The limited ability of the social sciences to rehabilitate and to reliably predict future dangerousness has dampened the interest in broad sentencing discretion. This, along with a growing interest in imposing just punishment, has led to less sentencing discretion and more determinate sentences (that is, sentences not subject to early release on parole).

This change in the underlying penal philosophy affected the legislative success not only of the code's sentencing and treatment provisions but also

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34. See Gerard E. Lynch, Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part, 2 Buff. Crim. L. Rev. 297 (1998).

35. See, for example, the (once) mandatory sentencing guidelines for federal courts, United States Sentencing Guidelines Manual (2005). The future of determinate guideline sentencing in the United States, however, recently has been thrown into doubt. See United States v. Booker, 543 U.S. 220 (2005) (federal sentencing guidelines merely advisory).

36. See, e.g., Marvin E. Frankel, Criminal Sentences: Law Without Order (1973).

37. See, e.g., Andrew von Hirsch, Doing Justice: The Choice of Punishments (1976); Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (1981); Herbert Morris, Persons and Punishment, 52 Monist 475 (1968).

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of some of its liability and grading provisions. For example, few states have followed the code's abandonment of the common law distinction between the punishment for attempted and consummated offenses. The code's policy makes good sense if one's focus is on rehabilitation and incapacitation of the dangerous—an offender may be equally dangerous whether or not his conduct in fact causes the harm intended or risked. On the other hand, if the criminal law is to capture the community's sense of justice, then the community's shared intuition that resulting harm does matter cannot be ignored.[38]

The code's Special Part also has become dated in some areas, such as in its treatment of sexual offenses and drug offenses. American society's views on many sexual and gender issues have changed since the code was drafted in the 1950s. Modern American codes typically adopt a gender-neutral approach to defining sexual offenses, give greater expression to the concern for victims of sexual offenses, and reflect a greater sensitivity to the history of sexual victimization of women by men. For instance, beginning in the 1980s, states began to reject the marital immunity for rape, which the Model Penal Code had retained from the common law. At the same time, drug offenses now figure among the most serious offenses defined in American criminal codes. In 1962 the Model Penal Code included no drug offenses. In an appendix to the code's Special Part, the drafters merely remarked that "a State enacting a new Penal Code may insert additional Articles dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws."[39]

III. THE INNOVATIONS OF THE MODEL PENAL CODE

To appreciate the Model Penal Code's contribution to criminal law codification in the United States, it is important to recall the embryonic state of the subject at the outset of the Model Penal Code project in the early 1950s. The then most recent codification effort was that of the 1948 reform

38. Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law (1995); Paul H. Robinson, Competing Conceptions of Modern Desert: Vengeful, Deontological & Empirical (forthcoming 2007); Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy (forthcoming 2007).

39. Model Penal Code app. (Proposed Official Draft 1962).

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of the federal criminal code, an alphabetical ordering of federal crimes for which, according to a contemporary observer, "the spadework was done by the hired hands of three commercial law-book publishers, on delegation from a congressional committee desirous of escaping the responsibility of hiring and supervising its own staff."[40]

As a result, the Model Penal Code drafters had virtually no existing American criminal codes to which to turn, with the possible exception of the recently reformed criminal code of Louisiana. That code, however, could have only limited significance for a Model Penal Code of American criminal law because of the unique history and nature of Louisiana law, which alone among the states was rooted not in uncodified English common law, but in codified European civil law. Much of what the Model Penal Code introduced into the United States has long been common practice in European codes. But while the code's structure generally resembles that of many European codes, the extent to which these foreign codes more directly influenced the Model Penal Code is unclear. The strongest foreign influence on the code came in the person of Glanville Williams, a British criminal law expert on the uncodified English common law.

A. A Comprehensive General Part

The Model Penal Code drafters created a "General Part" that contains a set of general principles applicable to each of the specific offenses contained in the "Special Part" of the code. The general principles include such matters as general principles for imposing liability, general principles of defense, general inchoate offenses, etc. Such a structure, hardly revolutianry by European standards, provides greater clarity and sophistication while simultaneously simplifying the code. Instead of having to repeat the rules governing complicity, omission liability, culpability requirements, or available defenses, for example, in each offense (or leaving them to the courts to define), the rules can be stated once in detailed form in the General Part, to be referred to in the prosecution of any offense in the Special Part.

The current federal criminal "code" is typical of what existed in the states before the Model Penal Code. It has essentially no General Part. (The term "code" may suggest a document of greater coherence and planning than is present in the current federal "code," so it may be better

40. Henry M. Hart, Jr. The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 432 n.70 (1958).

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to refer simply to "Title 18 of the United States Code"). Title 18's chapter 1, grandly titled "General Provisions," includes a less-than-helpful definition of complicity, an insanity defense, and a few definitions. Thus, 99 percent of the General Part remains uncodified in federal law, thereby delegating criminal-law making authority to the federal judiciary.

B. An Analytic Structure

The Model Penal Code, like most successful criminal codes, implicitly provides an analytic structure that gives judges, lawyers, and jurors a decisional process for assessing criminal liability.[41] Its three-part structure might be summarized with these questions:

First, does the actor's conduct constitute a crime? The code defines the contours of the law's prohibitions (and, where duties to act are created, the law's commands). This is the issue most familiar to laypersons and most prominent in older criminal codes. It is the sole subject of the code's entire Special Part.

Second, even if the actor's conduct does constitute a crime, are there special reasons why that conduct ought not to be considered wrongful in this instance, under these facts? Article 3 of the Model Penal Code answers this question through the use of justification defenses. These defenses concede the violation of a prohibitory norm, but offer a countervailing justificatory norm that undercuts the propriety of liability on the special facts of the current situation.

Finally, even if the actor's conduct is a crime and is wrongful (unjustified), should the actor be held blameworthy for it? Is he or she deserving of criminal liability and punishment? This question is answered primarily by the excuse defenses and culpability requirements in articles 2 and 4 of the code. For example, wrongful conduct by an actor who is at the time insane or under duress or involuntarily intoxicated may not be sufficiently blameworthy to merit the condemnation of criminal conviction.

C. Defining Offenses Fully, Using Defined Terms

The Model Penal Code drafters understood that an undefined term invites judicial lawmaking in the same way as an absent or partial provision, and

41. See Dubber, supra note 2, §§ 3, 18; Paul H. Robinson, Structure & Function in Criminal Law pt. II (1997). For a functional analysis of the code's structure, see id. pt. III.

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can as effectively undercut the goals of the legality principle. Every code will inevitably contain ambiguous language that must be interpreted by judges. A drafter's obligation, they believed, is to reserve that delegation of judicial authority to the instances in which it is not reasonably avoidable. Code terms that might reasonably be given different definitions by different readers ought to be defined.

With this view, the Model Penal Code drafters did much to fully define offenses and to define the terms they used in defining offenses; the code explicitly rejects common law offenses and bars judicial creation of offenses.[42] In addition, the code's General Part includes definitions of commonly used terms that will then have the same meaning in every provision of the code. Defined terms also are contained at the beginning of many articles in the Special Part.

Compared to many European criminal codes, the Model Penal Code covers more topics in greater detail. As a result, the code occasionally reads more like a criminal law textbook than a code. Its comprehensiveness and detail reflect the scope and nature of the code's reform ambition. Topics can be left for judicial or scholarly interpretation only in the presence of a highly sophisticated judiciary and academic community. At the time of the code project, the criminal law in the United States met neither of these conditions. The code, after all, was specifically designed to wrest the criminal law out of the hands of the judiciary which, after centuries of common-law making, had left the criminal law an unprincipled mess.

D. A System for the Interpretation of Code Provisions

The Model Penal Code drafters' concern for advancing legality interests also showed in their creation of a system for the interpretation of the code's provisions. Such guidance in the exercise of judicial discretion increases the law's predictability and reduces both disparity in application and the potential for abuse of discretion.

The statutory principles of interpretation also are designed to advance the goals for which criminal liability and punishment are imposed. Model Penal Code section 1.02 directs judges to interpret ambiguous provisions

42. Model Penal Code § 1.05 (Proposed Official Draft 1962).

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to further the code's purposes.[43] While such a provision has its shortcomings (it gives no guidance on what to do when different purposes conflict, as frequently occurs), it is an important first step toward rationality in code drafting, for it offers a formal statement of what the code is meant to achieve.

E. A System of Offenses

Rather than a *collection* of offenses, where each offense is an independent creature, often the result of a political campaign prompted by a particular crime or event, the Model Penal Code adopts a *system* of offenses, in which offenses are designed to work together as a complementary group. Offenses typically avoid both gaps and overlaps in coverage. By considering all offenses together, the legislature can better insure that the penalties associated with each offense properly reflect the relative seriousness of that offense in relation to other offenses.

Part of this systematic approach to creating and defining offenses is to organize offenses conceptually—offenses against the person, offenses against property, etc.—and within each general group to organize offenses into related subcategories.[44] Offenses against the person, for example, are organized into four articles: homicide (§ 210); assault, endangerment, and threats (§ 211); kidnapping and related offenses (§ 212); and sexual offenses (§ 213). Such conceptual grouping makes it easier to see, and to avoid, overlaps among offenses and unwarranted grading disparities. It also makes it easier for a code user to find the relevant offense. And, when the relevant offense is found, such grouping insures the user that related offenses are nearby, not hidden in a dark corner elsewhere in the code.

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43. The code's purposes are:

> (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes; (c) to safeguard conduct that is without fault from condemnation as criminal; (d) to give fair warning of the nature of the conduct declared to constitute an offense; (e) to differentiate on reasonable grounds between serious and minor offenses.

Model Penal Code § 1.02(1)(a)-(e) (Proposed Official Draft 1962).

44. For a comparative discussion of the code's notion of "individual or public interests" and the concept of *Rechtsgut* in German criminal law, see Markus D. Dubber, Theories of Crime and Punishment in German Criminal Law, 53 Am. J. Comp. L. 679 (2006).

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F. Innovations in Specific Criminal Law Doctrines

In substance, the Model Penal Code is based on the American criminal law at the time it was drafted. For the vast majority of issues in the general and special part of criminal law, this law was judge-made common law. If the code drafters ventured beyond the confines of American criminal law, they consulted English common law jurisprudence, particularly as interpreted by Glanville Williams, whose extended project to rationalize English criminal law coincided with Herbert Wechsler's attempt to rationalize American criminal law through the Model Penal Code.[45]

Many of the Model Penal Code's substantive innovations already were laid out in Wechsler's monumental 1937 article, "A Rationale of the Law of Homicide."[46] There Wechsler, and his Columbia colleague Jerome Michael, subjected American criminal law to a detailed critique, using the law of homicide as an illustration. The Model Penal Code thus arose from a painstaking critique of positive law, rather than from a systematic theory of criminal liability. Wechsler was no theoretician. As a major figure in the American legal process school, Wechsler saw the problems of substantive criminal law as problems of policy. The criminal law, and therefore the Model Penal Code, was a means to achieve a policy end.[47]

1. Offense Elements

The Model Penal Code set out to simplify and rationalize the hodgepodge of common law offense definitions in two ways.[48] First, it adopted an approach that has been called "element analysis," which carefully distinguished between the various elements of an offense, including conduct, attendant circumstances, and its result. Second, it recognized and defined only four mental states: purpose, knowledge, recklessness, and negligence. Each objective element of a given offense in the code can have attached to it a different mental state.

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45. See Glanville Williams, Criminal Law: The General Part (1st ed. 1953; 2d ed. 1962).

46. Jerome Michael & Herbert Wechsler, A Rationale of the Law of Homicide I & II, 37 Colum. L. Rev. 701, 1261 (1937).

47. That end, however, in Wechsler's opinion, recently had been scientifically settled once and for all in favor of a deterrent-rehabilitative approach. See id. at 732 n.126.

48. Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability, 35 Stan. L. Rev. 681 (1983); Robinson, supra note 41, ch. 3.

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The first innovation was designed to eliminate the common law's confusion about the so-called mens rea of a given offense. This confusion, the code drafters believed, often resulted from the inability of the common law to distinguish between different elements of an offense, each of which may require a different mental state for conviction.

Standing alone, the differentiation of various offense elements, coupled with the novel requirement that each element, rather than merely each offense, carry a mental state, might have complicated rather than simplified the law. The second innovation addressed this problem by replacing the dozens of mental states that had emerged over the course of the common law with merely four.

This radical change in the law of mens rea, one of the core principles of the common law, drew little criticism from commentators and proved remarkably popular among state legislatures.[49] In fact, the Model Penal Code's definitions of these four mental states may be the code's most important contribution to American criminal law reform. These definitions strove to simplify not only by radically reducing the number of mental states, but also by reducing (but not eliminating) reliance upon normative judgments. Talk of "malice aforethought" and even "premeditation" were replaced by presumably testable phenomena such as "conscious object" or "knowledge." In its zeal to clarify the law, the Model Penal Code even excised the words "intent" and "intention" from its terminology, concepts that in spite (or perhaps partly because) of their ambiguity had assumed a central place in the criminal law of the United States, as well as of many other countries.[50]

On the subject of so-called strict or absolute liability offenses, i.e., offenses whose elements do not all require a culpability state, the Model Penal Code struck a characteristically pragmatic compromise. Instead of eliminating such offenses altogether, it limited their common use to two offense categories, "civil offenses" defined in the criminal code as "violations," punishable only by fine, forfeiture, or other civil penalty, and "offenses defined by statutes other than the code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to

49. But see Jerome Hall, Negligent Behavior Should Be Excluded from Penal Liability, 63 Colum. L. Rev. 632 (1963).

50. But cf. N.Y. Penal Law § 15.05(1) (2006) (retaining mental state of "intentional," but redefining it in terms of "conscious objective").

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any material element thereof plainly appears."[51] The Model Penal Code does not prohibit strict liability in the code's offenses, but does create a presumption against interpreting the absence of a culpability element as strict liability. Instead, a requirement of recklessness is read into an offense that contains no specific culpable state of mind requirement.[52]

In the particular case of felony murder, a serious strict liability offense under the common law whose definition required no mental state with respect to the act of homicide, the Model Penal Code transformed the definitional question into an evidentiary one. Instead of eliminating the requirement of a mental state with respect to the homicidal act, as the common law had done, the code instead established a rebuttable presumption that the perpetrator of an underlying felony in fact had the mental state with respect to the killing that would constitute murder (recklessness manifesting an extreme indifference to the value of human life).[53]

2. Inchoate and Accomplice Liability

The Model Penal Code's abandonment of the common law distinction between inchoate and consummated offenses already has been mentioned.[54] This decision was both the most doctrinaire and the least successful by the code drafters. Punishing inchoate offenses as harshly as consummated ones appears particularly harsh against the background of the wide sweep of inchoate offenses under the code. By defining all inchoate offenses in its General Part, the code cemented the common law's broad approach to preparatory offenses. Every crime, including the pettiest misdemeanor, was criminalized in its inchoate form, whether as an attempt, a solicitation, or as a conspiracy. Still, the Model Penal Code did bar the conviction of, though not the prosecution for, both the inchoate and the consummated form of an offense.[55] The code thereby rejected the most expansive theory of inchoate offenses under the common law, still espoused at the time by federal criminal law, which had permitted separate punishments for the preparation and consummation

51. Model Penal Code § 2.05 (Proposed Official Draft 1962).

52. Id. § 2.02(3).

53. Id. § 210.2(1)(b).

54. See generally Herbert Wechsler et al., The Treatment of Inchoate Crimes in the Model Penal Code I & II, 61 Colum. L. Rev. 571, 957 (1961).

55. Model Penal Code § 1.07(1)(b) (Proposed Official Draft 1962).

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of the same offense.[56] The code also prohibits multiple convictions "of more than one [inchoate] offense . . . for conduct designed to commit or to culminate in the commission of the same crime."[57]

The Model Penal Code draws a sharp theoretical distinction between inchoate offenses and complicity, which was defined as the attribution of the principal's criminal conduct to another.[58] The distinction was of less practical significance, however, as the code abandoned not only the distinction between the punishment for preparatory and consummated offenses, but also that between the punishment of principals and accessories. In fact, the code discarded the common law distinctions between first- and second-degree principals, on the one hand, and accessories before and after the fact, on the other, in favor of a single distinction between principal and accomplice, both of whom were then subjected to the same punishment.[59]

Only after an intervention by Judge Learned Hand, one of America's most prominent judges, did the American Law Institute reject the drafters' proposal to extend accomplice liability, and therefore full punishment as a principal, to a person who was merely aware of his contribution to the principal's criminal act.[60] The code instead requires that the accomplice act "with the purpose of promoting or facilitating the commission of the offense."[61] As a compromise, some states have adopted general facilitation provisions that criminalize aiding another's criminal conduct knowingly or merely "believing it probable" that one is rendering aid.[62]

3. Justification Defenses

The code for the first time recognized a general defense of necessity, or lesser evils. This defense is available where particular justification defenses, such as self-defense, defense of property, or law enforcement authority,

56. See, e.g., Callanan v. United States, 364 U.S. 587 (1961).

57. Model Penal Code § 5.05(3) (Proposed Official Draft 1962).

58. See id. § 2.06.

59. On the common law of complicity, see Francis Bowes Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689 (1930).

60. Model Penal Code § 2.06 cmt. at 313-19 (Official Draft and Revised Comments 1985).

61. Model Penal Code § 2.06(3)(a) (Proposed Official Draft 1962).

62. N.Y. Penal Law § 115.00 (2006).

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are not. The defense applies to conduct the actor believes to be "necessary to avoid a harm or evil to himself or another," provided that "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."[63] The broad scope of this provision is best illustrated by the cases enumerated in the official code commentary:

> Under this section, property may be destroyed to prevent the spread of a fire. A speed limit may be violated in pursuing a suspected criminal. An ambulance may pass a traffic light. Mountain climbers lost in a storm may take refuge in a house or may appropriate provisions. Cargo may be jettisoned or an embargo violated to preserve the vessel. An alien may violate a curfew in order to reach an air raid shelter. A druggist may dispense a drug without the requisite prescription to alleviate grave distress in an emergency.[64]

The lesser evils defense does not affect the actor's civil liability and is a so-called affirmative defense. To successfully invoke an affirmative defense, the defendant must produce supporting evidence before the burden of proof shifts to the prosecution, which must then disprove the defense beyond a reasonable doubt.[65] The code frequently relies on this procedural mechanism to resolve difficult issues of substantive criminal law.[66]

4. Excuse Defenses

The Model Penal Code drafters devoted almost an entire article to the problem of legal insanity. Except for its final section, which sets the age of maturity for purposes of criminal liability at sixteen,[67] article 4 deals in great detail with the full panoply of substantive and procedural issues surrounding the defense of insanity, including such procedural questions as the defendant's competency to stand trial, the assignment of the burden of proof, the requirement of notice that an insanity defense will be offered, the form of the verdict and judgment, the appointment and selection of

63. Model Penal Code § 3.02(1) (Proposed Official Draft 1962).
64. Model Penal Code § 1.01 cmt. at 9–10 (Official Draft and Revised Comments 1985).
65. Model Penal Code §§ 1.12, 3.01 (Proposed Official Draft 1962).
66. See sections cited supra note 10.
67. Model Penal Code § 4.10 (Proposed Official Draft 1962).

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psychiatric experts, the admissibility of statements made during the examination, the form of the psychiatrist's report, the hearing on the question of insanity or competency, and the commitment following an acquittal on the basis of insanity.

The Model Penal Code's extensive coverage of mental illness reflects the conflicts surrounding this issue during the decade of the code's drafting. The advisory committee included several members of the "Group for the Advancement of Psychiatry," whose members were determined to radically reform the criminal law in the name of the science of psychiatry. In 1954, three years into the code project, the federal appellate court for the District of Columbia, in the famous *Durham* case,[68] replaced the so-called right-wrong test of insanity derived from the 1843 English case of *M'Naghten*[69] with a test designed to reflect advances in the field of psychiatry as well as to soften the perceived harshness of the *M'Naghten* rule.

Characteristically, the Model Penal Code once again struck a compromise by retaining but softening the *M'Naghten* test while assigning psychiatric experts a central role in the test's interpretation and application. The *M'Naghten* rule in its original formulation required that, "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." The Model Penal Code extended the defense to an actor who "lacks *substantial* capacity . . . to appreciate the criminality of his conduct."[70] In addition, the Model Penal Code made the defense available even to an actor who did not qualify under this cognitive prong, as long as he lacked "substantial" volitional capacity "to conform his conduct to the requirements of law."[71]

The Model Penal Code's insanity test proved popular in many American jurisdictions, including the District of Columbia after the abandonment of its *Durham* rule in 1972.[72] Following John Hinckley's acquittal

68. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). The *Durham* test was deceptively simple: "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." For later complications and the eventual demise of *Durham*, see United States v. Brawner, 471 F.2d 969 (1972) (en banc)

69. M'Naghten's Case, 1 C. & K. 130; 4 St. Tr. N.S. 847 (1843).

70. Model Penal Code § 4.01 (Proposed Official Draft 1962).

71. Id. § 4.01.

72. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

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under the volitional prong of the Model Penal Code's test for his assassination attempt on President Reagan in 1981, however, many states and the federal government restricted the defense of insanity by removing the volitional prong.[73]

5. Special Part

Most of the Model Penal Code's specific doctrinal innovations appeared in its General Part. The most important innovation in the Special Part was its revision of the law of homicide. The code's homicide article provides the best illustration of its new system of mental states.[74] In this article, the code drafters replaced the common law's multitude of homicide offenses with a single offense—"purposely, knowingly, recklessly or negligently caus[ing] the death of another human being"—with three defined grades. Murder, manslaughter, and negligent homicide thus differed primarily in their mental state, the first requiring purpose or knowledge, the second recklessness, and the third negligence.

The code's partial rejection of the felony murder rule already has been discussed. The common law defense of provocation was retained, though not without being transformed into the more general defense of "extreme mental or emotional disturbance."[75] The code made no attempt to connect this defense to other more general excuse defenses in its General Part. It therefore survives as a defense available only in homicide cases.

CONCLUSION

For almost half a century, the Model Penal Code has been the dominant force in American criminal code reform and a catalyst for American criminal law scholarship. In general, the Model Penal Code has stood the test of time. While individual provisions of the code, such as its definition of insanity and its grading of inchoate offenses, have been amended for one reason or another, no state has seen fit to undertake a wholesale reform of its criminal code away from the Model Penal Code. Even academic

73. See, e.g., Clark v. Arizona, 126 S. Ct. 2709 (2006).
74. Model Penal Code art. 210 (Proposed Official Draft 1962).
75. Id. § 210.3(1)(b).

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commentary generally has come to focus on the code, albeit not always agreeing with it.[76]

Nonetheless, the code is showing its age as the theory and practice of American criminal law has long since rejected the code's emphasis on deterrence and rehabilitation and as attitudes toward criminalization have shifted. A reform of the model therefore is much needed. When that reform comes, however, there can be little doubt that it will build upon the foundations laid down in the Model Penal Code.

76. For collections of code commentary during its first twenty years, see Symposium, The Model Penal Code, 63 Colum. L. Rev. 589 (1963), and Symposium, The 25th Anniversary of the Model Penal Code, 19 Rutgers L.J. 519 (1988). For a more recent critical exchange regarding the Model Code, see George P. Fletcher, Dogmas of the Model Penal Code, 2 Buff. Crim. L. Rev. 3 (1998), and Paul H. Robinson, In Defense of the Model Penal Code: A Reply to Professor Fletcher, 2 Buff. Crim. L. Rev. 25 (1998).

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Afghanistan Human Rights

Human Rights Concerns

The Islamic Republic of Afghanistan is home to 28.2 million people, a number which includes hundreds of thousands of refugees from various neighboring countries. The life expectancy is 42.9 years, under 5-mortality for both male and females is 223/237 per 1,000 and adult literacy is 28 per cent. Millions of people living in southern and eastern Afghanistan are terrorized by the Taleban, other insurgent groups, and local militias ostensibly allied with the government. People continue to suffer insecurity that further restricts their limited access to food, health care and schooling. While access to education has greatly improved since the years of Taleban rule and is now open to girls, many boys and girls still aren't in school. Education however continues to shine a beacon of hope for many Afghans who would like to see their country move toward a more democratic and peaceful place to live.

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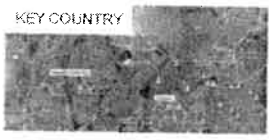

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Yemen denies warplane shot down

Army official denies claim by fighters that they brought down MiG fighter in Saada.

Last Modified: 02 Oct 2009 11:38 GMT

The United Nations estimates that 55,000 people have fled their homes because of the conflict [AFP]

A senior Yemeni military official has denied a claim that rebel Houthi fighters have shot down a MiG 21 warplane which was raiding their strongholds in the northern region of Saada.

State media quoted the official as saying the plane ran into a mountain peak because of a technical fault.

The fighters, from the Zaidi sect of Shia Islam, said in a statement that the jet was downed "this morning in the Shaaf area of Saada province, while it was bombing civilians in villages and markets".

Contradicting state media, another Yemeni military commander told the AFP news agency that the aircraft had been "flying at low attitude" when it was hit.

Mohammed Abdel Salam, a Houthi spokesman, identified the pilot as Lieutenant Shamsan Mohammed Abdu Meflih.

'Scorched Earth' campaign

Troops continue to press their seven-week-old offensive against the Houthis in the northern mountains, with no sign of the conflict ending.

Five fighters and four soldiers are reported to have been killed in fighting in the Harf Sufyan district of Amran province, on the road linking the capital Sanaa with Saada, the centre of the region of the same name which borders Saudi Arabia.

On Wednesday, 28 fighters were also killed in clashes near Saada.

The army launched operation "Scorched Earth" on August 11 in an attempt to finally crush an uprising in which thousands of people have been killed since it first broke out in 2004.

The United Nations estimates that 55,000 people have fled their homes because of the conflict.

The authorities accuse the Houthi fighters of seeking to restore the Zaidi Shia imamate that was overthrown in a republican coup in 1962, triggering an eight-year civil war.

The fighters deny the charge and say they are fighting to defend their community against government aggression and marginalisation.

A minority in mainly Sunni Yemen, the Zaidis are the majority community in the north.

Source: Agencies

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Libya: Protect Civilians in Sirte Fighting [1]

Ensure Humane Treatment of Prisoners

October 12, 2011

(New York) – Forces on both sides fighting in the Libyan city of Sirte should minimize harm to civilians and treat all prisoners humanely, Human Rights Watch said today. Fighters aligned with the National Transitional Council (NTC) have reached the center of the city, after attacking Sirte for more than three weeks.

NTC-aligned forces that capture pro-Gaddafi fighters and civilians suspected of actively supporting Gaddafi forces should promptly transfer their detainees to NTC facilities in Tripoli or Benghazi to minimize the danger of abuse from forces that were engaged in combat, Human Rights Watch said.

"Commanders on the ground in Sirte need to make sure that their forces protect civilians and allow them to flee the combat zone," said Fred Abrahams [2], special advisor at Human Rights Watch. "All prisoners should be treated humanely and transferred to the NTC authorities who can better ensure their safety."

The NTC political leadership has repeatedly called on fighters not to loot or commit revenge attacks, but forces on the ground do not always heed those calls, Human Rights Watch said.

Since mid-September 2011, various NTC-aligned forces have attacked Sirte, Muammar Gaddafi's hometown and one of two places still held by pro-Gaddafi forces. NATO warplanes have repeatedly attacked targets inside the city, in apparent coordination with allied forces on the ground.

NTC field commanders said on October 9 that they had seized Sirte's Ouagadougou conference center, Ibn Sina hospital, and Sirte University. But intense fighting continues in the city center.

Many of Sirte's pre-war population of roughly 100,000 have fled, but an unknown number of civilians remain in the city's center. According to the International Committee of the Red Cross [3], which evacuated 25 war-wounded and other patients from Ibn Sina Hospital on October 10 and 11, more than 20,000 people have left their homes so far, but "thousands" of civilians are still caught in the city. On October 11, hundreds of civilians fled the city during a lull in fighting, including residents and migrant workers, media reported.

All parties to the armed conflict in Libya are required to abide by the laws of war. People who commit serious laws-of-war violations deliberately or recklessly are subject to prosecution for war crimes, including by domestic courts or the International Criminal Court, which has jurisdiction for international crimes committed in Libya since February 15.

The laws of war require that all persons in custody be treated humanely, and be protected from torture or other ill-treatment. Looting and destruction of property not being used for military purposes is prohibited.

Human Rights Watch expressed particular concern that fighters and civilians from the town of Tawerga who are now in Sirte are especially vulnerable to abuse. The NTC-aligned forces attacking Sirte include people from Misrata, who allege that Tawerga residents were part of the Gaddafi forces who committed atrocities in Misrata. In early October, Human Rights Watch documented abuses, including torture, in and around Misrata by Misrata fighters against people from Tawerga.

Fighters from Misrata have also reportedly been looting private property in Abu Hadi, a suburb of Sirte. They have reportedly burned the homes of families suspected of supporting Gaddafi.

Between September 24 and October 8, 2011, Human Rights Watch interviewed 28 families who had recently fled Sirte. They described fierce fighting, a lack of electricity since late August, and dangerously low supplies of food and medicine.

Fleeing residents said that NTC-aligned forces had repeatedly shelled some residential neighborhoods over the past two weeks. The residents had mostly huddled in their homes for safety during the attacks and were unable to say where pro-Gaddafi forces were positioned at the time.

Three families said shells from NTC-aligned forces in the south and west had hit their homes. One family said its home was hit by a NATO airstrike. No civilian casualties resulted from these attacks, the families said. Without access to Sirte, Human Rights Watch could not verify the claims.

The laws of war require warring forces to attack only military targets. Attacks that do not discriminate between combatants and civilians, or that can be expected to cause harm to civilians disproportionate to the expected military gain, are unlawful. Forces must take all feasible steps to protect civilians under their control from attacks and avoid deploying in densely populated areas.

Two Sirte residents said they had seen Grad rockets strike the city from areas controlled by NTC-aligned fighters, but this could not be confirmed. News media outside Sirte have reported that Gaddafi forces also fired Grads from inside the city.

Grad rockets, with a range of 4 to 40 kilometers, have no guidance system and are inherently indiscriminate when fired into populated areas. When fired in groups, they have an impact over a wide area and can inflict extensive casualties in civilian-inhabited areas.

"Indiscriminate Grad rockets should not be fired into Sirte so long as civilians inhabit the city," Abrahams said.

While some families reported no problems leaving Sirte, others alleged that Gaddafi forces had tried to block their exit from the city by firing at them or above their vehicles. These families said they took circuitous routes to escape, sometimes through agricultural fields. Deliberate attacks on civilians are war crimes, Human Rights Watch said.

Several families said that NATO bombing had caused civilian casualties. One displaced resident said that around September 22 at 10 p.m., NATO struck the Imartameen building on Dubai Street, killing and wounding a large number of residents. At the time of the attack, about 10 pro-Gaddafi snipers were positioned on the roof, the resident said. The man said he was part of the crew who spent two days using heavy equipment to remove the bodies. Among the dead, he said, was Sadik Abuazoum, 43, a secondary school teacher, and Sadik's wife.

If snipers were deployed on the roof, that would have made the building a legitimate military target, Human Rights Watch said. It would raise concerns over whether pro-Gaddafi forces had taken all feasible steps to remove civilians from the building and whether NATO conducted an attack that caused disproportionate civilian harm.

Several fleeing residents said that NATO bombs had struck schools. One resident identified those schools as Ibn Khaldoun, Al-Merkezia, Al-Bayan al-Awal, and Al-Majed. He and the others knew of no civilian casualties in those attacks. It is not known whether Gaddafi forces were using the schools at the time, which would have made them military targets.

In addition to Sirte, pro-Gaddafi forces still hold the desert town of Bani Walid, about 120 kilometers southeast of Tripoli.

"The forces fighting the last Gaddafi areas should protect civilians caught in the fighting, and avoid looting and revenge," Abrahams said.

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Pakistan Human Rights

Human Rights Concerns

Amnesty International has long been concerned about the persistent pattern human rights violations occurring in Pakistan. Arbitrary detention, torture, deaths in custody, forced disappearances, and extrajudicial execution are rampant. The government of Pakistan has failed to protect individuals – particularly women, religious minorities and children – from violence and other human rights abuses committed in the home, in the community, and while in legal custody. It has failed to ensure legal redress after violations have occurred. In addition, Pakistan continues to impose the death penalty on persons convicted of crimes.

Since 9-11, individuals suspected of having links with "terrorist" organizations have been arbitrarily detained, denied access to lawyers, and turned over to U.S. custody or to the custody of their home country in violation of local and international law.

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Yemen

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Yemen Human Rights

Human Rights Concerns

Protestors in several cities came under attack by the security forces and other pro-government demonstrators. At least 100 people have been killed during peaceful demonstrations in various cities in Yemen since early February 2011.

Torture and other ill-treatment are widespread practices in Yemen and are committed, generally with impunity, against both detainees held in connection with politically motivated acts or protests and ordinary criminal suspects.

Amnesty International has longstanding concerns about the use of the death penalty in Yemen, particularly as death sentences are often passed after proceedings, which fall short of international standards for fair trial.

Women continued to face discrimination in law and practice and were inadequately protected against domestic and other violence.

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Presidential adviser John Brennan suggests that drones are effective and legal. Here are 12 reasons why the US needs to rethink their drones program.

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Hassan Ba'oom, leader of a political opposition group in southern Yemen, was released without charge along with his son Fawaz Ba'oom on 7 December 2011. They had been detained incommunicado since 2...

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Tell Russia To Release Pussy Riot!

Three young women have been sentenced to two years in prison by Russian authorities for allegedly performing a protest song in a cathedral as part of feminist punk group "Pussy Riot".

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Al-Qaida: US support for Yemen crackdown led to attack

US has increased military aid package to Yemen from less than $11m in 2006 to more than $70m in 2009

Hugh Macleod in Sana'a
The Guardian, Monday 28 December 2009 22.00 GMT

Al-Qaida in Yemen has been galvanised into winning local support over recent months by direct US and British support for Yemen's counter-terrorism efforts, according to sources close to the group.

Its statement yesterday saying the attempted bombing on Christmas Day was in retaliation for US attacks on the group in Yemen follows a year in which the US spent tens of millions of dollars boosting Yemen's coastguard and border security and providing helicopters with night-vision cameras.

Defence analysts and Yemen observers say that the US has also provided intelligence gathered over Yemen by unmanned drones.

The US has increased its military aid package to Yemen from less than $11m in 2006 to more than $70m this year, as well as providing up to $121m for development over the next three years.

The UK has also invested heavily in aid to Yemen. It has quadrupled its development assistance since 2007, allocating £105m between 2009 and 2011, though no figures on funds for military training were available.

Both the US and UK have trained Yemen's counter-terrorism unit, an elite squad of several hundred, including women, who specialise in intelligence gathering and raids on suspected al-Qaida bases.

On 15 December, the Yemeni airforce and ground troops launched a three-day offensive against al-Qaida training camps and bases in the eastern governorates of Marib, al-Jawf, Shebwa and Abyan, claiming to have killed or arrested scores of fighters and foiled a series of suicide bombings planned to mark the Islamic new year.

Following further airstrikes in Shebwa on 24 December, authorities claimed to have killed at least 30 al-Qaida members who had gathered for a meeting, though it remains unconfirmed whether the dead included the top leadership. Yemen's defence ministry said that the strikes had foiled an al-Qaida plot to attack the British embassy in Sana'a, which has been threatened several times since 2005.

A Foreign Office spokeswoman said she was unable to comment on security issues but confirmed that the UK was continuing to work closely with Yemeni authorities to counter the threat of terrorism.

Opposition news sources in Yemen reported that the airstrikes on Christmas Eve had killed members of local tribes, including women and children.

A senior Yemeni military source, speaking anonymously to the Guardian at the time of

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the first attack, said the operation had been launched after al-Qaida made direct threats against Yemen's president, Ali Abdullah Saleh, and his family.

American media reported that the attacks involved US warplanes, launched from carriers in the Gulf, but the Yemeni source said that the US had co-operated on the intelligence side only. According to the source, Barack Obama telephoned to congratulate Saleh immediately after the operation.

Sources with knowledge of al-Qaida's thinking in Yemen warn that the offensive risks plunging Saleh's regime into another war it would struggle to win, and that it could put Yemen into a situation similar to that existing in Afghanistan and Pakistan.

"The US airforce has been flying over eastern and southern areas of Yemen taking pictures of what they think are training camps for al-Qaida. The Yemeni airforce attacked these places. Just as in Waziristan [Pakistan], the US involvement led to civilian casualties, which mean people will join al-Qaida in revenge," said Shaea, an al-Qaida expert.

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